Approved: April 1, 2010

Date

MINUTES OF THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman Melvin Neufeld at 1:30 p.m. on March 18, 2010, in Room 346-S of the Capitol.

All members were present except:
Representative Rocky Fund- excused
Representative Bob Grant- excused
Representative Mike Peterson- excused

Committee staff present:
Mike Heim, Office of the Revisor of Statutes
Jason Long, Office of the Revisor of Statutes
Julian Efird, Kansas Legislative Research Department
Dennis Hodgins, Kansas Legislative Research Department
Nikki Feuerborn, Committee Assistant

Conferees appearing before the Committee:
Representative Lance Kinzer, (Attachment 1)
Philip Cosby, National Coalition (Attachment 2)
Michael Schuttloffel, Kansas Catholic Council (Attachment 3)
Scott Bergthold, Attorney (written only) (Attachment 4)
Representative Anthony Brown, (written only) (Attachment 5)
Judy Smith, Kansas Concerned Women of America (written only) (Attachment 6)
Serena Hein, Women's Liberation Foundation (Attachment 7)
Marisa Jefferis, Women's Liberation Foundation (Attachment 8)
Heather Hein, Wiomen's Liberation Foundation (Attachment 9)
Alaina Lamphear, Student, Kansas State University (Attachment 10)
Anna Lawrence, Women's Liberation Foundation (Attachment 11)
Lauren Hergott, Women's Liberation Foundation (Attachment 12) (written only)
Kathleen Lozano, Women's Liberation Foundation (Attachment 13) (written only)
Philip Bradley, Equal Entertainment Group (Attachment 14)
Danny Aaronson, FALA Attorney(Attachment 15)
Judith Hanna, Ph.D., Researcher (See Attachment 15)
John Samples, Owner, KanBuild (Attachment 16)
Jeff Levy, Executive Director of Association of Club Executives

Others attending:
See attached list.

Hearing on HB 2633 - Establishing the community defense act

Mike Heim, Office of the Revisor of Statutes, explained the bill which would limit activities, hours of operation, require structural changes, installation of cameras, and the hiring of additional personnel in both adult book stores and adult cabarets. Counties would be allowed to restrict zoning for such businesses.

Representative Kinzer assured the Committee that the bill was not an attempt to rid communities of adult entertainment but rather to implement restrictions which would lessen the negatives secondary effects to community safety (Attachment 1). Appellate courts have upheld the proposed legislation regarding nude dancing, dancer-patron buffers, no-touch rules, hours of operation, and open booth regulations.

Committee members discussed negative secondary effects and questioned whether kick boxing, wrestling, and boxing could also be considered as having negative secondary effects as they are a form of expressive conduct. They also questioned whether rulings by city and county governments would be required to the minimum state requirements. Representative Kinzer assured the Committee of the gender-neutral style of the bill but it might appear to target women due to societal issues regarding female nudity.

Philip Cosby, Executive Director and Program Director of the National Coalition for the Protection of Children & Families, explained the history of the sexually oriented business (SOB) (book store) in Abilene

and the subsequent law suit (Attachment 2). Small cities cannot afford such litigation and if the Legislature passes **HB 2633**, the statutes would apply to all county and city governments and eliminate the need for litigation in every municipality or county. He presented the deleterious effects of SOB land use studies in various cities and the secondary effects from such businesses. Mr. Cosby testified that it is the responsibility of the government to protect its citizens by regulating SOB's.

Michael M. Schuttloffel, Executive Director of the Kansas Catholic Conference, testified in support of the bill which would be an attempt to discourage pornography and sexually oriented business by regulations on the location and operation of such facilities (Attachment 3). He assured the Committee and the passage of the proposed legislation would not cripple the adult entertainment industry as they net more than the NHL, NBA, and major league baseball combined.

Written testimony was received from:
Scott Bergthold, Attorney (Attachment 4)
Representative Anthony Brown (Attachment 5)
Judy Smith, Kansas Concerned Women of America (Attachment 6)

Serena Hein is Co-Chair of the Kansas State Progressive Caucus, Kansas Legislative Director for the Greater Kansas City Women's Political Caucus, founder of the Women;s Liberation Foundation, and serves on the Executive Committee for the Kansas State Democratic Party (Attachment 7). In her statement, Ms. Hein testified that should this legislation be adopted, 4,000 women will be out of work due to the interpretation of moral behavior as used by government. If the citizenry does not approve of her profession, the role of the government is to protect her right to earn her living in a way she wants to as long as it is not illegal. She urged the Committee to remove language regarding exotic dancer regulations. These professional women are financially independent, good citizens, and pay their taxes. No sales tax is charged for stage and lap dances and most of the women are contract employees who set their own hours and keep log books of their own tips for tax purposes.

Marisa Jefferis described her financial independence and success as a college student while being self-employed in the adult entertainment world (Attachment 8). Most of the women who are in the entertainment business are single women who must support themselves and their families and without the opportunity to work at the clubs, they will be forced to seek government assistance and become a liability for taxpaying citizens.

Heather Hein, mother of Serena Hein, testified that the passage of this bill would put clubs featuring exotic dancers out of business (Attachment 9). She pointed out that most people within a community would not be aware that such a club existed in their area and that the closure of these clubs would put many young women out of work.

Alaina Lamphear spoke in opposition to the bill as she described it as too narrow but could be adapted to set state level laws for the health and safety of both the employees and patrons (Attachment 10). The prohibition of semi-nudity especially in art studios and cabarets could be seen as an infringement on the First Amendment rights because substantial evidence is not shown as to the negative crime or health statistics. Allowing communities to establish their own laws and acts would also define community standards for obscenity. It was pointed out that communities could required dancers to have STD testing for health and safety but she pointed out waitresses handling food were not included in this bill. Ms. Lamphear reminded the Committee of the loss of liquor tax revenue the state would suffer with the closure of these clubs. She also questioned the applicability of the new section regarding nudity and that when one attends such clubs, the expectation is nudity whereas there has not been an attempt to regulate nudity in other such venues especially in college towns.

Anna Lawrence gave her background as one of privilege, academic opportunities and achievement (Attachment 11). Her training as a dancer and the need for financial independence led her to become an exotic dancer which she enjoys and finds quite profitable. Her plans include law school and to become an attorney for the sex industry. She was astonished to find out that some legislators considered her a risk to the community and appeared to feel the need to protect her from this environment by legislating laws which

would ultimately prevent her from her chosen profession–an exotic dancer. Ms. Lawrence expressed disappointment that legislators who were operating from hearsay were attempting to curtail her rights of self-expression. No legislator had contacted her or any of the other dancers for their opinions regarding safety and environment. Ms. Lawrence pointed out that research presented by the proponents of the bill was from the 1980's and 1990's in midtown Minneapolis which is an entirely different venue than in Kansas. She invited the Committee members to do their own research and not rely on out-of-date and out-of-community resources. In her opinion the bill is an attempt to punish women who do not fit into the stereotypical female gender roles.

Committee members pointed out that the genesis of the bill addresses the cost to communities to patrol the adult entertainment industry i.e.clubs and pornographic book stores and respond to calls when needed.

Written testimony in opposition was presented by:
Lauren Hergott, Women's Liberation Foundation (Attachment 12)
Kathleen Lozano, Women's Liberation Foundation (Attachment 13)

Philip Bradley, representing the Equal Entertainment Group (EEG) and Kansas Licensed Beverage Association (KLBA), testified in opposition to the bill which he described as very complex and an attempt to further expand government regulations (Attachment 14). His objections included the bill being a proposed solution for a non-existent problem, the proposed hours of operation, requirement of changing of floor plans, interior rebuilds, installation of cameras/spying devices, hiring of additional personnel, and new additional operation procedures and all of these having to be completed within 180 days. Mr. Bradley pointed out that the bill contains two topics which are not related: legal pornographic book stores and adult exotic dance clubs which are not considered part of the sex industry. Mr. Bradley presented a CD and a hard copy of the testimony which was presented by the following persons (Attachment 15):

Danny Aaronson, FALA attorney, stated he disagreed with almost everything Mr. Cosby told the Committee except that Mr. Cosby wants the State of Kansas to fight the bookstore saga in Abilene because the County could no longer pay for the litigation.

- The case went clear to the 10th Circuit Court which ruled on behalf of Abilene Retail
- The case went to the Supreme Court and they refused to take the case
- The attorney who represented the county was Scott Bergthold who presented written testimony today
- The studies the county relied upon were the same ones presented today.
- The ruling in the case was that "one size does not fit all" and that a study from Minneapolis, Minnesota may not be good for Abilene, that a study for an urban area may not be good for a rural area, and that a study about a book store may not be relevant to a dance club.
- Where the law is passed (the locale) is what makes them constitutional or unconstitutional. The law from the 10th Circuit is that the law must be germane to the local conditions.
- The bill being presented would apply to both the rural and urban areas. It deals with large and small communities and like the studies presented, one size does not fit all.
- The loss of jobs, ancillary businesses, alcohol taxes, and the cost of litigation dollars of tax payers would be huge and the courts would very likely rule against the state. A state-wide study would be required for the litigation for both book stores and dance clubs.
- The Constitution of the United States protects nude dancing in the first amendment. It would be the burden of the Legislature if it goes to the courts to substantiate why you are doing it based upon adverse secondary effects which are germane to your locale.

If this bill is passed it is going to cost a great deal of money at the local level and there will be "as applied challenges" when clubs cannot meet the proposed distance requirements between dancers and customers and room size.

Dr. Judith Hanna, Senior Research scholar in the Department of Dance and a Senior Research Scientist at the University of Maryland, presented testimony "Right to Dance" in opposition to **HB 2633** (See page 15-6 of Attachment 15). Courts have dismissed the premise that exotic dance clubs cause problems disproportionate of other places of public assembly. This bill restricts the content and expression of exotic dance and denies the patrons a type of expression which has been popular for nearly a century.

John Samples, owner of KanBuild and four gentlemen's clubs in Kansas, testified that with all the proposed changes in tobacco taxes and with this bill, it is becoming more difficult to make a living in this state (Attachment 16). His bars in Topeka are the biggest in the area and he is the biggest Budweiser customer in Topeka. The clubs provide a safe and clean environment with both male and female customers including business men, bankers, doctors, lawyers, judges and even a few legislators. Clubs in Topeka have a $900,000 payroll annually with 60 jobs involved and 70 to 80 entertainers who are not on the payroll. The makeup of the entertainers are students and many single mothers who do not receive child support. The clubs provide more than $300,000 a year in tax revenue. In the ten years Mr. Samples has been in the business he has never had one complaint from the police or sheriff's departments. There has not been one infraction from the Alcohol Beverage Control agency. The employees have been very generous to the community through their donations to Toys for Tots, Breast Cancer Awareness, and many other worthy causes. He invited the Committee to check with the Sheriff's Department on their opinion of the gentlemen's clubs and what impact they have had on the community. Mr Samples invited the Committee to visit his clubs and see for themselves how the clubs operate and see what they do as a business.

Jeff Levy, Executive Director of Association of Club Executives, which oversees more than 4,000 adult entertainment clubs by training, writing manuals, setting good community standards, and to fight negative challenges which were created by society, government, or the religious right. He has logged 30,000 hours in the clubs and in that time has not seen the deleterious effects or crime which this bill is purported to help negate. He compared the lack of crime in the clubs to crimes of rape and abuse of children, women, and nuns within the Catholic Church and the secondary adverse effects. He stated the industry is safe and always has been. If Kansas gets rid of the industry, it will go underground or to another state. When the industry is allowed to operate, it can be regulated, taxed, and controlled with trained persons who develop good community standards. Mr. Levy asked that the bill not be passed because it will force litigation and that money and time could better be spent in addressing real problems which cause damage to society.

Mr. Bradley thanked the Chair and the Committee for their indulgence and reminded them that thousands of jobs would be lost in Kansas and also the source which generates more than $2 million in tax revenue each year.

The meeting was adjourned at 3:30 p.m.

FEDERAL AND STATE AFFAIRS COMMITTEE GUEST LIST
DATE: March 18, 2010

NAME	REPRESENTING
Joe Mosimann	Pence & Assoc KS
Ken Bahr	Cap Lob Grp LLC
Phil Bradley	EEG/KLBA
Anna Lawrence (DBA)	self (exotic dancer)
JODI L RADKE	CAMPAIGN FOR TOBACCO-FREE KIDS
Anne Spiess	American Cancer Society
Kevin Keatley	Kansas Assoc. of Counties
Heather Hein	self
Serena Hein	Women's Liberation Foundation
Keith Reavis	The Human Race/ACLU
Jenni Ross	KCSL
John D. Pinegar	Pinegar & Smith
Chris Masoner	Am. Cancer Soc.
Phillip Casey	Self
David Bunge	JCSO
Ed Klumpp	KACP/KPOA/KSA
Zach Snyder	Equal Ent. Group

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COMMITTEE ASSIGNMENTS
CHAIRMAN: JUDICIARY

MEMBER: CORRECTIONS AND JUVENILE JUSTICE

TOPEKA

LANCE KINZER
REPRESENTATIVE, 14TH DISTRICT

TESTIMONY REGARDING HB 2633

Many conferees will provide you with information regarding why you should pass HB 2633. But before that question is answered it is important to consider another question; Can we do the things set forth in this bill. It is to that narrower question that I would like to address myself today. At the most general level, it absolutely the case that restrictions and regulations, like those represented in House Bill 2633, have been repeatedly upheld by appellate courts based upon the negative secondary effects doctrine. Restrictions on nude dancing, dancer-patron buffers, no-touch rules, hours of operation, and open booth regulations have been upheld as constitutional when properly drafted and implemented.

Perhaps the most foundational case regarding this doctrine is, *Renton v. Playtime Theatres, Inc.* 475 U.S. 41 (1986), wherein the court held that any evidence that is reasonably believed to be relevant by a legislative body is sufficient basis for reasonable restrictions. The court concluded that significant substantive restrictions on the operation of adult oriented businesses can be considered content-neutral for constitutional purposes, if the goal was to address negative secondary effects. Evaluating the evidence regarding negative secondary effects is the proper role of this committee.

The use of the negative secondary effects doctrine has repeatedly been upheld as a legitimate government interest. In *5634 E. Hillborough Ave., Inc. v. Hillsborough County*, 294 Fed. Appx. 435 (11th Cir. 2008) (*cert. denied*, 129 S. Ct. 1995, 2009 U.S. LEXIS 2932 (U.S., 2009)), appellant nightclub owners challenged the constitutionality of a zoning ordinance and a licensing ordinance, among other restrictions. The court concluded that the county met its evidentiary burden to show that its ordinances had the purpose and effect of suppressing secondary effects.

In *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291 (6th Cir. 2008), Plaintiff's sexually orientated businesses sued the City over regulations put in place which regulated semi-nude adult entertainers. Here the court found that the ordinance passed the applicable test because: (1) regulating sexually oriented businesses to reduce negative secondary effects was within the scope of the city's authority; (2) the secondary effects which the city desired to reduce were undeniably important government interests; (3) the city aimed at suppressing the secondary effects associated with sexually oriented businesses and not the speech communicated by those businesses; and (4) the ordinance was narrowly tailored to the reduction of secondary effects. The ordinance was constitutional.

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Attachment 1

In *Daytona Grand, Inc. v City of Daytona Beach*, 490 F.3.d 860 (11th Cir. 2007), an adult entertainment club challenged zoning ordinances regulating permissible locations for adult theatres The city's zoning ordinances did not ban adult theaters altogether but restricted them to specific locations and imposed distance requirements between adult theaters and churches, schools, parks, playgrounds, and other adult businesses. The court held that the zoning ordinances was a reasonable time, place, and manner restriction.

The court has also upheld bans on nudity, as in *Barnes v. Glen Theater, Inc.*, 501, U.S. 560 (1991). Here Justice Souter extended the negative secondary effects doctrine beyond land use, and into the regulation of nudity. In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), the City appealed the state Supreme Court's ruling against the City's ban on nudity. However, the US Supreme Court upheld the ban because the ordinance was content-neutral since it regulated conduct alone, did not target nudity that contained an erotic message, and the City's interest in preventing harmful secondary effects associated with adult entertainment establishments was not related to the suppression of the exotic message conveyed by nude dancing. The 10th Circuit also utilized negative secondary effects as a basis for upholding Salt Lake City's ban on nudity. *Heideman v. South Salt Lake City*, 165 Fed. Appx. 627 (10th Cir. 2006)

Again, the courts have consistently uphold a broad range of restrictions based on negative secondary effects reasoning. The 6-foot rule (distance between dancers and patrons) was upheld in *Jake's Ltd., Inc. v. City of Coates,* 284 F.3d 884 (8th Cir. 2002). Here, the court held that the city's interest in preserving the quality of urban life and the character of its neighborhoods justified the zoning restrictions which were intended to minimize negative secondary effects. In *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998), The court upheld statewide hours of operation restrictions and ruled that sexually-explicit speech was different from other kinds of speech, was offered less protection because of other important social interests and could be regulated without subjecting the regulation to strict-scrutiny with a presumption of unconstitutionality.

Finally, it is important to note that the "adult entertainment industry" has repeatedly sought to undermine the negative secondary effects doctrine to no avail via the use of expert testimony. The following is a list of cases in which it was determined that testimony from industry experts was insufficient to undermine the negative secondary effects doctrine.

City of Erie v. Pap's A.M., 529 U.S. 277 (2000)

Daytona Grand, Inc. v. City of Daytona Beach, 490 F.3d 860 (11th Cir. 2007)

Doctor John's, Inc. v. Wahlen, 542 F.3d 787 (10th Cir. 2008)

Heidemanv. South Salt Lake City, 165 Fed. Appx. 627 (10th Cir 2006)

SOB, Inc. v. County of Benton, 317 F.3d (8th Cir. 2003)

Gammoh v. City of La Habra, 395 F.3d 114 (9th Cir. 2005)

G.M. Enterprises, Inc. v Town of St. Joseph, 350 F.3d 631 (7th Cir. 2003)

World Wide Video fo Washington v. Spkane, 368 F.3d 1186 (9th Cir. 2004)

Fantasy Ranch, Inc., v. City of Arlington, 459 F.3d 546 (5th Cir. 2006)

Fantasyland Video, Inc. v. County fo San Diego, 505 F.3d 996 (9th Cir. 2007)

In conclusion, the constitutionality, and sustainability, of restrictions like those proposed in House Bill 2633 should not be in doubt. Virtually identical restrictions have been upheld repeatedly and are the law in numerous jurisdictions throughout the ~~County~~. Country.

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TESTIMONY OF PHILLIP COSBY SUPPORTING ***HB 2633***
EXECUTIVE DIRECTOR KANSAS CITY OFFICE, NATIONAL COALITION
FOR THE PROTECTION OF CHILDREN AND FAMILIES
KANSAS HOUSE FEDERAL AND STATE AFAIRS COMMITTEE 2010 Session

Chairman Neufeld and honorable members of the Federal and State Affairs Committee, my name is Phillip Cosby. I am a native of Kansas and currently the Executive Director for the Kansas City office of the National Coalition for the Protection of Children and Families. I am honored to speak to you in support of HB 2633, "The Community Defense Act", a statewide regulation of sexually oriented businesses (SOB) through constitutionally sound Time, Place and Manner restrictions.

These past seven years I have spoken to thousands of Kansans citizens and civic officials concerning the negative effects of Sexually Oriented Businesses (SOB) in communities. Today I am providing you summaries of negative secondary effect studies of forty-three cities, court rulings and a CD containing 1,500 pages of detailed court upheld studies of twenty cites and twenty-two court cases all awarding municipalities the constitutional right to regulate SOB's thus reducing negative secondary effects. Negative effects which constitute a substantial government interest in regulating the Time, Place and Manner restrictions of SOB's.

Two famous examples of SOB regulation among scores are (1) the cleaning up of NYC's Times Square and the subsequent decrease in crime and increase of tourism, and (2) the current reputation of Atlanta Ga. as the sex trafficking capital of the US. These are not my words but the words of Atlanta's mayor, Shirley Franklin. *(Atlanta Journal-Constitution March 21st 2007)* Strip clubs promised Atlanta GA. prosperity and an "upscale cosmopolitan" appeal as they expanded to accommodate the International Olympics. What Atlanta inherited was a series of strip clubs that breed prostitution and sex trafficking or sexual slavery. Sex trafficking has now become the international #2 moneymaker for organized crime, right behind illegal drugs.

The evidence of harm is not anecdotal; the lawful regulation of the sex industry is based on real negative effects on communities and has been constitutionally upheld for nearly forty years. The deleterious effects are primarily increased crime, increased STD's, blight, property devaluation, prostitution, human and drug trafficking. In 1973 the SCOTUS stated "legislators are entitled to rely, in part on an appeal to common sense"

We all sense it. Every day the news relays the latest heartbreaking story of abductions, child molestations, human trafficking, solicitations, sexual misconduct at the highest levels of sacred and secular trust, urban blight, rising STD rates, fantasy driven rape and even murder. Our sense of safety, wholesomeness and innocence is evaporating. When you and I were in grade school we played freely with our friends on Saturdays in our neighborhoods and beyond. Our parents did not have to be unduly fraught with concerns for our personal safety. For us, the general rule was, when those street lights flicker on you better be home. Those days of experiencing such freedom and safety are long since gone for today's children. Outside of organized and supervised sports, where are those groups of playful youngsters today? What mother is willing to let her grade school aged child out of her sight today?

Communities are overwhelmed or intimidated by an industry that boasts that their annual US revenue is greater than all professional sports; football, baseball and basketball combined.

SOB attorneys always oppose any restrictions with misstatements like;

- *SOB's are a financial asset to communities.* (see attached 43 Land Use summaries and the CD with 20 detailed summaries, documenting the economic drain on communities)
- *SOB regulation is unconstitutional.* (see CD with 22 court cases ruling otherwise)
- *Litigation is a certainty and too costly.* (If CDA is passed, litigation will be a onetime showdown as opposed to the current endless gravy train of multiple community liti[illegible] bank accounts and intimidating communities).

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Attachment 2

Many ..nties and communities in Kansas have no regulatory protection in place. SOB's often ambush unprotected areas, especially along a highway system or main streets of cities. SOB's boldly declare that there is nothing the community can do and if they do enact an SOB regulation, their attorneys threaten and do file lawsuits. Such intimidation strategies more often than not, do work. If civic leaders do muster the wherewithal to enact SOB ordinance protection, lengthy litigation is a certainty. In the case of Abilene Kansas, litigation was going into its fifth year when an out of court compromise closed the case. SOB ordinance law is not a specialty of city and county attorneys who lack the resources to challenge such a lucrative industry. SOB's behave like water seeking the lowest level, if a state or community is fortunate enough to be protected by a sound constitutional ordinance, SOBs will bypass and seek out a vulnerable community.

Legislative bodies on many levels are behind the curve in recognizing and reacting to the cause and effect relationship of the sex industry and its related negative secondary effects. These brick and mortar sex businesses may be the tip of the iceberg of a larger problem of easy cyber access to pornography and obscenity but at least it is a place where case law has driven a stake where we can make a constitutional stand to address this growing public safety and health crisis.

Too often the disingenuous drum beat sounds like; this is a parental responsibility or let local communities contend with the problem on their own. How can parents and communities contend against the pervasive, aggressive and well funded sex industry? Would it be good public policy if there were a polluted water source to simply instruct a community to install their own filter?

Many states have come to the aid of outgunned communities with constitutionally upheld community defense acts. Even Denmark with its infamous anything goes approach to sex has corrected its misdirection with regulations stemming the tide of correlating negative effects.

This is a real pocketbook issue; sex crimes represent a large segment of criminal activity, at a cost of $30,000 annually per prisoner. You can't raise enough taxes, build enough prisons and buy enough ankle bracelets for this tsunami. The Center for Disease Control reported that 26% of teenage girls are now infected with a sexually transmitted disease. The list of STD's has now grown to over twenty-nine. Ladies and gentlemen what we have is an epidemic and we must act in concert with parents and communities. Citizen polling data consistently supports like regulatory efforts in the 67 % range. HB 2633 is a compelling governmental interest.

This state statute model was crafted by one of the most successful constitutional SOB ordinance attorneys in the nation. Law Office of Scott D. Bergthold, Chattanooga, TN, 423.899.3025 web site: www.adultbusinesslaw.com

Phillip Cosby
Kansas City Office,NCPC&F
11936 W. 119th St. # 193
Overland Park, Kansas 66213 Cell# 913-787-0075 pcosby@nationalcoalition.org

Findings and Rationale. Based on evidence of the adverse secondary effects of adult uses presented in hearings and in reports made available to the Kansas Legislature, and on findings, interpretations, and narrowing constructions incorporated in the cases of *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), *Young v. American Mini Theatres*, 427 U.S. 50 (1976), *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *California v. LaRue*, 409 U.S. 109 (1972); *N.Y. State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); and

Farkas v. Miller, 151 F.3d 900 (8th Cir. 1998); *United States v. Evans*, 272 F.3d 1069 (8th Cir. 2002); *United States v. Mueller*, 663 F.2d 811 (8th Cir. 1981); *BZAPS, Inc. v. City of Mankato*, 268 F.3d 603 (8th Cir. 2001); SOB, *Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003); *United States v. Frederickson*, 846 F.2d 517 (1988); *ILQ Invs. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994); *Ctr. for Fair Public Policy v. Maricopa County*, 336 F.4d 1153 (9th Cir. 2003); *North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441 (7th Cir. 1996); *World Wide Video of Washington, Inc. v. City of Spokane*, 386 F.3d 1186 (9th Cir. 2004); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999); *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (11th Cir. 2007); *Déjà Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville and Davidson County*, 274 F. 3d 377 (6th Cir. 2001); *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546 (5th Cir. 2006);

and based upon reports concerning secondary effects occurring in and around sexually oriented businesses, including, but not limited to, Negative Secondary Effects of Sexually Oriented Businesses: Summaries of Key Reports; Austin, Texas - 1986; Indianapolis, Indiana - 1984; Garden Grove, California - 1991; Houston, Texas - 1983, 1997; Phoenix, Arizona - 1979, 1995-98; Chattanooga, Tennessee - 1999-2003; Los Angeles, California - 1977; Whittier, California - 1978; Spokane, Washington - 2001; St. Cloud, Minnesota - 1994; Littleton, Colorado - 2004; Oklahoma City, Oklahoma - 1986; Dallas, Texas - 1997; Greensboro, North Carolina - 2003; Amarillo, Texas - 1977; McCleary Expert Report - 2006; New York, New York Times Square - 1994; and the Report of the Attorney General's Working Group On The Regulation Of Sexually Oriented Businesses, (June 6, 1989, State of Minnesota),

(1) Sexually oriented businesses, as a category of commercial enterprises, are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation.

(2) Sexually oriented businesses should be separated from sensitive land uses to minimize the impact of their secondary effects upon such uses, and should be separated from other sexually oriented businesses, to minimize the secondary effects associated with such uses and to prevent an unnecessary concentration of sexually oriented businesses in one area.

(3) Each of the foregoing negative secondary effects constitutes a harm which the State has a substantial government interest in preventing and/or abating. This substantial government interest in preventing secondary effects, which is the State's rationale exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses. Additionally, the State's interest in regulating sexually oriented businesses extends to preventing future secondary effects of either current or future sexually oriented businesses that may locate in the State.

Talking Points: HB 2633 - KANSAS COMMUNITY DEFENSE ACT

1. Many states already have court tested statewide "Time, Place & Manner" restrictions in place to regulate sexually oriented businesses (SOBs) including Alabama, Georgia, Illinois, New Jersey, Ohio, Arizona and Pennsylvania.

2. Most Kansas communities do not have the funds or legal expertise to contend with the lengthy litigation that SOBs promise will follow if they attempt to adopt a local SOB ordinance. Such intimidation by this wealthy industry (more annual revenue that ABC, NBC & CBS combined) is sufficient to dissuade most cities and counties.

3. If a Kansas community does attempt to craft and enact an SOB ordinance they will find themselves in lengthy litigation. For example the Dickinson County, Abilene Kansas case went on for five years. The case could have gone longer but the insurance company that represented Dickinson County was not inclined to throw what they estimated was another $ 1 million at it and the community was weary of the struggle.

4. A state wide Kansas statute will be challenged but the outcome will more than likely follow a well worn path the courts have taken that comes down on the side of public safety and health. That precedent will reduce the number of city by city and county by county court cases **dramatically reducing court costs**.

5. Geographically most Kansas communities do not to have planning and zoning offices. This leaves the maority of Kansas venerable and with few remedies when faced with SOB issues.

6. For over 35 years Federal and State Courts have upheld the constitutional right of lawmakers to regulate SOB's because of the "Negative Secondary Effects" these types of businesses have on communities. The leading negative secondary effects are increased crime, increased sexually transmitted diseases, general blight, decreased property values, increased drug trafficking, prostitution, etc... **These effects do not add value to communities but are costly and increasingly burdensome to taxpayers.**

7. SOB regulations put into place what is called TIME, PLACE and MANNER restrictions. Examples of the types of constitutional regulations that states can impose are; mandatory close of business at midnight till six a.m. ; a six foot standoff distance between dancers and patrons; a minimum light level inside the SOB; no private VIP rooms or booths; an employee of an SOB cannot have a criminal history, liquor restrictions, a distance of 1,000 feet from homes, churches, playgrounds, schools, day care centers, other SOB's, total nudity ban, etc...

8. "Time" and "Manner" SOB regulations can be applied retroactively to existing SOBs as well as future SOBs. To do otherwise would unwisely guarantee an unregulated monopoly by existing SOBs.

9. Statewide "Place" restrictions are applied to future SOBs. "Place" restrictions could be further strengthened by local municipalities on existing SOBs.

10. THE ROLE OF ALCOHOL AT STRIP CLUBS; Proximity to alcohol is a key component of the criminological theory of secondary effects. Alcohol aggravates an SOB's already-high ambient crime risk by lowering the inhibitions and clouding the judgments of the SOB's patrons. In effect, alcohol makes the soft targets found at the SOB site considerably softer. The available data corroborate this expectation in all respects. Predatory criminals prefer inebriated victims, and SOBs that serve alcohol or that are located near liquor-serving businesses pose accordingly larger and qualitatively different ambient public safety hazards. Governments rely on this consistent finding of crime-related secondary effect studies as a rationale for limiting nudity in liquor serving businesses.

Petition For STATEWIDE Lawful Regulation of Sexually Oriented Businesses in the STATE of KANSAS
Community Defense Act

2-6

:omote safe communities in Kansas, the below signatures represent a unified body of citizens urging elected officials to vote in support of a constitutionally sound Sexually Oriented Business (SOB) Bill regulating existing and future SOBs within Kansas.

The proven negative secondary effects of Sexually Oriented Businesses on communities continue to be documented and upheld by the courts.

Negative secondary effects include increased criminal activity, increased sexually transmitted diseases, decreased property values, increased drug trafficking and general blight. The Community Defense Act would impose constitutional time, place and manner regulations on existing and future Sexually Oriented Businesses thereby reducing the negative secondary effects on our communities.

Sign		**Email**		**Phone**	
Print		**Address**		**Zip**	
Sign		**Email**		**Phone**	
Print		**Address**		**Zip**	
Sign		**Email**		**Phone**	
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Sign		**Email**		**Phone**	
Print		**Address**		**Zip**	
Sign		**Email**		**Phone**	
Print		**Address**		**Zip**	

Please return petitions to:

National Coalition for the Protection of Children & Families
11936 W. 119th Street, #193, Overland Park, KS 66213

Information and more copies of this petition at: ***www.kscda.org*** *For questions call: (913) 839-1643*

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NLC SUMMARIES OF "SOB LAND USE" STUDIES

CRIME IMPACT STUDIES BY MUNICIPAL AND STATE GOVERNMENTS ON HARMFUL SECONDARY EFFECTS OF SEXUALLY-ORIENTED BUSINESSES

1. *American Center for Law and Justice*
2. *Phoenix, Arizona*
3. *Tucson, Arizona*
4. *Garden Grove, California*
5. *Los Angeles, California*
6. *Whittier, California*
7. *Adams Co., Colorado*
8. *Manatee Co., Florida*
9. *Indianapolis, Indiana*
10. *Minneapolis, Minnesota*
11. *Saint Paul, Minnesota*
12. *Las Vegas, Nevada*
13. *Ellicottville, New York*
14. *Islip, New York*
15. *New York, New York*
16. *Times Square, New York*
17. *New Hanover Co., North Carolina*
18. *Cleveland, Ohio*
19. *Oklahoma City, Oklahoma*
20. *Oklahoma City, Oklahoma II*
21. *Hamilton County, Tennessee*
22. *Amarillo, Texas*
23. *Austin, Texas*
24. *Beaumont, Texas*
25. *Cleburne, Texas*
26. *Dallas, Texas*
27. *El Paso, Texas*
28. *Houston, Texas 1983*
29. *....Houston, Texas 1986*
30. *....Houston, Texas 1991*
31. *....Houston, Texas 1997*
32. *Newport News, Virginia*
33. *Bellevue, Washington*
34. *Des Moines, Washington*
35. *Seattle, Washington*
36. *St. Croix Co., Wisconsin*
37. *Rome, Georgia*
38. *Saint Marys, Georgia*
39. *Adams County, Colorado*
40. *....Saint Paul, Minnesota*
41. *The State of Minnesota, Attorney General's working group*
42. *Kennedale, Texas*
43. *Effingham County, Effingham, Illinois*

225 N. Fairfax Street Alexandria VA 22305 703-748-5422~703-748-9242

National Law Center Summary of the
AMERICAN CENTER FOR LAW AND JUSTICE
LAND USE STUDY
DATED MARCH 31, 1996

OVERVIEW: This report, compiled by the Environmental Research Group for the American Center for Law and Justice in 1996, reviews the current state of knowledge about the impact of sexually-oriented businesses (SOBs) upon nearby residential and commercial areas. The study particularly notes the effect of SOBs on smaller municipalities. The study finds that SOBs support detrimental activities (i.e. personal and property crimes, prostitution, drugs, etc.) within the vicinity that are incompatible with activities occurring within residential areas. SOBs also have a negative impact on local businesses. Evidence indicates that when SOBs are located near each other or near businesses that serve alcohol, the harmful impact increases. Noting that this is not a recent problem, the study points to many municipalities that have examined the impact of SOBs on surrounding communities, thereby building an ample record of evidence in support of regulation and restriction of location and concentration of SOBs.

FINDINGS: The study gives a "Historic Overview" of the issues of SOBs and their effects, dating back to the late eighteenth century. The "tableau vivant" and "concert saloon," were the forerunners of today's "topless bar," seemingly in response to the economic pressures of the young working male of that day. The clientele of today's SOBs has not changed very much over time, being mostly young, single, transient males. In the past, when these businesses operated in a legal, far less regulated climate, it was much easier to see the link between SOBs and crime. Today, the impact of SOBs on its surroundings is less clear, but broader in scope.

The report examines the Garden Grove, CA study by McCleary and Meeker (1991) in depth, which studies 10 years worth of crime statistics in the area, pointing out the significant increase in property (burglary, theft, auto theft) and personal (assault and robbery) crimes that occur within 1,000 feet of an SOB when it is located near an establishment that sells alcohol. They also cite the City of Indianapolis study, which found a 77% higher incidence of serious crime in the area with multiple SOBs compared to the control area (matched by demographic characteristics, building types, etc.). The study indicated that SOBs help create conditions that draw outsiders to the area and provide venues for opportunistic crimes. Sex-related crimes were 4 times higher in *residential* areas near an SOB than in *commercial* areas near an SOB. Similar findings regarding significant increases in crime and arrests in areas near SOBs are referenced from studies out of Minnesota, the City of Austin, Los Angeles, and Hollywood.

Public and semi-private spaces (such as parking lots, spaces between buildings, and parks) have questionable ownership, thereby furthering the opportunity for crime. When an SOB exists, these areas become used for illicit purposes. As a result, legitimate users and residents are driven away by the illicit activity. A public area devoid of women and elderly is an indication of the relative safety in a public space. As potential patrons avoid an area, other commercial businesses suffer. The study notes that women who do walk in areas near an SOB can be subject to harassment and propositioning from assumptions that the woman is associated with the SOB. This all contributes to a "climate of fear" that intimidates people and causes them to avoid the area altogether. This may also contribute to declining property values.

National Law Center Summary of the
AMERICAN CENTER FOR LAW AND JUSTICE
LAND USE STUDY
(CONTINUED)

The study points to evidence that the presence of SOBs effects perceived reductions in the value of residential and commercial property. The City of Indianapolis conducted the most detailed survey, doing a 20% sample national survey of real estate appraisers and a 100% survey of appraisers in similarly-sized cities with a response rate of 33%. Seventy-five percent of those responding indicated that there was a significant negative impact on residential and commercial property values when SOBs are located nearby. In fact, no other type of facility (including drug rehab centers), have such a significant negative impact on property values. A City of Austin study stated that the presence of SOBs in a neighborhood leads mortgage lenders to the conclusion that it is in decline. Similar results have been found in other studies.

The study references trade area studies that indicate SOBs are regional facilities that primarily attract people from outside the neighborhood. A license plate study in Bothell, Washington showed that out of 321 cars in the parking lot of an SOB, only 8 (2.5%) were registered in Bothell. A regional customer base, as opposed to a neighborhood customer base makes SOB owners less responsive to neighborhood problems, decreases the informal social control of behavior, and increases the potential for opportunistic crime.

Finally, the study indicates that the negative effects of an SOB in a small town will likely be more magnified than in a bigger city. First, the compact nature of surrounding residential areas to the downtown area increases the reach that harmful, negative effects would have in the town. Also, smaller populations and shorter commercial business hours result in much lighter use of public, semi-private, uncontrolled spaces (i.e. parks, parking lots and recessed storefronts), thereby providing much greater potential for illicit activity in areas surrounding SOBs. Small towns typically experience more economic stress than larger cities. This is aggravated when SOBs locate in the downtown business district of a small town.

National Law Center Summary of the
PHOENIX, ARIZONA
LAND USE STUDY
DATED MAY 25, 1979

The study examines crime statistics for 1978 comparing areas which have sexually-oriented businesses with those that do not. The results showed a marked increase in sex offenses in neighborhoods with sexually-oriented businesses, and also proved increases in property and violent crimes as well. This study is not unique but is unusually significant, in covering the issue of property crimes more extensively.

Three study areas (near locations of sexually-oriented businesses) and three control areas (with no sexually-oriented businesses) were selected. The study and control areas were paired according to the number of residents, median family income, percentage of non-white population, median age of population, percentage of dwelling units built since 1950, and percentage of acreage used for residential and non-residential purposes.

Three categories of criminal activity were included in the study: property crimes (burglary, larceny, auto theft), violent crimes (rape, murder, robbery, assault), and sex crimes (rape, indecent exposure, lewd and lascivious behavior, child molestation).

On average, the number of sex offenses was 506% greater in neighborhoods where sexually-oriented businesses were located. In one of the neighborhoods the number was 1,000% above the corresponding control area. Of the sex offenses, indecent exposure was the most common offense and the largest contributor to the increase of crimes in areas where sexually-oriented businesses were located. Even without considering the crime of indecent exposure, the number of other sex crimes, such as rape, lewd and lascivious behavior, and child molestation, was 132% greater than in control areas without sexually-oriented businesses.

On average the number of property crimes was 43% greater in neighborhoods where sexually-oriented businesses were located, and the number of violent crimes was 4% higher in those areas.

The Phoenix ordinance requires sexually-oriented businesses to locate at least 1,000 feet from another sexually-oriented business and 500 feet from a school or residential zone. Approval by the City Council and area residents can waive the 500 foot requirement. A petition signed by 51% of the residents in the 500 foot radius who do not object must be filed and be verified by the Planning Director.

National Law Center Summary of the
TUCSON, ARIZONA
LAND USE STUDY
DATED MAY 1, 1990

OVERVIEW: This report is a memorandum from Police Department Investigative Services to the City Prosecutor describing events and activities at "adult entertainment bookstores and establishments" that demonstrate the need for stronger ordinances. Investigations had been in progress since 1986 following numerous complaints of illegal sexual activity and unsanitary conditions.

FINDINGS: Officers found a wide variety of illegal sexual conduct at all adult businesses. At virtually every such business, employees were arrested for prostitution or obscene sex shows. Dancers were usually prostitutes where, for a price, customers could observe them performing live sex acts. At several businesses, customers were allowed inside booths with dancers and encouraged to disrobe and masturbate. Many times, dancers would require customers to expose themselves before they would perform. Underage dancers were found, the youngest being a 15 year old female.

Within peep booths, officers found puddles of semen on the floor and walls. If customers had used tissues, these were commonly on the floor or in the hallway. On two occasions, fluid samples were collected from the booths. In the first instance, 21 of 26 samples (81%) tested positive for semen. In the second sampling, 26 of 27 fluid samples (96%) tested positive for semen. "Glory holes" in the walls between adjoining booths facilitated anonymous sex acts between men.

RECOMMENDATIONS: (1) The bottom of the door in peep booths must be at least 30 inches from the floor so that an occupant can be seen from the waist down when seated. (2) The booth cannot be modified nor can a chair be used to circumvent the visibility of the client. (3) Employee licensing procedures that include a police department background check should be put in effect. (4) In the event of a denied or revoked license, the requirement of a hearing before any action is taken.

National Law Center Summary of the
GARDEN GROVE, CALIFORNIA
LAND USE STUDY
DATED SEPTEMBER 12, 1991

OVERVIEW: This report by independent consultants summarizes statistics to determine whether adult businesses should be regulated because of their impact on the community in terms of crime, decreased property values and diminished quality of life. Statistics were measured from 1981 to 1990, and included crime data and surveys with real estate professionals and city residents. Garden Grove Boulevard, which has seven adult businesses, was selected as the study area. The study incorporated many control factors to insure accurate results. The report includes a brief legal history of adult business regulation and an extensive appendix with sample materials and a proposed statute.

CRIME: Crime increased significantly with the opening of an adult business, or with the expansion of an existing business or the addition of a bar nearby. The rise was greatest in "serious" offenses (termed "Part I" crimes: homicide, rape, robbery, assault, burglary, theft and auto theft). On Garden Grove Boulevard, the adult businesses accounted for 36% of all crime in the area. In one case, a bar opened less than 500 feet from an adult business, and serious crime within 1,000 feet of that business rose more than 300% the next year.

REAL ESTATE: Overwhelmingly, respondents said that an adult business within 200-500 feet of residential and commercial property depreciates that property value. The greatest impact was on single family homes. The chief factor cited for the depreciation was the increased crime associated with adult businesses.

HOUSEHOLD SURVEYS: 118 calls were completed in a random sample of households in the Garden Grove Boulevard vicinity. The public consensus was that adult businesses in that area were a serious problem. Nearly 25% of the surveyed individuals lived within 1,000 feet of an adult business. More than 21% cited specific personal experiences of problems relating to these businesses, including crime, noise, litter, and general quality of life. 80% said they would want to move if an adult business opened in their neighborhood, with 60% saying they "would move" or "probably would move." 85% supported city regulation of the locations of adult businesses, with 78% strongly advocating the prohibition of adult businesses within 500 feet of a residential area, school or church. Women commonly expressed fear for themselves and their children because of adult businesses.

RECOMMENDATIONS: The report concludes that adult businesses have a "real impact" on everyday life through harmful secondary effects and makes four recommendations: (1) Keep current requirement of 1,000 feet separation between adult businesses; (2) Prohibit adult establishments within 1,000 feet of residential areas; (3) Enact a system of conditional use permits for adult businesses with police department involvement in every aspect of the process; and (4) Prohibit bars or taverns within 1,000 feet of an adult business.

National Law Center Summary of the
LOS ANGELES, CALIFORNIA
LAND USE STUDY
DATED JUNE, 1977

OVERVIEW: The Department of City Planning studied the effects of the concentration of sexually-oriented businesses on surrounding properties for the years 1969-75 (a time of proliferation for such businesses). The report focuses on five areas with the greatest concentration of these businesses (compared to five "control" areas free of them), and cites data from property assessments/sales, public meeting testimony, and responses from two questionnaires (one to business/residential owners within a 500 foot radius of the five study areas and a second to realtors/real estate appraisers and lenders). Crime statistics in the study areas were compared to the city as a whole. Also included: a chart of sexually-oriented business regulations in eleven major cities, details of current regulations available under state/municipal law, and appendices with samples of questionnaires, letters, and other study materials.

PROPERTY: While empirical data for 1969-75 did not conclusively show the relation of property valuations to the concentration of sexually-oriented businesses, more than 90% of realtors, real estate appraisers and lenders responding to city questionnaires said that a grouping of such businesses within 500-1,000 feet of residential property decreases the market value of the homes. Also, testimony from residents and business people at two public meetings spoke overwhelmingly against the presence of sexually-oriented businesses citing fear, concern for children, loss of customers and difficulty in hiring employees at non-adult businesses, and the necessity for churches to provide guards for their parking lots.

CRIME: More crime occurred in areas of sexually-oriented business concentration. Compared to city-wide statistics for 1969-75, areas with several such businesses experienced greater increases in pandering (340%), murder (42.3%), aggravated assault (45.2%), robbery (52.6%), and purse snatching (17%). Street robberies, where the criminal has face to face contact with his victim, increased almost 70% more in the study areas. A second category of crime, including other assaults, forgery, fraud, counterfeiting, embezzlement, stolen property, prostitution, narcotics, liquor laws, and gambling increased 42% more in the study areas over the city as a whole.

RECOMMENDATIONS: The study recommended distances of more than a 1,000 feet separating sexually-oriented businesses from each other, and a minimum of 500 feet separation of such businesses from schools, parks churches and residential areas.

National Law Center Summary of the
WHITTIER, CALIFORNIA
LAND USE STUDY
DATED JANUARY 9, 1978

OVERVIEW: After experiencing a rapid growth of sexually-oriented businesses since 1969, the Whittier City Council commissioned a study of the effects of the businesses on the adjacent residential and commercial areas. At the time of the study, Whittier had 13 "adult" businesses: 6 model studios, 4 massage parlors, 2 bookstores, and 1 theater. Utilizing statistics, testimonies, and agency reports, the study compared two residential areas and four business areas over a span of 10 years (1968-1977). One residential area was near the largest concentration of adult businesses, the other had no commercial frontage but was chosen because of similar street patterns, lot sizes and number of homes. For businesses, Area 1 had six adult businesses, Area 2 had one, Area 3 had three, and Area 4 had none. 1973 was selected as the year to compare before and after effects of the adult businesses. Two chief concerns cited in the report are residential and business occupancy turnovers and increased crime.

OCCUPANCY TURNOVER: After 1973, 57% of the homes in the adult business area had changes of occupancy, compared to only 19% for the non-adult business area. Residents complained of "excessive noise, pornographic material left laying about, and sexual offenders (such as exhibitionist) venting their frustrations in the adjoining neighborhood." Citizens also expressed concern about drunk drivers coming into the area. Business Area 1, with the most concentration of adult businesses (6), experienced a 134% increase in annual turnover rate. Area 3, with three adult businesses at one location, showed a 107% turnover rate. Area 2 (with 1 adult business) had no measurable change and Area 4 (with no commercial or adult businesses) experienced a 45% decrease in turnover from similar periods.

CRIME: The City Council looked at the two residential areas for the time periods of 1970-73 (before adult businesses) and 1974-77 (after adult businesses). In the adult business area, criminal activity increased 102% (the entire city had only an 8.3% increase). Certain crimes skyrocketed (malicious mischief up 700%; all assaults up 387%; prostitution up 300%). All types of theft (petty, grand, and auto) increased more than 120% each. Ten types of crime were reported for the first time ever in the 1974-77 period.

RECOMMENDATIONS: The Council's report recommended a dispersal type ordinance that prohibits adult businesses closer than 500 feet to residential areas, churches and schools. Distances between adult businesses was recommended at 1,000 feet. In addition, the study proposed a 1,000 foot separation from parks because of their use by citizens after normal working hours. Adult businesses would be given an 18-36 month amortization period (if the change involved only stock in trade, a 90 day period was recommended).

National Law Center Summary of the
ADAMS CO., COLORADO
LAND USE STUDY
DATED APRIL, 1988

OVERVIEW: This report, authored by Sgt. J.J. Long of the Adams County Sheriffs Department, was designed to accompany a new Nude Entertainment Ordinance. The report covers two parts: first, an April 1988 study of six representative locations in Adams County was undertaken to determine the transiency of adult business customers. Second, crime statistics in two Adams County areas featuring adult businesses were gathered for the years of 1986 and 1987. The study concluded that there was a clearly demonstrated rise in crime and violence, and an increase in the attraction to transients to the area as a result of nude entertainment establishments. This caused a danger to residents and an undesirable model for youth and the community at large.

FINDINGS: Adams County features 6 adult bookstores (all but one featuring nude entertainment), 1 all nude "pop shoppe," 7 massage parlors, 8 topless nightclubs (with liquor licenses), and 6 nude "rap," lingerie, and modeling-type studios (28 locations in all). An April 1988 study of six adult business locations in Adams County, revealed that 76% of patrons were transient. During the time when no adult ordinance was in effect in Adams County (1986 and 1987), 24 crimes were reported in one area featuring two adult businesses. Eighty-three percent of these crimes were linked to the adult businesses. Forty-two percent of these crimes occurred at the location of an all-nude establishment, and sixty-four percent occurred outside the hours of 4:00 p.m. to midnight. During 1987, 28 crimes were reported, 93% of which were linked to the adult businesses, 50% were alcohol-related offenses, and 77% occurred at a single establishment. Finally, 61% of those crimes occurred during hours other than those between 4:00 p.m. and midnight. Crime rates between 1986 and 1987 for another Adams County area featuring three adult bookstores, two topless nightclubs, a bar, a liquor store, and a beer outlet revealed a 15% increase in crime, (i.e., 55 crimes in 1986 as opposed to 63 in 1987). In 1986, 29 of those crimes involved alcohol, while in 1987, 41 were linked to alcohol (a 41% increase). A rural area of Adams County with a single topless nightclub experienced a 39% increase in crime between 1986 and 1987. There was a marked increase in the number of adult entertainment locations opening for business during 1986 and 1987. Further, a check of criminal histories of some of the offenders showed arrests for morals crimes, sexual assaults, alcohol-related offenses, and crimes of violence. A study of armed robbery in one area during the same time period revealed that 66% of all reported armed robberies occurred at the adult bookstores. Finally, seven homicides from 1977 to 1987 were directly linked to adult bookstores and nude entertainment businesses.

The 1988 enactment of the Nude Entertainment Ordinance, which was upheld by the Colorado Supreme Court, reduced the number of adult businesses in Adams County to only 14. The Adams County ordinance included the following provisions: 1) restricting hours of operation from 4:00 p.m. to midnight, Monday to Saturday; 2) restricting location of SOBs to 500 feet from sensitive uses; 3) an amortization clause requiring compliance within a six month period; and 4) a public nuisance provision for repeated or continuing violation of the ordinance.

National Law Center Summary of the
MANATEE CO., FLORIDA
LAND USE STUDY
DATED JUNE, 1987

OVERVIEW: This report, conducted by the Manatee County Planning and Development Department, examines the ramifications of a proposed adult entertainment ordinance. It depends upon the findings of other jurisdictions to forecast the effects of adult businesses in Manatee County. It also examines other land use studies in order to determine appropriate land use controls for Manatee County.

FINDINGS: The **Boston Model** of concentrating adult businesses into on "combat zone" has the following advantages: 1) like uses are treated alike; 2) lower administrative costs; 3) control over growth of pornographic uses and the development of specific new uses; 4) no definitional vagueness; 5) apparent constitutionality; and 6) easier evaluation of total public services impact of pornographic uses (traffic, limited parking, higher police costs and other effects). Disadvantages of this model center on the blighting effect when a central zone is created. It may also attract "undesirables" to one area. The **Detroit Model** has these advantages: 1) apparent constitutionality (withstood challenge in *Young v. American Mini Theatres*); and 2) creates a separation zone between other adult businesses and residential areas. However, it suffers from definitional weaknesses. Most jurisdictions have adopted some form of the Detroit model. Other cities have added additional buffer requirements.

Studies of secondary effects in other cities (Austin, TX, Indianapolis, IN, Los Angeles, CA, and St. Paul, MN) have examined the impact of adult businesses on property value, crime rates, and incidences of blighting. Based upon the negative findings in these areas, cities have recommended zoning and other land use regulations.

There are five adult businesses currently in the County. All five are separated from one another by more than 1,000 feet. None meet the minimum residential buffer distance of 500 feet.

RECOMMENDATIONS: The dispersal model ordinance should be considered. The present zoning ordinance should be amended to add buffer requirements to provide distance from 1) residential districts, 2) churches, schools, child care facilities, and public recreation areas, and 3) other established adult businesses. There should be at least 500 feet of separation between an adult business and the nearest residential zone. A 2000 foot buffer should be established for churches, schools, child care facilities, and recreation areas. Adult businesses should be separated from one another by at least 1000'. A one year amortization period for compliance should be considered (as provided in the draft ordinance). "Sign controls should be considered which still protect a business's freedom to advertise, but also minimize public's exposure to such uses."

INDIANAPOLIS, INDIANA

National Law Center Summary of the
LAND USE STUDY
DATED FEBRUARY, 1984

OVERVIEW: After a 10 year growth in the number of sexually-oriented businesses (to a total of 68 on 43 sites) and numerous citizen complaints of decreasing property values and rising crime, the city compared 6 sexually-oriented business "study" areas and 6 "control" locations with each other and with the city as a whole. The study and control areas had high population, low income and older residences. In order to develop a "best professional opinion," the city collaborated with Indiana University on a national survey of real estate appraisers to determine valuation effects of sexually-oriented businesses on adjacent properties.

CRIME: From 1978-82, crime increases in the study areas were 23% higher than the control areas (46% higher than the city as a whole). Sex related crimes in the study areas increased more than 20% over the control areas. Residential locations in the study areas had a 56% greater crime increase than commercial study areas. Sex related crimes were 4 times more common in residential study areas than commercial study areas with sexually-oriented businesses.

REAL ESTATE: Homes in the study areas appreciated at only 1/2 the rate of homes in the control areas, and 1/3 the rate of the city. "Pressures within the study areas" caused a slight increase in real estate listings, while the city as a whole had a 50% decrease, denoting high occupancy turnover. Appraisers responding to the survey said one sexually-oriented business within 1 block of residences and businesses decreased their value and half of the respondents said the immediate depreciation exceeded 10%. Appraisers also noted that value depreciation on residential areas near sexually-oriented businesses is greater than on commercial locations. The report concludes: "The best professional judgment available indicates overwhelmingly that adult entertainment businesses -- even a relatively passive use such as an adult bookstore -- have a serious negative effect on their immediate environs."

RECOMMENDATIONS: Sexually-oriented businesses locate at least 500 feet from residential areas, schools, churches or established historic areas.

National Law Center Summary of the
MINNEAPOLIS, MINNESOTA
LAND USE STUDY
DATED OCTOBER, 1980

OVERVIEW: This report is divided into two sections: the relationship of bars and crime and the impact of "adult businesses" on neighborhood deterioration. In the study, an "adult business" is one where alcohol is served (including restaurants) or a sexually-oriented business (i.e., saunas, adult theaters and bookstores, rap parlors, arcades, and bars with sexually-oriented entertainment). Census tracts were used as study areas and evaluated for housing values and crime rates. Housing values were determined by the 1970 census compared to 1979 assessments. Crime rates were compared for 1974-75 and 1979-80. The study is strictly empirical and reported in a formal statistical manner; therefore it is difficult for layman interpretation of the data.

FINDINGS: The report concludes that concentrations of sexually-oriented businesses have significant relationship to higher crime and lower property values. Other than statistical charts, no statements of actual crime reports or housing values are included in the report. thus, the lay reader has only the most generalized statements of how the committee interpreted the empirical data.

RECOMMENDATIONS: First, that adult businesses be at least 1/10 mile (about 500 feet) from residential areas. Second, that adult businesses should not be adjacent to each other or even a different type of late night business (i.e., 24-hour laundromat, movie theaters). third, that adult businesses should be in large commercial zones in various parts of the city (to aid police patrol and help separate adult businesses from residential neighborhood). The report said "policies which foster or supplement attitudes and activities that strengthen the qualities of the neighborhoods are more likely to have desired impacts on crime and housing values than simple removal or restriction of adult businesses."

National Law Center Summary of the
ST. PAUL, MINNESOTA
LAND USE STUDY
DATED ARIL, 1988 (SUPPLEMENTAL TO 1987 STUDY)

OVERVIEW: As a "result of a growing concern among St. Paul citizens that the City's existing adult entertainment zoning provisions, adopted in 1983," did not "adequately address the land use problems associated with adult entertainment", the City Council directed the Planning Commission to study possible amendments to the Zoning Code. The Commission's proposed amendment was based on findings made during public hearings. The "substitute" "Amendment", adopted by the City Council, is a result of those findings and the findings made by the Council during its public hearings. The 1988 Study includes the findings, addresses the nine key features of the "substitute" "Amendment", and gives the rationale for each.

FINDINGS, "AMENDMENT", AND RATIONALE:

1) "[A]dult uses are harmful to surrounding commercial establishments but that significant spacing requirements between adult uses can minimize the harm in zones reserved for the most intensive commercial activity."

2) The "Amendment" treats all nine defined adult uses the same. Included are: "adult bookstores", "cabarets", "conversation/rap parlors", "health/sport clubs", "massage parlors", "mini-motion picture theaters", "motion picture theatres", "steamroom/bathhouse facilities", and "other adult uses." Each is defined as providing "matter", "entertainment", or "services" which is "distinguished or characterized by an emphasis on the "depiction", "description", "display" or "presentation" of "specified sexual activities" or "specified anatomical areas." "Most, if not all, existing statistical studies of the impact of adult uses do not differentiate between different types of adult uses and do not recognize that the land use impact of various types of adult uses is significantly different." "[E]qual treatment is consistent with the emphasis on deconcentration".

3) The "Amendment" set spacing between adult uses at 2,640 feet outside of the downtown area and 1,320 feet downtown. A six-block goal could not be met because of the necessity to provide a "sufficient land mass". The Phoenix and Indianapolis land use studies indicate that "the negative land use impact of a single adult use extends for up to three blocks".

4) Distances between adult uses and residential zones were increased from 200 feet to 800 feet "outside of downtown" and from 100 to 400 feet downtown in the substitute "Amendment". The goal of 1,980 feet outside of "downtown" and 990 feet downtown could not be met because of the necessity to provide "enough land and sites for potential future adult uses."

5) Distances from "protected uses" outside of downtown were increased from zero to 400 feet and from 100 to 200 feet downtown. Protection for zones "other than residential or small neighborhood business zones" was "justified" because their populations are "particularly vulnerable to the negative impacts of adult uses." "Protected uses" are: day care centers; houses of worship; public libraries; schools; public parks/parkways/public recreation centers and facilities;
fire stations (because of use for bicycle registration and school field trips); community residential facilities; missions; hotels/motels (which often have permanent residents).

National Law Center Summary of the
ST. PAUL, MINNESOTA
LAND USE STUDY
(CONTINUED)

6) Limiting one type of adult use per building was justified by experience with two pre-existing "multi-functional" adult businesses, numerous studies by other cities, and St. Paul's own study in 1978, which documented significantly higher crime rates associated with two adult businesses in an area, and significantly lower property values associated with three adult uses in an area. The 1987 study included statistics showing that most "prostitution arrests in the city occur within four blocks on either side of the concentration of four adult businesses." Other problems included "the propositioning" and "sexual harassment of neighborhood women mistaken for prostitutes", "discarding of hard-core pornographic literature" ("which is "most strongly associated with adult bookstores") "on residential property where it becomes available to minors", a "generally high crime rate," and "a general perception" that such an area "is an unsafe place due to the concentration of adult entertainment that exists there". Redevelopment experience in St. Paul showed that adult use areas caused a "blighting influence inhibiting development". Multi-functional adult uses will attract more customers which "increases the likelihood that such problems will occur." A "Sex for Sale Image" attracts more street prostitutes and their customers, and demoralizes other businesses and neighborhood residents".

7) Amount of land available for 24 existing adult uses (which includes split-off of two multi-functional businesses with three-four types per business) was 6.5% of the City's total land mass, for a maximum of 44 sites based on "absolute site capacity", calculated without regard for existing infrastructure, or 28 sites based on "relative site capacity" on existing street frontage calculated without regard for existing development or suitability of land for development.

8) Annual review of the "Special Condition Use Permit" was included in the "Amendment" "to ensure that no additional uses are added to the type of adult use that is permitted."

9) Prohibition of obscene works and illegal activities was included in the "Amendment" to "guard against the conclusion that the Zoning Code permits activities which the City can and should prohibit as illegal."

National Law Center Summary of the
LAS VEGAS, NEVADA
LAND USE STUDY
DATED MARCH 15, 1978

OVERVIEW: Prior to adopting a zoning ordinance for adult businesses, the City of Las Vegas conducted a survey of businesses, residences, and real estate brokers and agents. The results of the survey are included in this report. Also included in the report: minutes of the March 15, 1978, City Commission meeting on the matter of adding an adult business zoning chapter to the City code; an affidavit from Donald Saylor, Director of the Department of Community Planning and Development for Las Vegas, on the blighting effect of adult businesses; an affidavit from William Powell, Vice and Narcotics detective with the Las Vegas Metropolitan Police Department, on the link between a high concentration of adult businesses and an increase in criminal activity; and an affidavit from Donald Carns, professor of Sociology at the University of Nevada, Las Vegas, on the problems adult businesses pose for the economic well-being and vitality of a city.

FINDINGS: Among brokers and realtors, overwhelming majorities said that adult entertainment establishments had negative effects on the market value (82%), saleability/rentability (78%), and rental value (76%) of properties located near these establishments. According to 81%, there is a decrease in the annual income of businesses in the vicinity of adult establishments. Strong majorities reported that a concentration of adult businesses near other businesses (from under 500 feet to more than 1000 feet) has negative effects on market values, rental values, and rentability/saleability of residential property. Among surveyed homeowners and residents living near adult businesses, the consensus was similar: adult establishments have a negative effect on the 1) neighborhood; 2) business conditions (sales and profits) in the area (2-square block radius); and 3) value and appearance of homes in the vicinity (within 500 feet). Reportedly, 85% said that their normal living habits had been limited or hindered in some way due to the presence of adult businesses in the area. Among surveyed business owners and proprietors, the results were mixed. The majority of respondents did report that adult businesses had a negative effect on homes immediately adjacent to and in the area (500 feet or more) of adult businesses. A majority believed adult businesses had the following secondary effects: complaints from customers (66%), additional crime (58%), and deteriorated neighborhood appearance (58%). Finally, among residents living in areas not located near adult businesses, the consensus was clear: adult establishments have negative effects on neighborhoods, business conditions in the City, the value and appearance of homes, property values, the amount of crime, and resident transiency. These residents were nearly unanimous (96%) in the belief that their living habits had been limited or hindered by the operation of adult businesses.

RECOMMENDATIONS: Adult businesses should be prohibited from locating in residential areas. They should also be restricted to designated areas and dispersed throughout those designated areas. Adult businesses should be located at least 1000 feet from playgrounds, churches, schools, and parks.

National Law Center Summary of the
ELLICOTTVILLE, NEW YORK
LAND USE STUDY
DATED JANUARY, 1998

OVERVIEW: On April 28, 1997, the Ellicottville Village Board of Trustees and Town Board placed a moratorium on approvals of new sexually-oriented establishments. There were four purposes for the move: 1) to allow the community time to study the effects of adult entertainment businesses; 2) "to determine if a regulatory response was necessary;" and 3) "if stronger land use controls were warranted to draft the regulatory changes for the legislative board's consideration." As there were no adult businesses in Ellicottville at the time of the study, the report cites secondary effects studies in other jurisdictions as a means of forecasting the effects of an Ellicottville adult business. The negative secondary effects examined included: economic impacts, property values, fear of crime, and negative impact on community character.

FINDINGS: Ellicottville is a community that relies upon attracting tourists. As such, "the atmosphere and aesthetic features of the community take on an economic value." Though active land use controls have been practiced to maintain the look and vitality of the community, currently there are no differentiations made between the regulation of an adult business and, say, a juice bar.
To assess potential secondary effects, studies administered in other New York jurisdictions will be helpful. The 1994 NYC Adult Entertainment study found the following: adult businesses tend to cluster in certain areas, a rise in crime is linked to clusters of adult businesses, negative reactions toward adult businesses were common among adjacent business and home owners, isolation of adult businesses limited secondary effects, real estate brokers believe property values are negatively impacted by nearby adult establishments, and adult business signs are often larger and more graphic.

Allowing adult businesses to locate within the historic business district would negatively impact Ellicottville's efforts to provide a family-friendly community. Similarly, permitting adult businesses to locate near residences would have an eroding effect on "aesthetic qualities" and property values. The type of signage typically used by adult businesses would run counter to the business district. The following uses seemed most prone to negative secondary effects: the Ellicottville historic district, places of worship (6 churches in Ellicottville), the school, the child care facility, recreation parks/areas/playgrounds and public/civic facilities, and residential neighborhoods.

RECOMMENDATIONS: The Town and Village should adopt zoning regulations that create a land use category, and regulate adult establishment uses, allowing them to locate in industrial zones and the industrial-service commercial district. The establishment of adult businesses should be considered Conditional Uses (requiring approval of a special use permit). Exterior advertising, signs, and loudspeakers and sound equipment should be regulated. The following distance buffers should be set for: 500 feet (town) or 300 feet (Village) from residential areas; 1000 feet (town) or 500 feet (Village) from other adult businesses; and 500 feet (town and Village) from a church, school, day care center, park, playground, civic facility or historic resource. Definitions for adult uses should be added to existing zoning regulations.

National Law Center Summary of the
ISLIP, NEW YORK
LAND USE STUDY
DATED SEPTEMBER 23, 1980

OVERVIEW: This report, compiled by Daniel Dollmann of the Islip Department of Planning, features an analysis of studies and ordinances from other jurisdictions, a case study of an adult business in Islip, research of public outcry against the establishment of adult businesses in Islip, and a survey by hamlet of adult entertainment businesses in Islip. The study includes a lengthy appendix with news articles detailing the history of the Islip zoning ordinance, letters of complaint from local residents, a historical perspective about the Detroit ordinance, copies of ordinances from other jurisdictions, and a copy of the proposed Islip zoning ordinance, reflecting the findings in this report.

FINDINGS: The study looks at the Detroit ordinance, upheld by the U.S. Supreme Court in 1976, which restricted sexually-oriented businesses (SOBs) from locating within 1,000 feet of other SOBs, and within 500 feet of residential areas. The Islip ordinance is modeled after the Detroit ordinance's approach to disperse SOBs ("anti-skid row") as opposed to creating a "combat zone," which was unsuccessfully attempted by the Town of Islip in 1975. The study notes that the ordinance incorporates "adults-only" definitions in an attempt to avoid First Amendment issues. In determining its distance requirement between adult businesses and sensitive uses, the Town of Islip took into consideration: distance requirements used in Detroit, MI, Norwalk, CA, Dallas, TX, Prince George's Co., MD, and New Orleans, LA zoning ordinances; it's own measurements on an Islip zoning map of several distance proposals; information from the local case study; and resident feedback. The study analyzes the problems unique to an area called Sunrise Highway (23% of businesses are adult) and compares the differences between Islip and Detroit, including population size and number of SOBs, to justify needs for greater distance limitations between SOBs.

One of the goals of the Town is to protect its historic downtown district and keep it from further deterioration (which occurred in the past due to an increase in multi-family dwellings, transients and bars). The Study noted that limiting SOBs to the Town's light industrial zone would be in keeping with this goal. Currently, there is a "dead zone" in one of the healthier parts of the downtown area due to two adult businesses located there.

The Study includes a case study of the Bohemia Book Store which was located extremely close to a residential area. In 1980 the store was temporarily closed down by court order, as a result of citizen picketing and subsequent violence against the picketers. The operators of this particular SOB were reported to have associations with organized crime (i.e., mob-operated national porno ring, multiple obscenity charges and convictions).

RECOMMENDATIONS: the proposed zoning ordinance requires 500 feet between an adult business and residential areas or other sensitive uses, like churches and schools, and a ½ mile distance between SOBs. The ordinance includes a waiver clause for certain conditions, and an amortization clause.

National Law Center Summary of the
NEW YORK CITY, NEW YORK
LAND USE STUDY
DATED NOVEMBER, 1994

OVERVIEW: This study of the secondary impacts of adult entertainment uses on communities in New York City (NYC), prepared by the Department of City Planning (DCP), includes: a survey of studies in other jurisdictions, a description of the adult entertainment business in NYC, a review of studies previously done in NYC, a DCP survey of the impacts on NYC communities, and maps showing SOB locations.

FINDINGS: Recent trends in sexually-oriented businesses (SOBs) in NYC show a 35% increase over the last decade (75% of which were located in zoning districts that permit residences). However, since the survey for this information focused only on XXX video and bookstores, adult live or movie theaters, and topless or nude bars, this may be an underestimate of total SOB uses. Also in the past decade the availability of pornographic material has increased, the price has decreased greatly, and the image of nude bars has become more sophisticated or "upscale", contributing to the wide-spread availability of SOBs in NYC. SOBs have continued to concentrate in specific areas, specifically in three communities within Manhattan. Between 1984 and 1993: the concentrated areas of SOBs have nearly tripled; the number of SOBs has increased from 29 to 86 (74% of which were adult video stores – not included in the 1984 survey); adult theaters declined from 48 to 23, and topless/nude bars increased from 54 to 68 (54%).

After examining studies from other jurisdictions, this study concludes that the negative secondary impacts are similar in every jurisdiction, despite size of city, variations in land use patterns, and other local conditions. The study specifically examines the negative secondary impacts documented in Islip, NY, Indianapolis, IN, Whittier, CA, Austin, TX, Phoenix, AZ, Los Angeles, CA, New Hanover Co., NC, Manatee Co., FL, and MN,
which evidenced problems with "dead zones", declining property values, high turnover rates in adjacent businesses, and higher sex crime rates. Various studies done on the City of New York (including Times Square) showed that concentration of SOBs had resulted in significant negative impacts, including economic decline, decreased property values, and deterrence of customers, and significantly increased crime incidence. Business owners strongly believed their businesses were adversely affected by SOBs. The DCP did its study in NYC boroughs where there was less concentration of SOBs. The negative impacts in these areas were harder to measure, but there was a definite negative perception among residents about the presence of SOBs. It has been shown that negative perceptions related to SOBs can lead to disinvestment and tendency to avoid shopping in adjacent areas – leading to economic decline. Residents reared potential proliferation of SOBs and the resultant negative impact on traditional neighborhood-oriented shopping areas. Eighty percent of real estate brokers surveyed responded that an SOB would have a negative impact on property values (consistent with a national survey). Residents were also concerned about exposure to minors of sexual images.

The DCP concluded that it would be appropriate to regulate SOBs differently from other commercial businesses, based on the significant negative impact caused by SOBs.

National Law Center Summary of the
TIMES SQUARE, NEW YORK
LAND USE STUDY
DATED APRIL, 1994

OVERVIEW: The Times Square Business Improvement District (BID) conducted a study of the secondary effects of adult businesses on the Times Square area. Due to an increase in the number of adult use establishments from 36 in 1993[1] to 43 in 1994 the BID conducted this study to obtain evidence and documentation on the secondary effects of adult use businesses in the Times Square BID, and of their dense concentrations along 42nd Street and Eighth Avenue. The study was performed by combining available data on property values and incidence of crime, plus in-person and telephone interviews with a broad range of diverse business and real estate enterprises, including major corporations, smaller retail stores, restaurants, theatres and hotels, as well as with Community Boards, block associations, activists and advocates, churches, schools, and social service agencies.

FINDINGS: The study made the following four findings:

1) Surveys - All survey respondents voiced optimism about the future of Times Square, even as they bemoaned the increase of adult use establishments. Many respondents felt that some adult establishments could exist in the area, but their growing number and their concentration on Eighth Avenue constitute a threat to the commercial property and residential stability achieved in the past few years.

2) Crime - Although the study was unable to obtain data from before the recent increase in adult establishments and, thus, unable to show if there's been an increase in actual complaints, there were 118 complaints made to the police on Eighth Avenue between 45th and 48th compared to 50 on the control blocks on Ninth Avenue between 45th and 48th Streets. In addition, the study reveals a reduction in criminal complaints the further one goes north on Eighth Avenue away from the major concentration of these establishments.

3) Property Values - The rate of increase of total assessed values of the Eighth Avenue study blocks increased by 65% between 1985 and 1993 compared to 91% for the control blocks during the same period. Furthermore, acknowledging the many factors that lead to a property's increased value, including greater rents paid by some adult establishments, an assessment of the study blocks reveal that the rates of increases in assessed value for properties with adult establishments is greater than the increase for properties on the same blockfront without adult establishments.

4) Anecdotal evidence - Many property owners, businesses, experts, and officials provided anecdotal evidence that proximity to adult establishments hurts businesses and property values.

CONCLUSION: BID's findings support the results from other national studies and surveys. Adult use businesses in Times Square have a negative effect on property values, cause a greater number of criminal complaints, and have an overall negative impact on the quality of life for the residents and small businesses of Times Square.

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[1] This number is a great deal lower than the all time high of 140 in the late 1970s. During that time the Times Square area was referred to as a "sinkhole" by the (The Daily News, August 1`4, 1975).

National Law Center Summary of the
NEW HANOVER CO., NORTH CAROLINA
LAND USE STUDY
DATED JULY, 1989

OVERVIEW: This Planning Department report cites several studies and reports outlining adverse economic, physical, and social effects of adult businesses generally and specifically in jurisdictions across the country. While noting that New Hanover County does not currently have a noticeable problem with adult establishments, the report emphasizes the need to institute "preventative" zoning measures to protect and preserve the quality of life. It also offers an overview of common zoning approaches and the attendant constitutional issues.

FINDINGS:

1) Municipalities across the country have documented, both empirically and anecdotally, the adverse effects of adult businesses on property values, rental values, neighborhood conditions, and other commercial businesses in the immediate area.
2) Cities have documented a link between adult businesses and urban blight, increased traffic, and light and noise pollution.
3) Studies have linked concentrations of adult businesses to an increase in crime, specifically prostitution, drugs, assault, and other sex crimes.
4) Community reputations and general quality of life are also negatively impacted by the presence of adult businesses.
5) An adult bookstore has been closed and re-opened several times after raids by law enforcement authorities. It is also reported that a topless dancing establishment may be opened in the County.
6) New zoning regulations would control the establishment of adult businesses near churches, schools, and residential areas.

RECOMMENDATIONS: 1) New Hanover should adopt the dispersal (Detroit) zoning approach. 2) Adult businesses should not be permitted to locate within 1,000 feet of each other. 3) Adult businesses should not be permitted within 500 feet of any school, church, park, or residential zone. 4) Adult businesses should only be allowed to locate in designated business and industrial districts, and only by a special use permit. 5) Signs and displays used by adult businesses should be regulated to protect the public, especially teenagers and children, from exposure to obscene material ("any display, device or sign that depicts or describes sexual activities or specified anatomical areas should be out of view of the public way and surrounding property"). 6) The County Attorney's Office and Sheriff's Department should explore the viability of requiring licensing for adult businesses. 7) Definitions for "adult business establishments," "specified sexual activities," and "specified anatomical areas" should be added to the zoning ordinance.

National Law Center Summary of the
CLEVELAND, OHIO
LAND USE STUDY
DATED AUGUST 24, 1977

OVERVIEW: This is a Cleveland Police Department report from Captain Carl Delau, commander of the City's vice and obscenity enforcement units and reported by him while he participated in a panel discussion at the National Conference on the Blight of Obscenity held in Cleveland July 28-29, 1977. The topic was "The Impact of Obscenity on the Total Community." Crime statistics are included for 1976 robberies and rapes. Areas evaluated were census tracts (204 in the whole city, 15 study tracts with sexually-oriented businesses). At the time of the study, Cleveland had 26 pornography outlets (8 movie houses and 18 bookstores with peep shows). their location was not regulated by city zoning laws.

FINDINGS: For 1976, study tracts had nearly double the number of robberies as the city as a whole (40.5 per study tract compared to 20.5 for other city tracts). In one study tract with five sexually-oriented businesses and 730 people, there were 136 robberies. In the city's largest tract (13,587 people, zero pornography outlets) there were only 14 robberies. Of the three tracts with the highest incidence of rape, two had sexually-oriented businesses and the third bordered a tract with two such businesses. In these three, there were 41 rapes in 1976 (14 per tract), nearly seven times the city average of 2.4 rapes per census tract.

CONCLUSION: "Close scrutiny of the figures from the Data Processing Unit on any and every phase of the degree of crime as recorded by census tracts indicates a much higher crime rate where the pornography outlets are located."

National Law Center Summary of the
OKLAHOMA CITY, OKLAHOMA
LAND USE STUDY
DATED MARCH 3, 1986

OVERVIEW: This study contains the results of a survey of 100 Oklahoma City Real Estate Appraisers. Appraisers were given a hypothetical situation and a section to comment on the effects of sexually-oriented businesses in Oklahoma City. The hypothetical situation presented a residential neighborhood bordering an arterial street with various commercial properties which served the area. A building vacated by a hardware store was soon to be occupied by an "adult" bookstore. No other sexually-oriented businesses were in the area and no other vacant commercial space existed. With less than a one month response time, 34 completed surveys were received by the city.

FINDINGS: 32% of the respondents said that such a bookstore within one block of the residential area would decrease home values by at least 20%. Overwhelmingly, respondents said an "adult" bookstore would negatively effect other businesses within one block (76%). The level of depreciation is greater for residents than businesses. The negative effects on property values drop sharply when the sexually-oriented business is at least three blocks away. In the subjective portion, 86% of the respondents noted a negative impact of sexually-oriented businesses on Oklahoma City. Frequent problems cited by the appraisers included the attraction of undesirable clients and businesses, safety threats to residents and other shoppers (especially children), deterrence of home sales and rentals, and immediate area deterioration (trash, debris, vandalism).

CONCLUSIONS: Oklahoma City's findings supported results from other national studies and surveys. Sexually-oriented businesses have a negative effect on property values, particularly residential properties. The concentration of sexually-oriented businesses may mean large losses in property values.

National Law Center Summary of the
OKLAHOMA CITY, OKLAHOMA II
LAND USE STUDY
DATED JUNE 1992

This study, written by Jon Stephen Gustin, a retired sergeant for the Oklahoma City Police Department, examines a history of the successful abatement of sexually-oriented businesses (SOBs) in Oklahoma City between 1984 - 1989, which ultimately reduced an alarmingly high crime rate in the city, which is one of many harmful secondary effects related to the operation of SOBs in the community.

This study indicates that in the early 1980's there was a large growth of SOBs in Oklahoma City in conjunction with a boom in the oil industry resulting in a large influx of oil field workers in the area. Houses of prostitution, nude bars and adult theaters spread throughout the city. SOB promoters and entrepreneurs from around the country came to the area to compete for their share in the market. By 1984, over 150 SOBs and an estimated 200 prostitutes operated in the city. SOB owners competed by using more and more blatant signs and advertising. As a result, the city experienced epidemic proportions of crime problems associated with the SOBs. Citizens began to voice concerns over the decay of community moral standards, the increased crime rate, and decreased property values.

Although Oklahoma City had a history of unsuccessful prosecution of cases related to pornography, prostitution, and related SOBs, public pressure from citizens and elected officials ultimately resulted in support by the Chief of Police, the City Council and the city's District Attorney to prosecute SOBs that were in violation of the law. Abating prostitution and related businesses was the first priority. The media aided this effort by publishing names of arrested customers and prostitutes, and airing live coverage of arrests and raids. This bolstered citizen support of police and prosecutors.

At adult bookstores and peep booths arrests were made for customers propositioning undercover officers to engage in sex acts, for the sale and possession of pornography, the display of pornography and for health department violations (including seminal fluids on the walls and floors of peep show booths). [Note that the author uses the term "pornography" referring to illegal pornography, also known as "obscenity."]

The city next focused on prosecution for violations at nude and semi-nude dance bars, where customers engaged in sexual favors with nude employees in exchange for the purchase of expensive cocktails. Repeated arrests in these bars forced them into compliance, causing a lack of customer support. Simple arrests at escort services, which were organized fronts for prostitution, did little to abate the illegal activity. Therefore, police worked undercover , arresting solicitors of the service. Also an attempt was made to prohibit businesses that had been convicted on prostitution charges from having access to phone service.

As a result of the aggressive arrest and prosecution efforts, only a handful of the original 150 SOBs remained by early 1990. All remaining SOBs operated within statutory guidelines. It has been documented that incidents of reported rape in Oklahoma City decreased 27% during that period, while it increased 16% in the rest of the state. In 1983 nearly one-half of the rapes in Oklahoma occurred in Oklahoma City, decreasing to one-third by 1989. This is an example of the benefits of stringent enforcement and prosecution of the so called "victimless crimes" associated with SOBs.

National Law Center Summary of the
HAMILTON COUNTY AND
CITY OF CHATTANOOGA, TENNESSEE
LAND USE STUDY
DATED MAY 1997

OVERVIEW: The Community Protection Committee, established by County Resolution 794-18, undertook a 2 ½ year study of vice-related laws and law enforcement activities in Hamilton County, Tennessee. The mission of the Committee was the renewal of efforts to protect children and families, relating to public health and safety. Members of the Committee represented the Hamilton County Executive, the Board of Commissioners, the Mayor of Chattanooga, and the Chattanooga City Council. The resolution requested that all federal, state and local law enforcement agencies and legislature renew their commitments to enforcing existing vice-related laws, and enacting necessary legislation. In 1996, the Committee met bi-monthly to hear national and local experts and law enforcement officials. They finished preparing recommendations in December 1996 and presented the full report in May 1997.

SUMMARY OF THE REPORT: In preparing and researching for this report the Committee operated from the following questions: is the presence of vice related activity harmful to the community? If so, how does it harm the community? The Committee first focused on "prostitution" and "pornography" along with the corresponding "harmful effects on the community, finding that prostitution posed a danger to Chattanooga and Hamilton County.

The report found that prostitution is extremely dangerous to public health, primarily due to the spread of STDs, which currently infect one in five Americans. In Chattanooga, four people control all the escort services, which serve as a front for prostitution. The report cited statistics for Shelby County, TN, including 33% of all prostitutes jailed in 1990 tested positive for VD, and 13% of all prostitutes jailed tested positive for HIV, (all dying within 3-5 years at an estimated cost of $500,000 per person, at tax payer expense). In one topless club 8 out of 9 female employees tested positive for VD.

Other issues researched in the report include:

- addiction to obscenity and the danger it poses to Hamilton County (i.e. promoting violence and perpetuating the "rape myth");
- victims of the sex business (Performers - often runaway, drug-using girls from abusive backgrounds that are lured into stripping by promise of more money, then abused further by patrons; and Customers – addiction to pornography can produce aggression, depression, debt, and eventually, loss of family);
- the harm of pornography on children (the 12-17 yr. old male is the largest group of consumers of pornography; early exposure to porn related to greater involvement in deviant sexual practices; pedophiles use porn to molest children; in Hamilton County there were 585 cases of child molestation reported in 1994; the cost to Hamilton County to counsel sexually abused children in 1994 was over $1.5 Million; child molesters report from 30-60 victims each before arrested the first time);

National Law Center Summary of the
HAMILTON COUNTY AND
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(CONTINUED)

- the relationship of pornography and organized crime (organized crime has historically been involved in 95% of the adult business establishments);
- the harmful secondary effects of sex businesses on the community (including increased crime, good businesses abandoning area, reduced property values, eroded tax base, and lost revenue for law enforcement);
- a look at the what the law allows regarding the regulation of pornography and the establishing of a "Community Standard";
- an examination of the positive results from enforcement of zoning and obscenity laws (specifically looking at Oklahoma City, OK which strictly enforced obscenity during the late 1980s and experienced a 27% drop in the rape rate over 6 years);
- an assessment of law enforcement manpower and training necessary to be effective;
- analysis by Bruce Taylor (NLC) of related TN statutes that need to be amended or enacted by the State legislature to protect children and families from pornography-related vice crimes (i.e. making wholesaling a felony).

RECOMMENDATIONS: The Committee's recommendations included:

(1) Hamilton County - adopting a zoning ordinance to regulate SOBs; imposing reasonable gross receipt taxes on SOBs to fund additional enforcement; appropriating funds for a Special D.A. expert in prosecuting obscenity; developing a computer network in the Sheriff's department to track child sex abuse and obscenity cases; enforcing TN State law requiring persons arrested for prostitution to be tested for STDs; and establishing a committee to assist in the implementation of these recommendations.

(2) Hamilton County Sheriff's Department and Chattanooga Police Department - establishing a child sex abuse task force; educating the public about the relationship between child sex abuse and pornography.

(3) City of Chattanooga - strengthening zoning laws; continuing dispersement policy, which prohibits SOBs from clustering; revoking certain grandfather clause protections; hiring additional vice officers (currently only one officer); and regulating SOBs from locating within 500 feet of a business selling alcohol.

(4) Small Communities within Hamilton County – enacting SOB zoning laws to limit location of SOBs in the smaller communities; closely tracking child sex abuse and obscenity cases with Hamilton County Sheriff's Department.

(5) State of Tennessee – strengthening the State's Public Indecency and Obscenity laws; encouraging an officer exchange program to assist with local enforcement; encouraging Tennessee Bureau of Investigation to review organized crime activities and connections to the sex industry across the State; enacting legislation making it a felony for an adult to solicit sex from a minor, or to use pornography to solicit sex from a minor; enacting legislation giving local governments authority to restrict SOB operating hours; and revoking applicable licenses if an SOB sells pornography to a minor.

National Law Center Summary of the
AMARILLO, TEXAS
LAND USE STUDY
DATED SEPTEMBER 12, 1977

OVERVIEW: This Planning Department report cites several sources including national news magazines, "adult business" ordinances from other cities, an American Society of Planning Officials report and pertinent Supreme Court decisions. Lengthy explanation of the *Miller* test (with legal definitions), discussion of *Young v. American Mini Theatres*, and a comparison of the Boston and Detroit zoning models are included. The city defined "adult businesses" as taverns, lounges, lounges with semi-nude entertainment, and bookstores or theaters with publications featuring nudity and explicit sexual activities. (At the time, Amarillo had 3 such theaters and 4 bookstores with space for such publications).

FINDINGS: The police department provided an analysis showing that areas of concentrated "adult only" businesses had 2 1/2 times the street crime as the city average. The Planning Department concluded that concentrations of these businesses have detrimental effects on residential and commercial activities caused by 1) noise, lighting and traffic during late night hours 2) increased opportunity for street crimes and 3) the tendency of citizens to avoid such business areas. The study noted that lack of zoning regulations would lead to concentrations of sexually-oriented businesses (causing increased crime) or more such establishments locating near residential areas or family and juvenile oriented activity sites (churches, parks, etc.)

RECOMMENDATIONS: 1) Adult businesses locate 1,000 feet from each other. No recommended distance was specified from residential zones or family/juvenile activities. 2) City development of an amortization schedule and permit/licensing mechanism. 3) City regulation of signs and similar forms of advertising. 4) Vigorous enforcement of State Penal Code, especially relating to "Harmful to Minors." 5) City amendments prohibiting minors from viewing or purchasing sexually-oriented materials (enforced physical barriers).

National Law Center Summary of the
AUSTIN, TEXAS
LAND USE STUDY
DATED MAY 19, 1986

OVERVIEW: The report was the basis for developing an amendment to existing sexually-oriented business ordinances. At the time, 49 such businesses operated in Austin, mostly bookstores, theaters, massage parlors and topless bars. The study examined crime rates, property values, and trade area characteristics.

The report focused on sexually related crimes in four study areas (with sexually-oriented businesses) and four control areas (close to study areas and similar). Two study areas had one sexually-oriented business and the others had two such businesses. To determine the effects of these businesses on property values, the city sent surveys to 120 real estate appraising or landing firms (nearly half responded). For trade area characteristics, three businesses (a bookstore, theater and topless bar) were observed on a weekend night to determine customer addresses.

CRIME: Sexually related crime ranged from 177-482% higher in the four study areas than the city average. In the two study areas containing two sexually-oriented businesses, the rate was 66% higher than in the study areas with one such business. All control areas had crime rates near the city average.

REAL ESTATE: 88% said that a sexually-oriented business within one block of a residential area decreases the value of the homes (33% said depreciation would be at least 20%). Respondents also said such a business is a sign of neighborhood decline, making underwriters hesitant to approve the 90-95% financing most home buyers require. They said commercial property is also negatively effected by such businesses.

TRADE AREA CHARACTERISTICS: Of 81 license plates traced for owner address, only 3 lived within one mile of the sexually-oriented business. 44% were from outside Austin.

RECOMMENDATIONS: 1) Sexually-oriented businesses should be limited to highway or regionally-oriented zone districts. 2) Businesses should be dispersed to avoid concentration. 3) Conditional use permits should be required for these businesses.

National Law Center Summary of the
BEAUMONT, TEXAS
LAND USE STUDY
DATED SEPTEMBER 14, 1982

OVERVIEW: This report by the city Planning Department encourages amendments to existing "adult business" ordinances to include eating or drinking places featuring sexually-oriented entertainment (strippers, etc.). Zoning laws required "adult uses" to locate 500 ft. from residential areas; 300 ft. from any other adult bookstore, adult theater, bar, pool hall or liquor store; and 1,000 feet from a church, school, park, or recreational facility where minors congregate.

CRIME: Police verified that bars, taverns, and lounges (especially those with sexually-oriented entertainment) are frequent scenes of prostitution and the sale/use of narcotics. On the whole, all criminal activity was higher at sexually-oriented businesses.

RECOMMENDATIONS: 1) Add eating/drinking places that exclude minors (under Texas law), unless accompanied by a consenting parent, guardian or spouse. 2) Require specific permits for areas zoned as General Commercial-Multiple Family Dwelling Districts. 3) Reduce the required distance of sexually-oriented businesses from residential areas, schools, parks, and recreational facilities from 1,000 to 750 ft.

National Law Center Summary of the
CLEBURNE, TEXAS
LAND USE STUDY
DATED October 27, 1997

OVERVIEW: This is a report by Regina Atwell, City Attorney for the City of Cleburne, Texas, on how and why the city organized a joint, county-wide sexually-oriented business (SOB) task force. The purpose of this report is to educate and provide assistance to other jurisdictions on what the author considers important aspects of organizing, drafting and adopting an SOB ordinance or amendment to an SOB ordinance. In the introduction, Ms. Atwell cautions that although SOBs now appear more sophisticated and have begun to integrate into the mainstream, the secondary effects of these businesses are still harmful to the community. She offers a set of questions to help assess a local government's needs to enact or update its SOB ordinance. Also, she gives a brief legal history of zoning regulations for SOBs.

ORDINANCE ENACTMENT: The City of Cleburne decided to update its existing SOB ordinance in response to plans by Houston and Dallas to revise their SOB ordinances, as well as related concerns that Dallas-Ft. Worth SOBs might subsequently infiltrate the Cleburne area. After learning that the County did not have an SOB ordinance, county officials and officials from all cities in the county were invited to appoint task force members to join the Cleburne's SOB Task Force. Due to an excellent response from the county and many cities within the county, a Joint County-Wide SOB Task Force was formed, realizing that a united stand on this issue was imperative.

After researching the law, consulting experts, examining sample ordinances from other jurisdictions, thoroughly investigating SOBs and their negative secondary effects on the community, and deciding which time/place/manner regulations were most appropriate to protect the governmental interests of their area, the Joint Task Force presented a draft of an SOB Ordinance to their city and county officials. For all its functions, the Task Force relied on the following guidelines: (1) Drafting an ordinance is done by the city planning office, the city attorney and the ordinance review committee, in reliance on case studies discussing secondary effects of SOBs. It is important that the actual studies be presented to legislators; (2) Public hearings should be held to discuss the ordinance and a legislative record created to preserve testimony, studies, maps, and other evidence; (3) Draft a good "Preamble" indicating the council's concern with secondary effects of SOBs; (4) Keep legislative record clean from any suggestions that impermissible motives have influenced the legislative process; (5) Be sure the ordinance allows reasonable "alternative avenues of communication" for SOBs to locate, and include zoning maps with measurements and available sites for the record; and (6) If interested in enacting a licensing ordinance, be sure that it is narrowly drawn to serve legitimate state interests without restricting 1A speech of SOBs. The report also gives extensive tips for how to hold public hearings.

CONCLUSIONS: Regulation of SOBs, including licensing, was necessary to combat the detrimental effects of SOBs, including high crime rate, depreciated property values, and spread of communicable diseases. In addition, the Task Force recommended enforcement of public nuisance laws, diligent prosecution of obscenity and sexual offense cases, and specialized training for local police and sheriffs.

National Law Center Summary of the

DALLAS, TEXAS
LAND USE STUDY
DATED APRIL 29, 1997

This study, which is an update of a December 14, 1994 report prepared by The Malin Group, analyzes the effects of sexually-oriented businesses (SOBs), specifically those that offer or advertise live entertainment and operate as an adult cabaret, on the property values in the surrounding neighborhoods. The study concludes that there is a much greater impact on the surrounding neighborhoods when there is a high concentration of these businesses in one locale.

The study found that the presence of an SOB in an area can create a "dead zone" which is avoided by shoppers and families with children that do not want to be in areas that also have adult uses. Also, the late hours of operation combined with loitering by unsavory people in the area where SOBs are located, appear to lead to higher crime in the area. In fact, a look at police calls for service over a four year period (1993-1996) shows that SOBs were a major source of the calls. One area averaged more than one call to police per day, where there was a concentration of seven SOBs. In that same area there was a much higher incidence of sex crime arrests than in similar areas with none or fewer SOBs.

This study applied the conclusions of several other studies completed by New York, Phoenix, Indianapolis, Austin, and Los Angeles, finding that the methodology used was appropriate and the conclusions were sound. This study concludes that the finding in these other studies would not be any different in Dallas. The studies found that SOBs have negative secondary impacts such as increased crime rates, depreciation of property values, deterioration of community character and the quality of life. In addition, real estate brokers interviewed in the Dallas area reported that SOBs are "perceived to negatively affect nearby property values and decrease market values." There were similar results from surveys taken in New York City and a national survey completed in Indianapolis and Los Angeles. The study also showed that community residents were concerned that the business signs used by SOBs were out of keeping with neighborhood character and could expose minors to sexual images. In areas where SOBs were concentrated, the signs were larger more visible and more graphic, to compete for business.

The study shows that a concentration of SOBs has a higher negative impact on the surrounding communities than an area with one isolated SOB. When concentrated, SOBs tend to be a magnet for certain businesses such a pawn shops, gun stores, liquor stores, etc., while driving away more family-oriented businesses. It can be harder to rent or sell vacant land in areas where SOBs are located. In fact, the negative perceptions associated with these areas have a significant impact on declining property values, even where other negative effects of SOBs are difficult to measure. Interviews with owners of commercial property near SOBs confirmed that the loss of property value manifested in a variety of ways, including: increased operating costs, like additional security patrols, burglar alarms, and trash cleanup; properties selling at much lower sales prices; and extreme difficulty in leasing properties. Owners thought that if the SOBs were gone, their property values would increase.

National Law Center Summary of the

EL PASO, TEXAS
LAND USE STUDY
DATED SEPTEMBER 26, 1986

OVERVIEW: This study done by the Department of Planning, Research and Development, the City Attorney's Office, the Police Department Data Processing Division, and New Mexico State University involved one year of studying the impacts of SOBs on the El Paso area. A separate report by the New Mexico State University on perceived neighborhood problems is also included. The study is in response to resident concern about the negative impacts resulting from the significant growth in SOBs over the past ten years. The study results show that SOBs are an important variable in the deviation from normal rates for real estate market performance or crime. Also included in the study are detailed maps showing the locations of SOBs in El Paso and within the selected study areas.

FINDINGS: In studying the impacts caused by SOBs, three study areas (with SOBs located in the area) and three control areas (similar areas in size and population, but without SOBs) within El Paso were identified and studied. Using the results of the study areas and the attitudes of the residents living near SOBs, the study concluded that the following conditions existed within the study areas: (1) the housing base within the study area decreases substantially with the concentration of SOBs; (2) property values decrease for properties located within a 1-block radius of SOBs; (3) there is an increase in listings on the real estate market for properties located near SOBs; (4) the presence of SOBs results in a relative deterioration of the residential area of a neighborhood; (5) there is a significant increase in crime near SOBs; (6) the average crime rate in the study areas was 72% higher than the rate in the control areas; (7) sex-related crimes occurred more frequently in neighborhoods with even one SOB; (8) residents in the study areas perceived far greater neighborhood problems than residents in control areas; (9) residents in study areas had great fear of deterioration and crime than residents in control areas.

The study of perceived neighborhood problems done by the New Mexico State University revealed strong concern by residents of the impact of SOBs on children in the neighborhood. In addition, some respondents told survey interviewers they feared retaliation from SOBs if they gave information about problems related to SOBs. Overall, this survey showed a strong, consistent pattern of higher neighborhood crime, resident fear and resident dissatisfaction in the neighborhoods containing SOBs.

RECOMMENDATIONS: The main recommendations included that a zoning ordinance be adopted with distance requirements between SOBs and sensitive uses, that a licensing system be established, that annual inspections be required, that signage regulations be established, and that a penalty/fine section be included for violations.

National Law Center Summary of the
HOUSTON, TEXAS
LAND USE STUDY
DATED NOVEMBER 3, 1983

OVERVIEW: Report by the Committee on the Proposed Regulation of Sexually-Oriented Businesses determining the need and appropriate means of regulating such businesses. Four public hearings provided testimony from residents, business owners, realtors, appraisers, police, and psychologists. The committee and legal department then reviewed the transcripts and drafted a proposed ordinance. More hearings obtained public opinion on the proposal and the ordinance was refined for vote by the City Council.

TESTIMONY: The testimony was summarized into six broad premises: (1) The rights of individuals were affirmed. (2) Sexually-oriented businesses can exist with regulations that minimize their adverse effects. (3) The most important negative effects were on neighborhood protection, community enhancement, and property values. (4) Problems increased when these businesses were concentrated. (5) Such businesses contribute to criminal activities. (6) Enforcement of existing statutes was difficult.

ORDINANCE: (1) Required permits for sexually-oriented businesses (non-refundable $350 application fee). (2) Distance requirements: 750 ft. from a church or school; 1,000 ft. from other such businesses; 1,000 ft. radius from an area of 75% residential concentration. (3) Amortization period of 6 months that could be extended by the city indefinitely on the basis of evidence. (4) Revocation of permit for employing minors (under 17), blighting exterior appearance or signage, chronic criminal activity (3 convictions), and false permit information. (5) Age restrictions for entry.

National Law Center Summary of the
HOUSTON, TEXAS II
LAND USE STUDY
DATED JANUARY 7, 1986

OVERVIEW: This is a Legislative Report prepared by the Committee on the Regulation of Sexually-Oriented Businesses for the Houston City Council. This report was prepared to explain to the members of City Council, and to the public, why the Committee has recommended certain amendments to the "original ordinance." History behind the ordinance includes the formation by the Mayor of a committee of Council Members to determine the need for regulation of sexually-oriented businesses in Houston. This was in response to growing community concern over the proliferation of SOBs. After public hearings, the Legal Department reviewed testimony and research on the subject. A final version of the "original ordinance" was adopted in December 1983.

The Committee reconvened in 1985 to revisit several possible changes in the SOB ordinance, including whether *SOBs licensed to sell alcohol* should be subject to the distance provisions of the ordinance. Originally it appeared that State law preempted municipalities from regulating SOBs that sold alcoholic beverages. But in 1985 the Texas Legislature enabled municipalities to regulate businesses selling alcohol. The Committee also wanted to consider amendments regarding consolidating administrative responsibility for enforcement of the ordinance, and review possible procedural changes that would expedite and strengthen enforcement.

FINDINGS & CONCLUSIONS: The Committee found that the feedback from the hearing was similar to that received when passing the "original ordinance." Therefore the Committee reaffirmed those findings, including: (a) that SOBs have a substantial negative impact on their surrounding neighborhoods by adversely affecting area security, property values, potential for economic development, general quality of life, suitability for family activities, and stability of the neighborhood environment; (b) that problems created by SOBs increase in intensity if clustered together; and that it is reasonable to restrict exterior signage and features to protect properties in the vicinity; and finally, (c) that SOBs are likely contributory factors to criminal activities in and around the premises.

Additional findings and conclusions for the current amendments included: (a) that the proliferation of SOBs selling alcohol contributed to the City's difficulties in economic development (expert testimony explained that Houston had a "bad reputation," making it difficult to persuade employees to move and live there); (b) that all SOBs have adverse impacts on stability and attractiveness for investment in neighborhoods, whether residential or mixed use; (c) that the "original ordinance" had a substantially positive impact on encouraging neighborhood stability and economic development, as well as lowering the incidents of crime (prostitution, drug sales) and substantial traffic jams related to clustering of SOBs; (Example: A 10-block span on Westheimer Road had a cluster of 14 SOBs and suffered from tremendous amounts of criminal activity associated with them. The passing of the "original ordinance" served as an impetus for the area turning around. Today only there are only 4 SOBs and new economic development is occurring.); (d) that applying the existing distance requirements to SOBs that serve alcohol would not unduly, unfairly or improperly limit the ability of SOBs to locate within Houston, according to a study and testimony by a member of the Planning and Development Department; (e) that continuing an amortization provision instead of grandfathering in the existing SOBs selling alcohol

would be more effective, since there was recourse for those businesses showing they could not reasonably recoup their investment within the allotted 6-month amortization period; and (f) that testimonies of committee members and the Police Department Vice Squad revealed inadequacies and inconsistencies within the permitting and enforcement process that needed to be addressed.

RECOMMENDATIONS: The Committee recommended that (1) SOBs selling alcohol be included under the same distance limitations of the "original ordinance"; (2) that the principal responsibility for overseeing the permitting process be transferred from the Department of Finance and Administration to the Police Department; (3) that the processes for enforcement of the amended ordinance be streamlined; and (4) that licensed day care centers be added to churches and schools as a protected category.

National Law Center Summary of the
HOUSTON, TEXAS III
LAND USE STUDY
DATED JANUARY 7, 1991

OVERVIEW: This is a Legislative Report prepared by the Committee on the Regulation of Sexually-Oriented Businesses for the Houston City Council. This report was prepared and adopted by the City Council as part of the legislative record regarding proposed legislation to include adult bookstores and movie theaters within the ambit of the Houston City SOB Ordinance and to amend certain permit procedures. This report is intended to supplement the 1986 report issued when the City adopted an amendment to regulate premises serving alcoholic beverages (i.e. topless bars). All of the above amendments were based on changes in the Texas state enabling statute. This report relies in part on evidence gathered in 1983 and 1986 relating to adult bookstores and movie theaters.

FINDINGS: The Committee held several hearings regarding the secondary effects of adult bookstores and movie theaters on surrounding communities. The committee heard from expert witnesses, including representatives from the police department, real estate appraisal experts, local political scientists, and dozens of citizens. The overwhelming consensus of the evidence received indicated that adult bookstores and movie theaters exert the same sorts of impacts upon surrounding communities as other forms of adult uses currently regulated. The impacts included: reduction in property values, dehumanizing impact upon nearby social institutions (i.e. churches, schools, etc.) de-stabilization of community character, and psychological concerns regarding exposure to children. These findings were the basis for the Committee to begin formal consideration of regulating adult bookstores and movie theaters.

CONCERNS & RECOMMENDATIONS: The Committee had concerns about whether the change to the ordinance would require a revision in existing distance limitations (750 feet from sensitive uses and 1000 feet from other SOBs). It concluded that leaving the distance requirements the same would still allow more than an adequate number of sites for SOBs to locate. A one-time grandfathering provision would be available to those existing SOBs that could not quite comply with the 1000-ft requirement from other SOBs, but complied with all other locational requirements.

The Committee considered various revisions of the permit provisions to fix minor administrative problems raised by the Police Department, including sites applied for but not used, time extensions for signage issues, appeals, relocation, subdivision of property, compliance and "use of pasties", and miscellaneous areas of conformity with court decisions and city code.

The Committee considered addressing perceived loopholes in the ordinance that seemed to allow SOBs to achieve conspicuous exterior signage and premises, negatively affecting the surrounding community. However, conflicting public response to proposed amendments resulted in the Committee delaying any amendments on this issue till a future date.

HOUSTON, TEXAS III
(CONTINUED)

The Committee considered whether to add exposure of "male breasts" to the definition of "Specified Anatomical Areas", because of a Texas Supreme Court case examining this issue in light of Equal Rights. However, the Committee decided not to amend the ordinance based on expert testimony and lack of probative evidence based on actual experience in local SOBs that exposure to male breasts was considered sexually arousing.

At the second public hearing, which was poorly attended except for a few SOB business representatives, the Committee addressed various issues raised, including questions about amortization that the ordinance was being used to put SOBs out of business. The Committee maintained that the 6-month amortization was reasonable, given that extensions could be granted in certain circumstances. Also, the Committee affirmed that the ordinance does not regulate the substance of the speech, but only serves to minimize the secondary effects of adult uses on the community by addressing location, appearance, signage and related matters regarding SOBs.

CONCLUSIONS: The Committee recommended the ordinance as a logical step to complete the scope of the City's land use controls for adult uses.

National Law Center Summary of the

OVERVIEW: This is a summary of a legislative report prepared by the Sexually-Oriented Business Revision Committee for the Houston City Council, analyzing the strengths and weaknesses of the City's current SOB ordinance, and making recommendations for amendments and additions principally pertaining to employee licensing, lighting configurations, location requirements, prohibition of "glory holes," elimination of closed-off areas, public notification of SOB applications, clear lines of vision inside SOBs, and dancer "no-touch" policies. This report summary includes discussion of prior regulation efforts, testimony by HPD Vice Department, citizen correspondence, industry memos, legal research, and summaries of public testimony.

SUMMARY: This study was a result of increasing community concern over increasing proliferation of SOBs under the existing SOB ordinance and the HPD's need for better control over increasingly repetitive serious violations at numerous SOBs. The Committee made the following findings: (1) Due to criminal activity associated with SOBs, licenses should be required for all SOB employees (requiring criminal background investigations); (2) There are obstacles to successful enforcement of public lewdness, prostitution, indecent exposure, and other criminal activities (i.e. entertainers can detect when a patron is an undercover cop); (3) "Glory holes" between enclosed booths promote anonymous sex and facilitate the spread of disease, so prohibition of these openings was recommended; (4) The lack of a clear line of vision between manager's stations and booths or secluded areas (V IP rooms) encourages lewd behavior and sexual contact (also difficult to observe during inspections); (5) Multi-family tracts were being counted as one tract, so new formula devised based on homeowners' property size; (6) Inadequate lighting in SOBs makes it difficult for SOB managers and police to monitor illegal activities, so minimum requirements for "exit" signs in Uniform Building Code was suggested; (7) Locked rooms within SOBs are usually fronts for prostitution, so prohibition of enclosed rooms recommended; (8) Public and expert testimony requested the inclusion of "public parks" as a sensitive use in the zoning location ordinance; (9) Repeated testimony requested notification to public regarding pending SOB permits, so posting of a sign notifying of pending permit was required; and (10) Continuing amortization provisions was preferable to grandfathering in those SOBs not in compliance with the amended ordinance (i.e. 6 months plus extensions for recouping investment).

CONCLUSIONS: The Committee concluded that strengthening the ordinance would achieve expedited revocation process, accountability to SOB employees through licensing, aid to police investigations by improved lighting and configurations, protections to the community by increasing distance requirements, and reduction of disease from anonymous spread by eliminating "glory holes."

National Law Center Summary of the
NEWPORT NEWS, VIRGINIA
LAND USE STUDY
DATED MARCH, 1996

OVERVIEW: As of November, 1995, there were 31 "adult use" establishments: 14 "adult entertainment" establishments ("exotic dancing girls", "go-go" bars, "gentlemen's clubs", etc.); 8 "adult book/video stores" (outlets selling and renting pornographic magazines, videos, and sex devices); and 9 night clubs (music, dancing, or other live entertainment). Of the 31 uses, 17 are in the General Commercial zone, 5 in the Regional Business District zone, 7 in the Retail Commercial zone, and 2 are in the Light Industrial zone. They are dispersed along two streets with a few clusters. A proposed ordinance would require "adult uses" to be 500 feet from other "adult" uses and to locate at least 500 feet away from sensitive uses (churches, schools, homes, etc.), with no distance limits in the downtown zone.

CRIME: The Police Department researched calls for police responses to the 31 businesses, by address, for the period of January 1, 1994, to October 31, 1995, with a cross-check to assure accuracy of the calls to the correct address. The effects of concentrations of "adult uses" were also checked by comparing study areas with control areas. Study area 1, with 4 "adult" uses, had 81% more police calls than nearby control area 1. When adjusted for population differences, the study area had 57% higher police calls and 40% higher crimes than the control area. For the 31 sexually-oriented businesses, there were 425 calls of those: 65% were to strip clubs and go-go bars, averaging 23 calls per "adult entertainment" business; night clubs had 30% of the calls, averaging 14 calls per business; and "adult" bookstores and video stores had 4%, averaging 2 calls per business; . The reasons for the calls included: 25 assaults; 18 malicious destructions of property; 39 intoxications; 60 fights; and 151 disorderly conduct incidents. A selected list of restaurants with ABC licenses averaged 11 calls for service during the same period. One particular downtown "adult entertainment" establishment had 116.7 "police calls per 100 occupancy" compared to a regular restaurant, non-adult use, located across the street, with 50 calls per 100 occupancy.

MERCHANTS/REAL ESTATE: A very high percentage of realtors indicated that having "adult uses" nearby can reduce the number of people interested in occupying a property by 20 to 30%; would hurt property values and resale of adjacent residential property. Realtors expressed concern for personal safety, increased crime, noise, strangers in the neighborhood, and parking problems. Merchants associations surveyed supported strengthening the city's regulations of "adult uses" and expressed a common concern that additional "adult uses" would contribute to deterioration of their areas.

National Law Center Summary of the
BELLEVUE, WASHINGTON
LAND USE STUDY
DATED FEBRUARY, 1988

OVERVIEW: This is a compilation of materials prepared for the City Council Members of Bellevue, Washington for use in enacting an SOB zoning ordinance. The study includes general information about regulation of SOBs, secondary impacts from SOBs, experiences from nearby communities, description of Bellevue's current situation, and recommendations for appropriate forms of regulation of SOBs within Bellevue. Also included is a bibliography of land use studies, articles, correspondence and reference materials from adjacent municipalities made available for council members' use. Minutes from two public hearings about regulation of SOBs, maps showing the location of current SOBS, and memos from the planning department are also included.

FINDINGS: The study begins by explaining the legal basis history behind regulating SOBs. Existing provisions in the State and local codes relating to obscenity or licensing are mentioned. The study notes that the goal of regulating SOBs is to mitigate the secondary impacts of these uses in the communities. It concludes that the implications of the data and experience studied in other jurisdictions are significant to Bellevue. It discusses the link between crime rates and areas with concentrations of SOBs, as revealed by police research, noting the "skid row" effect that occurred in Detroit, and the higher percentages of crime documented in Cleveland (in the 1970's), and other cities. The study noted that while police crime statistics showed a strong connection between criminal activity and some adult uses, there is no clear consensus (in psychological studies) that exposure to pornography causes criminal behavior. The study also discusses the impact to property values. It notes a Kent survey of real estate appraisers that revealed an overall consensus that the impact on residential property values is probably negative. In Bellevue, the three existing SOBs are widely dispersed and centrally located in commercial areas, which have thus far not experienced deterioration in surrounding structures and areas. Based on a Puget Sound study, it was noted that SOBs are incompatible with residential, educational and religious uses. *The Northend Cinema v. Seattle* case agreed that the goal of preserving the quality of residential neighborhoods by prohibiting disruptive adult uses was a valid, substantial interest. This case also points out that residents' perceptions may be a major factor in siting SOBs. Overall the study concludes that research has shown SOBS may lead to the secondary effects mentioned above, but it is not possible to say definitely in each case. The study goes on to review regulations adopted by different jurisdictions, analyzing approaches of dispersal and concentration of SOBs. The study enumerates several sections of code showing public policy concerns to be considered when deciding Bellevue's approach to regulating SOBs. Currently, the three existing SOBs in Bellevue show no particular negative impacts on the surrounding community, and are widely dispersed from each other and other sensitive uses (residences, etc). However, there is not guarantee that future concentrations of SOBs will not occur.

RECOMMENDATIONS: The study recommended the adoption of a modified dispersal/concentration approach (i.e. dispersal within CB, OLB and CBD zones), with a 600-foot distance limitation between SOBs and other sensitive uses.

National Law Center Summary of the
DES MOINES, WASHINGTON
LAND USE STUDY
DATED AUGUST, 1984

OVERVIEW: This land use study includes an independent report prepared by R. W. Thorpe & Associates, Inc for the Des Moines City Council, and a report from the City Administration on the impacts of Sexually-Oriented Businesses (SOBs) on the area. Appendices include: a theater admission report, a 1978 Des Moines Community opinion survey, a copy of a Des Moines ordinance requiring an impact study of SOBs on the city, a list of criminal incidents related to the adult theater, a business activity chart of businesses adjacent to the adult theater, a copy *of Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153 (1978), and transcripts of the hearing and testimonies.

FINDINGS: When the study was made, Des Moines had an adult theater operating in the Revitalization area/central business district of the city. It had been operating as such since the 1970's. The Administration report noted a 1978 Community Opinion Survey reporting that the majority of residents in the area were opposed to the theater. The Administration's report also lists several negative impacts caused by the presence of the adult theater in the community, including: decreased property values, refusal to shop in stores adjacent to the adult theatre, noticeable deterioration of the district, deferred maintenance, parking and traffic problems, attraction of transients, increased crime, and interference with parental responsibilities for children. As a result, the study noted that there had been numerous business failures and high business turnover in the commercial areas near the adult theater. Public testimony, staff studies and the independent study all concluded that the continued presence of the adult theater would nullify any investment in the revitalization efforts of downtown Des Moines. The study examined efforts to regulate SOBs in North Carolina, Detroit, Maryland, and Seattle. The Administration's study took particular note of Seattle's zoning ordinance, which restricted location of SOBs to a certain part of the city. It was upheld by that state's highest court, which said the city's important interest in regulating the use of its property for commercial purposes was sufficient justification.

The independent study submitted by R. W. Thorpe & Associates, Inc for the Des Moines City Council mostly focused on and made comparisons to studies done in cities in the western part of Washington State. However, the study also looked at other jurisdictions like Boston, and New Orleans. It looks at various negative impacts on the community including crime, decline in adjacent land uses, economic impact (decreased property values), and community impact (incompatibility with sensitive uses and areas where minors may meet collectively). It discussed differing approaches to regulating SOBs, including clustering and dispersal.

RECOMMENDATIONS: The Administration's report, based partly on the independent study, concluded that a zoning ordinance should be enacted, locating adult businesses in the CG zone along Highway 99. This would keep SOBs away from the central business district that the city was trying to revitalize and maintain a family friendly atmosphere there. Dispersal of SOBs was also recommended to minimize impact of crime potential volatile situations associated with close proximity of SOBs.

National Law Center Summary of the
SEATTLE, WASHINGTON
LAND USE STUDY
DATED MARCH 24, 1989

OVERVIEW: The report concerns a proposed amendment to add topless dance halls to existing land use regulations for "adult entertainment establishments." Seattle had eight such dance halls (termed "adult cabaréts"), six established since 1987. The study relies on reports from a number of cities, including Indianapolis, Los Angeles, Phoenix, Austin and Cleveland.

FINDINGS: The increased number of cabarets resulted in citizen complaints, including phone calls, letters (from individuals and merchants associations), and several petitions with hundreds of signatures. Protests cited decreased property values; increased insurance rates; fears of burglary, vandalism, rape, assaults, drugs, and prostitution; and overall neighborhood deterioration. The report notes that patrons of these cabarets most often are not residents of nearby neighborhoods. Without community identity, behavior is less inhibited. Increased police calls to a business, sirens, and traffic hazards from police and emergency vehicles are not conducive to healthy business and residential environments.

RECOMMENDATIONS: Since city zoning policy is based on the compatibility of businesses, the report recommends that the cabarets locate in the same zones as "adult motion picture theaters." This plan allows about 130 acres for such businesses to locate throughout the city.

National Law Center Summary of the
ST. CROIX CO., WISCONSIN
LAND USE STUDY
DATED SEPTEMBER, 1993

OVERVIEW: At the time the St. Croix County Planning Department did this study, the County had two adult cabarets, but did not have a problem with concentration of sexually-oriented businesses (SOBs). The study acknowledges that SOB zoning ordinances have generally been upheld by the courts as constitutional and suggests the County consider following the lead of other communities who have enacted similar ordinances. The main concern surrounded possible growth of SOBs resulting from future plans for an interstate highway system linking St. Croix County and the great Twin Cities metro area. To preserve the County's "quality of life" the study indicates the need to take preventative vs. after-the-fact action.

SUMMARY: The study notes the continued growth of the SOB industry and analyzes the economic, physical, and social impact it has on the community. It examines documented economic impact of SOBs in Los Angeles, CA, Detroit, MI, Beaumont, TX, and Indianapolis, IN, noting that concentrations of SOBs results in decreased property values, rental values, and rentability/salability. General economic decline is also associated with concentration of SOBs. Residents surveyed in other studies perceived a less negative impact on property values of residential and commercial areas the further away SOBs were located. The study also noted that economic decline caused physical deterioration and blight. During night time operation hours, traffic congestion and noise glare could also be problems. Social impacts studied included negative effects on morality, crime, community reputation and quality of life. It noted the 1970 Commission on Obscenity and Pornography saying porn has a deleterious effect upon the individual morality of American citizens. It sites the Phoenix, AZ study reporting a tremendous increase in crime in three study areas containing SOBs (43% more property crimes, 4% more violent crimes, and over 500% more sex crimes). The study mentions Justice Powell's quote *in Young v. American Mini-Theatres* regarding using zoning to protect "quality of life."

The study analyzes different zoning techniques, including dispersal and concentration of SOBs, and their constitutionality. It also discusses the use of "special use" and "special exception" permits. Other regulatory techniques discussed include licensing ordinances, active law enforcement, sign regulations, and nuisance provisions. The study includes detailed examples of SOB definitions, a proposed zoning ordinance, and a bibliography of the sources used for this study.

RECOMMENDATIONS: The study recommended that the county adopt a zoning ordinance using the dispersal technique. It also suggested the county explore the possibility of licensing SOBs.

National Law Center Summary of the
ROME, GEORGIA CITY COMMISSION
LAND USE STUDY
DATED MARCH 6, 1995

OVERVIEW: Captain Marshall Smith, the Commander of the Detective Division of Rome (GA) City Police Department presented a report to the City Commission in respect the effects of crime rates surrounding adult entertainment and the impacts on other Georgia communities.

SUMMARY OF THE REPORT: The Captain reported several Georgia communities had sufficient increases of reported crimes in several Georgia communities. Specifically, Captain Smith reported the following:

- An investigator in La Grange, Georgia stated that after an adult entertainment business opened in this community, there was an increase in the number of calls. Specifically, the La Grange Police Department responded to 106 calls relating to one adult club in the year 1994.

- The Augusta Police Department reported that for a two-year period between January of 1993 and December 1994, the Police Department responded to 971 calls from three different adult entertainment businesses. The calls for service ranged from thefts and fights to aggravated assaults with weapons involved.

- The Whitfield County Sheriff's Office stated they have had instances involving prostitution, drugs, thefts, and aggravated assaults involving discharging of firearms.

National Law Center Summary of the
THE CITY OF SAINT MARYS, GEORGIA
DIGEST OF RESEARCH ON THE EVIDENCES OF RELATIONSHIPS BETWEEN ADULT ORIENTATED BUSINESSES AND COMMUNITY CRIME AND DISORDER

The Police Department of Saint Marys, Georgia, was requested to gather evidence relating to the evidence of the relationship between crime and adult businesses, if any.

THE REPORT: The report summarizes studies from across the United States and specifically in the State of Georgia with respect to the adverse secondary effects of all adult oriented businesses in those communities. The report took those various studies together and other sources of evidence and found that the amount of crime and the type of crime, especially sexual related crimes, would increase at statistically significant levels with the introduction of adult oriented businesses in their community.

National Law Center Summary of the
THE ADAMS COUNTY SHERIFF'S DEPARTMENT
ADAMS COUNTY NUDE ENTERTAINMENT STUDY
DATED JUNE 20, 1991

OVERVIEW: The Adams County Sheriff's Department performed research related to a proposed nude entertainment ordinance for Adams County, Colorado. In this study six representative locations were selected at random representing six different areas in the unincorporated portions of Adams County.

SUMMARY OF THE REPORT:

- The study in April of 1988 determined that 76 percent of the patronage of adult businesses in their community were transient, coming from counties other than Adams County, Colorado.

- A one-block area of the community was selected because it contained two nude entertainment establishments, a Seven Eleven, a convenience store, a neighborhood tavern, three fast food businesses, and a gas station. In this block in 1986, 24 crimes were reported from the area of which 83 percent were attributed to the two nude entertainment establishments.

- In 1987 the same area was surveyed and 28 crimes were reported, 93 percent of which were attributed to the two adult businesses. It was also noted in this block that 61 percent of the crimes occurred between 4:00 p.m. and 12:00 p.m.

- A study of another block, which included three adult book stores, two topless night clubs, one neighborhood bar, one liquor store, and one beer outlet found that during 1986, 55 crimes were reported compared to 63 crimes in 1987, a 15 percent increase.

- In a more rural and isolated section of the county where a topless night club was located, 13 crimes were reported in 1986, compared to 18 crimes in 1987, a 39 percent increase.

- This study was updated looking at 1990 statistics and reported no significant changes in these areas with a few exceptions. One such exception was that one block in question in the original study reported crimes increased by 900 percent of which a 290 percent increase was attributed to adult businesses which offered nude entertainment and/or alcohol.

National Law Center Summary of the
MINNESOTA ATTORNEY GENERAL'S WORKING GROUP ON THE REGULATIONS OF SEXUALLY-ORIENTED BUSINESSES

DATED JUNE 6, 1989

OVERVIEW: The Attorney General of the State of Minnesota created a working group with respect to the regulation of adult businesses. The working group for a testimony conducted briefings on the impact of adult businesses on crime and communities with methods available to reduce the secondary effects of adult businesses. Additional research was done to evaluate strategy use in other states and cities and the ramifications of those strategies.

FINDINGS RECOMMENDATIONS:

1. City and county attorneys' offices in the Twin Cities metropolitan area should designate a prosecutor to pursue obscenity prosecutions and support that prosecutor with specialized training.

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

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

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

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

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

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

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

National Law Center Summary of the MINNESOTA ATTORNEY GENERAL'S WORKING GROUP ON THE REGULATIONS OF SEXUALLY-ORIENTED BUSINESSES

(CONTINUED)

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

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

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

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

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

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

National Law Center Summary of the REPORT TO THE CITY OF ATTORNEY OF KENNEDALE, TEXAS, ON CRIME-RELATED SECONDARY EFFECTS OF ADULT BUSINESSES

The City Attorney for Kennedale, Texas retained Professor Richard McCleary to express an opinion as to four questions relating to litigation in which the city was involved regarding sexually-oriented businesses (SOBs). Specifically, Professor McCleary reported on the crime-related secondary effects of SOBs.

The following are the questions asked and opinions rendered by Dr. McCleary:

Question 1: Do SOBs pose significant ambient public safety hazards?

Opinion 1: As a class, SOBs pose a significant ambient public safety hazards. These hazards involve not only "victimless" crimes (prostitution, e.g.) plus, also, "serious" crimes, (robbery, e.g.) and "opportunistic" crimes, (vandalism, e.g.) that are associated with vice.

Question 2: How valid is the empirical evidence that SOBs pose significant public safety hazards?

Opinion 2: The criminogenic nature of SOBs is a scientific fact. This opinion is based on two considerations. First, strong, empirically-validated criminological theory predicts that crime victimization risks will be higher around SOB sites as a consequence of the normal commercial activities at the sight. Second, this theoretically expected secondary effect has been observed in a diverse range of locations, circumstances, and times. Although the magnitude and nature of the observed crime-related secondary effect varies from case to case, every adequately designed study has observed and reported a large, significant effect.

Question 3: Do SOBs that provide material for off-premise-only use pose smaller ambient public safety hazards than other SOBs?

Opinion 3: To the extent that the on premise and off premise only SOB's draw similar patrons from similarly wide catchment areas, criminological theory predicts similar ambient crime risks. This theoretical expectation is supported by the data.

Question 4: Can the ambient public safety hazard associated with SOBs be mitigated by "hours-of-operation" regulations?

Opinion 4: The ambient public safety hazard (or crime victimization risk) can be mitigated by regulation, including hours-of-operation regulations.

National Law Center Summary of the
REPORT OF DR. RICHARD MCCLEARY TO EFFINGHAM COUNTY, EFFINGHAM, ILLINOIS

OVERVIEW: Dr. McCleary was asked to review materials sent to him by the Effingham County State's Attorney's office and the empirical studies of crime-related secondary effects. Dr. McCleary provided his opinions with respect crime-related secondary effects.

FINDINGS AND OPINIONS: Dr. McCleary offered the following opinions to the stated questions and those opinions are stated herein:

Question 1: Do sexually-oriented businesses, as a general class, pose significant ambient public safety hazards?

Opinion 1: As a class, SOBs pose a significant ambient public safety hazards. These hazards involve not only "victimless" crimes (prostitution, e.g.) plus, also, "serious" crimes," (robbery, e.g.) and "opportunistic" crimes, (vandalism, e.g.) that are associated with vice. The ambient public safety hazard (for crime victimization risks) can be ameliorated by regulation.

Question 2: Given an affirmative answer to the first question, how valid is the evidence upon which this opinion is based?

Opinion 2: The criminogenic nature of SOBs is a scientific fact. This opinion is based on two considerations. First, strong, empirically-validated criminological theory predicts that crime victimization risks will be higher around sexually-oriented business sites, and as a consequence of the normal commercial activities at the site. Second, this theoretically expected secondary effect has been observed in a diverse range of locations, circumstances, and times. Although the magnitude and nature of the observed crime-related secondary effect varies from case to case, every adequately designed study has observed and reported a large, significant effect.

CITY OF LITTLETON, COLORADO, Petitioner v. Z. J. GIFTS D-4, L. L. C., a limited liability company, dba CHRISTAL'S

No. 02-1609

SUPREME COURT OF THE UNITED STATES

124 S. Ct. 2219; 159 L. Ed. 2d 84; 2004 U.S. LEXIS 4026; 72 U.S.L.W. 4451

March 24, 2004, Argued
June 7, 2004, Decided

NOTICE: [*1]**

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT. *Z.J. Gifts D-4, L.L.C. v. City of Littleton, 311 F.3d 1220, 2002 U.S. App. LEXIS 23754 (10th Cir. Colo., 2002)*

DISPOSITION: Reversed.

DECISION: **[**84]** City's "adult business" licensing ordinance held to facially meet requirement, under Federal Constitution's First Amendment, that such licensing scheme assure prompt judicial review of administrative decision denying license.

SUMMARY: A Colorado city enacted an adult business ordinance that (1) required businesses such as adult bookstores to (a) have "adult business" licenses, and (b) comply with local zoning rules; (2) listed specific circumstances under which the city would deny a license; (3) set forth time limits (typically amounting to about 40 days) within which city officials were required to reach a final licensing decision; and (4) provided that the final decision could be appealed to a state court pursuant to the state's civil procedure rules.

In an area of the city that was not zoned for adult businesses, a company opened a store that sold adult books. Instead of applying for a license, the company filed a suit alleging that the ordinance, on its face, violated the Federal Constitution. A Federal District Court rejected the company's allegation. However, the United States Court of Appeals for the Tenth Circuit held that state law did not assure the constitutionally-required prompt final judicial decision (*311 F.3d 1220*).

On certiorari, the United States Supreme Court reversed. In an opinion by Breyer, J., joined by Rehnquist, Ch. J., and O'Connor, Thomas, and Ginsburg, JJ., joined as to point 1 below by Souter and Kennedy, JJ, and joined as to point 2 below by Stevens, J., it was held that the licensing ordinance facially met the requirement, under the *Federal Constitution's First Amendment*, that such a licensing scheme assure prompt judicial review of an administrative decision denying a license, as:

(1) The Supreme Court read the reference, in two opinions joined by a total of six Justices in an earlier Supreme Court case involving a state's motion- **[**85]** picture-censorship **[**85]** statute, to "prompt judicial review" as encompassing a prompt judicial decision.

(2) The state's ordinary judicial-review procedures sufficed to assure prompt judicial access and a prompt judicial decision, as long as the state courts remained sensitive to the need to prevent *First Amendment* harms and administer those procedures accordingly.

Stevens, J., concurring in part and concurring in the judgment, said that (1) application of neutral licensing criteria was a ministerial action that regulated speech, rather than an exercise of discretionary judgment that prohibited speech; and (2) a decision to deny a license for failure to comply with these neutral criteria was therefore not subject to the presumption of invalidity that attached to the direct censorship of particular expressive material.

Souter, J., joined by Kennedy, J., concurring in part and concurring in the judgment, (1) agreed with the Supreme Court's opinion that the licensing scheme involved in the instant case was unlike full-blown censorship, so that the ordinance did not need a strict timetable for judicial review to survive a facial challenge; but (2) said that (a) the licensing scheme was not as innocuous as common zoning, for the scheme was triggered by the content of expressive materials to be sold, (b) because the sellers might be unpopular with local authorities, there was a risk of delay in the licensing and review process, and (c) if there was evidence of foot-dragging, then immediate judicial intervention would be required, and judicial oversight or review at any stage of the proceedings would have to be expeditious.

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Scalia, J., concurring in the judgment, expressed the view that (1) the bookstore's activity--pandering of sex--was not protected by the *First Amendment*; and (2) to the extent that the city ordinance, in targeting sex-pandering businesses, could apply to constitutionally protected expression, the ordinance's excess was not so great as to render the ordinance substantially overbroad and thus subject to facial invalidation.

LAWYERS' EDITION HEADNOTES:

[LEdHN1]**
CONSTITUTIONAL LAW §963
-- city ordinance -- "adult business" license -- free expression -- judicial review
Headnote:
[1A] [1B] [1C] [1D] [1E] [1F] [1G] [1H] [1I] [1J]

A city's "adult business" licensing ordinance--which (1) set forth time limits (typically amounting to about 40 days) within which city officials were required to reach a final licensing decision; and (2) provided that the final decision could be appealed to a state court pursuant to the state's civil procedure rules--facially met the requirement, under the *Federal Constitution's First Amendment*, that such a licensing scheme assure prompt judicial review of an administrative decision denying a license, as:

(1) The United States Supreme Court read the reference, in two opinions joined by a total of six Justices in an earlier Supreme Court case involving a state's motion-picture-censorship statute, to "prompt judicial **[**86]** review" as encompassing a prompt judicial decision.

(2) The state's ordinary judicial-review procedures sufficed to assure prompt judicial access and a prompt judicial decision, as long as the state courts remained sensitive to the need to prevent *First Amendment* harms and administer those procedures accordingly, for:

(a) Ordinary court procedural rules and practices in the state provided reviewing courts with judicial tools sufficient to avoid delay-related *First Amendment* harm.

(b) The Supreme Court had no reason to doubt the willingness of the state's judges to exercise these powers wisely so as to avoid serious threats of such harm, where (i) there was no evidence before the Supreme Court of any special state-court-related problem in this respect, and (ii) had there been some such problems, federal remedies would have provided an additional safety valve.

(c) The typical *First Amendment* harm at issue in the instant case differed from the harm at issue in the earlier censorship case, diminishing the need in the typical case for special procedural rules imposing special 2- or 3-day decisionmaking time limits, where the licensing scheme in the instant case, rather than seeking to censor material, applied reasonably objective, nondiscriminatory criteria that were (i) not content-related, and (ii) simple enough to apply, and their application simple enough to review, that their use was unlikely to totally suppress any specific item of adult material.

(d) Nothing in the earlier censorship case--or in another prior Supreme Court case concerning a city licensing ordinance for sexually-oriented businesses--required a city or state to place judicial-review safeguards all in a city ordinance that set forth a licensing scheme.

(Scalia, J., dissented in part from this holding.)

[LEdHN2]**
CONSTITUTIONAL LAW §963
-- "adult business" license -- judicial determination
Headnote: [2]

The United States Supreme Court, in applying the procedural requirements of the *Federal Constitution's First Amendment* to an "adult business" licensing scheme in *FW/PBS, Inc. v Dallas (1990) 493 US 215, 107 L Ed 2d 603, 110 S Ct 596*, did not find that the *First Amendment* did not require such a scheme to assure a prompt judicial determination of a license applicant's legal claim concerning an administrative denial of a license.

[LEdHN3]**
COURTS §155.5
-- challenge to ordinance
Headnote: [3]

With respect to the United States Supreme Court's view that a particular state's ordinary judicial-review procedures sufficed to assure the prompt judicial determination of an adult-business-license applicant's legal claim concerning an administrative denial of such license that was required by the *Federal Constitution's First Amendment*, as long as the courts remained sensitive to the need to prevent *First Amendment* harms and administer those procedures accordingly, the question whether the courts had done so was a matter normally fit for case-by-case determination rather than a facial challenge.

[LEdHN4]**
EVIDENCE §98
-- city ordinance -- presumption
Headnote: [4]

In determining whether a city's "adult business" licensing ordinance facially met the requirement, under the *Federal Constitution's First* **[**87]** *Amendment*, that such a licensing scheme assure prompt judicial review of an administrative decision denying a license, the United States Supreme Court presumed that courts were aware of the constitutional need to avoid undue delay resulting in the unconstitutional suppression of protected speech.

[LEdHN5]**
CONSTITUTIONAL LAW §961
-- zoning -- adult material
Headnote: [5]

A zoning system that is valid under the *Federal Constitution's First Amendment* seeks to determine where, not whether, protected adult material can be sold.

[LEdHN6]**
CONSTITUTIONAL LAW §963
-- adult business -- judicial decision
Headnote: [6]

Where a regulation simply conditioned the operation of an adult business on compliance with neutral and nondiscretionary criteria, and did not seek to censor content, an adult business was not entitled to an unusually speedy judicial decision of the type the United States Supreme Court had determined to be required, under the *Federal Constitution's First Amendment*, in an earlier case that involved a state's motion-picture censorship statute. **[**88]**

SYLLABUS: Under petitioner city's "adult business license" ordinance, the city's decision to deny a license may be appealed to the state district court pursuant to Colorado Rules of Civil Procedure. Respondent Z. J. Gifts D-4, L. L. C. (hereinafter ZJ), opened an adult bookstore in a place not zoned for adult businesses. Instead of applying for a license, ZJ filed suit attacking the ordinance as facially unconstitutional. The Federal District Court rejected ZJ's claims, but the Tenth Circuit held, as relevant here, that state law does not assure the constitutionally required "prompt final judicial *decision*."

Held:

The ordinance meets **[***2]** the *First Amendment's* requirement that such a licensing scheme assure prompt judicial review of an administrative decision denying a license.

(a) The Court rejects the city's claim that its licensing scheme need only provide prompt access to judicial review, but not a "prompt judicial determination," of an applicant's legal claim. The city concedes that *Freedman v. Maryland, 380 U.S. 51, 59, 13 L. Ed. 2d 649, 85 S. Ct. 734*, in listing constitutionally necessary "safeguards" applicable to a motion picture censorship statute, spoke of the need to assure a "prompt final judicial decision," but adds that Justice O'Connor's controlling plurality opinion in *FW/PBS, Inc. v. Dallas, 493 U.S. 215, 107 L. Ed. 2d 603, 110 S. Ct. 596*, which addressed an adult business licensing scheme, did not use the word "decision," instead speaking only of the "*possibility of prompt judicial review*," *id., 493 U.S. 215, at 228, 107 L. Ed. 2d 603, 110 S. Ct. 596* (emphasis added). Justice O'Connor's *FW/PBS* opinion, however, points out that *Freedman*'s "judicial review" safeguard is meant to prevent "undue delay," *493 U.S., at 228, 107 L. Ed. 2d 603, 110 S. Ct. 596*, which includes *judicial*, as well as *administrative*, delay. A delay in issuing a judicial decision, **[***3]** no less than a delay in obtaining access to a court, can prevent a license from being "issued within a reasonable period of time." *Ibid.* Nothing in the opinion suggests the contrary.

(b) However, the Court accepts the city's claim that Colorado law satisfies any "prompt judicial determination" requirement, agreeing that the Court should modify *FW/PBS*, withdrawing its implication that *Freedman*'s special judicial review rules--*e.g.*, strict time limits--apply in this case. Colorado's ordinary "judicial review" rules suffice to assure a prompt judicial *decision*, as long as the courts remain sensitive to the need to prevent *First Amendment* harms and administer those procedures accordingly. And whether the courts do so is a matter normally fit for case-by-case determination rather than a facial challenge. Four considerations support this conclusion. First, ordinary court procedural rules and practices give reviewing courts judicial tools sufficient to avoid delay-related *First Amendment* harm. Indeed, courts may arrange **[**89]** their schedules to "accelerate" proceedings, and higher courts may grant expedited review. Second, there is no reason to doubt state **[***4]** judges' willingness to exercise these powers wisely so as to avoid serious threats of delay-induced *First Amendment* harm. And federal remedies would provide an additional safety valve in the event of any such problem. Third, the typical *First Amendment* harm at issue here differs from that at issue in *Freedman*, diminishing the need in the typical case for procedural rules imposing special decisionmaking time limits. Unlike in *Freedman*, this ordinance does not

seek to *censor* material. And its licensing scheme applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display. These criteria are simple enough to apply and their application simple enough to review that their use is unlikely in practice to suppress totally any specific item of adult material in the community. And the criteria's simple objective nature means that in the ordinary case, judicial review, too, should prove simple, hence expeditious. Finally, nothing in *FW/PBS* or *Freedman* requires a city or State to place judicial review safeguards all in the city ordinance that sets forth a licensing scheme. **[***5]**

311 F.3d 1220, reversed.

COUNSEL: J. Andrew Nathan argued the cause for petitioner.

Douglas R. Cole argued the cause for Ohio, et al., as amici curiae, by special leave of court.

Michael W. Gross argued the cause for respondent.

JUDGES: Breyer, J., delivered the opinion of the Court, in which Rehnquist, C. J., and O'Connor, Thomas, and Ginsburg, JJ., joined, in which Stevens, J., joined as to Parts I and II-B, and in which Souter and Kennedy, JJ., joined except as to Part II-B. Stevens, J., filed an opinion concurring in part and concurring in the judgment. Souter, J., filed an opinion concurring in part and concurring in the judgment, in which Kennedy, J., joined. Scalia, J., filed an opinion concurring in the judgment.

OPINIONBY: BREYER

OPINION: **[*2221]** Justice **Breyer** delivered the opinion of the Court.

[LEdHR1A]** [1A] In this case we examine a city's "adult business" licensing ordinance to determine whether it meets the *First Amendment's* requirement that such a licensing scheme assure prompt judicial review of an administrative decision denying a license. See **[*2222]** *FW/PBS, Inc. v. Dallas, 493 U.S. 215, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990)*; cf. *Freedman v. Maryland, 380 U.S. 51, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965)*. We conclude that the ordinance before us, considered on its face, is consistent with the *First Amendment's* demands.

I

Littleton, Colorado, has enacted an "adult business" ordinance that requires an "adult bookstore, **[***6]** adult novelty store or adult video store" to have an "adult business license." Littleton City Code §§ 3-14-2, 3-14-4 (2003), App. to Brief for Petitioner 13a-20a, 23a. The ordinance defines "adult business"; it requires an applicant to provide certain basic information about the business; it insists upon compliance with local "adult business" (and other) zoning rules; it lists eight specific circumstances the presence of which requires the city to deny a license; and it sets forth time limits (typically amounting to about 40 days) within which city officials must reach a final licensing decision. §§ 3-14-2, 3-14-3, 3-14-5, 3-14-7, 3-14-8, *id.*, at 13a-30a. The **[**90]** ordinance adds that the final decision may be "appealed to the [state] district court pursuant to Colorado rules of civil procedure 106(a)(4)." § 3-14-8(B)(3), *id.*, at 30a.

In 1999, the respondent, a company called Z. J. Gifts D-4, L. L. C. (hereinafter ZJ), opened a store that sells "adult books" in a place not zoned for adult businesses. Compare Tr. of Oral Arg. 13 (store "within 500 feet of a church and day care center") with § 3-14-3(B), App. to Brief for Petitioner 21a (forbidding adult businesses at such locations). **[***7]** Instead of applying for an adult business license, ZJ brought this lawsuit attacking Littleton's ordinance as unconstitutional on its face. The Federal District Court rejected ZJ's claims; but on appeal the Court of Appeals for the Tenth Circuit accepted two of them, *311 F.3d 1220, 1224 (2002)*. The court held that Colorado law "does not assure that [the city's] license decisions will be given expedited [judicial] review"; hence it does not assure the "prompt final judicial *decision*" that the Constitution demands. *Id., at 1238*. It also held unconstitutional another ordinance provision (not now before us) on the ground that it threatened lengthy administrative delay--a problem that the city believes it has cured by amending the ordinance. Compare *id., at 1233-1234*, with § 3-14-7, App. to Brief for Petitioner 27a-28a, and Brief for Petitioner 3. Throughout these proceedings, ZJ's store has continued to operate.

The city has asked this Court to review the Tenth Circuit's "judicial review" determination, and we granted certiorari in light of lower court uncertainty on this issue. Compare, *e.g., 311 F.3d at 1238* **[***8]** (*First Amendment* requires prompt judicial *determination* of license denial); *Nightclubs, Inc. v. Paducah, 202 F.3d 884, 892-893 (CA6 2000)* (same); *Baby Tam & Co. v. Las Vegas, 154 F.3d 1097, 1101-1102 (CA9 1998)* (same); *11126 Baltimore Blvd., Inc. v. Prince George's County, 58 F.3d 988, 998-1001 (CA4 1995)* (en banc) (same), with *Boss Capital, Inc. v. Casselberry, 187 F.3d 1251, 1256-1257 (CA11 1999)* (Constitution requires only prompt *access* to courts); *TK's Video, Inc. v. Denton County, 24 F.3d 705, 709 (CA5 1994)* (same); see also *Thomas v. Chicago Park Dist., 534 U.S. 316, 325-326, 151 L. Ed. 2d 783, 122 S. Ct. 775 (2002)* (noting a Circuit split); *City News & Novelty, Inc. v. Waukesha, 531 U.S. 278, 281, 148 L. Ed. 2d 757, 121 S. Ct. 743 (2001)* (same).

II

[LEdHR1B]** [1B] **[**LEdHR2]** [2] The city of Littleton's claims rest essentially upon two arguments. First, this Court, in applying the *First Amendment's* **[*2223]** procedural requirements to an "adult business" licensing scheme in *FW/PBS*, found that the *First Amendment* required such a scheme to provide an applicant with "*prompt access*" to judicial review of an administrative denial **[***9]** of the license, but that the *First Amendment* did not require assurance of a "prompt judicial *determination*" of the applicant's legal claim. Second, in any event, Colorado law satisfies any "prompt judicial determination" requirement. We reject the first argument, but we accept the second.

A

The city's claim that its licensing scheme need not provide a "prompt judicial determination" of an applicant's legal claim rests upon its **[**91]** reading of two of this Court's cases, *Freedman* and *FW/PBS*. In *Freedman*, the Court considered the *First Amendment's* application to a "motion picture censorship statute"--a statute that required an "'owner or lessee'" of a film, prior to exhibiting a film, to submit the film to the Maryland State Board of Censors and obtain its approval. *380 U.S., at 52, and n 1, 13 L. Ed. 2d 649, 85 S. Ct. 734* (quoting Maryland statute). It said, "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id., at 58, 13 L. Ed. 2d 649, 85 S. Ct. 734*. The Court added that those safeguards must include (1) strict time limits leading to **[***10]** a speedy administrative decision and minimizing any "prior restraint"-type effects, (2) burden of proof rules favoring speech, and (3) (using language relevant here) a "procedure" that will "*assure a prompt final judicial decision*, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id., at 58-59, 13 L. Ed. 2d 649, 85 S. Ct. 734* (emphasis added).

In *FW/PBS*, the Court considered the *First Amendment's* application to a city ordinance that "regulates sexually oriented businesses through a scheme incorporating zoning, licensing, and inspections." *493 U.S., at 220-221, 107 L. Ed. 2d 603, 110 S. Ct. 596*. A Court majority held that the ordinance violated the *First Amendment* because it did not impose strict administrative time limits of the kind described in *Freedman*. In doing so, three Members of the Court wrote that "the full procedural protections set forth in *Freedman* are not required," but that nonetheless such a licensing scheme must comply with *Freedman's* "core policy"--including (1) strict administrative time limits and (2) (using language somewhat different from *Freedman's*) "*the possibility of prompt judicial review in the event that the license is erroneously* **[***11]** *denied.*" *493 U.S., at 228, 107 L. Ed. 2d 603, 110 S. Ct. 596* (opinion of O'Connor, J.) (emphasis added). Three other Members of the Court wrote that all *Freedman's* safeguards should apply, including *Freedman*'s requirement that "a prompt judicial determination must be available." *493 U.S., at 239, 107 L. Ed. 2d 603, 110 S. Ct. 596* (Brennan, J., concurring in judgment). Three Members of the Court wrote in dissent that *Freedman's* requirements did not apply at all. See *493 U.S., at 244-245, 107 L. Ed. 2d 603, 110 S. Ct. 596* (White, J., joined by Rehnquist, C. J., concurring in part and dissenting in part); *id., at 250, 107 L. Ed. 2d 603, 110 S. Ct. 596* (Scalia, J., concurring in part and dissenting in part).

The city points to the differing linguistic descriptions of the "judicial review" requirement set forth in these opinions. It concedes that *Freedman*, in listing constitutionally necessary "safeguards," spoke of the need to assure a "prompt final judicial decision." *380 U.S., at 59, 13 L. Ed. 2d 649, 85 S. Ct. 734*. But it adds that Justice O'Connor's controlling plurality opinion in *FW/PBS* did not use the word "decision," instead speaking only of the "*possibility of prompt judicial* **[*2224]** *review.*" *493 U.S., at 228, 107 L. Ed. 2d 603, 110 S. Ct. 596* (emphasis added); see also *id., at 229, 107 L. Ed. 2d 603, 110 S. Ct. 596* **[***12]** ("an avenue for prompt judicial review"); *id., at 230, 107 L. Ed. 2d 603, 110 S. Ct. 596* ("availability of prompt judicial review"). **[**92]** This difference in language between *Freedman* and *FW/PBS*, says the city, makes a major difference: The *First Amendment*, as applied to an "adult business" licensing scheme, demands only an assurance of speedy access to the courts, not an assurance of a speedy court decision.

[LEdHR1C]** [1C] In our view, however, the city's argument makes too much of too little. While Justice O'Connor's *FW/PBS* plurality opinion makes clear that only *Freedman's* "core" requirements apply in the context of "adult business" licensing schemes, it does not purport radically to alter the nature of those "core" requirements. To the contrary, the opinion, immediately prior to its reference to the "judicial review" safeguard, says:

"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 *[Freedman]* safeguards are essential . . . ." *493 U.S., at 228, 107 L. Ed. 2d 603, 110 S. Ct. 596.*

These words, pointing out that **[***13]** *Freedman's* "judicial review" safeguard is meant to prevent "undue

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delay," *493 U.S., at 228, 107 L. Ed. 2d. 603, 110 S. Ct. 596*, include *judicial*, as well as *administrative,* delay. A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being "issued within a reasonable period of time." *Ibid.* Nothing in the opinion suggests the contrary. Thus we read that opinion's reference to "prompt judicial review," together with the similar reference in Justice Brennan's separate opinion (joined by two other Justices), see *id., at 239, 107 L. Ed. 2d 603, 110 S. Ct. 596*, as encompassing a prompt judicial decision. And we reject the city's arguments to the contrary.

B

We find the second argument more convincing. In effect that argument concedes the constitutional importance of assuring a "prompt" judicial decision. It concedes as well that the Court, illustrating what it meant by "prompt" in *Freedman*, there set forth a "model" that involved a "hearing one day after joinder of issue" and a "decision within two days after termination of the hearing." *380 U.S., at 60, 13 L. Ed 2d 649, 85 S. Ct. 734.* But the city says that here the *First Amendment* nonetheless does not require **[***14]** it to impose 2- or 3-day time limits; the *First Amendment* does not require special "adult business" judicial review rules; and the *First Amendment* does not insist that Littleton write detailed judicial review rules into the ordinance itself. In sum, Colorado's ordinary "judicial review" rules offer adequate assurance, not only that *access* to the courts can be promptly obtained, but also that a judicial *decision* will be promptly forthcoming.

[LEdHR1D]** [1D] **[**LEdHR3]** [3] Littleton, in effect, argues that we should modify *FW/PBS,* withdrawing its implication that *Freedman's* special judicial review rules apply in this case. And we accept that argument. In our view, Colorado's ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent *First Amendment* harms and administer those procedures accordingly. And whether the courts do so is a matter normally fit for case-by-case determination rather than a **[**93]** facial challenge. We reach this conclusion for several reasons.

[LEdHR1E]** [1E] First, ordinary court procedural rules and practices, in Colorado as elsewhere, **[*2225]** provide reviewing courts with judicial tools sufficient to avoid delay-related *First Amendment* harm. Indeed, where **[***15]** necessary, courts may arrange their schedules to "accelerate" proceedings. Colo. Rule Civ. Proc. 106(a)(4)(VIII) (2003). And higher courts may quickly review adverse lower court decisions. See, *e.g., Goebel v. Colorado Dep't of Institutions, 764 P.2d 785, 792 (Colo. 1988)* (en banc) (granting "expedited review").

[LEdHR1F]** [1F] **[**LEdHR4]** [4] Second, we have no reason to doubt the willingness of Colorado's judges to exercise these powers wisely so as to avoid serious threats of delay-induced *First Amendment* harm. We presume that courts are aware of the constitutional need to avoid "undue delay result[ing] in the unconstitutional suppression of protected speech." *FW/PBS, supra, at 228, 107 L. Ed. 2d 603, 110 S. Ct. 596*; see also, *e.g., Schlesinger v. Councilman, 420 U.S. 738, 756, 43 L. Ed. 2d 591, 95 S. Ct. 1300 (1975).* There is no evidence before us of any special Colorado court-related problem in this respect. And were there some such problems, federal remedies would provide an additional safety valve. See Rev Stat § 1979, *42 U.S.C. § 1983.*

[LEdHR1G]** [1G] Third, the typical *First Amendment* harm at issue here differs from that at issue in *Freedman,* diminishing the need in the typical case for special procedural **[***16]** rules imposing special 2- or 3-day decisionmaking time limits. *Freedman* considered a Maryland statute that created a Board of Censors, which had to decide whether a film was "'pornographic,'" tended to "'debase or corrupt morals,'" and lacked "'whatever other merits.'" *380 U.S., at 52-53, n. 2, 13 L. Ed. 2d 649, 85 S. Ct. 734* (quoting Maryland statute). If so, it denied the permit and the film could not be shown. Thus, in *Freedman,* the Court considered a scheme with rather subjective standards and where a denial likely meant complete censorship.

In contrast, the ordinance at issue here does not seek to *censor* material. And its licensing scheme applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display. The ordinance says that an adult business license "*shall*" be denied if the applicant (1) is underage; (2) provides false information; (3) has within the prior year had an adult business license revoked or suspended; (4) has operated an adult business determined to be a state law "public nuisance" within the prior year; (5) (if a corporation) is not authorized to do business in the State; (6) has **[***17]** not timely paid taxes, fees, fines, or penalties; (7) has not obtained a sales tax license (for which zoning compliance is required, see Tr. of Oral Arg. 16-17); or (8) has been convicted of certain crimes within the prior five years. § 3-14-8(A), App. to Brief for Petitioner 28a-29a (emphasis added).

[LEdHR1H]** [1H] **[**LEdHR5]** [5] These objective criteria are simple enough to apply and their application simple enough to review that their use is unlikely in practice to suppress totally the presence of

any specific item of adult material in the Littleton community. Some license applicants will satisfy the criteria even if others do not; hence the **[**94]** community will likely contain outlets that sell protected adult material. A supplier of that material should be able to find outlets; a potential buyer should be able to find a seller. Nor should zoning requirements suppress that material, for a constitutional zoning system seeks to determine *where*, not *whether*, protected adult material can be sold. See *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986)*. The upshot is that Littleton's "adult business" licensing scheme does "not present the grave 'dangers **[*2226]** of a censorship system.'" *FW/PBS, 493 U.S., at 228, 107 L. Ed. 2d 603, 110 S. Ct. 596* **[***18]** (opinion of O'Connor, J.) (quoting *Freedman, supra, at 58, 13 L. Ed. 2d 649, 85 S. Ct. 734*). And the simple objective nature of the licensing criteria means that in the ordinary case, judicial review, too, should prove simple, hence expeditious. Where that is not so--where, for example, censorship of material, as well as delay in opening an additional outlet, is improperly threatened--the courts are able to act to prevent that harm.

[LEdHR1I]** [1I] Fourth, nothing in *FW/PBS* or in *Freedman* requires a city or a State to place judicial review safeguards all in the city ordinance that sets forth a licensing scheme. *Freedman* itself said: "How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide." *380 U.S., at 60, 13 L. Ed. 2d 649, 85 S. Ct. 734*. This statement is not surprising given the fact that many cities and towns lack the state-law legal authority to impose deadlines on state courts.

[LEdHR1J]** [1J] **[**LEdHR6]** [6] These four sets of considerations, taken together, indicate that Colorado's ordinary rules of judicial review are adequate--at least for purposes of this facial challenge to the ordinance. Where (as here and as in *FW/PBS*) the regulation simply conditions the **[***19]** operation of an adult business on compliance with neutral and nondiscretionary criteria, cf. *post, at ____ - ____, 159 L. Ed. 2d, at 94-95* (Stevens, J., concurring in part and concurring in judgment), and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type. Colorado's rules provide for a flexible system of review in which judges can reach a decision promptly in the ordinary case, while using their judicial power to prevent significant harm to *First Amendment* interests where circumstances require. Of course, those denied licenses in the future remain free to raise special problems of undue delay in individual cases as the ordinance is applied.

For these reasons, the judgment of the Tenth Circuit is reversed.

[96contd]**

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

CONCURBY: Scalia

CONCUR: Justice **Scalia,** concurring in the judgment.

Were the respondent engaged in activity protected by the *First Amendment*, I would agree with the Court's disposition of the question presented by the facts of this case (though not with all of the Court's reasoning). Such activity, when subjected to a general permit requirement unrelated to censorship of content, has no special claim to priority in the judicial process. The notion that media corporations have constitutional entitlement to accelerated judicial review of the denial of zoning variances is absurd.

I do not believe, however, that Z. J. Gifts is engaged in activity protected by the *First Amendment*. I adhere to the view I expressed in *FW/PBS, Inc. v Dallas, 493 U.S. 215, 250, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990)* (opinion concurring in part and dissenting in part): the pandering of sex is not protected by the *First Amendment*. "The Constitution does not require a State or municipality to permit a business that intentionally specializes in, and holds itself forth to the public as specializing in, performance or portrayal of sex acts, sexual organs in a state of arousal, or live human nudity." *Id., at 258, 107 L. Ed. 2d 603, 110 S. Ct. 596*. This represents the Nation's long understanding of the *First Amendment*, recognized and adopted by this Court's opinion in *Ginzburg v United States, 383 U.S. 463, 470-471, 16 L. Ed. 2d 31, 86 S. Ct. 942 (1966)*. Littleton's ordinance targets sex-pandering businesses, see Littleton City Code § 3-14-2 (2003); to the extent it could apply to constitutionally protected expression its excess is not so great as to render it substantially overbroad and thus subject to facial invalidation, **[**97]** see *FW/PBS, 493 U.S., at 261-262, 107 L. Ed. 2d 603, 110 S. Ct. 596*. Since the city of Littleton "could constitutionally have proscribed the commercial activities that it chose instead to license, I do not think the details of its licensing scheme had to comply with *First Amendment* standards." *Id., at 253, 107 L. Ed. 2d 603, 110 S. Ct. 596*.

[94contd]**

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

Justice **Stevens,** concurring in part and concurring in the judgment.

There is an important difference between an ordinance conditioning the operation of a business on compliance with certain neutral criteria, on the one hand, and an ordinance conditioning the exhibition of a motion picture on the consent of a censor. The former is an aspect of the routine operation of a municipal government. The latter is a **[***20]** species of content-based prior restraint. Cf. *Graff v. Chicago, 9 F.3d 1309, 1330-1333 (CA7 1993)* (Flaum, J., concurring).

[95]** The *First Amendment* is, of course, implicated whenever a city requires a bookstore, a newsstand, a theater, or an adult business to obtain a license before it can begin to operate. For that reason, as Justice O'Connor explained in her plurality opinion in *FW/PBS, Inc. v. Dallas, 493 U.S. 215, 226, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990)*, a licensing scheme for businesses that engage in *First Amendment* activity must be accompanied by adequate procedural safeguards to avert "the possibility that constitutionally protected speech will be suppressed." But Justice O'Connor's opinion also recognized that the full complement of safeguards that are necessary in cases that "present the grave 'dangers of a censorship system'" are "not required" in the ordinary adult-business licensing scheme. *Id., at 228, 107 L. Ed. 2d 603, 110 S. Ct. 596* (quoting *Freedman v. Maryland, 380 U.S. 51, 58, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965))*. In both contexts, "undue delay results in the unconstitutional suppression **[*2227]** of protected speech," *493 U.S., at 228, 107 L. Ed. 2d 603, 110 S. Ct. 596*, and *FW/PBS* therefore requires both **[***21]** that the licensing decision be made promptly and that there be "the possibility of prompt judicial review in the event that the license is erroneously denied." *Ibid.* But application of neutral licensing criteria is a "ministerial action" that regulates speech, rather than an exercise of discretionary judgment that prohibits speech. *Id., at 229, 107 L. Ed. 2d 603, 110 S. Ct. 596.* The decision to deny a license for failure to comply with these neutral criteria is therefore not subject to the presumption of invalidity that attaches to the "direct censorship of particular expressive material." *Ibid.* Justice O'Connor's opinion accordingly declined to require that the licensor, like the censor, either bear the burden of going to court to effect the denial of a license or otherwise assume responsibility for ensuring a prompt judicial determination of the validity of its decision. *Ibid.*

The Court today reinterprets *FW/PBS*'s references to "the possibility of prompt judicial review" as the equivalent of *Freedman*'s "prompt judicial decision" requirement. *Ante, at ____ - ____, 159 L. Ed. 2d, at 90-92.* I fear that this misinterpretation of *FW/PBS* may invite other, more serious misinterpretations with respect to the **[***22]** content of that requirement. As the Court applies it in this case, assurance of a "prompt judicial decision" means little more than assurance of the *possibility* of a prompt decision--the same possibility of promptness that is available whenever a person files suit subject to "ordinary court procedural rules and practices." *Ante, at ____, 159 L. Ed. 2d, at 93.* That possibility will generally be sufficient to guard against the risk of undue delay in obtaining a remedy for the erroneous application of neutral licensing criteria. But the mere possibility of promptness is emphatically insufficient to guard against the dangers of unjustified suppression of speech presented by a censorship system of the type at issue in *Freedman*, and is certainly not what *Freedman* meant by "prompt judicial decision."

Justice O'Connor's opinion in *FW/PBS* recognized that differences between ordinary licensing schemes and censorship systems warrant imposition of different procedural protections, including different requirements with respect to which party must assume the burden of taking the case to court, as well as the risk **[**96]** of judicial delay. I would adhere to the views there expressed, and thus do not join **[***23]** Part II-A of the Court's opinion. I do, however, join the Court's judgment and Parts I and II-B of its opinion.

Justice **Souter,** with whom Justice **Kennedy** joins, concurring in part and concurring in the judgment.

I join the Court's opinion, except for Part II-B. I agree that this scheme is unlike full-blown censorship, *ante, at ____ - ____, 159 L. Ed. 2d, at 93-94*, so that the ordinance does not need a strict timetable of the kind required by *Freedman v. Maryland, 380 U.S. 51, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965)*, to survive a facial challenge. I write separately to emphasize that the state procedures that make a prompt judicial determination possible need to align with a state judicial practice that provides a prompt disposition in the state courts. The emphasis matters, because although Littleton's ordinance is not as suspect as censorship, neither is it as innocuous as common zoning. It is a licensing scheme triggered by the content of expressive materials to be sold. See *Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448, 152 L. Ed. 2d 670, 122*

S. Ct. 1728 (2002) (Kennedy, J., concurring in judgment) ("These ordinances are content based, and we should call them so"); *id., at 455-457, 152 L. Ed. 2d 670, 122 S. Ct. 1728* (Souter, J., dissenting). Because **[***24]** the sellers may be unpopular with local authorities, **[*2228]** there is a risk of delay in the licensing and review process. If there is evidence of foot-dragging, immediate judicial intervention will be required, and judicial oversight or review at any stage of the proceedings must be expeditious. **[***25]** **[***26]**

REFERENCES:

Go To Full Text Opinion

Go to Supreme Court Brief(s)

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16A Am Jur 2d, Constitutional Law § 529; *50 Am Jur 2d, Lewdness, Indecency, and Obscenity §§ 12, 16, 21, 22*; *51 Am Jur 2d, Licenses and Permits §§ 80, 107, 111*

USCS, *Constitution, Amendment 1*

L Ed Digest, Constitutional Law § 963

L Ed Index, Adult or X-Rated Businesses or Movies; Licenses and Permits

Annotation References

Constitutionality of obscene motion pictures--federal cases. *22 L Ed 2d 949.*

The Supreme Court and the right of free speech and press. *93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.*

Constitutionality of federal and state regulation of obscene literature--federal cases. *1 L Ed 2d 2211, 4 L Ed 2d 1821.*

Validity of ordinances restricting location of "adult entertainment" or sex-oriented businesses. *10 ALR 5th 538.* **[***27]**

Validity of statutes or ordinances requiring sex-oriented businesses to obtain operating licenses. *8 ALR4th 130.*

Citation #2
535 U.S. 425

535 U.S. 425; 122 S. Ct. 1728; 152 L. Ed. 2d 670; 2002 U.S. LEXIS 3424; 70 U.S.L.W. 4369; 30 Media L. Rep. 1769; 2002 Cal. Daily Op. Service 4067; 2002 Daily Journal DAR 5167; 15 Fla. L. Weekly Fed. S 267

CITY OF LOS ANGELES v. ALAMEDA BOOKS, INC., ET AL.

00-799

SUPREME COURT OF THE UNITED STATES

535 U.S. 425; 122 S. Ct. 1728; 152 L. Ed. 2d 670; 2002 U.S. LEXIS 3424; 70 U.S.L.W. 4369; 30 Media L. Rep. 1769; 2002 Cal. Daily Op. Service 4067; 2002 Daily Journal DAR 5167; 15 Fla. L. Weekly Fed. S 267

December 4, 2001, Argued
May 13, 2002, Decided

PRIOR HISTORY: [****1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: *222 F.3d 719,* reversed and remanded.

DECISION: Grant of summary judgment in favor of challengers held inappropriate with respect to claim that city zoning ordinance facially violated First Amendment, where ordinance prohibited operation of more than one "adult" entertainment business in same building.

SUMMARY: *In Renton v Playtime Theatres, Inc. (1986) 475 US 41, 89 L Ed 2d 29, 106 S Ct 925,* the United States Supreme Court--in upholding the validity, under the Federal Constitution's First Amendment free speech guarantee, of a zoning ordinance, enacted by a municipality in the state of Washington, that prohibited any (sexually) "adult" movie theater from locating within 1,000 feet of any residential zone, family dwelling, church, park, or school--(1) found that the ordinance was properly analyzed as a regulation of time, place, and manner; (2) deemed the ordinance "content-neutral," on the basis that the ordinance was aimed at the undesirable secondary effects of such theaters on the surrounding community, with respect to crime rates, property values, and the quality of the municipality's neighborhoods; and (3) concluded that the municipality had met its burden of showing that (a) the ordinance was designed to serve a substantial government interest, and (b) reasonable alternative avenues of communication remained available.

A 1977 study conducted by the city of Los Angeles, California, had concluded that concentrations of adult businesses were associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities. Accordingly, the city enacted an ordinance prohibiting the location of specified adult enterprises within 1,000 feet of another such enterprise or within 500 feet of any religious institution, school, or public park. In 1983, in order to close an asserted "loophole" in the earlier ordinance, the city enacted another ordinance which prohibited the establishment or maintenance of more than one adult entertainment business in the same building, structure, or portion thereof. Two adult entertainment establishments--each of which was concededly violating the 1983 ordinance by operating an adult bookstore and an adult video arcade in the same building--then (1) filed a suit, in the United States District Court for the Central District of California, under *42 USCS 1983* against the city; (2) included a claim alleging that the 1983 ordinance facially violated the First Amendment; and (3) sought declaratory and injunctive relief. The District Court, in granting summary judgment to the two establishments, found that the 1983 ordinance was a content-based regulation of speech that failed strict scrutiny.

On appeal, the United States Court of Appeals for the Ninth Circuit, in affirming on different grounds, expressed the view that even if the 1983 ordinance were content-neutral, the 1983 ordinance was invalid under Renton v Playtime Theatres, Inc., and Court of Appeals precedents interpreting the Renton decision, as (1) the city had failed to demonstrate that the 1983 ordinance was designed to serve a substantial government interest; and (2) specifically, the city had failed to present evidence, upon which the city could reasonably rely, to demonstrate a link between multiple-use adult establishments and negative secondary effects (decision as amended, *222 F3d 719).*

On certiorari, the Supreme Court reversed and remanded. Although the court was unable to agree upon a majority opinion, the court, by a 5-4 vote of the Justices, agreed that a grant of summary judgment to the two establishments on their First Amendment claim was inappropriate at the then-existing stage of the litigation.

O'Connor, J., announced the judgment of the court and, in an opinion joined by Rehnquist, Ch. J., and Scalia

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and Thomas JJ., expressed the view that (1) for purposes of complying, at this stage of the litigation, with the evidentiary requirement of the First Amendment framework developed in Renton v Playtime Theatres, Inc., the city could reasonably rely on the 1977 study in order to demonstrate that the 1983 ordinance's ban on multiple-use adult establishments served the city's interest in reducing crime; (2) accordingly, the city did not need to present foreign studies to overcome the summary judgment against the city; and (3) it would be inappropriate for the Supreme Court, under the circumstances of the case at hand, to depart from the Renton framework or to reach the issues whether the city's ordinance was actually content-neutral or was actually a regulation of time, place, and manner.

Scalia, J., concurring, expressed the view that (1) the opinion of O'Connor, J., represented a correct view of the Supreme Court's precedents concerning regulation of the secondary effects of pornographic speech; but (2) in a case such as the one at hand, First Amendment traditions made such secondary-effects analysis unnecessary, as the Constitution did not prevent communities that wished to do so from regulating--or entirely suppressing--the business of pandering sex.

Kennedy, J., concurring in the judgment, expressed the view that while the designation, in Renton v Playtime Theatres, Inc., of the zoning ordinance there at issue as content-neutral was imprecise--and while the application of the Renton decision in the opinion of O'Connor, J., might constitute a subtle expansion--the First Amendment did not require a city to ignore the tangible, adverse, and secondary effects of high concentrations of adult businesses, if the city used its zoning power in a reasonable way to ameliorate these effects without suppressing speech; and (2) while the 1983 ordinance might not withstand the appropriate intermediate scrutiny if the city's assumptions in the case at hand were proved unsound at trial, the ordinance ought to survive a summary-judgment motion.

Souter, J., joined by Stevens and Ginsburg, JJ., and joined in part (as to point 3 below) by Breyer, J., dissenting, expressed the view that (1) for purposes of First Amendment scrutiny, even though the kind of zoning regulation of adult businesses that was at issue had been called content-neutral, this kind of regulation instead ought to occupy a middle tier between (a) full-blown content-based restrictions, and (b) regulations that applied without any reference to the substance of what was said; (2) this lesser or middle-tier scrutiny demanded a factual demonstration for claims which the government made about secondary effects; and (3) even if it were assumed, for the purposes of deciding the case at hand under the First Amendment, that the city's earlier zoning ordinance was justified on the basis of the 1977 study, (a) the 1977 study did not support the city's assumption of undesirable secondary effects, from combining selling and viewing activities in a single store, that underlay the 1983 ordinance, (b) the city had not called the Supreme Court's attention to any other evidence that supported the city's assumption, and (c) enforcing the 1983 ordinance's policy of breaking up stores sounded like a content-based strategy for driving out expressive adult businesses.

LAWYERS' EDITION HEADNOTES:

[*LEdHN1]**
CONSTITUTIONAL LAW §961
SUMMARY JUDGMENT JUDGMENT ON PLEADINGS §5
-- freedom of speech -- adult entertainment businesses -- zoning
Headnote:[1A][1B][1C][1D][1E][1F][1G][1H][1I]
With respect to a Federal District Court claim, under *42 USCS 1983,* by two (sexually) "adult" entertainment establishments that a city's zoning ordinance facially violated the Federal Constitution's First Amendment guarantee of freedom of speech, the United States Supreme Court held that a grant of summary judgment in favor of the two establishments was inappropriate at the then-existing stage of the litigation, as:
(1) The ordinance prohibited the establishment or maintenance of more than one adult entertainment business in the same building, structure, or portion thereof.
(2) Each of the two establishments challenging the ordinance was concededly violating it by operating an adult bookstore and an adult video arcade in the same building.
(3) Four Justices of the Supreme Court were of the view that (a) for purposes of complying, at this stage of the litigation, with the evidentiary requirement of the First Amendment framework developed in *Renton v Playtime Theatres, Inc. (1986) 475 US 41, 89 L Ed 2d 29, 106 S Ct 925,* the city could reasonably rely on a study which the city had conducted some years before enacting the ordinance--which study had concluded that concentrations of adult businesses were associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities--in order to demonstrate that the ordinance's ban on multiple-use adult establishments served the city's interest in reducing crime; (b) accordingly, the city did not need to present foreign studies to overcome the summary

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judgment against the city; and (c) it would be inappropriate for the Supreme Court, under the circumstances of the case at hand, to depart from the Renton framework or to reach the issues whether the city's ordinance was actually content-neutral or was actually a regulation of time, place, and manner.

(4) One Justice was of the view that (a) while the designation, in Renton v Playtime Theatres, Inc., of a similar zoning ordinance as content-neutral was imprecise--and while the application of the Renton decision by the first four Justices might constitute a subtle expansion--the First Amendment did not require a city to ignore the tangible, adverse, and secondary effects of high concentrations of adult businesses, if the city used its zoning power in a reasonable way to ameliorate these effects without suppressing speech; and (b) while the ordinance in question might not withstand the appropriate intermediate scrutiny if the city's assumptions in the case at hand were proved unsound at trial, the ordinance ought to survive a summary-judgment motion.

[Per O'Connor, J., Rehnquist, Ch. J., and Scalia, Thomas, and Kennedy, JJ. Dissenting: Souter, Stevens, Ginsburg, and Breyer, JJ.]

[*LEdHN2]**

CONSTITUTIONAL LAW §961

-- free speech -- adult establishments

Headnote:[2A][2B]

For purposes of the Federal Constitution's First Amendment guarantee of freedom of speech, when a city enacts a zoning ordinance regulating (sexually) "adult" establishments, the city may not properly assert that it will reduce allegedly harmful secondary effects by reducing speech in the same proportion. [Per O'Connor, J., Rehnquist, Ch. J., and Scalia, Thomas, and Kennedy, JJ.]

SYLLABUS: Based on its 1977 study concluding that concentrations of adult entertainment establishments are associated with higher crime rates in surrounding communities, petitioner city enacted an ordinance prohibiting such enterprises within 1,000 feet of each other or within 500 feet of a religious institution, school, or public park. Los Angeles Municipal Code § 12.70(C) (1978). Because the ordinance's method of calculating distances created a loophole permitting the concentration of multiple adult enterprises in a single structure, the city later amended the ordinance to prohibit "more than one adult entertainment business in the same building." § 12.70(C) (1983). Respondents, two adult establishments that openly operate combined bookstores/video arcades in violation of § 12.70(C), as amended, sued under *42 U. S. C. § 1983* for declaratory and injunctive relief, alleging that **[****2]** the ordinance, on its face, violates the First Amendment. Finding that the ordinance was not a content-neutral regulation of speech, the District Court reasoned that neither the 1977 study nor a report cited in *Hart Book Stores* v. *Edmisten,* a Fourth Circuit case upholding a similar statute, supported a reasonable belief that multiple-use adult establishments produce the secondary effects the city asserted as content-neutral justifications for its prohibition. Subjecting § 12.70(C) to strict scrutiny, the court granted respondents summary judgment because it felt the city had not offered evidence demonstrating that its prohibition was necessary to serve a compelling government interest. The Ninth Circuit affirmed on the different ground that, even if the ordinance were content neutral, the city failed to present evidence upon which it could reasonably rely to demonstrate that its regulation of multiple-use establishments was designed to serve its substantial interest in reducing crime. The court therefore held the ordinance invalid under *Renton v. Playtime Theatres, Inc., 475 U.S. 41.*

Held: The judgment is reversed, and the case is remanded. **[****3]** *222 F.3d 719,* reversed and remanded.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS, concluded that Los Angeles may reasonably rely on its 1977 study to demonstrate that its present ban on multiple-use adult establishments serves its interest in reducing crime. Pp. 5-15.

(a) The 1977 study's central component is a Los Angeles Police Department report indicating that, from 1965 to 1975, crime rates for, *e.g.,* robbery and prostitution grew much faster in Hollywood, which had the city's largest concentration of adult establishments, than in the city as a whole. The city may reasonably rely on the police department's conclusions regarding crime patterns to overcome summary judgment. In finding to the contrary on the ground that the 1977 study focused on the effect on crime rates of a concentration of establishments--not a concentration of operations within a single establishment--the Ninth Circuit misunderstood the study's implications. While the study reveals that areas with high concentrations of adult establishments are associated with high crime rates, such areas are also areas with high concentrations of adult operations, albeit **[****4]** each in separate establishments. It was therefore consistent with the 1977 study's findings, and thus reasonable, for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large

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establishment, will reduce crime rates. Neither the Ninth Circuit nor respondents nor the dissent provides any reason to question the city's theory. If this Court were to accept their view, it would effectively require that the city provide evidence that not only supports the claim that its ordinance serves an important government interest, but also does not provide support for any other approach to serve that interest. *Renton* specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. The Court there held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. *475 U.S. at 51-52.* This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support **[****5]** its rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the *Renton* standard. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. See, *e.g., Erie v. Pap's A. M., 529 U.S. 277, 298, 146 L. Ed. 2d 265, 120 S. Ct. 1382.* This case is at a very early stage in this process. It arrives on a summary judgment motion by respondents defended only by complaints that the 1977 study fails to prove that the city's justification for its ordinance is necessarily correct. Therefore, it must be concluded that the city, at this stage of the litigation, has complied with *Renton's* evidentiary requirement. Pp. 5-14.

(b) The Court need not resolve the parties' dispute over whether the city can rely on evidence from *Hart Book Stores* to overcome summary judgment, nor respondents' alternative argument that the ordinance **[****6]** is not a time, place, and manner regulation, but is effectively a ban on adult video arcades that must be subjected to strict scrutiny. Pp. 14-15.

JUSTICE KENNEDY concluded that this Court's precedents may allow Los Angeles to impose its regulation in the exercise of the zoning authority, and that the city is not, at least, to be foreclosed by summary judgment. Pp. 1-10.

(a) Under *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925,* if a city can decrease the crime and blight associated with adult businesses by exercising its zoning power, and at the same time leave the quantity and accessibility of speech substantially undiminished, there is no First Amendment objection, even if the measure identifies the problem outside the establishments by reference to the speech inside--that is, even if the measure is content based. On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. For example, it may not impose a content-based fee or tax, see *Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230, 95 L. Ed. 2d 209, 107 S. Ct. 1722,* even if the government purports to justify the fee by reference to secondary effects, see *Forsyth County v. Nationalist Movement, 505 U.S. 123, 134-135, 120 L. Ed. 2d 101, 112 S. Ct. 2395.* **[****7]** That the ordinance at issue is more a typical land-use restriction than a law suppressing speech is suggested by the fact that it is not limited to expressive activities, but extends, *e.g.,* to massage parlors, which the city has found to cause the same undesirable secondary effects; also, it is just one part of an elaborate web of land-use regulations intended to promote the social value of the land as a whole without suppressing some activities or favoring others. Thus, the ordinance is not so suspect that it must be subjected to the strict scrutiny that content-based laws demand in other instances. Rather, it calls for intermediate scrutiny, as *Renton* held. Pp. 2-5.

(b) *Renton's* description of an ordinance similar to Los Angeles' as "content neutral," *475 U.S. at 48,* was something of a fiction. These ordinances are content based, and should be so described. Nevertheless, *Renton's* central holding is sound. Pp. 5-6.

(c) The necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like the one at issue may reduce the costs of secondary effects without substantially reducing speech. If two adult businesses are under the **[****8]** same roof, an ordinance requiring them to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. The premise must be that businesses--even those that have always been under one roof--will for the most part disperse rather than shut down, that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced. As to whether there is sufficient evidence to support this proposition, the Court has consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required. See, *e.g., Renton, supra, at 51-52.* Here, the proposition to be shown is supported by common experience and a study showing a correlation between the concentration of adult establishments and crime. Assuming that the study supports the city's original dispersal ordinance,

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most of the necessary analysis follows. To justify the ordinance at issue, the city may infer--from its study and from its own experience--that two adult businesses under the same roof are no better than two next door, and that knocking down the wall between **[****9]** the two would not ameliorate any undesirable secondary effects of their proximity to one another. If the city's first ordinance was justified, therefore, then the second is too. Pp. 6-10.

(d) Because these considerations seem well enough established in common experience and the Court's case law, the ordinance survives summary judgment. P. 10.

COUNSEL: Michael L. Klekner argued the cause for petitioner.

John H. Weston argued the cause for respondents.

JUDGES: O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion. KENNEDY, J., filed an opinion concurring in the judgment. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, and in which BREYER, J., joined as to Part II.

OPINIONBY: O'CONNOR

OPINION: [1731] [***677] [*429]**

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join.

[*LEdHR1A]** [1A]Los Angeles Municipal Code § 12.70(C) (1983), as amended, prohibits "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof." **[****10]** Respondents, two adult establishments that each operated an adult bookstore and an adult video arcade in the same building, filed a suit under Rev. Stat. § 1979, *42 U.S.C. § 1983* (1994 ed., Supp. V), alleging that § 12.70(C) violates the First Amendment and seeking declaratory and injunctive relief. The District Court granted summary judgment to respondents, finding that the city of Los Angeles' prohibition was a content-based regulation of speech that failed strict scrutiny. The Court of Appeals for the Ninth Circuit affirmed, but on different grounds. It held that, even if § 12.70(C) were a content-neutral regulation, the city failed to demonstrate that the **[*430]** prohibition was designed to serve a substantial government interest. Specifically, the Court of Appeals found that the city failed to present evidence upon which it could reasonably rely to demonstrate a link between multiple-use adult establishments and negative secondary **[***678]** effects. Therefore, the Court of Appeals held the Los Angeles prohibition on such establishments invalid under *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986),* and its precedents **[****11]** interpreting that case. *222 F.3d 719, 723-728 (2000).* We reverse and remand. The city of Los Angeles may reasonably rely on a study it conducted some years before enacting the present version of § 12.70(C) to demonstrate that its ban on multiple-use adult establishments serves its interest in reducing crime.

[1732]** I

[*LEdHR1B]** [1B]In 1977, the city of Los Angeles conducted a comprehensive study of adult establishments and concluded that concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities. See App. 35-162 (Los Angeles Dept. of City Planning, Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles (City Plan Case No. 26475, City Council File No. 74-4521-S.3, June 1977)). Accordingly, the city enacted an ordinance prohibiting the establishment, substantial enlargement, or transfer of ownership of an adult arcade, bookstore, cabaret, motel, theater, or massage parlor or a place for sexual encounters within 1,000 feet of another such enterprise or within 500 feet of any religious institution, school, or public park. See Los Angeles Municipal **[****12]** Code § 12.70(C) (1978).

There is evidence that the intent of the city council when enacting this prohibition was not only to disperse distinct adult establishments housed in separate buildings, but also to disperse distinct adult businesses operated under common ownership and housed in a single structure. See App. 29 **[*431]** (Los Angeles Dept. of City Planning, Amendment--Proposed Ordinance to Prohibit the Establishment of More than One Adult Entertainment Business at a Single Location (City Plan Case No. 26475, City Council File No. 82-0155, Jan. 13, 1983)). The ordinance the city enacted, however, directed that "the distance between any two adult entertainment businesses shall be measured in a straight line . . . from the closest exterior structural wall of each business." Los Angeles Municipal Code § 12.70(D) (1978). Subsequent to enactment, the city realized that this method of calculating distances

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created a loophole permitting the concentration of multiple adult enterprises in a single structure.

Concerned that allowing an adult-oriented department store to replace a strip of adult establishments could defeat the goal of the original ordinance, the city council amended § 12.70(C) **[****13]** by adding a prohibition on "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof." Los Angeles Municipal Code § 12.70(C) (1983). The amended ordinance defines an "Adult Entertainment Business" as an adult arcade, bookstore, cabaret, motel, theater, or massage parlor or a place for sexual encounters, and notes that each of these enterprises "shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." § 12.70(B)(17). The ordinance uses the term "business" to refer to certain types of goods or services sold **[***679]** in adult establishments, rather than the establishment itself. Relevant for purposes of this case are also the ordinance's definitions of adult bookstores and arcades. An "Adult Bookstore" is an operation that "has as a substantial portion of its stock-in-trade and offers for sale" printed matter and videocassettes that emphasize the depiction of specified sexual activities. § 12.70(B)(2)(a). An adult arcade is an **[****14]** operation where, "for any form of consideration," five or fewer patrons together may view films or videocassettes **[*432]** that emphasize the depiction of specified sexual activities. § 12.70(B)(1).

Respondents, Alameda Books, Inc., and Highland Books, Inc., are two adult establishments operating in Los Angeles. Neither is located within 1,000 feet of another adult establishment or 500 feet of any religious institution, public park, or school. Each establishment occupies less than 3,000 square feet. Both respondents rent and sell sexually oriented products, including videocassettes. Additionally, both provide booths where patrons can view videocassettes for a fee. Although respondents are located in different buildings, each operates its retail sales and rental operations in the same commercial space in which its video booths are located. There are no **[**1733]** physical distinctions between the different operations within each establishment and each establishment has only one entrance. *222 F.3d 719 at 721.* Respondents concede they are openly operating in violation of § 12.70(C) of the city's Code, as amended. Brief for Respondents 7; Brief for Petitioner 9.

After a city **[****15]** building inspector found in 1995 that Alameda Books, Inc., was operating both as an adult bookstore and an adult arcade in violation of the city's adult zoning regulations, respondents joined as plaintiffs and sued under *42 U.S.C. § 1983* for declaratory and injunctive relief to prevent enforcement of the ordinance. *222 F.3d at 721.* At issue in this case is count I of the complaint, which alleges a facial violation of the First Amendment. Both the city and respondents filed crossmotions for summary judgment.

The District Court for the Central District of California initially denied both motions on the First Amendment issues in count I, concluding that there was "a genuine issue of fact whether the operation of a combination video rental and video viewing business leads to the harmful secondary effects associated with a concentration of separate businesses in a single urban area." App. 255. After respondents filed a motion for reconsideration, however, the District **[*433]** Court found that Los Angeles' prohibition on multiple-use adult establishments was not a content-neutral regulation of speech. App, to Pet. for Cert. 51. It reasoned that the neither **[****16]** the city's 1977 study nor a retort cited in *Hart Book Stores v. Edmisten, 612 F.2d 821 (CA4 1979)* (upholding a North Carolina statute that also banned multiple-use adult establishments), supported a reasonable belief that multiple-use adult establishments produced the secondary effects the city asserted as content-neutral justifications for its prohibition. App. to Pet. for Cert. 34-47. Therefore, the District Court proceeded to subject the Los Angeles ordinance to strict scrutiny. Because it felt that the city did not offer evidence to demonstrate that its prohibition is necessary to serve a compelling **[***680]** government interest, the District Court granted summary judgment for respondents and issued a permanent injunction enjoining the enforcement of the ordinance against respondents. *Id.,* at 51.

The Court of Appeals for the Ninth Circuit affirmed, although on different grounds. The Court of Appeals determined that it did not have to reach the District Court's decision that the Los Angeles ordinance was content based because, even if the ordinance were content neutral, the city failed to present evidence upon which it could reasonably rely to demonstrate that its **[****17]** regulation of multiple-use establishments is "designed to serve" the city's substantial interest in reducing crime. The challenged ordinance was therefore invalid under *Renton, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925. 222 F.3d at 723-724.* We granted certiorari, *532 U.S. 902 (2001),* to clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton, supra.*

II

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In *Renton v. Playtime Theatres, Inc., supra,* this Court considered the validity of a municipal ordinance that prohibited any adult movie theater from locating within 1,000 feet of any residential zone, family dwelling, church, park, **[*434]** or school. Our analysis of the ordinance proceeded in three steps. First, we found that the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations. The ordinance was properly analyzed, therefore, as a time, place, and manner regulation. *Id., at 46.* We next considered whether the ordinance was content neutral or content based. If the regulation were content based, it would be considered presumptively invalid and **[****18]** subject to strict scrutiny. *Simon & Schuster, Inc. v. Members of N. Y. State* **[**1734]** *Crime Victims Bd., 502 U.S. 105, 115, 118, 116 L. Ed. 2d 476, 112 S. Ct. 501 (1991); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230-231, 95 L. Ed. 2d 209, 107 S. Ct. 1722 (1987).* We held, however, that the Renton ordinance was aimed not at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely at crime rates, property values, and the quality of the city's neighborhoods. Therefore, the ordinance was deemed content neutral. *Renton, supra, at 47-49.* Finally, given this finding, we stated that the ordinance would be upheld so long as the city of Renton showed that its ordinance was designed to serve a substantial government interest and that reasonable alternative avenues of communication remained available. *475 U.S. at 50.* We concluded that Renton had met this burden, and we upheld its ordinance. *Id., at 51-54.*

The Court of Appeals applied the same analysis to evaluate the Los Angeles ordinance challenged **[****19]** in this case. First, the Court of Appeals found that the Los Angeles ordinance was not a complete ban on adult entertainment establishments, but rather a sort of adult zoning regulation, which *Renton* considered a time, place, and manner regulation. *222 F.3d at 723.* The Court of Appeals turned to the second step of the *Renton* analysis, but did not draw **[***681]** any conclusions about whether the Los Angeles ordinance was content based. It explained that, even if the Los Angeles ordinance were content neutral, the city had failed to demonstrate, **[*435]** as required by the third step of the *Renton* analysis, that its prohibition on multiple-use adult establishments was designed to serve its substantial interest in reducing crime. The Court of Appeals noted that the primary evidence relied upon by Los Angeles to demonstrate a link between combination adult businesses and harmful secondary effects was the 1977 study conducted by the city's planning department. The Court of Appeals found, however, that the city could not rely on that study because it did not "'support a reasonable belief that [the] combination [of] businesses . . . produced harmful secondary effects of the type **[****20]** asserted." *222 F.3d at 724.* For similar reasons, the Court of Appeals also rejected the city's attempt to rely on a report on health conditions inside adult video arcades described in *Hart Book Stores,* a case that upheld a North Carolina statute similar to the Los Angeles ordinance challenged in this case. *612 F.2d 821.*

[*LEdHR1C]** [1C]The central component of the 1977 study is a report on city crime patterns provided by the Los Angeles Police Department. That report indicated that, during the period from 1965 to 1975, certain crime rates grew much faster in Hollywood, which had the largest concentration of adult establishments in the city, than in the city of Los Angeles as a whole. For example, robberies increased 3 times faster and prostitution 15 times faster in Hollywood than citywide. App. 124-125.

The 1977 study also contains reports conducted directly by the staff of the Los Angeles Planning Department that examine the relationship between adult establishments and property values. These staff reports, however, are inconclusive. Not surprisingly, the parties focus their dispute before this Court on the report by the Los Angeles Police Department. Because we **[****21]** find that reducing crime is a substantial government interest and that the police department report's conclusions regarding crime patterns may reasonably be relied upon to overcome summary judgment against **[*436]** the city, we also focus on the portion of the 1977 study drawn from the police department report.

The Court of Appeals found that the 1977 study did not reasonably support the inference that a concentration of adult operations within a single adult establishment produced greater levels of criminal activity because the study focused on the **[**1735]** effect that a concentration of establishments--not a concentration of operations within a single establishment--had on crime rates. The Court of Appeals pointed out that the study treated combination adult bookstore/arcades as single establishments and did not study the effect of any separate-standing adult bookstore or arcade. *222 F.3d at 724.*

The Court of Appeals misunderstood the implications of the 1977 study. While the study reveals that areas with high concentrations of adult establishments are associated with high crime rates, areas with high concentrations of adult establishments are also areas

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with high concentrations [****22] of adult operations, albeit each in separate establishments. It was therefore consistent with the findings of the 1977 study, and thus reasonable, for Los Angeles [***682] to suppose that a concentration of adult establishments is correlated with high crime rates because a concentration of operations in one locale draws, for example, a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity. The assumption behind this theory is that having a number of adult operations in one single adult establishment draws the same dense foot traffic as having a number of distinct adult establishments in close proximity, much as minimalls and department stores similarly attract the crowds of consumers. Brief for Petitioner 28. Under this view, it is rational for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates.

[*437] Neither the Court of Appeals, nor respondents, nor the dissent provides any reason to question the city's theory. In particular, they do not offer a competing theory, let alone [****23] data, that explains why the elevated crime rates in neighborhoods with a concentration of adult establishments can be attributed entirely to the presence of permanent walls between, and separate entrances to, each individual adult operation. While the city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects, it does not bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own.

The error that the Court of Appeals made is that it required the city to prove that its theory about a concentration of adult operations attracting crowds of customers, much like a minimall or department store does, is a necessary consequence of the 1977 study. For example, the Court of Appeals refused to allow the city to draw the inference that "the expansion of an adult bookstore to include an adult arcade would increase" business activity and "produce the harmful secondary effects identified in the Study." *222 F.3d at 726.* It reasoned that such an inference would justify limits on the inventory of an [****24] adult bookstore, not a ban on the combination of an adult bookstore and an adult arcade. The Court of Appeals simply replaced the city's theory--that having many different operations in close proximity attracts crowds--with its own-that the size of an operation attracts crowds. If the Court of Appeals' theory is correct, then inventory limits make more sense. If the city's theory is correct, then a prohibition on the combination of businesses makes more sense. Both theories are consistent with the data in the 1977 study. The Court of Appeals' analysis, however, implicitly requires the city to prove that its theory is the only one that can plausibly explain the data [*438] because only in this manner can the city refute the Court of Appeals' logic.

Respondents make the same logical error as the Court of Appeals when they suggest that the city's prohibition on multiuse establishments will raise crime rates in certain neighborhoods because it will [**1736] force certain adult businesses to relocate to areas without any other adult businesses. Respondents' claim assumes that the 1977 study proves [***683] that all adult businesses, whether or not they are located near other adult businesses, generate [****25] crime. This is a plausible reading of the results from the 1977 study, but respondents do not demonstrate that it is a compelled reading. Nor do they provide evidence that refutes the city's interpretation of the study, under which the city's prohibition should on balance reduce crime. If this Court were nevertheless to accept respondents' speculation, it would effectively require that the city provide evidence that not only supports the claim that its ordinance serves an important government interest, but also does not provide support for any other approach to serve that interest.

In *Renton,* we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. *475 U.S. at 51-52;* see also, *e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 584, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991)* (SOUTER, [****26] J., concurring in judgment) (permitting municipality to use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects). This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's [*439] evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton.* If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory

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that justifies its ordinance. See, *e.g., Erie v. Pap's A. M., 529 U.S. 277, 298, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000)* (plurality opinion). This case is at a very early stage in this process. It arrives on a summary judgment motion by respondents defended only by complaints that the 1977 study **[****27]** fails to prove that the city's justification for its ordinance is necessarily correct. Therefore, we conclude that the city, at this stage of the litigation, has complied with the evidentiary requirement in *Renton.*

JUSTICE SOUTER faults the city for relying on the 1977 study not because the study fails to support the city's theory that adult department stores, like adult minimalls, attract customers and thus crime, but because the city does not demonstrate that free-standing single-use adult establishments reduce crime. See *post,* at 8-9 (dissenting opinion). In effect, JUSTICE SOUTER asks the city to demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime. Our cases have never required that municipalities make such a showing, certainly not without actual and convincing evidence from plaintiffs to the contrary. See, *e.g., Barnes, supra, at 583-584* (SOUTER, J., concurring in judgment). Such a requirement would go **[***684]** too far in undermining our settled position that municipalities must be given a "reasonable **[****28]** opportunity to experiment with solutions'" to address the secondary effects of protected speech. *Renton, supra, at 52* (quoting *Young v. American Mini Theatres, Inc., 427 U.S. 50, 71, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976)* (plurality opinion)). A municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because **[*440]** the solution would, by definition, not have been implemented previously. The city's ordinance banning multiple-use **[**1737]** adult establishments is such a solution. Respondents contend that there are no adult video arcades in Los Angeles County that operate independently of adult bookstores. See Brief for Respondents 41. But without such arcades, the city does not have a treatment group to compare with the control group of multiple-use adult establishments, and without such a comparison JUSTICE SOUTER would strike down the city's ordinance. This leaves the city with no means to address the secondary effects with which it is concerned.

Our deference to the evidence presented by the city of Los Angeles is the product of a careful balance between competing interests. **[****29]** One the one hand, we have an "obligation to exercise independent judgment when First Amendment rights are implicated." *Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 666, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994)* (plurality opinion); see also *Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-844, 56 L. Ed. 2d 1, 98 S. Ct. 1535 (1978).* On the other hand, we must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems. See *Turner, supra, at 665-666; Erie v. Pap's A. M., supra, at 297-298* (plurality opinion). We are also guided by the fact that *Renton* requires that municipal ordinances receive only intermediate scrutiny if they are content neutral. *Renton, supra, at 48-50.* There is less reason to be concerned that municipalities will use these ordinances to discriminate against unpopular speech. See. *Erie, supra*, at 298-299.

JUSTICE SOUTER **[****30]** would have us rethink this balance, and indeed the entire *Renton* framework. In *Renton,* the Court distinguished the inquiry into whether a municipal ordinance is content neutral from the inquiry into whether it is "designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." *475 U.S. at 47-54.* The former requires courts to verify that the "predominate concerns" motivating the **[*441]** ordinance "were with the secondary effects of adult [speech], and not with the content of adult [speech]." *Id., at 47.* The latter inquiry goes one step further and asks whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance. Only at this stage did *Renton* contemplate that courts would examine evidence concerning regulated speech and secondary effects. *Id., at 50-52.* **[***685]** JUSTICE SOUTER would either merge these two inquiries or move the evidentiary analysis into the inquiry on content neutrality, **[****31]** and raise the evidentiary bar that a municipality must pass. His logic is that verifying that the ordinance actually reduces the secondary effects asserted would ensure that zoning regulations are not merely content-based regulations in disguise. See *post,* at 5-6.

We think this proposal unwise. First, none of the parties request the Court to depart from the *Renton* framework. Nor is the proposal fairly encompassed in the question presented, which focuses on the sorts of evidence upon which the city may rely to demonstrate that its ordinance is designed to serve a substantial governmental interest. Pet. for Cert. i. Second, there is no evidence suggesting that courts have difficulty determining whether municipal ordinances are motivated primarily by the content of adult speech or by its secondary effects without looking to evidence connecting such speech to the asserted secondary

effects. In this case, the Court of Appeals has not yet had an opportunity to address the issue, having assumed for the sake of argument that the city's ordinance is content neutral. *222 F.3d at 723.* It would be inappropriate for this Court to reach the question of content neutrality before **[****32]** permitting the lower court to pass upon it. Finally, JUSTICE SOUTER does **[**1738]** not clarify the sort of evidence upon which municipalities may rely to meet the evidentiary burden he would require. It is easy to say that courts must demand evidence **[*442]** when "common experiences" or "common assumptions" are incorrect, see *post,* at 6-7, but it is difficult for courts to know ahead of time whether that condition is met. Municipalities will, in general, have greater experience with and understanding of the secondary effects that follow certain protected speech than will the courts. See *Pap's A. M., 529 U.S. at 297-298* (plurality opinion). For this reason our cases require only that municipalities rely upon evidence that is "reasonably believed to be relevant" to the secondary effects that they seek to address.

III

[*LEdHR1D]** [1D]The city of Los Angeles argues that its prohibition on multiuse establishments draws further support from a study of the poor health conditions in adult video arcades described in *Hart Book Stores,* a case that upheld a North Carolina ordinance similar to that **[****33]** challenged here. See *612 F.2d at 828, n. 9.* Respondents argue that the city cannot rely on evidence from *Hart Book Stores* because the city cannot prove it examined that evidence before it enacted the current version of § 12.70(C). Brief for Respondents 21. Respondents note, moreover, that unsanitary conditions in adult video arcades would persist regardless of whether arcades were operated in the same buildings as, say, adult bookstores. *Ibid.*

We do not, however, need to resolve the parties' dispute over evidence cited in *Hart Book Stores.* Unlike the city of Renton, the city of Los Angeles conducted its own study of adult businesses. We have concluded that the Los Angeles study provides evidence to support the city's theory that a concentration of adult operations in one locale attracts crime, and can be reasonably relied upon to **[***686]** demonstrate that Los Angeles Municipal Code § 12.70(C) (1983) is designed to promote the city's interest in reducing crime. Therefore; the city need not present foreign studies to overcome the summary judgment against it.

[*443] **[***LEdHR1E]** [1E] **[***LEdHR2A]** [2A]Before concluding, it should be noted that respondents argue, as an alternative basis to sustain the Court **[****34]** of Appeals' judgment, that the Los Angeles ordinance is not a typical zoning regulation. Rather, respondents explain, the prohibition on multiuse adult establishments is effectively a ban on adult video arcades because no such business exists independently of an adult bookstore. Brief for Respondents 12-13. Respondents request that the Court hold that the Los Angeles ordinance is not a time, place, and manner regulation, and that the Court subject the ordinance to strict scrutiny. This also appears to be the theme of JUSTICE KENNEDY's concurrence. He contends that "[a] city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Post,* at 7 (opinion concurring in judgment). We consider that unobjectionable proposition as simply a reformulation of the requirement that an ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban. The Court of Appeals held, however, that the city's prohibition on the combination of adult bookstores and arcades is not a ban and respondents did not petition for review of that determination.

Accordingly, we reverse the Court of Appeals' judgment granting summary **[****35]** judgment to respondents and remand the case for further proceedings.

It is so ordered.

CONCURBY: SCALIA; KENNEDY

CONCUR: JUSTICE SCALIA, concurring.

I join the plurality opinion because I think it represents a correct application of our jurisprudence concerning regulation of the "secondary effects" of pornographic speech. As I have said elsewhere, however, in a case such as this our First Amendment **[**1739]** traditions make "secondary effects" analysis quite unnecessary. The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering **[*444]** sex. See, *e.g., Erie v. Pap's A. M., 529 U.S. 277, 310, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000)* (SCALIA, J., concurring in judgment); *FW/PBS, Inc. v. Dallas, 493 U.S. 215, 256-261, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990)* (SCALIA, J., concurring in part and dissenting in part).

JUSTICE KENNEDY, concurring in the judgment.

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[*LEdHR1F]** [1F]Speech can produce tangible consequences: It can change minds. It can prompt actions. These primary effects signify the power and the necessity of free speech. Speech can also cause secondary effects, **[****36]** however, unrelated to the impact of the speech on its audience. A newspaper factory may cause pollution, and a billboard may obstruct a view. These secondary consequences are not always immune from regulation by zoning laws even though they are produced by speech.

Municipal governments know that high concentrations of adult businesses can damage the value and the integrity of a neighborhood. The damage is measurable; it is all too **[***687]** real. The law does not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing. speech. A city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young v. American Mini Theatres, Inc., 427 U.S. 50, 71, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976)* (plurality opinion).

The question in this case is whether Los Angeles can seek to reduce these tangible, adverse consequences by separating adult speech businesses from one another--even two businesses that have always been under the same roof. In my view our precedents may allow the city to impose its regulation in the exercise of the zoning impose its regulation in **[****37]** the exercise of the zoning authority. The city is not, at least, to be foreclosed by summary judgment, so I concur in the judgment.

This separate statement seems to me necessary, however, for two reasons. First, *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986),* described a similar ordinance as "content neutral," and I agree with the dissent that the designation **[*445]** is imprecise. Second, in my view, the plurality's application of *Renton* might constitute a subtle expansion, with which I do not concur.

I

In *Renton,* the Court determined that while the material inside adult bookstores and movie theaters is speech, the consequent sordidness outside is not. The challenge is to correct the latter while leaving the former, as far as possible, untouched. If a city can decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of the speech substantially undiminished, there is no First Amendment objection. This is so even if the measure identifies the problem outside by reference to the speech inside--that is, even if the **[****38]** measure is in that sense content based.

On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. A city may not, for example, impose a content-based fee or tax. See *Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230, 95 L. Ed. 2d 209, 107 S. Ct. 1722 (1987)* ("Official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press"). This is true even if the government purports to justify the fee by reference to secondary effects. See *Forsyth County v. Nationalist Movement, 505 U.S. 123, 134-135, 120 L. Ed. 2d 101, 112 S. Ct. 2395 (1992).* Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible **[**1740]** strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech.

A zoning measure can be consistent with the First Amendment if it is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech. It is well documented **[****39]** that multiple adult businesses in close proximity may change the character of a neighborhood **[*446]** for the worse. Those same businesses spread across the city may not have the same deleterious effects. At least in theory, a dispersal ordinance causes these businesses to separate rather than **[***688]** to close, so negative externalities are diminished but speech is not.

The calculus is a familiar one to city planners, for many enterprises other than adult businesses also cause undesirable externalities. Factories, for example, may cause pollution, so a city may seek to reduce the cost of that externality by restricting factories to areas far from residential neighborhoods. With careful urban planning a city in this way may reduce the costs of pollution for communities, while at the same time allowing the productive work of the factories to continue. The challenge is to protect the. activity inside while controlling side effects outside.

Such an ordinance might, like a speech restriction, be "content based." It might, for example, single out slaughterhouses for specific zoning treatment, restricting them to a particularly remote part of town. Without knowing more, however, one would hardly presume **[****40]** that because the ordinance is specific to that business, the city seeks to discriminate against it or help a favored group. One would presume, rather, that the ordinance targets not the business but its particular noxious side effects. But. cf. *Slaughter-House Cases, 83 U.S. 36, 16 Wall. 36, 21 L. Ed. 394*

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(1873). The business might well be the city's most valued enterprise; nevertheless, because of the pollution it causes, it may warrant special zoning treatment. This sort of singling out is not impermissible content discrimination; it is sensible urban planning. Cf. *Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388, 71 L. Ed. 303, 47 S. Ct. 114, 4 Ohio Law Abs. 816 (1926)* ("A nuisance may be merely a right thing in the wrong place,--like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

[*447] True, the First Amendment protects speech and not slaughterhouses. But in both contexts, the inference of impermissible discrimination is not- strong. An equally - strong inference is that the ordinance is targeted not at the activity, **[****41]** but at its side effects. If a zoning ordinance is directed to the secondary effects of adult speech, the ordinance does not necessarily constitute impermissible content discrimination. A zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it.

The ordinance at issue in this case is not limited to expressive activities. It also extends, for example, to massage parlors, which the city has found to cause similar secondary effects. See Los Angeles Municipal Code §§ 12.70(B)(8) (1978), 12.70(B)(17) (1983), 1270(C) (1986), as amended. This ordinance, moreover, is just one part of an elaborate web of land-use regulations in Los Angeles, all of which are intended to promote the social value of the land as a whole without suppressing some activities or favoring others. See § 12.02 ("The purpose of this article is to consolidate and coordinate all existing zoning regulations and provisions into one comprehensive zoning plan . . . in order to encourage the most appropriate use of land . . . and to promote the health, safety, and the general welfare . . ."). All this further suggests that the ordinance is more in the nature **[****42]** of a typical land-use restriction and less in the nature of a law suppressing speech.

[1741]** For these reasons, the ordinance is **[***689]** not so suspect that we must employ the usual rigorous analysis that content based laws demand in other instances. The ordinance may be a covert attack on speech, but we should not presume it to be so. In the language of our First Amendment doctrine it calls for intermediate and not strict scrutiny, as we held in *Renton*.

[*448] II

In *Renton*, the Court began by noting that a zoning ordinance is a time, place, or manner restriction. The Court then proceeded to consider the question whether the ordinance was "content based." The ordinance "by its terms [was] designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life, not to suppress the expression of unpopular views." *475 U.S. at 48* (internal quotation marks omitted). On this premise, the Court designated the restriction "content neutral." *Ibid.*

The Court appeared to recognize, however, that the designation was something of **[****43]** a fiction, which, perhaps, is why it kept the phrase in quotes. After all, whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based. And the ordinance in *Renton* "treat[ed] theaters that specialize in adult films differently from other kinds of theaters." *Id., at 47*. The fiction that this sort of ordinance is content neutral--or "content neutral"--is perhaps more confusing than helpful, as JUSTICE SOUTER demonstrates, see *post*, at 4 (dissenting opinion). It is also not a fiction that has commanded our consistent adherence. See *Thomas v. Chicago Park Dist., 534 U.S. 316, 322, 151 L. Ed. 2d 783, 122 S. Ct. 775, and n. 2* (2002) (suggesting that a licensing scheme targeting only those businesses purveying sexually explicit speech is not content neutral). These ordinances are content based and we should call them so.

Nevertheless, for the reasons discussed above, the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate **[****44]** rather than strict scrutiny. Generally, the government has no power to restrict speech based on content, but there are exceptions to the rule. See *Simon & Schuster, Inc. v. Members of N. Y. State Crime* **[*449]** *Victims Bd., 502 U.S. 105, 126-127, 116 L. Ed. 2d 476, 112 S. Ct. 501 (1991)* (KENNEDY, J., concurring in judgment). And zoning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use. As a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers. The zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are

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unconstitutional. For this reason, we apply intermediate rather than strict scrutiny.

[*690]** III

[*LEdHR1G]** [1G] **[***LEdHR2B]** [2B]The narrow question presented in this case is whether the ordinance at issue is invalid "because the city did not study the negative effects of such combinations of adult businesses, but rather relied on judicially approved statutory precedent **[****45]** from other jurisdictions." Pet. for Cert. i. This question is actually two questions. First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition? The plurality skips to the second question and gives the correct answer; but in my view more attention must be given to the first.

[1742]** At the outset, we must identify the claim a city must make in order to justify a content-based zoning ordinance. As discussed above, a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with JUSTICE SOUTER. See *post,* at 5. The rationale of **[*450]** the ordinance must be that it will suppress secondary effects--and not by suppressing speech.

[*LEdHR1H]** [1H]The plurality's statement of the proposition to be supported is **[****46]** somewhat different. It suggests that Los Angeles could reason as follows: (1) "a concentration of operations in one locale draws . . . a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity"; (2) "having a number of adult operations in one single adult establishment draws the same dense foot traffic as having a number of distinct adult establishments in close proximity"; (3) "reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates." *Ante,* at 8-9.

These propositions all seem reasonable, and the inferences required to get from one to the next are sensible. Nevertheless, this syllogism fails to capture an important part of the inquiry. The plurality's analysis does not address how speech will fare under the city's ordinance. As discussed, the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience **[****47]** will reduce demand and fewer patrons will lead to fewer secondary effects. This reasoning would as easily justify a content-based tax: Increased prices will reduce demand, and fewer customers will mean fewer secondary effects. But a content-based tax may not be justified in this manner. See *Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 95 L. Ed. 2d 209, 107 S. Ct. 1722 (1987); Forsyth County v. Nationalist Movement, 505 U.S. 123, 120 L. Ed. 2d 101, 112 S. Ct. 2395 (1992).* It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech.

[*691]** The analysis requires a few more steps. If two adult businesses are under the same roof, an ordinance requiring them **[*451]** to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. It is true that cutting adult speech in half would probably reduce secondary effects proportionately. But again, a promised proportional reduction does not suffice. Content-based taxes could achieve that, yet these are impermissible.

The premise, therefore, must **[****48]** be that businesses--even those that have always been under one roof--will for the most part disperse rather than shut down. True, this premise has its own conundrum. As JUSTICE SOUTER writes, "the city. . . claims no interest in the proliferation of adult businesses." *Post,* at 9. The claim, therefore, must be that this ordinance will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced. This must be the rationale of a dispersal statute.

Only after identifying the proposition to be proved can we ask the second part of the question presented: is there sufficient evidence to support the proposition? As to this, we have consistently held that a city must have latitude to experiment, at **[**1743]** least at the outset, and that very little evidence is required. See, *e.g., Renton, 475 U.S. at 51-52* ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably **[****49]** believed to be relevant to the problem that the city addresses"); *Young, 427 U.S. at*

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71 ("The city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems"); *Erie v. Pap's A. M., 529 U.S. 277, 300-301, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000)* (plurality opinion). As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. See *Renton, supra, at 51-52.* The Los Angeles City Council **[*452]** knows the streets of Los Angeles better than we do. See *Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 665-666, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994); Erie, supra, at 297-298* (plurality opinion). It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion.

In this case the proposition to be shown is supported by a single study and common experience. The city's study shows a correlation between the concentration of adult establishments and crime. Two or more adult businesses in close proximity seem to attract a **[****50]** critical mass of unsavory characters and the crime rate may increase as a result. The city, therefore, sought to disperse these businesses. Los Angeles Municipal Code § 12.70(C) (1983), as amended. This original ordinance is not challenged here, and we may assume that it is constitutional.

If we assume that the study supports the original ordinance, then most of the necessary analysis follows. We may posit that two adult **[***692]** stores next door to each other attract 100 patrons per day. The two businesses split apart might attract 49 patrons each. (Two patrons, perhaps, will be discouraged by the inconvenience of the separation--a relatively small cost to speech.) On the other hand, the reduction in secondary effects might be dramatic, because secondary effects may require a critical mass. Depending on the economics of vice, 100 potential customers/victims might attract a coterie of thieves, prostitutes, and other ne'er-do-wells; yet 49 might attract none at all. If so, a dispersal ordinance would cause a great reduction in secondary effects at very small cost to speech. Indeed, the very absence of secondary effects might increase the audience for the speech; perhaps for every two people **[****51]** who are discouraged by the inconvenience of two-stop shopping, another two are encouraged by hospitable surroundings. In that case, secondary effects might be eliminated at no cost to **[*453]** speech whatsoever, and both the city and the speaker will have their interests well served.

Only one small step remains to justify the ordinance at issue in this case. The city may next infer--from its study and from its own experience--that two adult businesses under the same roof are no better than two next door. The city could reach the reasonable conclusion that knocking down the wall between two adult businesses does not ameliorate any undesirable secondary effects of their proximity to one another. If the city's first ordinance was justified, therefore, then the second is too. Dispersing two adult businesses under one roof is reasonably likely to cause a substantial reduction in secondary effects while reducing speech very little.

IV

[*LEdHR1I]** [1I]These propositions are well established in common experience and in zoning policies that we have already examined, and for these reasons this ordinance is not invalid on its face. If these assumptions **[**1744]** can be proved unsound at trial, then the ordinance **[****52]** might not withstand intermediate scrutiny. The ordinance does, however, survive the summary judgment motion that the Court of Appeals ordered granted in this case.

DISSENTBY: SOUTER

DISSENT: JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, and with whom JUSTICE BREYER joins as to Part II, dissenting.

In 1977, the city of Los Angeles studied sections of the city with high and low concentrations of adult business establishments catering to the market for the erotic. The city found no certain correlation between the location of those establishments and depressed property values, but it did find some correlation between areas of higher concentrations of such business and higher crime rates. On that basis, Los Angeles followed the examples of other cities in adopting a zoning ordinance requiring dispersion of adult **[*454]** establishments. I assume that the ordinance was constitutional when adopted, see, *e.g., Young v. American Mini Theatres, Inc., 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976),* and assume for purposes of this case that the original ordinance remains valid today. n1

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n1 Although *amicus* First Amendment Lawyers Association argues that recent studies refute the findings of adult business correlations with secondary effects sufficient to justify such an ordinance, Brief for First Amendment Lawyers

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Association as *Amicus Curiae* 21-23, the issue is one I do not reach.

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[**53]**

The city subsequently amended its ordinance to forbid clusters of such **[***693]** businesses at one address, as in a mall. The city has, in turn, taken a third step to apply this amendment to prohibit even a single proprietor from doing business in a traditional way that combines an adult bookstore, selling books, magazines, and videos, with an adult arcade, consisting of open viewing booths, where potential purchasers of videos can view them for a fee.

From a policy of dispersing adult establishments, the city has thus moved to a policy of dividing them in two. The justification claimed for this application of the new policy remains, however, the 1977 survey, as supplemented by the authority of one decided case on regulating adult arcades in another State. The case authority is not on point, see *infra,* at 9, n. 4, and the 1977 survey provides no support for the breakup policy. Its evidentiary insufficiency bears emphasis and is the principal reason that I respectfully dissent from the Court's judgment today.

I

This ordinance stands or falls on the results of what our cases speak of as intermediate scrutiny, generally contrasted with the demanding standard applied under the First Amendment **[****54]** to a content-based regulation of expression. The variants of middle-tier tests cover a grab-bag of restrictive, statutes, with a corresponding variety of justifications. **[*455]** While spoken of as content neutral, these regulations are not uniformly distinct from the content-based regulations calling for scrutiny that is strict, and zoning of businesses based on their sales of expressive adult material receives mid-level scrutiny, even though it raises a risk of content-based restriction. It is worth being clear, then, on how close to a content basis adult business zoning can get, and why the application of a middle-tier standard to zoning regulation of adult bookstores calls for particular care.

Because content-based regulation applies to expression by very reason of what is said, it carries a high risk that expressive limits are imposed for the sake of suppressing a message that is disagreeable to listeners or readers, or the government. See *Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y., 447 U.S. 530, 536, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980)* ("When regulation is based on the content of speech, governmental action must be scrutinized more carefully **[****55]** to ensure **[**1745]** that communication has not been prohibited merely because public officials disapprove the speaker's views" (internal quotation marks omitted)). A restriction based on content survives only on a showing of necessity to serve a legitimate and compelling governmental interest, combined with least-restrictive narrow tailoring to serve it, see *United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813, 146 L. Ed. 2d 865, 120 S. Ct. 1878 (2000);* since merely protecting listeners from offense at the message is not a legitimate interest of the government, see *Cohen v. California, 403 U.S. 15, 24-25, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971),* strict scrutiny leaves few survivors.

The comparatively softer intermediate scrutiny is reserved for regulations justified by something other **[***694]** than content of the message, such as a straightforward restriction going only to the time; place, or manner of speech or other expression. It is easy to see why review of such a regulation may be relatively relaxed. No one has to disagree with any message to find something wrong with a loudspeaker at three in the morning, see *Kovacs v. Cooper, 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448* **[*456]** *(1949);* **[****56]** the sentiment may not provoke, but being blasted out of a sound sleep does. In such a case, we ask simply whether the regulation is narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984).* A middle-tier standard is also applied to limits on expression through action that is otherwise subject to regulation for nonexpressive purposes, the best known example being the prohibition on destroying draft cards as an act of protest, *United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968);* here a regulation passes muster "if it furthers an important or substantial govemmental interest ... unrelated to the suppression of free expression" by a restriction "no greater than is essential to the furtherance of that interest." *Id., at 377.* As mentioned already, yet another middle-tier variety is zoning restriction as a means of responding to the "secondary effects" of adult businesses, principally crime and declining **[****57]** property values in the neighborhood. *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).* n2

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n2 Limiting such effects qualifies as a substantial governmental interest, and an ordinance has been said to survive if it is shown to serve such ends without unreasonably limiting alternatives. *Renton, 475 US. at 50.* Because *Renton* called its secondary-effects ordinance a mere time, place, or manner restriction and thereby glossed over the role of content in secondary-effects zoning, see *infra* this page, I believe the soft focus of its statement of the middle-tier test should be rejected in favor of the *United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968),* formulation quoted above. *O'Brien* is a closer relative of secondary-effects zoning than mere time, place, or manner regulations, as the Court has implicitly recognized. *Erie v. Pap's A. M., 529 U.S. 277, 289, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000).*

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[**58]**

Although this type of land-use restriction has even been called a variety of time, place, or manner regulation, *id.,* at 46, equating a secondary-effects zoning regulation with a mere regulation of time, place, or manner jumps over an important difference between them. A restriction on loudspeakers has no obvious relationship to the substance of **[*457]** what is broadcast, while a zoning regulation of businesses in adult expression just as obviously does. And while it may be true that an adult business is burdened only because of its secondary effects, it is clearly burdened only if its expressive products have adult content. Thus, the Court has recognized that this kind of regulation, though called content neutral, occupies a kind of limbo between full-blown, content-based restrictions and regulations that apply without any reference to the substance of what is said. *Id.,* at 47.

[1746]** It would in fact make sense to give this kind of zoning regulation a First Amendment label of its own, and if we called it content correlated, we would not only describe it for what it **[***695]** is, but keep alert to a risk of content-based regulation that it poses. The risk lies in the fact that when a **[****59]** law applies selectively only to speech of particular content, the more precisely the content is identified, the greater is the opportunity for government censorship. Adult speech refers not merely to sexually explicit content, but to speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts; a restriction on adult content is thus also a restriction turning on a particular viewpoint, of which the government may disapprove.

This risk of viewpoint discrimination is subject to a relatively simple safeguard, however. If combating secondary effects of property devaluation and crime is truly the reason for the regulation, it is possible to show by empirical evidence that the effects exist, that they are caused by the expressive activity subject to the zoning, and that the zoning can be expected either to ameliorate them or to enhance the capacity of the government to combat them (say, by concentrating them in one area), without suppressing the expressive activity itself. This capacity of zoning regulation to address the practical problems without eliminating the speech is, after all, the only possible excuse for speaking of secondary-effects **[****60]** zoning as akin to time, place, or manner regulations.

[*458] In examining claims that there are causal relationships between adult businesses and an increase in secondary effects (distinct from disagreement), and between zoning and the mitigation of the effects, stress needs to be placed on the empirical character of the demonstration available. See *Metromedia, Inc. v. San Diego, 453 U.S. 490, 510, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981)* ("Judgments ... defying objective evaluation ... must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose"); *Young, 427 U.S. at 84* (Powell, J., concurring) ("Courts must be alert ... to the possibility of using the power to zone as a pretext for suppressing expression"). The weaker the demonstration of facts distinct from disapproval of the "adult" viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation. n3

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n3 Regulation of commercial speech, which is like secondary-effects zoning in being subject to an intermediate level of First Amendment scrutiny, see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y., 447 U.S. 557, 569, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980),* provides an instructive parallel in the cases enforcing an evidentiary requirement to ensure that an asserted rationale does not cloak an illegitimate governmental motive. See, *e.g., Rubin v. Coors Brewing Co., 514 U.S. 476, 487, 131 L. Ed. 2d 532, 115 S. Ct. 1585 (1995); Edenfield v. Fane, 507*

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U.S. 761, 123 L. Ed. 2d 543, 113 S. Ct. 1792 (1993). The government's "burden is not satisfied by mere speculation or conjecture," but only by "demonstrat[ing] that the harms [the government] recites are real and that its restriction will in fact alleviate them to a material degree." *Id., at 770-771*. For unless this "critical" requirement is met, *Rubin, supra, at 487*, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression," *Edenfield, supra, at 771*.

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[**61]**

Equal stress should be placed on the point that requiring empirical justification of claims about property value or crime is not demanding anything Herculean. Increased crime, like prostitution and muggings, and declining property values **[***696]** in areas surrounding adult businesses, are all readily observable, often to the untrained eye and certainly to the police officer and urban planner. These harms can be shown by police reports, crime statistics, and studies of market **[*459]** value, all of which are within a municipality's capacity or available from the distilled experiences of comparable communities. See, *e.g., Renton,* **[**1747]** *supra,* at 51; *Young, supra, at 55*.

And precisely because this sort of evidence is readily available, reviewing courts need to be wary when the government appeals, not to evidence, but to an uncritical common sense in an effort to justify such a zoning restriction. It is not that common sense is always illegitimate in First Amendment demonstration. The need for independent proof varies with the point that has to be established, and zoning can be supported by common experience when there is no reason to question it. We have appealed to common **[****62]** sense in analogous cases, even if we have disagreed about how far it took us. See *Erie v. Pap's A. M., 529 U.S. 277, 300-301, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000)* (plurality opinion); *id., at 313, and n. 2* (SOUTER, J., concurring in part and dissenting in part). But we must be careful about substituting common assumptions for evidence, when the evidence is as readily available as public statistics and municipal property valuations, lest we find out when the evidence is gathered that the assumptions are highly debatable. The record in this very case makes the point. It has become a common-place, based on our own cases, that concentrating adult establishments drives down the value of neighboring property used for other purposes. See *Renton, 475 U.S. at 51; Young, 427 U.S. at 55*. In fact, however, the city found that general assumption unjustified by its 1977 study. App. 39, 45.

The lesson is that the lesser scrutiny applied to content-correlated zoning restrictions is no excuse for a government's failure to provide a factual demonstration for claims it makes about secondary effects; on the contrary, this is **[****63]** what demands the demonstration. See, *e.g., Schad v. Mount Ephraim, 452 U.S. 61, 72-74, 68 L. Ed. 2d 671, 101 S. Ct. 2176 (1981)*. In this case, however, the government has not shown that bookstores containing viewing booths, isolated from other adult establishments, increase **[*460]** crime or produce other negative secondary effects in surrounding neighborhoods, and we are thus left without substantial justification for viewing the city's First Amendment restriction as content correlated but not simply content based. By the same token, the city has failed to show any causal relationship between the breakup policy and elimination or regulation of secondary effects.

II

Our cases on the subject have referred to studies, undertaken with varying degrees of formality, showing the geographical correlations between the presence or concentration of adult business establishments and enhanced crime rates or depressed property values. See, *e.g., Renton, sup ra,* at 50-51; *Young, supra, at 55*. Although we **[***697]** have held that intermediate scrutiny of secondary-effects legislation does not demand a fresh evidentiary study of its factual basis if the published results **[****64]** of investigations elsewhere are "reasonably" thought to be applicable in a different municipal setting, *Renton, supra, at 51-52,* the city here took responsibility to make its own enquiry. App. 35-162. As already mentioned, the study was inconclusive as to any correlation between adult business and lower property values, *id., at 45,* and it reported no association between higher crime rates and any isolated adult establishments. But it did find a geographical correlation of higher concentrations of adult establishments with higher crime rates, *id., at 43,* and with this study in hand, Los Angeles enacted its 1978 ordinance requiring dispersion of adult stores and theaters. This original position of the ordinance is not challenged today, and I will assume its justification on the theory accepted in *Young,* that eliminating concentrations of adult establishments will spread out the documented secondary effects and render them more manageable that way.

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[1748]** The application of the 1983 amendment now before us is, however, a different matter. My concern is not with the **[*461]** assumption behind the amendment itself, that a conglomeration **[****65]** of adult businesses under one roof, as in a minimall or adult department store, will produce undesirable secondary effects comparable to what a cluster of separate adult establishments brings about, *ante,* at 8. That may or may not be so. The assumption that is clearly unsupported, however, goes to the city's supposed interest in applying the amendment to the book and video stores in question, and in applying it to break them up. The city, of course, claims no interest in the proliferation of adult establishments, the ostensible consequence of splitting the sales and viewing activities so as to produce two stores where once there was one. Nor does the city assert any interest in limiting the sale of adult expressive material as such, or reducing the number of adult video booths in the city, for that would be clear content-based regulation, and the city was careful in its 1977 report to disclaim any such intent. App. 54. n4

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n4 Finally, the city does not assert an interest in curbing any secondary effects within the combined bookstore-arcades. In *Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (1979),* the Fourth Circuit upheld a similar ban in North Carolina, relying in part on a county health department report on the results of an inspection of several of the combined adult bookstore-video arcades in Wake County, North Carolina. *Id., at 828-829, n. 9.* The inspection revealed unsanitary conditions and evidence of salacious activities taking place within the video cubicles. *Ibid.* The city introduces this case to defend its breakup policy although it is not clear from the opinion how separating these video arcades from the adult bookstores would deter the activities that took place within them. In any event, while *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986),* allowed a city to rely on the experiences and studies of other cities, it did not dispense with the requirement that "whatever evidence the city relies upon [be] reasonably believed to be relevant to the problem that the city addresses," *id., at 51-52,* and the evidence relied upon by the Fourth Circuit is certainly not necessarily relevant to the Los Angeles ordinance. Since November 1977, five years before the enactment of the ordinance at issue, Los Angeles has regulated adult video booths, prohibiting doors, setting minimum levels of lighting, and requiring that their interiors be fully visible from the entrance to the premises. Los Angeles Municipal Code §§ 103.101(i), (j). Thus, it seems less likely that the unsanitary conditions identified in *Hart Book Stores* would exist in video arcades in Los Angeles, and the city has suggested no evidence that they do. For that reason, *Hart Book Stores* gives no indication of a substantial governmental interest that the ban on multiuse adult establishments would further.

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[**66]** **[*462]**

Rather, the city apparently assumes **[***698]** that a bookstore selling videos and providing viewing booths produces secondary effects of crime, and more crime than would result from having a single store without booths in one part of town and a video arcade in another. n5 But the city neither says this in so many words nor proffers any evidence to support even the simple proposition that an otherwise lawfully located adult bookstore combined with video booths will produce any criminal effects. The Los Angeles study treats such combined stores as one, see *id., at 81-82,* and draws no general conclusion that individual stores spread apart from other adult establishments (as under the basic Los Angeles ordinance) are associated with any degree of criminal activity above the general norm; nor has the city called the Court's attention to any other empirical study, or even anecdotal police evidence, that supports the city's assumption. In fact, if the Los Angeles study sheds any light whatever on the city's position, it is the light of skepticism, for we may fairly suspect that the study said nothing about the secondary effects of **[**1749]** freestanding stores because no effects **[****67]** were observed. The reasonable supposition, then, is that 'splitting some of them up will have no consequence for secondary effects whatever. n6

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n5 The plurality indulges the city's assumption but goes no further to justify it than stating what is obvious from what the city's study says about concentrations of

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the stand-alone video store will go out of business. (Of course, the bookstore owner could, consistently with the ordinance, continue to operate video booths at no charge, but if this were always commercially feasible then the city would face the separate problem that under no theory could a rule simply requiring that video booths be operated for free be said to reduce secondary effects.)

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[**70]**

[1750]** Nor is the plurality's position bolstered, as it seems to think, *ante,* at 11, by relying on the statement in *Renton,* that courts should allow cities a "'reasonable opportunity to experiment with solutions to admittedly serious problems,'" *475 U.S. at 52.* The plurality overlooks a key distinction between the zoning regulations at issue in *Renton* and **[*465]** *Young* (and in Los Angeles as of 1978), and this new Los Angeles breakup requirement. In those two cases, the municipalities' substantial interest for purposes of intermediate scrutiny was an interest in choosing between two strategies to deal with crime or property value, each strategy tied to the businesses' location, which had been shown to have a causal connection with the secondary effects: the municipality could either concentrate businesses for a concentrated regulatory strategy, or disperse them in order to spread out its regulatory efforts. The limitations on location required no further support than the factual basis tying location to secondary effects; the zoning approved in those two cases had no effect on the way the owners of the **[***700]** stores carried on their adult businesses beyond controlling **[****71]** location, and no heavier burden than the location limit was approved by this Court.

The Los Angeles ordinance, however, does impose a heavier burden, and one lacking any demonstrable connection to the interest in crime control. The city no longer accepts businesses as their owners choose to conduct them within their own four walls, but bars a video arcade in a bookstore, a combination shown by the record to be commercially natural, if not universal. App. 47-51, 229-230, 242. Whereas *Young* and *Renton* gave cities the choice between two strategies when each was causally related to the city's interest, the plurality today gives Los Angeles a right to "experiment" with a First Amendment restriction in response to a problem of increased crime that the city has never even shown to be associated with combined bookstore-arcades standing alone. But the government's freedom of experimentation cannot displace its burden under the intermediate scrutiny standard to show that the restriction on speech is no greater than essential to realizing an important objective, in this case policing crime. Since we cannot make even a best guess that the city's breakup policy will have any effect on **[****72]** crime **[*466]** or law enforcement, we are a very far cry from any assurance against covert content-based regulation. n9

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n9 The plurality's assumption that the city's "motive" in applying secondary-effects zoning can be entirely compartmentalized from the proffer of evidence required to justify the zoning scheme, *ante,* at 13, is indulgent to an unrealistic degree, as the record in this case shows. When the original dispersion ordinance was enacted in 1978, the city's study showing a correlation between concentrations of adult business and higher crime rates showed that the dispersal of adult businesses was causally related to the city's law enforcement interest, and that in turn was a fair indication that the city's concern was with the secondary effect of higher crime rates. When, however, the city takes the further step of breaking up businesses with no showing that a traditionally combined business has any association with a higher crime rate that could be affected by the breakup, there is no indication that the breakup policy addresses a secondary effect, but there is reason to doubt that secondary effects are the city's concern. The plurality seems to ask us to shut our eyes to the city's failings by emphasizing that this case is merely at the stage of summary judgment, *ante,* at 11, but ignores the fact that at this summary judgment stage the city has made it plain that it relies on no evidence beyond the 1977 study, which provides no support for the city's action.

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[**73]**

And concern with content-based regulation targeting a viewpoint is right to the point here, as witness a fact that involves no guesswork. If we take the city's

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adult establishments (but not isolated ones): the presence of several adult businesses in one neighborhood draws "a greater concentration of adult consumers to the neighborhood, [which] either attracts or generates criminal activity." *Ante,* at 8.

n6 *Renton,* the Court approved a zoning ordinance "aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood." *475 U.S. at 50.* The city, however, does not appeal to that decision to show that combined bookstore-arcades isolated from other adult establishments, like the theaters in *Renton,* give rise to negative secondary effects, perhaps recognizing that such a finding would only call into doubt the sensibility of the city's decision to proliferate such businesses. See *ante,* at 10. Although the question may be open whether a city can rely on the experiences of other cities when they contradict its own studies, that question is not implicated here, as Los Angeles relies exclusively on its own study, which is tellingly silent on the question whether isolated adult establishments have any bearing on criminal activity.

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[**68]** **[*463]**

The inescapable point is that the city does not even claim that the 1977 study provides any support for its assumption. We have previously accepted studies, like the city's own study here, as showing a causal connection between concentrations of adult business and identified secondary effects. n7 Since that is an acceptable basis for requiring adult businesses to disperse when they are housed in separate premises, there is certainly a relevant argument to be made that restricting their concentration at one spacious address should have some effect on sales, traffic, and effects in the neighborhood. But even if that argument may justify a ban on adult "minimalls," *ante,* at 8, it provides no support for what the city **[***699]** proposes to do here. The bookstores involved here are not concentrations of traditionally separate adult businesses that have been studied and shown to have an association with secondary effects, and they exemplify no new form of concentration like a mall under one roof. They are combinations of selling and viewing activities that have commonly been combined, and the plurality itself recognizes, *ante,* at 10, that no study conducted by the city has reported that this **[****69]** type of traditional business, any more than any other adult business, has a correlation with secondary effects **[*464]** in the absence of concentration with other adult establishments in the neighborhood. And even if splitting viewing booths from the bookstores that continue to sell videos were to turn some customers away (or send them in search of video arcades in other neighborhoods), it is nothing but speculation to think that marginally lower traffic to one store would have any measurable effect on the neighborhood, let alone an effect on associated crime that has never been shown to exist in the first place. n8

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n7 As already noted, n. 1, *supra, amicus* First Amendment Lawyers Association argues that more recent studies show no such thing, but this case involves no such challenge to the previously accepted causal connection.

n8 JUSTICE KENNEDY would indulge the city in this speculation, so long as it could show that the ordinance will "leave the quantity and accessibility of speech substantially intact." *Ante,* at 7 (opinion concurring in judgment). But the suggestion that the speculated consequences may justify content-correlated regulation if speech is only slightly burdened turns intermediate scrutiny on its head. Although the goal of intermediate scrutiny is to filter out laws that unduly burden speech, this is achieved by examining the asserted governmental interest, not the burden on speech, which must simply be no greater than necessary to further that interest. *Pap's A. M., 529 U.S. at 301;* see also n. 2, *supra.* Nor has JUSTICE KENNEDY even shown that this ordinance leaves speech "substantially intact." He posits an example in which two adult stores draw 100 customers, and each business operating separately draws 49. *Ante,* at 9. It does not follow, however, that a combined bookstore-arcade that draws 100 customers, when split, will yield a bookstore and arcade that together draw nearly that many customers. Given the now double outlays required to operate the businesses at different locations, see *infra,* at 15, the far more likely outcome is that

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breakup policy at its face, enforcing it will mean that in every case two establishments will operate instead of the traditional one. Since the city presumably does not wish **[**1751]** merely to multiply adult establishments, it makes sense to ask what offsetting gain the city may obtain from its new breakup policy. The answer may lie in the fact that two establishments in place of one will entail two business overheads in place of one: two monthly rents, two electricity bills, two payrolls. Every month business will be more expensive than it used to be, perhaps even twice as much. That sounds like a good strategy for driving out expressive adult businesses. It sounds, in other words, like a policy of content-based regulation.

I respectfully dissent.

REFERENCES:
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16A Am Jur 2d, Constitutional Law 520; *50 Am Jur 2d, Lewdness, Indecency, and Obscenity 20, 21, 24*; *83 Am Jur 2d, Zoning and Planning 463-465*

USCS, Constitution, Amendment 1

L Ed Digest, Constitutional Law 961; Summary **[****74]** Judgment and Judgment on Pleadings 5

L Ed Index, Adult or X-Rated Businesses or Movies

Annotation References:

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Citation #3
529 U.S. 277

529 U.S. 277; 120 S. Ct. 1382; 146 L. Ed. 2d 265; 2000 U.S. LEXIS 2347; 68 U.S.L.W. 4239; 28 Media L. Rep. 1545; 2000 Cal. Daily Op. Service 2443; 2000 Daily Journal DAR 3255; 2000 Colo. J. C.A.R. 1618; 13 Fla. L. Weekly Fed. S 203

CITY OF ERIE, ET AL. v. PAP'S A. M., TDBA "KANDYLAND"

No. 98-1161

SUPREME COURT OF THE UNITED STATES

529 U.S. 277; 120 S. Ct. 1382; 146 L. Ed. 2d 265; 2000 U.S. LEXIS 2347; 68 U.S.L.W. 4239; 28 Media L. Rep. 1545; 2000 Cal. Daily Op. Service 2443; 2000 Daily Journal DAR 3255; 2000 Colo. J. C.A.R. 1618; 13 Fla. L. Weekly Fed. S 203

November 10, 1999, Argued
March 29, 2000, Decided

PRIOR HISTORY: [****1] ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT.

DISPOSITION: *553 Pa. 348, 719 A. 2d 273,* reversed and remanded.

DECISION: Pennsylvania city's public indecency ordinance, as applied to prohibit nude dancing, held not to violate free expression guarantee of Federal Constitution's First Amendment.

SUMMARY: The city of Erie, Pennsylvania enacted a public indecency ordinance that prohibited knowingly or intentionally appearing in public in a "state of nudity." In order to comply with this ordinance, dancers at an Erie establishment--that featured female nude dancing--had to wear, at a minimum, "pasties" and a "G-string." Two days after the ordinance went into effect, the corporation which operated the nude dancing establishment (1) filed a complaint against the city of Erie, the mayor of the city, and members of the city council, and (2) sought declaratory relief and a permanent injunction against the enforcement of the ordinance. The Court of Common Pleas of Erie County (1) granted the permanent injunction, and (2) struck down the ordinance as unconstitutional. On cross appeals, the Commonwealth Court reversed the trial court's order *(674 A2d 338).* The Pennsylvania Supreme Court granted review and reversed, reasoning that (1) the ordinance's public nudity provisions violated the corporation's right to freedom of expression as protected by the Federal Constitution's First and Fourteenth Amendments, (2) nude dancing was expressive conduct entitled to some quantum of protection under the First Amendment, (3) the ordinance was content based and subject to strict scrutiny, and (4) the ordinance failed the narrow tailoring requirement of strict scrutiny *(553 Pa 348, 719 A2d 273).* After the United States Supreme Court granted certiorari *(526 US 1111, 143 L Ed 2d 786, 119 S Ct 1753),* the corporation filed a motion to dismiss the case as moot, noting that (1) the establishment no longer operated as a nude dancing club, and (2) the corporation was not operating such a club at any other location. The Supreme Court denied the motion *(527 US 1034, 144 L Ed 2d 792, 119 S Ct 2391).*

On certiorari, the Supreme Court reversed and remanded. In those portions of the opinion of O'Connor, J., which constituted the opinion of the court and were joined by Rehnquist, Ch. J., and Kennedy, Souter, and Breyer, JJ., it was held that the case at hand had not been rendered moot, where (1) the corporation was still incorporated under state law, (2) the corporation had not mentioned a potential mootness issue in the corporation's brief in opposition to the city's petition for a writ of certiorari, (3) the city had an ongoing injury, and (4) the Supreme Court had an interest in preventing litigants from attempting to manipulate jurisdiction to insulate a favorable decision from review. Also, O'Connor, J., joined by Rehnquist, Ch. J., and Kennedy and Breyer, JJ., expressed the view that--even though nude dancing performed as entertainment was expressive conduct that was entitled to some protection under the First Amendment--(1) the city's interest in combating the negative secondary effects associated with nude dancing establishments--which effects assertedly included violence, sexual harassment, public intoxication, prostitution, and the spread of sexually transmitted diseases--was a legitimate government interest unrelated to the suppression of expression; (2) thus, the city's public indecency ordinance ought to be evaluated under a four-factor test from *United States v O'Brien (1968) 391 US 367, 20 L Ed 2d 672, 88 S Ct 1673;* and (3) the city's ordinance was a content-neutral regulation that satisfied the O'Brien test so as to be sufficiently justified under the First Amendment, where (a) the city's efforts to protect public health and safety were within the city's police powers, (b) the ordinance

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furthered the important government interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing, (c) the government interest was unrelated to the suppression of free expression, and (d) the restriction was no greater than was essential to the furtherance of the government interest.

Scalia, J., joined by Thomas, J., concurring in the judgment, expressed the view that although the case at hand ought to have been dismissed for want of jurisdiction on the basis of mootness, (1) the city's ordinance--as a general law regulating the conduct of going nude in public and not specifically directed at expression--was not subject to First Amendment scrutiny at all; (2) when conduct other than speech is regulated, the First Amendment is violated only where the government prohibits conduct precisely because of conduct's communicative attributes; and (3) thus, even if the city had specifically singled out the activity of nude dancing, the ordinance did not violate the First Amendment unless--in a circumstance not demonstrated on the record--the communicative character of nude dancing had prompted the ban.

Souter, J., concurring in part and dissenting in part, expressed the view that (1) the city's stated interest in combating the secondary effects associated with nude dancing establishments was an interest unrelated to the suppression of expression, (2) the city's public indecency ordinance was thus properly considered under the four-factor test from United States v O'Brien, (3) the record did not provide a sufficient evidentiary showing--either for the seriousness of the threatened harm or for the efficacy of the chosen remedy--to sustain the city's ordinance, and (4) the decision of the Pennsylvania Supreme Court ought to have been vacated and remanded.

Stevens, J., joined by Ginsburg, J., dissenting, expressed the view that the city's ordinance ought to have been ruled invalid, as, among other factors, (1) nude dancing performed as entertainment was expressive conduct that was entitled to some protection under the First Amendment; (2) the secondary effects of commercial enterprises featuring indecent entertainment had justified only the regulation of the location of these establishments through zoning; (3) the extension of secondary-effects cases to the total suppression of protected speech--in the form of nude dancing in the case at hand--was not supported by precedent or by persuasive reasoning; (4) the dispersal of establishments that simply limited the places where speech could occur was a minimal imposition, whereas a total ban was the most exacting of restrictions; and (5) the state's interest in fighting presumed secondary effects was sufficiently strong to justify the former, but far too weak to support the latter.

LAWYERS' EDITION HEADNOTES:

[*LEdHN1]**
CONSTITUTIONAL LAW §961
-- free speech -- public indecency
Headnote: [1A] [1B] [1C] [1D] [1E] [1F]
For purposes of the Federal Constitution's First Amendment, a city's interest in combating the negative secondary effects associated with nude dancing establishments--which effects assertedly include violence, sexual harassment, public intoxication, prostitution, and the spread of sexually transmitted diseases--is a legitimate government interest that is unrelated to the suppression of expression; thus, the city's public indecency ordinance that prohibits knowingly or intentionally appearing in public in a "state of nudity" should be evaluated under the four-factor test from *United States v O'Brien (1968) 391 US 367, 20 L Ed 2d 672, 88 S Ct 1673,* which finds a government regulation sufficiently justified if (1) the regulation is within the constitutional power of the government to enact, (2) the regulation furthers an important or substantial government interest, (3) the governmental interest is unrelated to the suppression of free expression, and (4) the incidental restriction on alleged freedoms is no greater than is essential to the furtherance of that interest. [Per O'Connor, J., Rehnquist, Ch. J., and Kennedy, Breyer, and Souter, JJ. Dissenting: Scalia, Thomas, Stevens, and Ginsburg, JJ.]

[*LEdHN2]**
APPEAL §1677
CONSTITUTIONAL LAW §961
-- regulation of expressive conduct -- nude dancing -- reversal -- remand
Headnote: [2A] [2B] [2C] [2D] [2E] [2F]
On certiorari to review a judgment by a state's highest court--wherein the state court ruled that a city's indecency ordinance, which prohibits knowingly or intentionally appearing in public in a "state of nudity," violated the right of a corporation, which operated a nude dancing establishment, to freedom of expression as protected by the Federal Constitution's First and Fourteenth Amendments--the United States Supreme Court will reverse the state court's judgment and will remand the case for further proceedings, where (1) four Justices of the Supreme Court are of the opinion that the city's ordinance is a content-neutral regulation that satisfies the four-factor test of *United States v O'Brien*

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(1968) 391 US 367, 20 L Ed 2d 672, 88 S Ct 1673--that is, (a) the ordinance is within the city's constitutional power to enact because the city's efforts to protect public health and safety are within the city's police powers, (b) the ordinance furthers the important government interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing, (c) the government interest is unrelated to the suppression of free expression, and (d) the restriction is no greater than is essential to the furtherance of the government interest--so as to be sufficiently justified under the First Amendment; and (2) two Justices are of the opinion that (a) the city's ordinance--as a general law regulating the conduct of going nude in public and not specifically directed at expression--is not subject to First Amendment scrutiny at all, and (b) even if the city specifically singled out the activity of nude dancing, the ordinance does not violate the First Amendment unless--in a circumstance not demonstrated on the record--the communicative character of nude dancing prompted the ban. [Per O'Connor, J., Rehnquist, Ch. J., and Kennedy, Breyer, Scalia, and Thomas, JJ. Dissenting: Stevens and Ginsburg, JJ. Dissenting in part: Souter, J.]

[*LEdHN3]**
APPEAL §1662.5
-- indecency ordinance -- nude dancing -- mootness
Headnote: [3A] [3B]
A case is not rendered moot subsequent to a ruling by a state's highest court that a city's indecency ordinance--which prohibits knowingly or intentionally appearing in public in a "state of nudity"--violated the right of a corporation, which operated a nude dancing establishment, to freedom of expression as protected by the Federal Constitution's First and Fourteenth Amendments, where (1) despite no longer operating a nude dancing club at any location, the corporation is still incorporated under state law, and--to the extent that the corporation has an interest in resuming operations--has an interest in preserving the ruling of the state court; (2) the corporation did not mention a potential mootness issue in the corporation's brief in opposition to the city's United States Supreme Court petition for writ of certiorari, which brief was filed after the business had closed and the property was sold; (3) the city has an ongoing injury because the city is barred from enforcing the public nudity provisions of the ordinance; and (4) the Supreme Court has an interest in preventing litigants from attempting to manipulate jurisdiction to insulate a favorable decision from review. (Scalia and Thomas, JJ., dissented from this holding.)

[*LEdHN4]**
COURTS §762
-- moot case
Headnote: [4]
A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome, that is, when the challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated, then (1) it becomes impossible for a court to grant any effectual relief whatever to the prevailing party, and (2) any opinion as to the legality of the challenged action would be advisory.

[*LEdHN5]**
CONSTITUTIONAL LAW §961
-- nude dancing -- expressive conduct
Headnote: [5A] [5B] [5C]
For purposes of the Federal Constitution's First Amendment, nude dancing performed as entertainment is expressive conduct that is entitled to some protection. [Per O'Connor, J., Rehnquist, Ch. J., and Kennedy, Breyer, Stevens, and Ginsburg, JJ.]

SYLLABUS: Erie, Pennsylvania, enacted an ordinance making it a summary offense to knowingly or intentionally appear in public in a "state of nudity." Respondent Pap's A. M. (hereinafter Pap's), a Pennsylvania corporation, operated "Kandyland," an Erie establishment featuring totally nude erotic dancing by women. To comply with the ordinance, these dancers had to wear, at a minimum, "pasties" and a "G-string." Pap's filed suit against Erie and city officials, seeking declaratory relief and a permanent injunction against the ordinance's enforcement. The Court of Common Pleas struck down the ordinance **[****2]** as unconstitutional, but the Commonwealth Court reversed. The Pennsylvania Supreme Court in turn reversed, finding that the ordinance's public nudity sections violated Pap's right to freedom of expression as protected by the First and Fourteenth Amendments. The Pennsylvania court held that nude dancing is expressive conduct entitled to some quantum of protection under the First Amendment, a view that the court noted was endorsed by eight Members of this Court in *Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456.* The Pennsylvania court explained that, although one stated purpose of the ordinance was to combat negative secondary effects, there was also an unmentioned purpose to "impact negatively on the erotic message of the dance." Accordingly, the Pennsylvania court concluded that the ordinance was related to the suppression of expression.

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Because the ordinance was not content neutral, it was subject to strict scrutiny. The court held that the ordinance failed the narrow tailoring requirement of strict scrutiny. After this Court granted certiorari, Pap's filed a motion to dismiss the case as moot, noting that Kandyland no longer operated as a nude dancing club, and that **[****3]** Pap's did not operate such a club at any other location. This Court denied the motion.

Held: The judgment is reversed, and the case is remanded.

553 Pa. 348, 719 A.2d 273, reversed and remanded.

JUSTICE O'CONNOR, delivered the opinion of the Court with respect to Parts I and II, concluding that the case is not moot. A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *County of Los Angeles v. Davis, 440 U.S. 625, 631, 59 L. Ed. 2d 642, 99 S. Ct. 1379.* Simply closing Kandyland is not sufficient to moot the case because Pap's is still incorporated under Pennsylvania law, and could again decide to operate a nude dancing establishment in Erie. Moreover, Pap's failed, despite its obligation to the Court, to mention the potential mootness issue in its brief in opposition, which was filed after Kandyland was closed and the property sold. See *Board of License Comm'rs of Tiverton v. Pastore, 469 U.S. 238, 240, 83 L. Ed. 2d 618, 105 S. Ct. 685.* In any event, this is not a run of the mill voluntary cessation case. Here it is the plaintiff who, having prevailed below, seeks to have the case declared moot. And it **[****4]** is the defendant city that seeks to invoke the federal judicial power to obtain this Court's review of the decision. Cf. *ASARCO Inc. v. Kadish, 490 U.S. 605, 617-618, 104 L. Ed. 2d 696, 109 S. Ct. 2037.* The city has an ongoing injury because it is barred from enforcing the ordinance's public nudity provisions. If the ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot. See *Church of Scientology of Cal. v. United States, 506 U.S. 9, 13, 121 L. Ed. 2d 313, 113 S. Ct. 447.* And Pap's still has a concrete stake in the case's outcome because, to the extent it has an interest in resuming operations, it has an interest in preserving the judgment below. This Court's interest in preventing litigants from attempting to manipulate its jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness. See, *e.g., United States v. W. T. Grant Co., 345 U.S. 629, 632. Pp. 5-7, 97 L. Ed. 1303, 73 S. Ct. 894.*

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER, concluded in Parts III and IV that:

1. Government restrictions on public nudity such as Erie's ordinance should **[****5]** be evaluated under the framework set forth in *United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673,* for content-neutral restrictions on symbolic speech. Although being "in a state of nudity" is not an inherently expressive condition, nude dancing of the type at issue here is expressive conduct that falls within the outer ambit of the First Amendment's protection. See, *e.g., Barnes, 501 U.S. at 565-566* (plurality opinion). What level of scrutiny applies is determined by whether the ordinance is related to the suppression of expression. *E.g., Texas v. Johnson, 491 U.S. 397, 403, 105 L. Ed. 2d 342, 109 S. Ct. 2533.* If the governmental purpose in enacting the ordinance is unrelated to such suppression, the ordinance need only satisfy the "less stringent," intermediate *O'Brien* standard. *E.g., Johnson, supra, at 403.* If the governmental interest is related to the expression's content, however, the ordinance falls outside *O'Brien* and must be justified under the more demanding, strict scrutiny standard. *Johnson, supra, at 403.* An almost identical public nudity ban was held not to violate the First Amendment in *Barnes*, although no five **[****6]** Members of the Court agreed on a single rationale for that conclusion. The ordinance here, like the statute in *Barnes*, is on its face a general prohibition on public nudity. By its terms, it regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity. Although Pap's contends that the ordinance is related to the suppression of expression because its preamble suggests that its actual purpose is to prohibit erotic dancing of the type performed at Kandyland, that is not how the Pennsylvania Supreme Court interpreted that language. Rather, the Pennsylvania Supreme Court construed the preamble to mean that one purpose of the ordinance was to combat negative secondary effects. That is, the ordinance is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland and not at suppressing the erotic message conveyed by this type of nude dancing. See *391 U.S. at 382;* see also *Boos v. Barry, 485 U.S. 312, 321, 99 L. Ed. 2d 333, 108 S. Ct. 1157.* The Pennsylvania Supreme Court's ultimate **[****7]** conclusion that the ordinance was nevertheless content based relied on Justice White's position in dissent in *Barnes* that a ban of this type *necessarily* has the purpose of suppressing

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the erotic message of the dance. That view was rejected by a majority of the Court in *Barnes*, and is here rejected again. Pap's argument that the ordinance is "aimed" at suppressing expression through a ban on nude dancing is really an argument that Erie also had an illicit motive in enacting the ordinance. However, this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive. *O'Brien, supra,* 391 U.S. at 382-383. Even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is therefore *de minimis*. If States are to be able to regulate secondary effects, then such *de minimis* intrusions on expression cannot be sufficient to render the ordinance content based. See, *e.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288, 299, 82 L. Ed. 2d 221, 104 S. Ct. 3065.* **[****8]** Thus, Erie's ordinance is valid if it satisfies the *O'Brien* test. Pp. 7-15.

2. Erie's ordinance satisfies *O'Brien*'s four-factor test. First, the ordinance is within Erie's constitutional power to enact because the city's efforts to protect public health and safety are clearly within its police powers. Second, the ordinance furthers the important government interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing. In terms of demonstrating that such secondary effects pose a threat, the city need not conduct new studies or produce evidence independent of that already generated by other cities, so long as the evidence relied on is reasonably believed to be relevant to the problem addressed. *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52, 89 L. Ed. 2d 29, 106 S. Ct. 925.* Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *Young v. American Mini Theatres, Inc., 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440,* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. See *Renton, supra, at 51-52.* **[****9]** In fact, Erie expressly relied on *Barnes* and its discussion of secondary effects, including its reference to *Renton* and *American Mini Theatres*. The evidentiary standard described in *Renton* controls here, and Erie meets that standard. In any event, the ordinance's preamble also relies on the city council's express findings that "certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare . . . ." The council members, familiar with commercial downtown Erie, are the individuals who would likely have had first-hand knowledge of what took place at and around nude dancing establishments there, and can make particularized, expert judgments about the resulting harmful secondary effects. Cf., *e.g., FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 56 L. Ed. 2d 697, 98 S. Ct. 2096.* The fact that this sort of leeway is appropriate in this case, which involves a content-neutral restriction that regulates conduct, says nothing whatsoever about its appropriateness in a case involving actual regulation of First Amendment expression. Also, although requiring dancers to wear pasties and G-strings may not greatly **[****10]** reduce these secondary effects, *O'Brien* requires only that the regulation further the interest in combating such effects. The ordinance also satisfies *O'Brien*'s third factor, that the government interest is unrelated to the suppression of free expression, as discussed *supra.* The fourth *O'Brien* factor -- that the restriction is no greater than is essential to the furtherance of the government interest -- is satisfied as well. The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis*. The pasties and G-string requirement is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message. See, *e.g., Barnes, 501 U.S. at 572.* Pp. 15-21.

JUSTICE SCALIA, joined by JUSTICE THOMAS, agreed that the Pennsylvania Supreme Court's decision must be reversed, but disagreed with the mode of analysis that should be applied. Erie self-consciously modeled its ordinance on the public nudity statute upheld in *Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456,* calculating (one would have supposed reasonably) that **[****11]** the Pennsylvania courts would consider themselves bound by this Court's judgment on a question of federal constitutional law. That statute was constitutional not because it survived some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it was not subject to First Amendment scrutiny at all. *Id., at 572* (SCALIA, J., concurring in judgment). Erie's ordinance, too, by its terms prohibits not merely nude dancing, but the act -- irrespective of whether it is engaged in for expressive purposes -- of going nude in public. The facts that the preamble explains the ordinance's purpose, in part, as limiting a recent increase in nude live entertainment, that city councilmembers in supporting the ordinance commented to that effect, and that the ordinance

includes in the definition of nudity the exposure of devices simulating that condition, neither make the law any less general in its reach nor demonstrate that what the municipal authorities *really* find objectionable is expression rather than public nakedness. That the city made no effort to enforce the ordinance against a production of Equus **[****12]** involving nudity that was being staged in Erie at the time the ordinance became effective does not render the ordinance discriminatory on its face. The assertion of the city's counsel in the trial court that the ordinance would not cover theatrical productions to the extent their expressive activity rose to a higher level of protected expression simply meant that the ordinance would not be enforceable against such productions if the Constitution forbade it. That limitation does not cause the ordinance to be not generally applicable, in the relevant sense of being *targeted* against expressive conduct. Moreover, even if it could be concluded that Erie specifically singled out the activity of nude dancing, the ordinance still would not violate the First Amendment unless it could be proved (as on this record it could not) that it was the communicative character of nude dancing that prompted the ban. See *id., at 577.* There is no need to identify "secondary effects" associated with nude dancing that Erie could properly seek to eliminate. The traditional power of government to foster good morals, and the acceptability of the traditional judgment that nude public dancing **[****13]** *itself* is immoral, have not been repealed by the First Amendment. Pp. 6-10.

COUNSEL: Gregory A. Karle argued the cause for petitioners.

John W. Weston argued the cause for reponsdent.

JUDGES: O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which REHNQUIST, C. J., and KENNEDY, SOUTER, and BREYER, JJ., joined, and an opinion with respect to Parts III and IV, in which REHNQUIST, C. J., and KENNEDY, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined. SOUTER, J., filed an opinion concurring in part and dissenting in part. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined.

OPINIONBY: O'CONNOR

OPINION: **[*282]** **[**1387]** **[***274]** JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Parts III and IV, in which THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join.

[*LEdHR1A]** [1A] **[***LEdHR2A]** [2A]The city of Erie, Pennsylvania, enacted an ordinance banning public nudity. Respondent Pap's A. M. (hereinafter **[*283]** Pap's), which operated a nude dancing establishment in Erie, challenged the constitutionality of the ordinance and sought a permanent injunction against its enforcement. The Pennsylvania Supreme Court, **[****14]** although noting that this Court in *Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991),* had upheld an Indiana ordinance that was "strikingly **[**1388]** similar" to Erie's, found that the public nudity sections of the ordinance violated respondent's right to freedom of expression under the *United States Constitution. 553 Pa. 348, 356, 719 A.2d 273, 277 (1998).* This case raises the question whether the Pennsylvania Supreme Court properly evaluated the ordinance's constitutionality under the First Amendment. We hold that Erie's ordinance is a content-neutral regulation that satisfies the four-part test of *United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968).* Accordingly, we reverse the decision of the Pennsylvania Supreme Court and remand for the consideration of any remaining issues.

I

On September 28, 1994, the city council for the city of Erie, Pennsylvania, enacted Ordinance 75-1994, a public indecency ordinance that makes it a summary offense to knowingly or intentionally appear in public in a "state of nudity." * **[*284]** Respondent Pap's, a Pennsylvania corporation, operated an establishment in **[***275]** Erie known as "Kandyland" that featured totally nude **[****15]** erotic dancing performed by women. To comply with the ordinance, these dancers must wear, at a minimum, "pasties" and a "G-string." On October 14, 1994, two days after the ordinance went into effect, Pap's filed a complaint against the city of Erie, the mayor of the city, and members of the city council, seeking declaratory relief and a permanent injunction against the enforcement of the ordinance.

---------- Footnotes ----------

* Ordinance 75-1994, codified as Article 711 of the Codified Ordinances of the city of Erie, provides in relevant part:

"1. A person who knowingly or intentionally, in a public place:

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"a. engages in sexual intercourse

"b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code

"c. appears in a state of nudity, or

"d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.

"2. "Nudity" means the showing of the human male or female genital *[sic],* pubic hair or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.

"3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

"4. The prohibition set forth in subsection 1(c) shall not apply to:

"a. Any child under ten (10) years of age; or

"b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age."

---------- End Footnotes----------

[**16]**

The Court of Common Pleas of Erie County granted the permanent injunction and struck down the ordinance as unconstitutional. Civ. No. 60059-1994 (Jan. 18, 1995), Pet. for Cert. 40a. On cross appeals, the Commonwealth Court reversed the trial court's order. *674 A.2d 338 (1996).*

The Pennsylvania Supreme Court granted review and reversed, concluding that the public nudity provisions of the ordinance violated respondent's rights to freedom of expression as protected by the *First and Fourteenth Amendments. 553 Pa. 348, 719 A.2d 273 (1998).* The Pennsylvania court first inquired whether nude dancing constitutes expressive conduct that is within the protection of the First Amendment. The court noted that the act of being nude, in and of **[*285]** itself, is not entitled to First Amendment protection because it conveys no message. *Id., at 354, 719 A.2d at 276.* Nude dancing, however, is expressive conduct that is entitled to some quantum of protection under the **[**1389]** First Amendment, a view that the Pennsylvania Supreme Court noted was endorsed by eight Members of this Court in *Barnes. 553 Pa. at 354, 719 A. 2d at 276.*

The Pennsylvania court **[****17]** next inquired whether the government interest in enacting the ordinance was content neutral, explaining that regulations that are unrelated to the suppression of expression are not subject to strict scrutiny but to the less stringent standard of *United States v. O'Brien, supra, at 377.* To answer the question whether the ordinance is content based, the court turned to our decision in *Barnes. 553 Pa. at 355-356, 719 A.2d at 277.* Although the Pennsylvania court noted that the Indiana statute at issue in *Barnes* "is strikingly similar to the Ordinance we are examining," it concluded that "unfortunately for our purposes, the *Barnes* Court splintered and produced four separate, non-harmonious opinions." *553 Pa. at 356, 719 A.2d at 277.* After canvassing these separate opinions, the Pennsylvania court concluded that, although it is permissible to find precedential effect in a fragmented decision, to do so a majority of the Court must have been in agreement on the concept that is deemed to be the holding. See *Marks v. United* **[***276]** *States, 430 U.S. 188, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977).* The Pennsylvania court noted that "aside from the agreement **[****18]** by a majority of the *Barnes* Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the *Barnes* Court agreed." *553 Pa. at 358, 719 A.2d at 278.* Accordingly, the court concluded that "no clear precedent arises out of *Barnes* on the issue of whether the [Erie] ordinance . . . passes muster under the First Amendment." *Ibid.*

Having determined that there was no United States Supreme Court precedent on point, the Pennsylvania court **[*286]** conducted an independent examination

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of the ordinance to ascertain whether it was related to the suppression of expression. The court concluded that although one of the purposes of the ordinance was to combat negative secondary effects, "inextricably bound up with this stated purpose is an unmentioned purpose . . . to impact negatively on the erotic message of the dance." *Id., at 359, 719 A.2d at 279.* As such, the court determined the ordinance was content based and subject to strict scrutiny. The ordinance failed the narrow tailoring requirement of strict scrutiny because the court found that imposing criminal and civil sanctions on those who commit **[****19]** sex crimes would be a far narrower means of combating secondary effects than the requirement that dancers wear pasties and G-strings. *Id., at 361-362, 719 A.2d at 280.*

Concluding that the ordinance unconstitutionally burdened respondent's expressive conduct, the Pennsylvania court then determined that, under Pennsylvania law, the public nudity provisions of the ordinance could be severed rather than striking the ordinance in its entirety. Accordingly, the court severed §§ 1(c) and 2 from the ordinance and reversed the order of the *Commonwealth Court. 553 Pa. at 363-364, 719 A.2d at 281.* Because the court determined that the public nudity provisions of the ordinance violated Pap's right to freedom of expression under the United States Constitution, it did not address the constitutionality of the ordinance under the Pennsylvania Constitution or the claim that the ordinance is unconstitutionally overbroad. *Ibid.*

In a separate concurrence, two justices of the Pennsylvania court noted that, because this Court upheld a virtually identical statute in *Barnes,* the ordinance should have been upheld under the *United States Constitution. 553 Pa. at 364, 719 A.2d at 281.* **[****20]** They reached the same result as the majority, however, because they would have held that the public nudity sections of the ordinance violate the Pennsylvania Constitution. *Id., at 370, 719 A.2d at 284.* **[*287]**

The city of Erie petitioned for a writ of certiorari, which we granted. *526 U.S. 1111* **[**1390]** *(1999).* Shortly thereafter, Pap's filed a motion to dismiss the case as moot, noting that Kandyland was no longer operating as a nude dancing club, and Pap's was not operating a nude dancing club at any other location. Respondent's Motion to Dismiss as Moot 1. We denied the motion. *527 U.S. 1034 (1999).*

II

[*LEdHR3A]** [3A] **[***LEdHR4]** [4]As a preliminary matter, we must address the justiciability question. "'[A] case is moot when the issues **[***277]** presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *County of Los Angeles v. Davis, 440 U.S. 625, 631, 59 L. Ed. 2d 642, 99 S. Ct. 1379 (1979)* (quoting *Powell v. McCormack, 395 U.S. 486, 496, 23 L. Ed. 2d 491, 89 S. Ct. 1944 (1969)).* The underlying concern is that, when the challenged conduct ceases such that "'there is no reasonable expectation that the wrong will be repeated,'" *United States v. W. T. Grant Co., 345 U.S. 629, 633, 97 L. Ed. 1303, 73 S. Ct. 894 (1953),* **[****21]** then it becomes impossible for the court to grant "'any effectual relief whatever' to [the] prevailing party," *Church of Scientology of Cal. v. United States, 506 U.S. 9, 12, 121 L. Ed. 2d 313, 113 S. Ct. 447 (1992)* (quoting *Mills v. Green, 159 U.S. 651, 653, 40 L. Ed. 293, 16 S. Ct. 132 (1895)).* In that case, any opinion as to the legality of the challenged action would be advisory.

[*LEdHR3B]** [3B]Here, Pap's submitted an affidavit stating that it had "ceased to operate a nude dancing establishment in Erie." Status Report Re Potential Issue of Mootness 1 (Sept. 8, 1999). Pap's asserts that the case is therefore moot because "the outcome of this case will have no effect upon Respondent." Respondent's Motion to Dismiss as Moot 1. Simply closing Kandyland is not sufficient to render this case moot, however. Pap's is still incorporated under Pennsylvania law, and it could again decide to operate a nude dancing establishment in Erie. See Petitioner's Brief in Opposition to Motion to Dismiss 3. JUSTICE SCALIA differs with our assessment as to the likelihood that Pap's may resume its nude dancing **[*288]** operation. Several Members of this Court can attest, however, that the "advanced age" of Pap's owner (72) does not make it "absolutely **[****22]** clear" that a life of quiet retirement is his only reasonable expectation. Cf. *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000).* Moreover, our appraisal of Pap's affidavit is influenced by Pap's failure, despite its obligation to the Court, to mention a word about the potential mootness issue in its brief in opposition to the petition for writ of certiorari, which was filed in April 1999, even though, as JUSTICE SCALIA points out, Kandyland was closed and that property sold in 1998. See *Board of License Comm'rs of Tiverton v. Pastore, 469 U.S. 238, 240, 83 L. Ed. 2d 618, 105 S. Ct. 685 (1985) (per curiam).* Pap's only raised the issue after this Court granted certiorari.

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In any event, this is not a run of the mill voluntary cessation case. Here it is the plaintiff who, having prevailed below, now seeks to have the case declared moot. And it is the city of Erie that seeks to invoke the federal judicial power to obtain this Court's review of the Pennsylvania Supreme Court decision. Cf. *ASARCO Inc. v. Kadish, 490 U.S. 605, 617-618, 104 L. Ed. 2d 696, 109 S. Ct. 2037 (1989).* The city has an ongoing injury because it is barred from enforcing the public nudity provisions **[****23]** of its ordinance. If the challenged ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot. See *Church of Scientology of Cal. v. United States, supra, at 13.* And Pap's still has a concrete stake in the outcome of this case because, to the extent Pap's has an interest in resuming operations, it has an interest in preserving **[***278]** the judgment of the Pennsylvania Supreme Court. Our interest in preventing litigants from attempting **[**1391]** to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here. See *United States v. W. T. Grant Co., supra, at 632;* cf. *Arizonans for Official English v. Arizona, 520 U.S. 43,* **[*289]** *74, 137 L. Ed. 2d 170, 117 S. Ct. 1055 (1997).* Although the issue is close, we conclude that the case is not moot, and we turn to the merits.

III

[*LEdHR5A]** [5A]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 **[****24]** protection. See *Barnes v. Glen Theatre, Inc., 501 U.S. at 565-566* (plurality opinion); *Schad v. Mount Ephraim, 452 U.S. 61, 66, 68 L. Ed. 2d 671, 101 S. Ct. 2176 (1981).*

[*LEdHR1B]** [1B]To determine what level of scrutiny applies to the ordinance at issue here, we must decide "whether the State's regulation is related to the suppression of expression." *Texas v. Johnson, 491 U.S. 397, 403, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989);* see also *United States v. O'Brien, 391 U.S. at 377.* If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the "less stringent" standard fom *O'Brien* for evaluating restrictions on symbolic speech. *Texas v. Johnson, supra, at 403; United States v. O'Brien, supra, at 377.* If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard. *Texas v. Johnson, supra, at 403.*

In *Barnes*, we analyzed an almost identical statute, holding that Indiana's public nudity ban **[****25]** did not violate the First Amendment, although no five Members of the Court agreed on a single rationale for that conclusion. 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.

The city of Erie argues that the ordinance is a content-neutral restriction that is reviewable under *O'Brien* because the ordinance bans conduct, not speech; specifically, public **[*290]** nudity. Respondent counters that the ordinance targets nude dancing and, as such, is aimed specifically at suppressing expression, making the ordinance a content-based restriction that must be subjected to strict scrutiny.

The ordinance here, like the statute in *Barnes*, is on its face a general prohibition on public nudity. *553 Pa. at 354, 719 A.2d at 277.* By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity. And like the statute in *Barnes*, the Erie ordinance replaces and updates provisions **[****26]** of an "Indecency and Immorality" **[***279]** ordinance that has been on the books since 1866, predating the prevalence of nude dancing establishments such as Kandyland. Pet. for Cert. 7a; see *Barnes v. Glen Theatre, Inc., supra, at 568.*

Respondent and JUSTICE STEVENS contend nonetheless that the ordinance is related to the suppression of expression because language in the ordinance's preamble suggests that its actual purpose is to prohibit erotic dancing of the type performed at Kandyland. *Post,* at 1 (dissenting opinion). That is not how the Pennsylvania Supreme Court interpreted that language, however. In the preamble to the ordinance, the city council stated that it was adopting the regulation

"'for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely **[**1392]** impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually

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transmitted diseases and other deleterious effects.'" *553 Pa. at 359, 719 A.2d at 279.*

The Pennsylvania Supreme Court construed this language **[****27]** to mean that one purpose of the ordinance was "to combat negative secondary effects." *Ibid.* **[*291]**

As JUSTICE SOUTER noted in *Barnes*, "on its face, the governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression." *501 U.S. at 585* (opinion concurring in judgment). In that sense, this case is similar to *O'Brien*. O'Brien burned his draft registration card as a public statement of his antiwar views, and he was convicted under a statute making it a crime to knowingly mutilate or destroy such a card. This Court rejected his claim that the statute violated his First Amendment rights, reasoning that the law punished him for the "noncommunicative impact of his conduct, and for nothing else." *391 U.S. at 382.* In other words, the Government regulation prohibiting the destruction of draft cards was aimed at maintaining the integrity of the Selective Service System and not at suppressing the message of draft resistance that O'Brien sought to convey by burning his draft card. So too here, the ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects caused by **[****28]** the presence of adult entertainment establishments like Kandyland and not at suppressing the erotic message conveyed by this type of nude dancing. Put another way, the ordinance does not attempt to regulate the primary effects of the expression, *i.e.*, the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare, which we have previously recognized are "caused by the presence of even one such" establishment. *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48, 50, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986);* see also *Boos v. Barry, 485 U.S. 312, 321, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988).*

Although the Pennsylvania Supreme Court acknowledged that one goal of the ordinance was to combat the negative secondary effects associated with nude dancing establishments, **[***280]** the court concluded that the ordinance was nevertheless content based, relying on Justice White's position in dissent in *Barnes* for the proposition that a ban of this type *necessarily* has the purpose of suppressing the erotic message **[*292]** of the dance. Because the Pennsylvania court agreed with Justice White's approach, it concluded that the ordinance must **[****29]** have another, "unmentioned" purpose related to the suppression of expression. *553 Pa. at 359, 719 A.2d at 279.* That is, the Pennsylvania court adopted the dissent's view in *Barnes* that "'since the State permits the dancers to perform if they wear pasties and Gstrings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition." *553 Pa. at 359, 719 A.2d at 279* (quoting *Barnes, 501 U.S. at 592* (White, J., dissenting)). A majority of the Court rejected that view in *Barnes*, and we do so again here.

Respondent's argument that the ordinance is "aimed" at suppressing expression through a ban on nude dancing -- an argument that respondent supports by pointing to statements by the city attorney that the public nudity ban was not intended to apply to "legitimate" theater productions -- is really an argument that the city council also had an illicit motive in enacting the ordinance. As we have said before, however, this Court will not strike down an otherwise constitutional statute on the basis of an alleged **[****30]** illicit motive. *O'Brien, 391 U.S. at 382-383;* **[**1393]** *Renton v. Playtime Theatres, Inc., 475 U.S. at 47-48* (that the "predominate" purpose of the statute was to control secondary effects was "more than adequate to establish" that the city's interest was unrelated to the suppression of expression). In light of the Pennsylvania court's determination that one purpose of the ordinance is to combat harmful secondary effects, the ban on public nudity here is no different from the ban on burning draft registration cards in *O'Brien*, where the Government sought to prevent the means of the expression and not the expression of antiwar sentiment itself.

JUSTICE STEVENS argues that the ordinance enacts a complete ban on expression. We respectfully disagree with that characterization. The public nudity ban certainly has **[*293]** the effect of limiting one particular means of expressing the kind of erotic message being disseminated at Kandyland. But simply to define what is being banned as the "message" is to assume the conclusion. We did not analyze the regulation in *O'Brien* as having enacted a total ban on expression. Instead, the Court recognized that the regulation **[****31]** against destroying one's draft card was justified by the Government's interest in preventing the harmful "secondary effects" of that conduct (disruption to the Selective Service System), even though that regulation may have some incidental effect on the expressive element of the conduct. Because this justification was unrelated to the suppression of O'Brien's antiwar message, the

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regulation was content neutral. Although there may be cases in which banning the means of expression so interferes with the message that it essentially bans the message, that is not the case here.

Even if we had not already rejected **[***281]** the view that a ban on public nudity is necessarily related to the suppression of the erotic message of nude dancing, we would do so now because the premise of such a view is flawed. The State's interest in preventing harmful secondary effects is not related to the suppression of expression. In trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood. See *Renton, 475 U.S. at 50-51.* In *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984),* **[****32]** we held that a National Park Service regulation prohibiting camping in certain parks did not violate the First Amendment when applied to prohibit demonstrators from sleeping in Lafayette Park and the Mall in Washington, D. C., in connection with a demonstration intended to call attention to the plight of the homeless. Assuming, *arguendo,* that sleeping can be expressive conduct, the Court concluded that the Government interest in conserving park property was unrelated to the demonstrators' message about homelessness. *Id., at 299.* **[*294]** So, while the demonstrators were allowed to erect "symbolic tent cities," they were not allowed to sleep overnight in those tents. Even though the regulation may have directly limited the expressive element involved in actually sleeping in the park, the regulation was nonetheless content neutral.

Similarly, even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is *de minimis.* And as **[****33]** JUSTICE STEVENS eloquently stated for the plurality in *Young v. American Mini Theatres, Inc., 427 U.S. 50, 70, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976),* "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the **[**1394]** interest in untrammeled political debate," and "few of us would march our sons or daughters off to war to preserve the citizen's right to see" specified anatomical areas exhibited at establishments like Kandyland. If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based. See *Clark v. Community for Creative Non-Violence, supra, at 299; Ward v. Rock Against Racism, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989)* (even if regulation has an incidental effect on some speakers or messages but not others, the regulation is content neutral if it can be justified without reference to the content of the expression).

This case is, **[****34]** in fact, similar to *O'Brien, Community for Creative Non-Violence,* and *Ward.* The justification for the government regulation in each case prevents harmful "secondary" effects that are unrelated to the suppression of expression. See, *e.g., Ward v. Rock Against Racism, 491 U.S. at 791-792* **[***282]** (noting that "the principal justification for the **[*295]** sound-amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of [the adjacent] Sheep Meadow and its more sedate activities," and citing *Renton* for the proposition that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others"). While the doctrinal theories behind "incidental burdens" and "secondary effects" are, of course, not identical, there is nothing objectionable about a city passing a general ordinance to ban public nudity (even though such a ban may place incidental burdens on some protected speech) and at the same time recognizing that one specific occurrence of public nudity -- nude erotic dancing -- is particularly problematic **[****35]** because it produces harmful secondary effects.

JUSTICE STEVENS claims that today we "for the first time" extend *Renton*'s secondary effects doctrine to justify restrictions other than the location of a commercial enterprise. *Post,* at 1. Our reliance on *Renton* to justify other restrictions is not new, however. In *Ward,* the Court relied on *Renton* to evaluate restrictions on sound amplification at an outdoor bandshell, rejecting the dissent's contention that *Renton* was inapplicable. See *Ward v. Rock Against Racism, supra, at 804, n. 1* (Marshall, J., dissenting) ("Today, for the first time, a majority of the Court applies *Renton* analysis to a category of speech far afield from that decision's original limited focus"). Moreover, Erie's ordinance does not effect a "total ban" on protected expression. *Post,* at 3.

In *Renton,* the regulation explicitly treated "adult" movie theaters differently from other theaters, and defined "adult" theaters solely by reference to the

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content of their movies. *475 U.S. at 44.* We nonetheless treated the zoning regulation as content neutral because the ordinance was aimed at the secondary **[****36]** effects of adult theaters, a justification unrelated to the content of the adult movies themselves. *475 U.S. at 48.* **[*296]** Here, Erie's ordinance is on its face a content-neutral restriction on conduct. Even if the city thought that nude dancing at clubs like Kandyland constituted a particularly problematic instance of public nudity, the regulation is still properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing.

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 **[**1395]** if it satisfies the four-factor test from *O'Brien* for evaluating restrictions on symbolic speech.

IV

[*LEdHR1C]** [1C] **[***LEdHR2B]** [2B]Applying that standard here, we conclude that Erie's ordinance is justified under *O'Brien.* The first factor of the *O'Brien* test is whether the government regulation is within the constitutional power of **[***283]** the government **[****37]** to enact. Here, Erie's efforts to protect public health and safety are clearly within the city's police powers. The second factor is whether the regulation furthers an important or substantial government interest. The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important. And in terms of demonstrating that such secondary effects pose a threat, the city need not "conduct new studies or produce evidence independent of that already generated by other cities" to demonstrate the problem of secondary effects, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton v. Playtime Theatres, Inc., 475 U.S. at 51-52.* Because the nude dancing at Kandyland is of the same character as the adult entertainment **[*297]** at issue in *Renton, Young v. American Mini Theatres, Inc., 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976),* and *California v. LaRue, 409 U.S. 109, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972),* it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. **[****38]** And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. See *Renton v. Playtime Theatres, Inc., 475 U.S. at 51-52* (indicating that reliance on a judicial opinion that describes the evidentiary basis is sufficient). In fact, Erie expressly relied on *Barnes* and its discussion of secondary effects, including its reference to *Renton* and *American Mini Theatres.* Even in cases addressing regulations that strike closer to the core of First Amendment values, we have accepted a state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing. See *Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 145 L. Ed. 2d 886, 120 S. Ct. 897 (2000)* (slip op., at 13, n. 6). Regardless of whether JUSTICE SOUTER now wishes to disavow his opinion in *Barnes* on this point, see *post,* at 8 (opinion concurring in part and dissenting in part), the evidentiary standard described in *Renton* controls here, and Erie meets that standard. **[****39]**

In any event, Erie also relied on its own findings. The preamble to the ordinance states that "the Council of the City of Erie *has, at various times over more than a century, expressed its findings* that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity." Pet. for Cert. 6a (emphasis added). The city council members, familiar with commercial downtown Erie, are the individuals who would likely have had first-hand knowledge of what took place at and around nude dancing establishments **[*298]** in Erie, and can make particularized, expert judgments about the resulting harmful secondary effects. Analogizing to the administrative agency context, it is well established that, as long as a party has an opportunity to respond, an administrative agency may take official notice of such "legislative **[***284]** facts" within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment. See *FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 56 L. Ed. 2d 697, 98 S. Ct. 2096 (1978);* **[****40]** *Republic Aviation* **[**1396]** *Corp. v. NLRB, 324 U.S. 793, 89 L. Ed. 1372, 65 S. Ct. 982 (1945);* 2 K. Davis & R. Pierce, Administrative Law Treatise § 10.6 (3d ed. 1994). Here, Kandyland has had ample opportunity

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to contest the council's findings about secondary effects -- before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited. And the study relied on by *amicus curiae* does not cast any legitimate doubt on the Erie city council's judgment about Erie. See Brief for First Amendment Lawyers Association as *Amicus Curiae* 16-23.

Finally, it is worth repeating that Erie's ordinance is on its face a content neutral restriction that regulates conduct, not First Amendment expression. And the government should have sufficient leeway to justify such a law based on secondary effects. On this point, *O'Brien* is especially instructive. The Court there did not require evidence **[****41]** that the integrity of the Selective Service System would be jeopardized by the knowing destruction or mutilation of draft cards. It simply reviewed the Government's various administrative interests in issuing the cards, and then concluded that "Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people **[*299]** who knowingly and willfully destroy or mutilate them." *391 U.S. at 378-380.* There was no study documenting instances of draft card mutilation or the actual effect of such mutilation on the Government's asserted efficiency interests. But the Court permitted Congress to take official notice, as it were, that draft card destruction would jeopardize the system. The fact that this sort of leeway is appropriate in a case involving conduct says nothing whatsoever about its appropriateness in a case involving actual regulation of First Amendment expression. As we have said, so long as the regulation is unrelated to the suppression of expression, "the government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken **[****42]** word." *Texas v. Johnson, 491 U.S. at 406.* See, *e.g., United States v. O'Brien, supra, at 377; United States v. Albertini, 472 U.S. 675, 689, 86 L. Ed. 2d 536, 105 S. Ct. 2897 (1985)* (finding sufficient the Government's assertion that those who had previously been barred from entering the military installation pose a threat to the security of that installation); *Clark v. Community for Creative Non-Violence, 468 U.S. at 299* (finding sufficient the Government's assertion that camping overnight in the park poses a threat to park property).

JUSTICE SOUTER, however, would require Erie to develop a specific evidentiary record supporting its ordinance. *Post,* at 7-8. **[***285]** JUSTICE SOUTER agrees that Erie's interest in combating the negative secondary effects associated with nude dancing establishments is a legitimate government interest unrelated to the suppression of expression, and he agrees that the ordinance should therefore be evaluated under *O'Brien. O'Brien*, of course, required no evidentiary showing at all that the threatened harm was real. But that case is different, JUSTICE SOUTER contends, because in *O'Brien* "there **[****43]** could be no doubt" that a regulation prohibiting the destruction of draft cards would alleviate the harmful secondary effects **[*300]** flowing from the destruction of those cards. *Post,* at 2, n. 1.

[*LEdHR2C]** [2C]But whether the harm is evident to our "intuition," *ibid*, is not the proper inquiry. If it were, we would simply say there is no doubt that a regulation prohibiting public nudity would alleviate the harmful secondary effects associated with nude dancing. In any event, JUSTICE SOUTER conflates **[**1397]** two distinct concepts under *O'Brien*: whether there is a substantial government interest and whether the regulation furthers that interest. As to the government interest, *i.e.*, whether the threatened harm is real, the city council relied on this Court's opinions detailing the harmful secondary effects caused by establishments like Kandyland, as well as on its own experiences in Erie. JUSTICE SOUTER attempts to denigrate the city council's conclusion that the threatened harm was real, arguing that we cannot accept Erie's findings because the subject of nude dancing is "fraught with some emotionalism," *post,* at 5. Yet surely the subject of drafting our citizens into the military is "fraught" **[****44]** with more emotionalism than the subject of regulating nude dancing. JUSTICE SOUTER next hypothesizes that the reason we cannot accept Erie's conclusion is that, since the question whether these secondary effects occur is "amenable to empirical treatment," we should ignore Erie's actual experience and instead require such an empirical analysis. *Post,* at 6, n. 4 (referring to a "scientifically sound" study offered by an *amicus curiae* to show that nude dancing establishments do not cause secondary effects). In *Nixon*, however, we flatly rejected that idea. 528 U.S. at ___ (slip op., at 14-15) (noting that the "invocation of academic studies said to indicate" that the threatened harms are not real is insufficient to cast doubt on the experience of the local government).

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As to the second point -- whether the regulation furthers the government interest -- it is evident that, since crime and other public health and safety problems are caused by the presence of nude dancing establishments like Kandyland, a **[*301]** ban on such nude dancing would further Erie's interest in preventing such secondary effects. To be sure, requiring dancers to wear pasties and Gstrings may not greatly reduce **[****45]** these secondary effects, but *O'Brien* requires only that the regulation further the interest in combating such effects. Even though the dissent questions the wisdom of Erie's chosen remedy, *post*, at 7 (opinion of STEVENS, J.), the "'city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems,'" *Renton v. Playtime Theatres, Inc., 475 U.S. at 52* **[***286]** (quoting *American Mini Theatres, 427 U.S. at 71* (plurality opinion)). It also may be true that a pasties and G-string requirement would not be as effective as, for example, a requirement that the dancers be fully clothed, but the city must balance its efforts to address the problem with the requirement that the restriction be no greater than necessary to further the city's interest.

[*LEdHR1D]** [1D] **[***LEdHR2D]** [2D]The ordinance also satisfies *O'Brien*'s third factor, that the government interest is unrelated to the suppression of free expression, as discussed *supra,* at 7-15. The fourth and final *O'Brien* factor -- that the restriction is no greater than is essential to the furtherance of the government interest -- is satisfied as well. The ordinance regulates conduct, and **[****46]** any incidental impact on the expressive element of nude dancing is *de minimis*. The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message. See *Barnes v. Glen Theatre, Inc., 501 U.S. at 572* (plurality opinion of REHNQUIST, C. J., joined by O'CONNOR and KENNEDY, JJ.); *501 U.S. at 587* (SOUTER, J., concurring in judgment). JUSTICE SOUTER points out that zoning is an alternative means of addressing this problem. It is far from clear, however, that zoning imposes less of a burden on expression than the minimal requirement implemented here. In any event, since this is a content-neutral restriction, least restrictive **[*302]** means analysis is not required. See *Ward, 491 U.S. at 798-799, n. 6.* **[**1398]**

[*LEdHR2E]** [2E]We hold, therefore, that Erie's ordinance is a content-neutral regulation that is valid under *O'Brien*. Accordingly, the judgment of the Pennsylvania Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CONCURBY: SCALIA; SOUTER **[****47]** (In Part)

CONCUR: JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

I

In my view, the case before us here is moot. The Court concludes that it is not because respondent could resume its nude dancing operations in the future, and because petitioners have suffered an ongoing, redressable harm consisting of the state court's invalidation of their public nudity ordinance.

As to the first point: Petitioners do not dispute that Kandyland no longer exists; the building in which it was located has been sold to a real estate developer, and the premises are currently being used as a comedy club. We have a sworn affidavit from respondent's sole shareholder, Nick Panos, to the effect that Pap's "operates no active business," and is "a 'shell' corporation." More to the point, Panos swears that neither Pap's nor Panos "employs any individuals involved in the nude dancing business," "maintains any contacts in the adult entertainment business," **[***287]** "has any current interest in any establishment providing nude dancing," or "has any intention to own or operate a nude dancing establishment in the future." n1 App. to Reply to Brief in Opposition to Motion to Dismiss 7-8.

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n1 Curiously, the Court makes no mention of Panos' averment of no intention to operate a nude dancing establishment in the future, but discusses the issue as though the only factor suggesting mootness is the closing of Kandyland. *Ante*, at 6. I see no basis for ignoring this averment. The only fact mentioned by the Court to justify regarding it as perjurious is that respondent failed to raise mootness in its brief in opposition to the petition for certiorari. That may be good basis for censure, but it is scant basis for suspicion of perjury -- particularly since respondent, far from seeking to "insulate a favorable decision from review," *ante*, at 7, asks us in light of the mootness to vacate the

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judgment below. Reply to Brief in Opposition to Motion to Dismiss 5.

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[*303] [**48]**

Petitioners do not contest these representations, but offer in response only that Pap's *could* very easily get back into the nude dancing business. The Court adopts petitioners' line, concluding that because respondent is still incorporated in Pennsylvania, it "could again decide to operate a nude dancing establishment in Erie." *Ante*, at 6. That plainly does not suffice under our cases. The test for mootness we have applied in voluntary-termination cases is not whether the action originally giving rise to the controversy could not *conceivably* reoccur, but whether it is "absolutely clear that the . . . behavior could not *reasonably be expected to recur.*" *United States v. Concentrated Phosphate Export Assn., Inc., 393 U.S. 199, 203, 21 L. Ed. 2d 344, 89 S. Ct. 361 (1968)* (emphasis added). Here I think that test is met. According to Panos' uncontested sworn affidavit, Pap's ceased doing business at Kandyland, and the premises were sold to an independent developer, in 1998 -- the year before the petition for certiorari in this case was filed. It strains credulity to suppose that the 72-year-old Mr. Panos shut down his going business *after* securing his victory in the Pennsylvania **[****49]** Supreme Court, and before the city's petition for certiorari was even filed, in order to increase his chances of preserving his judgment in the statistically unlikely event that a (not yet filed) petition might be granted. Given the timing of these events, given the fact that respondent has no existing interest in nude dancing (or in any other business), given Panos' sworn representation that he does not intend to invest **[**1399]** -- through Pap's or otherwise -- in any nude dancing business, and given Panos' advanced **[*304]** age, n2 it seems to me that there is "no reasonable *expectation*," even if there remains a theoretical possibility, that Pap's will resume nude dancing operations in the future. n3 **[****50]**

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n2 The Court asserts that "several Members of this Court can attest . . . that the 'advanced age'" of 72 "does not make it 'absolutely clear' that a life of quiet retirement is [one's] only reasonable expectation." *Ante*, at 6. That is *tres gallant*, but it misses the point. Now as heretofore, Justices in their seventies continue to do their work competently -- indeed, perhaps better than their youthful colleagues because of the wisdom that age imparts. But to respond to my point what the Court requires is citation of an instance in which a Member of this Court (or of any other court, for that matter) resigned at the age of 72 to begin a new career -- or more remarkable still (for this is what the Court suspects the young Mr. Panos is up to) resigned at the age of 72 to go judge on a different court, of no greater stature, and located in Erie, Pennsylvania rather than Palm Springs. I base my assessment of reasonable expectations not upon Mr. Panos' age alone, but upon that combined with his sale of the business and his assertion, under oath, that he does not intend to enter another.

n3 It is significant that none of the assertions of Panos' affidavit is contested. Those pertaining to the sale of Kandyland and the current noninvolvement of Pap's in any other nude dancing establishment would seem readily verifiable by petitioners. The statements regarding Pap's and Panos' intentions for the future are by their nature not verifiable, and it would be reasonable not to credit them if *either* petitioners asserted some reason to believe they were not true *or* they were not rendered highly plausible by Panos' age and his past actions. Neither condition exists here.

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The situation here is indistinguishable from that which obtained in *Arizonans for Official English v. Arizona, 520 U.S. 43, 137 L. Ed. 2d 170, 117 S. Ct. 1055 (1997),* where the plaintiff-respondent, a state employee who had sued to enjoin enforcement of an amendment to the Arizona Constitution making English that State's official language, had resigned her public-sector employment. We held **[***288]** the case moot and, since the mootness was attributable to the "'unilateral action of the party who prevailed in the lower court,'" we followed **[****51]** our usual practice of vacating the favorable judgment respondent had obtained in the **[*305]** Court of Appeals. *Id. at 72* (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall*

Partnership, 513 U.S. 18, 23, 130 L. Ed. 2d 233, 115 S. Ct. 386 (1994)).

The rub here is that this case comes to us on writ of certiorari to a state court, so that our lack of jurisdiction over the case also entails, according to our recent jurisprudence, a lack of jurisdiction to direct a vacatur. See *ASARCO Inc. v. Kadish, 490 U.S. 605, 621, n. 1, 104 L. Ed. 2d 696, 109 S. Ct. 2037 (1989).* The consequences of that limitation on our power are in this case significant: A dismissal for mootness caused by respondent's unilateral action would leave petitioners subject to an ongoing legal disability, and a large one at that. Because the Pennsylvania Supreme Court severed the public nudity provision from the ordinance, thus rendering it inoperative, the city would be prevented from enforcing its public nudity prohibition not only against respondent, should it decide to resume operations in the future, and not only against other nude dancing establishments, but against anyone who appears nude in public, regardless of the "expressiveness" **[****52]** of his conduct or his purpose in engaging in it.

That is an unfortunate consequence (which could be avoided, of course, if the Pennsylvania Supreme Court chose to vacate its judgments in cases that become moot during appeal). But it is not a consequence that authorizes us to entertain a suit the Constitution places beyond our power. And leaving in effect erroneous state determinations regarding the Federal Constitution is, after all, not unusual. It would have occurred here, even without the intervening mootness, if we had denied certiorari. And until the 1914 revision of the Judicial Code, it occurred *whenever* a state court erroneously sustained a federal constitutional challenge, since we did not even have *statutory* jurisdiction to entertain **[**1400]** an appeal. Compare Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85-87 with Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. In any event, the short of the matter is that we have no power to suspend the fundamental precepts that federal courts "are limited by the case-or-controversy requirement **[*306]** of Art. III to adjudication of actual disputes between adverse parties," *Richardson v. Ramirez, 418 U.S. 24, 36, 41 L. Ed. 2d 551, 94 S. Ct. 2655 (1974),* and that **[****53]** this limitation applies "at all stages of review," *Preiser v. Newkirk, 422 U.S. 395, 401, 45 L. Ed. 2d 272, 95 S. Ct. 2330 (1975)* (quoting *Steffel v. Thompson, 415 U.S. 452, 459, n. 10, 39 L. Ed. 2d 505, 94 S. Ct. 1209 (1974)* (internal quotation marks omitted)).

Which brings me to the Court's second reason for holding that this case is still alive: The Court concludes that because petitioners have an "ongoing injury" caused by the state court's invalidation of its duly enacted public nudity provision, our ability to hear the case and reverse the judgment below is itself "sufficient to prevent the case from being moot." *Ante,* at 7. Although the Court does not cite any authority for the proposition **[***289]** that the burden of an adverse decision below suffices to keep a case alive, it is evidently relying upon our decision in *ASARCO,* which held that Article III's standing requirements were satisfied on writ of certiorari to a state court even though there would have been no Article III standing for the action producing the state judgment on which certiorari was sought. We assumed jurisdiction in the case because we concluded that the party seeking to invoke the federal judicial power had standing to challenge **[****54]** the adverse judgment entered against them by the state court. Because that judgment, if left undisturbed, would "cause direct, specific, and concrete injury to the parties who petition for our review," *ASARCO, 490 U.S. at 623-624,* and because a decision by this Court to reverse the State Supreme Court would clearly redress that injury, we concluded that the original plaintiffs' lack of standing was not fatal to our jurisdiction. *490 U.S. at 624.*

I dissented on this point in *ASARCO, see 490 U.S. at 634* (REHNQUIST, C. J., concurring in part and dissenting in part, joined by SCALIA, J.), and remain of the view that it was incorrectly decided. But *ASARCO* at least did not purport to hold that the constitutional standing requirements of injury, causation, and redressability may be satisfied *solely* by **[*307]** reference to the lower court's adverse judgment. It was careful to note -- however illogical that might have been, see *490 U.S. at 635* -- that the parties "remained adverse," and that jurisdiction was proper only so long as the "requisites of a case or controversy are also met," *490 U.S. at 619, 624.* Today the **[****55]** Court would appear to drop even this fig leaf. n4 In concluding that the injury to *Erie* is "sufficient" to keep this case alive, the Court performs the neat trick of identifying a "case or controversy" that has only one interested party.

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n4 I say "appear" because although the Court states categorically that "the availability of . . . relief [from the judgment below] is sufficient to prevent the case from being moot," it follows this statement, in the next sentence, with the assertion that Pap's, the state court

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plaintiff, retains a "concrete stake in the outcome of this case." *Ante*, at 7. Of course, if the latter were true a classic case or controversy existed, and resort to the exotic theory of "standing by virtue of adverse judgment below" was entirely unnecessary.

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II

[*LEdHR2F]** [2F]For the reasons set forth above, I would dismiss this case for want of jurisdiction. Because the Court resolves the threshold mootness question differently and proceeds to address the merits, I will do so briefly as well. I agree that **[****56]** the decision of the Pennsylvania Supreme Court must be reversed, but disagree with the mode of analysis the Court has applied.

The city of Erie self-consciously modeled its ordinance on the public nudity **[**1401]** statute we upheld against constitutional challenge in *Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991)*, calculating (one would have supposed reasonably) that the courts of Pennsylvania would consider themselves bound by our judgment on a question of federal constitutional law. In *Barnes*, I voted to uphold the challenged Indiana statute "not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed **[***290]** at expression, it is not **[*308]** subject to First Amendment scrutiny at all." *Id., at 572* (opinion concurring in judgment). Erie's ordinance, too, by its terms prohibits not merely nude dancing, but the act -- irrespective of whether it is engaged in for expressive purposes -- of going nude in public. The facts that a preamble to the ordinance explains that its purpose, in part, is to "limit a recent increase in nude live entertainment," App. to Pet. for Cert. 42a, that **[****57]** city councilmembers in supporting the ordinance commented to that effect, see *post*, at 13-14, and n. 16 (STEVENS, J., dissenting), and that the ordinance includes in the definition of nudity the exposure of devices simulating that condition, see *post*, at 15, neither make the law any less general in its reach nor demonstrate that what the municipal authorities *really* find objectionable is expression rather than public nakedness. As far as appears (and as seems overwhelmingly likely), the preamble, the councilmembers' comments, and the chosen definition of the prohibited conduct simply reflect the fact that Erie had recently been having a public nudity problem not with streakers, sunbathers or hot-dog vendors, see *Barnes, supra, at 574* (SCALIA, J., concurring in judgment), but with lap dancers.

There is no basis for the contention that the ordinance does not apply to nudity in theatrical productions such as Equus or Hair. Its text contains no such limitation. It was stipulated in the trial court that no effort was made to enforce the ordinance against a production of Equus involving nudity that was being staged in Erie at the time the ordinance became effective. **[****58]** App. 84. Notwithstanding JUSTICE STEVENS' assertion to the contrary, however, see, *post*, at 12, neither in the stipulation, nor elsewhere in the record, does it appear that the city was aware of the nudity -- and before this Court counsel for the city attributed nonenforcement not to a general exception for theatrical productions, but to the fact that no one had complained. Tr. of Oral Arg. 16. One instance of nonenforcement -- against a play already in production that prosecutorial discretion might reasonably have **[*309]** "grandfathered" -- does not render this ordinance discriminatory on its face. To be sure, in the trial court counsel for the city said that "to the extent that the expressive activity that is contained in [such] productions rises to a higher level of protected expression, they would not be [covered]," App. 53 -- but he rested this assertion upon the provision in the preamble that expressed respect for "fundamental Constitutional guarantees of free speech and free expression," and the provision of Paragraph 6 of the ordinance that provided for severability of unconstitutional provisions, *id.* at 53-54. n5 What he was saying there (in order to fend off the overbreadth **[****59]** challenge of respondent, who **[***291]** was in no doubt that the ordinance *did* cover theatrical productions, see *id.* at 55) was essentially what he said at oral argument before this Court: that the ordinance would not be enforceable against theatrical productions if the Constitution forbade it. **[**1402]** Tr. of Oral Arg. 13. Surely that limitation does not cause the ordinance to be not generally applicable, in the relevant sense of being *targeted* against expressive conduct. n6

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n5 This follow-up explanation rendered what JUSTICE STEVENS calls counsel's "categorical" assertion that such productions would be exempt, see *post*, at 12, n. 12, notably *un*categorical. Rather than accept counsel's explanation -- in the

trial court and here -- that is compatible with the text of the ordinance, JUSTICE STEVENS rushes to assign the ordinance a meaning that its words cannot bear, on the basis of counsel's initial foot-fault. That is not what constitutional adjudication ought to be.

n6 To correct JUSTICE STEVENS' characterization of my present point: I do not argue that Erie "carved out an exception" for Equus and Hair. *Post*, at 13, n. 14. Rather, it is my contention that the city attorney assured the trial court that the ordinance was susceptible of an interpretation that would carve out such exceptions to the extent the Constitution required them. Contrary to JUSTICE STEVENS' view, *post*, at 13, n. 14, I do not believe that a law directed against all public nudity ceases to be a "general law" (rather than one directed at expression) if it makes exceptions for nudity protected by decisions of this Court. To put it another way, I do not think a law contains the vice of being directed against expression if it bans all public nudity, except that public nudity which the Supreme Court has held cannot be banned because of its expressive content.

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[*310] [**60]**

Moreover, even were I to conclude that the city of Erie had specifically singled out the activity of nude dancing, I still would not find that this regulation violated the First Amendment unless I could be persuaded (as on this record I cannot) that it was the communicative character of nude dancing that prompted the ban. When conduct other than speech itself is regulated, it is my view that the First Amendment is violated only "where the government prohibits conduct precisely because of its communicative attributes." *Barnes, supra, at 577* (emphasis deleted). Here, even if one hypothesizes that the city's object was to suppress only nude dancing, that would not establish an intent to suppress what (if anything) nude dancing communicates. I do not feel the need, as the Court does, to identify some "secondary effects" associated with nude dancing that the city could properly seek to eliminate. (I am highly skeptical, to tell the truth, that the addition of pasties and g-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease.) The traditional power of government to **[****61]** foster good morals (*bonos mores*), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment.

DISSENTBY: STEVENS; SOUTER (In Part)

DISSENT: [*317contd]

[1406contd]**

[*296contd]** [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

Far more important than the question whether nude dancing is entitled to the protection of the First Amendment are the dramatic changes in legal doctrine that the Court endorses today. Until now, the "secondary effects" of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. For the first time, the Court has now held that such effects may justify **[*318]** the total suppression of protected speech. Indeed, the plurality opinion concludes that admittedly trivial advancements of a State's interests may provide the basis for censorship. The Court's commendable attempt to replace the fractured decision in *Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991)*, with a single coherent rationale is strikingly unsuccessful; it is supported neither by precedent nor by persuasive reasoning.

I

[*LEdHR5B]** [5B]As the preamble to Ordinance **[****62]** No. 75-1994 candidly acknowledges, the council of the city of Erie enacted the restriction at issue "for the purpose of limiting a recent increase in nude live entertainment within the City." *Ante*, at 9. Prior to the enactment of the ordinance, the dancers at Kandyland performed in the nude. As the Court recognizes, after its enactment they can perform precisely the same dances if they wear "pasties and G-strings." *Ante*, at 13; see also, *ante*, at 4, n.2 (SOUTER, J., concurring in part and dissenting in part). In both instances, the erotic messages conveyed by the dancers to a willing audience are a form of

expression protected by the First Amendment. *Ante*, at 7. n1 Despite the similarity between the messages conveyed by the two forms of dance, they are not identical.

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n1 Respondent does not contend that there is a constitutional right to engage in conduct such as lap dancing. The message of eroticism conveyed by the nudity aspect of the dance is quite different from the issue of the proximity between dancer and audience. Respondent's contention is not that Erie has focused on lap dancers, see *ante*, at 7 (SCALIA, J., concurring), but that it has focused on the message conveyed by nude dancing.

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[**63]**

If we accept Chief Judge Posner's evaluation of this art form, see *Miller v. South Bend, 904 F.2d 1081, 1089-1104 (CA7 1990)* (en banc), the difference between the two messages is significant. The plurality assumes, however, that the difference in the content of the message resulting from **[*319]** the mandated costume change is "*de minimis.*" *Ante*, at 13. Although I suspect that the patrons of Kandyland are more likely to share Chief Judge Posner's view than the plurality's, **[***297]** for present purposes I shall accept the assumption that the difference in the message is small. The crucial point to remember, however, is **[**1407]** that whether one views the difference as large or small, nude dancing still receives First Amendment protection, even if that protection lies only in the "outer ambit" of that Amendment. *Ante*, at 7. Erie's ordinance, therefore, burdens a message protected by the First Amendment. If one assumes that the same erotic message is conveyed by nude dancers as by those wearing miniscule costumes, one means of expressing that message is banned; n2 if one assumes that the messages are different, one of those messages is banned. In either event, the ordinance is **[****64]** a total ban.

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n2 Although nude dancing might be described as one protected "means" of conveying an erotic message, it does not follow that a protected message has not been totally banned simply because there are other, similar ways to convey erotic messages. See *ante*, at 11-12. A State's prohibition of a particular book, for example, does not fail to be a total ban simply because other books conveying a similar message are available.

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The Court relies on the so-called "secondary effects" test to defend the ordinance. *Ante*, at 9-15. The present use of that rationale, however, finds no support whatsoever in our precedents. Never before have we approved the use of that doctrine to justify a total ban on protected First Amendment expression. On the contrary, we have been quite clear that the doctrine would not support that end.

In *Young v. American Mini Theatres, Inc., 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976),* we upheld a Detroit zoning ordinance that placed special restrictions on the location of motion picture **[****65]** theaters that exhibited "adult" movies. The "secondary effects" of the adult theaters on the neighborhoods where they were located -- lower property values and increases in crime (especially prostitution) to name a few -- justified the burden imposed **[*320]** by the ordinance. *Id., at 54, 71, and n. 34* (plurality opinion). Essential to our holding, however, was the fact that the ordinance was "nothing more than a limitation on the place where adult films may be exhibited" and did not limit the size of the market in such speech. *Id., at 71;* see also *id., at 61, 63, n. 18, 70, 71, n. 35.* As Justice Powell emphasized in his concurrence:

"At most the impact of the ordinance on [the First Amendment] interests is incidental and minimal. Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view them. The ordinance is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content. Nor is there any significant overall curtailment of adult movie presentations, or the opportunity for a message to reach an audience." **[****66]** *427 U.S. at 78-79.*

See also *id., at 81, n. 4* ("[A] zoning ordinance that merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression"). **[***298]**

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In *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986),* we upheld a similar ordinance, again finding that the "secondary effects of such theaters on the surrounding community" justified a restrictive zoning law. *Id., at 47.* We noted, however, that "the Renton ordinance, like the one in *American Mini Theatres*, does not ban adult theaters altogether," but merely "circumscribes their choice as to location." *Id., at 46, 48;* see also *id., at 54* ("In our view, the First Amendment requires . . . that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city . . . "). Indeed, in both *Renton* and *American Mini Theatres*, the zoning ordinances were analyzed as mere "time, **[*321]** place, and manner" regulations. n3 See **[**1408]** *Renton, 475 U.S. at 46;* **[****67]** *American Mini Theatres, 427 U.S. at 63, and n. 18; 427 U.S. at 82, n. 6.* Because time, place, and manner regulations must "leave open ample alternative channels for communication of information," *Ward v. Rock Against Racism, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989),* a total ban would necessarily fail that test. n4

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n3 The Court contends, *ante*, at 14, that *Ward v. Rock Against Racism, 491 U.S. 781, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989),* shows that we have used the secondary effects rationale to justify more burdensome restrictions than those approved in *Renton* and *American Mini Theatres*. That argument is unpersuasive for two reasons. First, as in the two cases just mentioned, the regulation in *Ward* was as a time, place, and manner restriction. See *491 U.S. at 791; id., at 804* (Marshall, J., dissenting). Second, as discussed below, *Ward* is not a secondary effects case. See *infra*, at 9-10.

n4 We also held in *Renton* that in enacting its adult theater zoning ordinance, the city of Renton was permitted to rely on a detailed study conducted by the city of Seattle that examined the relationship between zoning controls and the secondary effects of adult theaters. (It was permitted to rely as well on "the 'detailed findings' summarized" in an opinion of the Washington Supreme Court to the same effect.) *475 U.S. at 51-52.* Renton, having identified the same problem in its own city as that experienced in Seattle, quite logically drew on Seattle's experience and adopted a similar solution. But if Erie is relying on the Seattle study as well (as the Court suggests, *ante*, at 16), 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 warn by the performers -- it merely assumes it to be so. See *infra,* at 7-8. 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.

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[**68]**

And we so held in *Schad v. Mount Ephraim, 452 U.S. 61, 68 L. Ed. 2d 671, 101 S. Ct. 2176 (1981).* There, we addressed a zoning ordinance that did not merely require the dispersal of adult theaters, but prohibited **[*322]** them altogether. In striking down that law, we focused precisely on that distinction, holding that the secondary effects analysis endorsed in the past did not apply to an ordinance that totally banned nude dancing: "The restriction [in *Young* v. *American Mini Theatres*] did not affect **[***299]** the number of adult movie theaters that could operate in the city; it merely dispersed them. The Court did not imply that a municipality could ban all adult theaters -- much less all live entertainment or all nude dancing -- from its commercial districts citywide." *Id., at 71* (plurality opinion); see also *id., at 76; id., at 77* (Blackmun, J., concurring) (joining plurality); *id., at 79* (Powell, J., concurring) (same).

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

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that simply limits the places where speech may occur is **[****69]** 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. n5 Yet it is perfectly clear that in the present case -- to use Justice Powell's metaphor in *American Mini Theatres* -- the city of Erie has totally silenced a message the dancers at Kandyland want to convey. The fact that this censorship may have a laudable ulterior purpose cannot mean that censorship is not censorship. **[**1409]** For these reasons, the Court's holding rejects the explicit reasoning in *American Mini Theatres* and *Renton* and the express holding in *Schad.*

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n5 As the Court recognizes by quoting my opinion in *Young v. American Mini Theatres, Inc., 427 U.S. 50, 70, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976),* see *ante*, at 13, "the First Amendment will not tolerate the total suppression of erotic materials that have some artistic value," though it will permit zoning regulations.

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[**70]**

The Court's use of the secondary effects rationale to permit a total ban has grave implications for basic free speech principles. Ordinarily, laws regulating the primary effects of speech, *i.e.,* the intended persuasive effects caused by the **[*323]** speech, are presumptively invalid. Under today's opinion, a State may totally ban speech based on its secondary effects -- which are defined as those effects that "happen to be associated" with speech, *Boos v. Barry, 485 U.S. 312, 320-321, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988); see ante*, at 10 -- yet the regulation is not presumptively invalid. Because the category of effects that "happen to be associated" with speech includes the narrower subset of effects caused by speech, today's holding has the effect of swallowing whole a most fundamental principle of First Amendment jurisprudence.

II

The Court's mishandling of our secondary effects cases is not limited to its approval of a total ban. It compounds that error by dramatically reducing the degree to which the State's interest must be furthered by the restriction imposed on speech, and by ignoring the critical difference between secondary effects caused by speech and the incidental effects on **[****71]** speech that may be caused by a regulation of conduct.

In what can most delicately be characterized as an enormous understatement, the plurality concedes that "requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects." *Ante*, at 20. To **[***300]** believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible. It would be more accurate to acknowledge, as JUSTICE SCALIA does, that there is no reason to believe that such a requirement "will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease." *Ante*, at 10 (opinion concurring in judgment); see also *ante*, at 4, n. 2 (SOUTER, J., concurring in part and dissenting in part). Nevertheless, the plurality concludes that the "less stringent" test announced in *United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968),* "requires only that the regulation further the interest in **[*324]** combating such effects," *ante*, at 20; see also *ante,* at 8. It is one thing to say, however, that **[****72]** *O'Brien* is more lenient than the "more demanding standard" we have imposed in cases such as *Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).* See *ante*, at 8. It is quite another to say that the test can be satisfied by nothing more than the mere possibility of *de minimis* effects on the neighborhood.

The Court is also mistaken in equating our secondary effects cases with the "incidental burdens" doctrine applied in cases such as *O'Brien*; and it aggravates the error by invoking the latter line of cases to support its assertion that Erie's ordinance is unrelated to speech. The incidental burdens doctrine applies when "'speech' and 'nonspeech' elements are combined in the same course of conduct," and the government's interest in regulating the latter justifies incidental burdens on the former. *O'Brien, 391 U.S. at 376.* Secondary effects, on the other hand, are indirect consequences of protected speech and may justify regulation of the places where that speech may occur. See *American Mini Theatres, 427 U.S. at 71, n. 34* ("[A] concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime"). n6 When a State enacts **[****73]** **[**1410]** a regulation, it might focus on the secondary effects of speech as its aim, or it might concentrate on nonspeech related concerns, having no thoughts at all with respect to how

its regulation will affect speech -- and only later, when the regulation is found to burden speech, justify the imposition as an unintended incidental consequence. n7 But those interests are not the **[*325]** same, and the Court cannot ignore their differences and insist that both aims are equally unrelated to speech simply because Erie might have "recognized" that it could possibly **[***301]** have had either aim in mind. See *ante*, at 14. n8 One can think of an apple and an orange at the same time; that does not turn them into the same fruit. **[****74]**

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n6 A secondary effect on the neighborhood that "happens to be associated with" a form of speech is, of course, critically different from "the direct impact of speech on its audience." *Boos, 485 U.S. at 320-321.* The primary effect of speech is the persuasive effect of the message itself.

n7 In fact, the very notion of focusing in on incidental burdens at the time of enactment appears to be a contradiction in terms. And if it were not the case that there is a difference between laws aimed at secondary effects and general bans incidentally burdening speech, then one wonders why JUSTICES SCALIA and SOUTER adopted such strikingly different approaches in *Barnes*.

n8 I frankly do not understand the Court's declaration that a State's interest in the secondary effects of speech that "happen to be associated" with the speech are not "related" to the speech. *Ante*, at 12. See, *e.g.*, Webster's Third International Dictionary 132 (1966) (defining "associate" as "closely related"). Sometimes, though, the Court says that the secondary effects are "caused" by the speech, rather than merely "associated with" the speech. See, *e.g.*, *ante* at 10, 12, 16, 19. If that is the definition of secondary effects the Court adopts, then it is even more obvious that an interest in secondary effects is related to the speech at issue. See *Barnes, 501 U.S. at 585-586* (SOUTER, J., concurring) (secondary effects are not related to speech because their connection to speech is only one of correlation, not causation).

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Of course, the line between governmental interests aimed at conduct and unrelated to speech, on the one hand, and interests arising out of the effects of the speech, on the other, may be somewhat imprecise in some cases. In this case, however, **[****75]** we need not wrestle with any such difficulty because Erie has expressly justified its ordinance with reference to secondary effects. Indeed, if Erie's concern with the effects of the message were unrelated to the message itself, it is strange that the only means used to combat those effects is the suppression of the message. n9 For these reasons, the Court's argument that "this case is similar to *O'Brien*," *ante,* at 9; see also *ante,* at 13, is quite wrong, as are its **[*326]** citations to *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984),* and *Ward v. Rock Against Racism, 491 U.S. 781, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989), ante*, at 12-14, neither of which involved secondary effects. The Court cannot have its cake and eat it too -- either Erie's ordinance was not aimed at speech and the Court may attempt to justify the regulation under the incidental burdens test, or Erie has aimed its law at the secondary effects of speech, and the Court can try to justify the law under that doctrine. But it cannot conflate the two with the expectation that Erie's interests aimed at secondary effects will be rendered unrelated to speech by virtue of this doctrinal polyglot. **[****76]**

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n9 As Justice Powell said in his concurrence in *Young v. American Mini Theatres, 427 U.S. at 82, n. 4:* "Had [Detroit] been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location." Quite plainly, Erie's total ban evinces its concern with the message being regulated.

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[*LEdHR5C]** [5C]Correct analysis of the issue in this case should begin with the proposition that nude dancing is a species of expressive conduct that is protected by the First Amendment. As Chief Judge

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Posner has observed, nude dancing fits well within a broad, cultural tradition recognized as expressive **[**1411]** in nature and entitled to First Amendment protection. See *904 F.2d at 1089-1104;* see also Note, *97 Colum. L. Rev. 1844 (1997).* The nudity of the dancer is both a component of the protected expression and the specific target of the ordinance. It is pure sophistry to reason from the premise that **[****77]** the regulation of the nudity component of nude dancing is unrelated to the message conveyed by nude dancers. Indeed, both the text of the ordinance and the reasoning in the Court's opinion make **[***302]** it pellucidly clear that the city of Erie has prohibited nude dancing *"precisely because of its communicative attributes." Barnes, 501 U.S. at 577* (SCALIA, J., concurring in judgment) (emphasis in original); see *501 U.S. at 596* (White, J., dissenting).

III

The censorial purpose of Erie's ordinance precludes reliance on the judgment in *Barnes* as sufficient support for the Court's holding today. Several differences between the Erie ordinance and the statute at issue in *Barnes* belie the Court's assertion that the two laws are "almost identical." **[*327]** *Ante*, at 8. To begin with, the preamble to Erie's ordinance candidly articulates its agenda, declaring:"Council specifically wishes to adopt the concept of Public Indecency prohibited by the laws of the State of Indiana, which was approved by the U.S. Supreme Court in Barnes vs. Glen Theatre Inc., . . . *for the purpose of limiting a recent increase in nude live entertainment within the City.*" App. **[****78]** to Pet. for Cert. 42a (emphasis added); see also *ante,* at 9. n10As its preamble forthrightly admits, the ordinance's "purpose" is to "limit" a protected form of speech; its invocation of *Barnes* cannot obliterate that professed aim. n11

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n10 The preamble also states: "The Council of the City of Erie has [found] . . . that certain lewd, immoral activities carried on in public places for profit . . . lead to the debasement of both women and men . . . ." App. to Pet. for Cert. 41a.

n11 Relying on five words quoted from the Supreme Court of Pennsylvania, the Court suggests that I have misinterpreted that Court's reading of the preamble. *Ante*, at 9. What follows, however, is a more complete statement of what that Court said on this point: "We acknowledge that one of the purposes of the Ordinance is to combat negative secondary effects. That, however, is not its only goal. 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. . . . We believe . . . that the stated purpose for promulgating the Ordinance is inextricably linked with the content-based motivation to suppress the expressive nature of nude dancing." *553 Pa. 348, 359, 719 A.2d 273, 279 (1998).*

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[**79]**

Erie's ordinance differs from the statute in *Barnes* in another respect. In *Barnes*, the Court expressly observed that the Indiana statute had not been given a limiting construction by the Indiana Supreme Court. As presented to this Court, there was nothing about the law itself that would confine its application to nude dancing in adult entertainment establishments. See *Barnes, 501 U.S. at 564, n. 1* (discussing Indiana Supreme Court's lack of a limiting construction); see also *501 U.S. at 585, n. 2* (SOUTER, J., concurring). **[*328]** Erie's ordinance, however, comes to us in a much different posture. In an earlier proceeding in this case, the Court of Common Pleas asked Erie's counsel "what effect would this ordinance have on theater . . . productions such as Equus, Hair, O[h!] Calcutta[!]? Under your ordinance would these things be prevented . . . ?" Counsel responded: "No, they wouldn't, Your Honor." App. 53. n12 Indeed, as *stipulated* in **[**1412]** the record, the city permitted **[***303]** a production of Equus to proceed without prosecution, even after the ordinance was in effect, and despite its awareness of the nudity involved in the production. *427 U.S. at 84.* n13 **[****80]** Even if, in light of its broad applicability, the statute in *Barnes* was not aimed at a particular form of speech, Erie's ordinance is quite different. As presented to us, the ordinance is deliberately targeted at Kandyland's type of nude dancing (to the exclusion of plays like Equus), in terms of both its applicable scope and the city's enforcement. n14 **[****81]**

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n12 In my view, Erie's categorical response forecloses JUSTICE SCALIA's

assertion that the city's position on Equus and Hair was limited to "one instance," where "the city was [not] aware of the nudity," and "no one had complained." *Ante*, at 8 (concurring opinion). Nor could it be contended that selective applicability by stipulated enforcement should be treated differently from selective applicability by statutory text. See *Barnes, 501 U.S. at 574* (SCALIA, J., concurring) (selective enforcement may affect a law's generality). Were it otherwise, constitutional prohibitions could be circumvented with impunity.

n13 The stipulation read: "The play, 'Equus' featured frontal nudity and was performed for several weeks in October/November 1994 at the Roadhouse Theater in downtown Erie with no efforts to enforce the nudity prohibition which became effective during the run of the play."

n14 **JUSTICE SCALIA** argues that Erie might have carved out an exception for Equus and Hair because it guessed that this Court would consider them protected forms of expression, see *Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 550, 557-558, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975)* (holding that Hair, including the "group nudity and simulated sex" involved in the production, is protected speech); in his view, that makes the distinction unobjectionable and renders the ordinance no less of a general law. *Ante*, at 9 (concurring opinion). This argument appears to contradict his earlier definition of a general law: "A law is 'general' . . . if it regulates conduct without regard to whether that conduct is expressive." *Barnes v. Glen Theatre, Inc., 501 U.S. 560, 575, n. 3, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991)* (opinion concurring in judgment). If the ordinance regulates conduct (public nudity), it does not do so without regard to whether the nudity is expressive if it exempts the public nudity in Hair *precisely* "because of its expressive content." *Ante*, at 9, n. 6 (concurring opinion). Moreover, if Erie exempts Hair because it wants to avoid a conflict with the First Amendment (rather than simply to exempt instances of nudity it finds inoffensive), that rationale still does not explain why Hair is exempted but Kandyland is not, since *Barnes* held that both are constitutionally protected.

JUSTICE SCALIA also states that even if the ordinance singled out nude dancing, he would not strike down the law unless the dancing was singled out because of its message. *Ante*, at 9 (concurring opinion). He opines that here, the basis for singling out Kandyland is morality. *Ante,* at 9. But since the "morality" of the public nudity in Hair is left untouched by the ordinance, while the "immorality" of the public nudity in Kandyland is singled out, the distinction cannot be that "nude public dancing *itself* is immoral." *Ante*, at 10 (emphasis in original). Rather, the only arguable difference between the two is that one's message is more immoral than the other's.

---------- End Footnotes ----------

[*329] [**82]**

This narrow aim is confirmed by the expressed views of the Erie City Councilmembers who voted for the ordinance. The four city councilmembers who approved the measure (of the six total councilmembers) each stated his or her view that the ordinance was aimed specifically at nude adult entertainment, and not at more mainstream forms of entertainment that include total nudity, nor even at nudity in general. One lawmaker observed: "We're not talking about nudity. We're not talking about the theater or art . . . . We're talking about what is indecent and immoral . . . . We're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion." App. 39. Though not quite as succinct, the other councilmembers **[***304]** expressed similar convictions. For example, one member illustrated his understanding of the aim of the law by contrasting it with his recollection about high school students swimming in the nude in the school's pool. The ordinance was not intended to cover those incidents of nudity: "But what I'm getting at is [the swimming] wasn't indecent, it wasn't an immoral thing, and **[*330]** yet there was nudity." *Id.* at 42. The same lawmaker then disfavorably compared **[****83]** the nude swimming incident to the activities that occur in "some of these clubs" that exist in Erie -- clubs that would be covered **[**1413]** by the law. *Ibid. n15* Though such comments could be consistent with an

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interest in a general prohibition of nudity, the complete absence of commentary on that broader interest, and the councilmembers' exclusive focus on adult entertainment, is evidence of the ordinance's aim. In my view, we need not strain to find consistency with more general purposes when the most natural reading of the record reflects a near obsessive preoccupation with a single target of the law. n16

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n15 Other members said their focus was on "bottle clubs," and the like, App. 43, and attempted to downplay the effect of the ordinance by acknowledging that "the girls can wear thongs or a Gstring and little pasties that are smaller than a diamond." *Ibid.* Echoing that focus, another member stated that "there still will be adult entertainment in this town, only it will be in a little different form." *Id.* at 47.

n16 The Court dismisses this evidence, declaring that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *Ante*, at 11 (citing *United States v. O'Brien, 391 U.S. 367, 382-383, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968); Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986)).* First, it is worth pointing out that this doctrinaire formulation of *O'Brien*'s cautionary statement is overbroad. See generally L. Tribe, American Constitutional Law § 12-5, pp. 819-820 (2d ed. 1988). Moreover, *O'Brien* itself said only that we would not strike down a law "on the *assumption* that a wrongful purpose or motive has caused the power to be exerted," *391 U.S. at 383* (emphasis added; internal quotation marks omitted), and that statement was due to our recognition that it is a "hazardous matter" to determine the actual intent of a body as large as Congress "on the basis of what fewer than a handful of Congressmen said about [a law]," *391 U.S. at 384.* Yet neither consideration is present here. We need not base our inquiry on an "assumption," nor must we infer the collective intent of a large body based on the statements of a few, for we have in the record the actual statements of all the city councilmembers who voted in favor of the ordinance.

---------- End Footnotes ----------

[**84]**

The text of Erie's ordinance is also significantly different from the law upheld in *Barnes*. In *Barnes*, the statute defined "nudity" as "the showing of the human male or female **[*331]** genitals" (and certain other regions of the body) "with less than fully opaque covering." *501 U.S. at 569, n. 2.* The Erie ordinance duplicates that definition in all material respects, but adds the following to its definition of "nudity":"The exposure of any device, costume, or covering *which gives the appearance of or simulates* the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, *which device simulates and gives the realistic appearance* of nipples and/or areola." *Ante*, at 2, n. (emphasis added).Can it be doubted that this out-of-the-ordinary definition of "nudity" is aimed directly at the dancers in establishments such as Kandyland? Who else is likely to don such garments? n17 **[***305]** We should not stretch to embrace fanciful explanations when the most natural reading of the ordinance unmistakably identifies its intended target.

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n17 Is it seriously contended (as would be necessary to sustain the ordinance as a general prohibition) that, when crafting this bizarre definition of "nudity," Erie's concern was with the use of simulated nipple covers on "nude beaches and [by otherwise] unclothed purveyors of hot dogs and machine tools"? *Barnes, 501 U.S. at 574* (SCALIA, J., concurring in judgment); see also *ante*, at 7 (SCALIA, J., concurring). It is true that one might *conceivably* imagine that is Erie's aim. But it is far more likely that this novel definition was written with the Kandyland dancers and the like in mind, since they are the only ones covered by the law (recall that plays like Equus are exempted from coverage) who are likely to utilize such unconventional clothing.

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[**85]**

It is clear beyond a shadow of a doubt that the Erie ordinance was a response to a more specific concern than nudity in general, namely, nude dancing of the sort found in Kandyland. n18 Given that the **[**1414]** Court has not even tried to defend **[*332]** the ordinance's total ban on the ground that its censorship of protected speech might be justified by an overriding state interest, it should conclude that the ordinance is patently invalid. For these reasons, as well as the reasons set forth in Justice White's dissent in *Barnes,* I respectfully dissent.

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n18 The Court states that Erie's ordinance merely "replaces and updates provisions of an 'Indecency and Immorality' ordinance" from the mid-19th century, just as the statute in *Barnes* did. *Ante*, at 8-9. First of all, it is not clear that this is correct. The record does indicate that Erie's Ordinance No. 75-1994 updates an older ordinance of similar import. Unfortunately, that old regulation is not in the record. Consequently, whether the new ordinance merely "replaces" the old one is a matter of debate. From statements of one councilmember, it can reasonably be inferred that the old ordinance was merely a residential zoning restriction, not a total ban. See App. 43. If that is so, it leads to the further question why Erie felt it necessary to shift to a total ban in 1994.

But even if the Court's factual contention is correct, it does not undermine the points I have made in the text. In *Barnes*, the point of noting the ancient pedigree of the Indiana statute was to demonstrate that its passage antedated the appearance of adult entertainment venues, and therefore could not have been motivated by the presence of those establishments. The inference supposedly rebutted in *Barnes* stemmed from the *timing* of the enactment. Here, however, the inferences I draw depend on the text of the ordinance, its preamble, its scope and enforcement, and the comments of the councilmembers. These do not depend on the timing of the ordinance's enactment.

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[**86] [*310contd]**

[1402contd]**

[*291contd]** [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

JUSTICE SOUTER, concurring in part and dissenting in part.

[*LEdHR1E]** [1E]I join Parts I and II of the Court's opinion and agree with the analytical approach that the plurality employs in deciding this case. Erie's stated interest in combating the secondary effects associated with nude dancing establishments is an interest unrelated to the suppression of expression under *United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968),* and the city's regulation is thus properly considered under the *O'Brien* standards. I do not believe, however, that the current record allows us to say that the city has made a sufficient **[*311]** evidentiary showing to sustain its regulation, and I would therefore vacate the decision of the Pennsylvania Supreme Court and remand the case for further proceedings. **[***292]**

I

In several recent cases, we have confronted the need for factual justifications to satisfy intermediate scrutiny under the First Amendment. See, *e.g., Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 145 L. Ed. 2d 886, 120 S. Ct. 897 (2000); Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 137 L. Ed. 2d 369, 117 S. Ct. 1174 (1997) (Turner II); Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994) (Turner* **[****87]** *I).* Those cases do not identify with any specificity a particular quantum of evidence, nor do I seek to do so in this brief concurrence. n1 What the **[**1403]** cases do make plain, however, is that application of an intermediate scrutiny test to a government's asserted rationale for regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue.

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n1 As explained below, *infra,* at 7, the issue of evidentiary justification was never

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joined, and with a multiplicity of factors affecting the analysis, a general formulation of the quantum required under *United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968),* will at best be difficult. A lesser showing may suffice when the means-end fit is evident to the untutored intuition. As we said in *Nixon*, "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." 528 U.S. at ___ (slip op., at 11). (In *O'Brien*, for example, the secondary effects that the Government identified flowed from the destruction of draft cards, and there could be no doubt that a regulation prohibiting that destruction would alleviate the concomitant harm.) The nature of the legislating institution might also affect the calculus. We do not require Congress to create a record in the manner of an administrative agency, see *Turner II, 520 U.S. 180, 213, 137 L. Ed. 2d 369, 117 S. Ct. 1174 (1997),* and we accord its findings greater respect than those of agencies. See *id., at 195.* We might likewise defer less to a city council than we would to Congress. The need for evidence may be especially acute when a regulation is content based on its face and is analyzed as content neutral only because of the secondary effects doctrine. And it may be greater when the regulation takes the form of a ban, rather than a time, place, or manner restriction.

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[*312] [**88]**

In *Turner I,* for example, we stated that"when the Government defends a regulation on speech as a means to address past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' *Quincy Cable TV, Inc. v. FCC, 248 U.S. App. D.C. 1, 768 F.2d 1434, 1455 (CADC 1985).* It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *512 U.S. at 664* (plurality opinion). The plurality concluded there, of course, that the record, though swollen by three years of hearings on the Cable Television Consumer Protection and Competition Act of 1992, was insufficient to permit the necessary determinations and remanded for a more thorough factual development. When the case came back to us, in *Turner II,* a majority of the Court reiterated those requirements, characterizing the enquiry into the acceptability of the Government's regulations as one that turned on whether they "were designed to address a real harm, and whether those provisions will alleviate it in a material way." *520 U.S. at 195.* Most recently, **[****89]** in *Nixon*, we repeated that "we have never accepted mere conjecture as adequate to carry a First Amendment burden," 528 U.S. at ___ (slip op., at 12), **[***293]** and we examined the "evidence introduced into the record by respondents or cited by the lower courts in this action . . ," *id.* at (slip op., at 13).

The focus on evidence appearing in the record is consistent with the approach earlier applied in *Young v. American Mini Theatres, Inc., 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976),* and *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).* In *Young*, Detroit adopted a zoning ordinance requiring dispersal of adult theaters through the city and prohibiting them within 500 feet of a residential area. Urban planners and real estate experts attested to the harms created by clusters of such theaters, see *427 U.S. at 55,* and we found that "the record **[*313]** discloses a factual basis" supporting the efficacy of Detroit's chosen remedy, *id. at 71.* In *Renton*, the city similarly enacted a zoning ordinance requiring specified distances between adult theaters and residential zones, churches, parks, or schools. See *475 U.S. at 44.* **[****90]** The city "held public hearings, reviewed the experiences of Seattle and other cities, and received a report from the City Attorney's Office advising as to developments in other cities." *Ibid.* We found that Renton's failure to conduct its own studies before enacting the ordinance was not fatal; "the First Amendment does not require a city **[**1404]** . . . to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id. at 51-52.*

The upshot of these cases is that intermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed. n2 See, *e.g., Edenfield v. Fane, 507 U.S. 761, 770-773,*

123 L. Ed. 2d 543, 113 S. Ct. 1792 (1993) (striking down regulation of commercial speech for failure to show direct and material efficacy). That evidentiary basis may be borrowed from the records made by other governments if the experience elsewhere is germane to the measure under **[****91]** consideration and actually relied upon. I will assume, further, that the reliance may be shown by legislative invocation of a judicial opinion that accepted an evidentiary foundation as sufficient **[*314]** for a similar regulation. What is clear is that the evidence of reliance must be a matter of demonstrated fact, not speculative supposition.

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n2 The plurality excuses Erie from this requirement with the simple observation that "it is evident" that the regulation will have the required efficacy. *Ante*, at 19. The *ipse dixit* is unconvincing. While I do agree that evidentiary demands need not ignore an obvious fit between means and ends, see n. 1, *supra*, 1, it is not obvious that this is such a case. It is not apparent to me as a matter of common sense that establishments featuring dancers with pasties and G-strings will differ markedly in their effects on neighborhoods from those whose dancers are nude. If the plurality does find it apparent, we may have to agree to disagree.

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By these standards, the record before **[****92]** us today is deficient in its failure to reveal any evidence on which Erie may have relied, either for the seriousness of the threatened harm **[***294]** or for the efficacy of its chosen remedy. The plurality does the best it can with the materials to hand, see *ante*, at 16-17, but the pickings are slim. The plurality quotes the ordinance's preamble asserting that over the course of more than a century the city council had expressed "findings" of detrimental secondary effects flowing from lewd and immoral profitmaking activity in public places. But however accurate the recital may be and however honestly the councilors may have held those conclusions to be true over the years, the recitation does not get beyond conclusions on a subject usually fraught with some emotionalism. The plurality recognizes this, of course, but seeks to ratchet up the value of mere conclusions by analogizing them to the legislative facts within an administrative agency's special knowledge, on which action is adequately premised in the absence of evidentiary challenge. *Ante*, at 17. The analogy is not obvious; agencies are part of the executive branch and we defer to them in part to allow them the freedom necessary **[****93]** to reconcile competing policies. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-845, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*. That aside, it is one thing to accord administrative leeway as to predictive judgments in applying "'elusive concepts'" to circumstances where the record is inconclusive and "evidence . . . is difficult to compile," *FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 796-797, 56 L. Ed. 2d 697, 98 S. Ct. 2096 (1978)*, and quite another to dispense with evidence of current fact as a predicate for banning a subcategory of expression. n3 As **[*315]** to current fact, the city council's closest **[**1405]** approach to an evidentiary record on secondary effects and their causes was the statement of one councilor, during the debate over the ordinance, who spoke of increases in sex crimes in a way that might be construed as a reference to secondary effects. See App. 44. But that reference came at the end of a litany of concerns ("free condoms in schools, drive-by shootings, abortions, suicide machines" and declining student achievement test scores) that do not seem to be secondary effects of nude dancing. *Ibid.* Nor does the invocation of *Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991)*, **[****94]** in one paragraph of the preamble to Erie's ordinance suffice. App. to Pet. for Cert. 42a. The plurality opinion in *Barnes* made no mention of evidentiary showings at all, and though my separate opinion did make a pass at the issue, I did not demand reliance on germane evidentiary demonstrations, whether specific to the statute in question or developed elsewhere. To invoke *Barnes*, therefore, does not indicate that the issue of evidence has been addressed.

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n3 The proposition that the presence of nude dancing establishments increases the incidence of prostitution and violence is amenable to empirical treatment, and the city councilors who enacted Erie's ordinance are in a position to look to the facts of their own community's experience as well as to experiences elsewhere. Their failure to do so is made all the clearer by one of the *amicus* briefs, largely devoted to the argument that scientifically sound

studies show no such correlation. See Brief for First Amendment Lawyers Association as *Amicus Curiae* 16-23; *id.*, at App. 1-29.

---------- End Footnotes ----------

[**95]**

There is one point, however, on which an evidentiary record is not quite so hard to find, but it hurts, not helps, the city. The final *O'Brien* **[***295]** requirement is that the incidental speech restriction be shown to be no greater than essential to achieve the government's legitimate purpose. *391 U.S. at 377.* To deal with this issue, we have to ask what basis there is to think that the city would be unsuccessful in countering any secondary effects by the significantly lesser restriction of zoning to control the location of nude dancing, thus allowing for efficient law enforcement, restricting effects on property values, and limiting exposure of the public. **[*316]** The record shows that for 23 years there has been a zoning ordinance on the books to regulate the location of establishments like Kandyland, but the city has not enforced it. One councilor remarked that "I think there's one of the problems. The ordinances are on the books and not enforced. Now this takes place. You really didn't need any other ordinances." App. 43. Another commented, "I felt very, very strongly, and I feel just as strongly right now, that this is a zoning matter." *Id.* at 45. Even on the plurality's **[****96]** view of the evidentiary burden, this hurdle to the application of *O'Brien* requires an evidentiary response.

The record suggests that Erie simply did not try to create a record of the sort we have held necessary in other cases, and the suggestion is confirmed by the course of this litigation. The evidentiary question was never decided (or, apparently, argued) below, nor was the issue fairly joined before this Court. While respondent did claim that the evidence before the city council was insufficient to support the ordinance, see Brief for Respondent 44-49, Erie's reply urged us not to consider the question, apparently assuming that *Barnes* authorized us to disregard it. See Reply Brief for Petitioners 6-8. The question has not been addressed, and in that respect this case has come unmoored from the general standards of our First Amendment jurisprudence. n4

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n4 By contrast, federal courts in other cases have frequently demanded evidentiary showings. See, *e.g.*, *Phillips v. Keyport, 107 F.3d 164, 175 (CA3 1997)* (en banc); *J&B Entertainment, Inc.* v. *Jackson, 152 F.3d 362, 370-371 (CA5 1998).*

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[**97]**

Careful readers, and not just those on the Erie City Council, will of course realize that my partial dissent rests on a demand for an evidentiary basis that I failed to make when I concurred in *Barnes, supra.* I should have demanded the evidence then, too, and my mistake calls to mind Justice Jackson's foolproof explanation of a lapse of his own, when he quoted Samuel Johnson, "'Ignorance, sir, ignorance.'" *McGrath v. Kristensen, 340 U.S. 162, 178, 95 L. Ed. 173, 71 S. Ct. 224 (1950)* (concurring **[*317]** opinion). I may not be less ignorant of nude dancing than I was nine years ago, but after many subsequent occasions to think further about the needs of the **[**1406]** First Amendment, I have come to believe that a government must toe the mark more carefully than I first insisted. I hope it is enlightenment on my part, and acceptable even if a little late. See *Henslee v. Union Planters Nat. Bank & Trust Co., 335 U.S. 595, 600, 93 L. Ed. 259, 69 S. Ct. 290 (1949) (per curiam)* (Frankfurter, J., dissenting).

II

[*LEdHR1F]** [1F]The record before us now does not permit the conclusion that Erie's ordinance is reasonably designed to mitigate real harms. This does not mean that the required showing cannot **[***296]** be made, only that, **[****98]** on this record, Erie has not made it. I would remand to give it the opportunity to do so. n5 Accordingly, although I join with the plurality in adopting the *O'Brien* test, I respectfully dissent from the Court's disposition of the case.

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n5 This suggestion does not, of course, bar the Pennsylvania Supreme Court from choosing simpler routes to disposition of the case if they exist. Respondent mounted a federal overbreadth challenge to the ordinance; it also asserted a violation of the Pennsylvania Constitution. Either one of these arguments, if successful, would

obviate the need for the factual development that is a prerequisite to *O'Brien* analysis.

---------- End Footnotes----------

REFERENCES:
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16A Am Jur 2d, Constitutional Law 504, 508, 510; 50 Am Jur 2d, Lewdness, Indecency, and Obscenity 17, 18

USCS, Constitution, Amendment 1

L Ed Digest, Constitutional Law 961

L Ed Index, Nude Dancing

Annotation References:

What circumstances render **[****99]** civil case, or issues arising therein, moot so as to preclude Supreme Court's consideration of their merits. *44 L Ed 2d 745.*

The Supreme Court and the right of free speech and press. *93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.*

Regulation of exposure of female, but not male, breasts. *67 ALR5th 431.*

Validity of ordinances restricting location of "adult-entertainment" or sex-oriented businesses. *10 ALR5th 538.*

Validity of statute or ordinances requiring sex-oriented businesses to obtain operation licenses. *8 ALR4th 130.*

Topless or bottomless dancing or similar conduct as offenses. *49 ALR3d 1084.*

2-47116

Citation #4
475 U.S. 41

shown at adult motion picture theaters, but rather at the secondary effects of such theaters on the surrounding community, (2) the city's pursuit of its zoning interests is unrelated to the suppression of free expression, and (3) the ordinance is justified without reference to the content of regulated speech. (Brennan and Marshall, JJ., dissented from this holding.)

[*LEdHN3]**
CONSTITUTIONAL LAW §934
free speech -- "content-neutral" regulation -- time, place, and manner of expression --
Headnote: [3]
"Content-neutral" regulations of the time, place, and manner of expression are acceptable, under the First Amendment, so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.

[*LEdHN4]**
COURTS §102
inquiry into legislative motive --
Headnote: [4]
The United States Supreme Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.

[*LEdHN5]**
CONSTITUTIONAL LAW §936
free speech -- adult theater -- ordinance restricting location --
Headnote: [5]
A city zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school, does not contravene the fundamental principle which underlies judicial concern about "content-based" speech regulations: that government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.

[*LEdHN6]**
CONSTITUTIONAL LAW §936
free speech -- adult theater -- ordinance restricting location --
Headnote: [6]
A city zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school, is designed to serve a substantial governmental interest, so as to satisfy First Amendment requirements, a city's interest in attempting to preserve the quality of urban life being one which must be accorded high respect. (Brennan and Marshall, JJ., dissented from this holding.)

[*LEdHN7]**
CONSTITUTIONAL LAW §936
free speech -- adult theater -- ordinance restricting location --
Headnote: [7A] [7B]
A city zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school, allows for reasonable alternative avenues for communication, so as to satisfy First Amendment requirements, where (1) the ordinance leaves some 520 acres, or more than 5 percent of the entire land area of the city, open to use as adult theater sites, and (2) such land consists of ample, accessible real estate, including acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space which is criss-crossed by freeways, highways, and roads; that theater owners who intend to exhibit adult motion pictures in their theaters 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; the First Amendment does not compel the government to insure that adult theaters, or any other kinds of speech-related businesses, will be able to obtain sites at bargain prices; and the First Amendment requires only that the city refrain from effectively denying a person a reasonable opportunity to open and operate an adult theater within the city. (Brennan and Marshall, JJ., dissented from this holding.)

[*LEdHN8]**
CONSTITUTIONAL LAW §936
free speech -- adult theater -- ordinance restricting location --
Headnote: [8]
A city is entitled to rely on the experiences of other cities in enacting a zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school; the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem which the city addresses; and another city's choice of a different method of adult theater zoning to combat the secondary effects of adult theaters does not call into question either the other city's identification of those secondary effects or the relevance of the other city's experience.

2-120118

CITY OF RENTON ET AL. v. PLAYTIME THEATRES, INC., ET AL.

No. 84-1360

SUPREME COURT OF THE UNITED STATES

475 U.S. 41; 106 S. Ct. 925; 89 L. Ed. 2d 29; 1986 U.S. LEXIS 2; 54 U.S.L.W. 4160; 12 Media L. Rep. 1721

November 12, 1985, Argued
February 25, 1986, Decided

PRIOR HISTORY: [****1]

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: *748 F.2d 527,* reversed.

DECISION: Zoning ordinance prohibiting adult movie theaters from locating within 1,000 feet of residential property, church, park, or school held not to violate First Amendment.

SUMMARY: Two theater owners who intended to exhibit adult motion pictures in their theaters brought suit in the United States District Court for the Western District of Washington, seeking declaratory and injunctive relief against a city zoning ordinance which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Rejecting the theater owners' claims that the ordinance violated the First and Fourteenth Amendments, the District Court entered summary judgment in favor of the city. The United States Court of Appeals for the Ninth Circuit reversed and remanded the case, holding (1) that the ordinance constituted a substantial restriction on speech, (2) that the city had failed to make a sufficient showing of a substantial governmental interest in support of the ordinance, and (3) that the city's asserted interests had not been shown to be unrelated to the suppression of speech *(748 F2d 527).*

On certiorari, the United States Supreme Court reversed. In an opinion by Rehnquist, J., joined by Burger, Ch. J., and White, Powell, Stevens, and O'Connor, JJ., the court, concluding that the ordinance was not unconstitutional, held that the ordinance (1) was a "content-neutral" speech regulation, (2) was designed to serve a substantial governmental interest, and (3) allowed for reasonable alternative avenues of communication; that the city was entitled to rely on the experience of other cities in enacting a zoning ordinance for adult motion picture theaters; that there was no constitutional defect in the method chosen by the city to further its substantial interests; that the ordinance was not unconstitutionally underinclusive for failing to regulate businesses other than adult motion picture theaters; and that the ordinance represented a valid governmental response to the serious problems created by adult motion picture theaters.

Brennan, J., joined by Marshall, J., dissented on the grounds that because the ordinance imposed special restrictions on certain kinds of speech on the basis of content, the ordinance was not "content-neutral," and that even if the ordinance could fairly be characterized as "content-neutral," the city failed to make a sufficient showing of a substantial governmental interest in support of the ordinance, and the ordinance did not provide for reasonable alternative avenues of communication.

LAWYERS' EDITION HEADNOTES:

[*LEdHN1]**
CONSTITUTIONAL LAW §936
free speech -- adult theater -- ordinance restricting location --
Headnote: [1]
A city zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school, does not violate the First Amendment. (Brennan and Marshall, JJ., dissented from this holding.)

[*LEdHN2]**
CONSTITUTIONAL LAW §934
free speech -- "content-neutral" regulation -- time, place, and manner of expression --
Headnote: [2A] [2B] [2C] [2D]
For purposes of the First Amendment, a city zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school, is a form of "content-neutral" regulation of time, place, and manner of expression, where (1) the ordinance is aimed not at the content of the films

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[*LEdHN9]**
CONSTITUTIONAL LAW §936
free speech -- adult theater -- ordinance restricting location --
Headnote: [9]
There is no constitutional defect, under the First Amendment, in the methods chosen by a city to further its substantial interests, where the city enacts a zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school, and where the ordinance is narrowly tailored to affect only that category of theaters shown to produce unwanted secondary effects; cities may choose to regulate adult theaters by dispersing them or by effectively concentrating them.

[*LEdHN10]**
CONSTITUTIONAL LAW §936
free speech -- adult theater -- ordinance restricting location --
Headnote: [10]
A city zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school, is not unconstitutionally underinclusive for failing to regulate businesses other than adult motion picture theaters, where there is no evidence that, at the time the ordinance was enacted, any other adult business was located in, or was contemplating moving into, the city, and where there is no basis for assuming that the city will not, in the future, amend its ordinance to include other kinds of adult businesses, which have been shown to produce the same kinds of secondary effects as adult theaters; that the city chose first to address the potential problems created by one particular kind of adult business in no way suggests that the city has singled out adult theaters for discriminatory treatment.

[*LEdHN11]**
CONSTITUTIONAL LAW §936
free speech -- adult theater -- ordinance restricting location --
Headnote: [11]
A city zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school, represents a valid governmental response to the serious problems created by adult theaters, and satisfies the dictates of the First Amendment, where the city has not used the power to zone as a pretext for suppressing expression, but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas.

[*LEdHN12]**
CONSTITUTIONAL LAW §404
equal protection -- theaters --
Headnote: [12A] [12B]
The rights, under the equal protection clause of the Fourteenth Amendment, of theater owners intending to exhibit adult motion pictures in their theaters are not violated by a city zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school.

[*LEdHN13]**
MUNICIPAL CORPORATIONS §37.7
validity of ordinance -- vagueness --
Headnote: [13A] [13B]
A city zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school, is not unconstitutionally vague, where (1) the ordinance applies to buildings "used" for presenting sexually explicit films, (2) the term "used" describes a continuing course of conduct of exhibiting sexually explicit films in a manner which appeals to a prurient interest, and (3) even if there may be some uncertainty about the effect of the ordinance on other persons, it is unquestionably applicable to theater owners who intend to exhibit adult motion pictures in their theaters.

SYLLABUS: Respondents purchased two theaters in Renton, Washington, with the intention of exhibiting adult films and, at about the same time, filed suit in Federal District Court, seeking injunctive relief and a declaratory judgment that the First and Fourteenth Amendments were violated by a city ordinance that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The District Court ultimately entered summary judgment in the city's favor, holding that the ordinance did not violate the First Amendment. The Court of Appeals reversed, holding that the ordinance constituted a substantial restriction on First Amendment interests, and remanded the case for reconsideration as to whether the city had substantial governmental interests to support the ordinance.

Held: The ordinance is a valid governmental response to the serious problems created by adult theaters and satisfies the dictates of the First Amendment. Cf. *Young v. American Mini Theatres, Inc., 427 U.S. 50.* **[****2]** Pp. 46-55.

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(a) Since the ordinance does not ban adult theaters altogether, it is properly analyzed as a form of time, place, and manner regulation. "Content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. Pp. 46-47.

(b) The District Court found that the Renton City Council's "predominate" concerns were with the secondary effects of adult theaters on the surrounding community, not with the content of adult films themselves. This finding is more than adequate to establish that the city's pursuit of its zoning interests was unrelated to the suppression of free expression, and thus the ordinance is a "content-neutral" speech regulation. Pp. 47-50.

(c) The Renton ordinance is designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication. A city's interest in attempting to preserve the quality of urban life, as here, must be accorded high respect. Although the ordinance was enacted without the benefit of studies specifically relating to Renton's particular problems, Renton **[****3]** was entitled to rely on the experiences of, and studies produced by, the nearby city of Seattle and other cities. Nor was there any constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, or by effectively concentrating them, as in Renton. Moreover, the ordinance is not "underinclusive" for failing to regulate other kinds of adult businesses, since there was no evidence that, at the time the ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton. Pp. 50-53.

(d) As required by the First Amendment, the ordinance allows for reasonable alternative avenues of communication. Although respondents argue that in general there are no "commercially viable" adult theater sites within the limited area of land left open for such theaters by the ordinance, the fact that respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a violation of the First Amendment, which does not compel the Government to ensure that adult theaters, or any other kinds of speech-related **[****4]** businesses, will be able to obtain sites at bargain prices. Pp. 53-54.

COUNSEL: E. Barrett Prettyman, Jr., argued the cause for appellants. With him on the briefs were David W. Burgett, Lawrence J. Warren, Daniel Kellogg, Mark E. Barber, and Zanetta L. Fontes.

Jack R. Burns argued the cause for appellees. With him on the briefs was Robert E. Smith. *

* Briefs of amici curiae urging reversal were filed for Jackson County, Missouri, by Russell D. Jacobson; for the Freedom Council Foundation by Wendell R. Bird and Robert K. Skolrood; for the National Institute of Municipal Law Officers by George Agnost, Roy D. Bates, Benjamin L. Brown, J. Lamar Shelley, John W. Witt, Roger F. Cutler, Robert J. Alfton, James K. Baker, Barbara Mather, James D. Montgomery, Clifford D. Pierce, Jr., William H. Taube, William I. Thornton, Jr., and Charles S. Rhyne; and for the National League of Cities et al. by Benna Ruth Solomon, Joyce Holmes Benjamin, Beate Bloch, and Lawrence R. Velvel.

Briefs of amici curiae urging affirmance were filed for the American Civil Liberties Union et al. by David Utevsky, Jack D. Novik, and Burt Neuborne; and for the American Booksellers Association, Inc., et al. by Michael A. Bamberger.

Eric M. Rubin and Walter E. Diercks filed a brief for the Outdoor Advertising Association of America, Inc., et al. as amici curiae.

[**5]**

JUDGES: REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., concurred in the result. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, post, p. 55.

OPINIONBY: REHNQUIST

OPINION: **[*43]** **[***35]** **[**926]** JUSTICE REHNQUIST delivered the opinion of the Court.

[*LEdHR1]** [1]This case involves a constitutional challenge to a zoning ordinance, enacted by appellant city of Renton, Washington, that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Appellees, Playtime Theatres, Inc., and Sea-First Properties, Inc., filed an action in the United States District Court for the Western District of Washington seeking a declaratory judgment that the Renton ordinance violated the First and Fourteenth Amendments and a permanent injunction against its enforcement. The District Court ruled in favor of Renton and denied the permanent injunction,

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but the Court of Appeals for the Ninth Circuit reversed and remanded for reconsideration. *748 F.2d 527 (1984)*. We noted probable jurisdiction, *471 U.S. 1013* **[**927]** *(1985),* **[****6]** and now reverse the judgment of the Ninth Circuit. n1

---------- Footnotes ----------

n1 This appeal was taken under *28 U. S. C. § 1254*(2), which provides this Court with appellate jurisdiction at the behest of a party relying on a state statute or local ordinance held unconstitutional by a court of appeals. As we have previously noted, there is some question whether jurisdiction under § 1254(2) is available to review a nonfinal judgment. See *South Carolina Electric & Gas Co.* v. *Flemming, 351 U.S. 901 (1956); Slaker v. O'Connor, 278 U.S. 188 (1929)*. But see *Chicago v. Atchison, T. & S. F. R. Co., 357 U.S. 77, 82-83 (1958)*.

The present appeal seeks review of a judgment remanding the case to the District Court. We need not resolve whether this appeal is proper under § 1254(2), however, because in any event we have certiorari jurisdiction under *28 U. S. C. § 2103*. As we have previously done in equivalent situations, see *El Paso v. Simmons, 379 U.S. 497, 502-503 (1965); Doran v. Salem Inn, Inc., 422 U.S. 922, 927 (1975),* we dismiss the appeal and, treating the papers as a petition for certiorari, grant the writ of certiorari. Henceforth, we shall refer to the parties as "petitioners" and "respondents."

---------- End Footnotes ----------

[**7]**

[*44] In May 1980, the Mayor of Renton, a city of approximately 32,000 people located just south of Seattle, suggested to the Renton City Council that it consider the advisability of enacting zoning legislation dealing with adult entertainment uses. No such uses existed in the city at that time. Upon the Mayor's suggestion, the City Council referred the matter to the city's Planning and Development Committee. The Committee held public hearings, reviewed the experiences of Seattle and other cities, and received a report from the City Attorney's Office advising as to developments in other cities. The City Council, meanwhile, adopted Resolution No. 2368, which imposed a moratorium on the licensing of "any business . . . which . . . has as its primary purpose the selling, renting or showing of sexually explicit materials." App. 43. The resolution contained a clause explaining that such businesses "would have a severe impact upon surrounding businesses and residences." *Id.*, at 42.

In April 1981, acting on the basis **[***36]** of the Planning and Development Committee's recommendation, the City Council enacted Ordinance No. 3526. The ordinance prohibited any "adult motion picture **[****8]** theater" from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school. App. to Juris. Statement 79a. The term "adult motion picture theater" was defined as "[an] enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or [characterized] by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' . . . for observation by patrons therein." *Id.*, at 78a.

[*45] In early 1982, respondents acquired two existing theaters in downtown Renton, with the intention of using them to exhibit feature-length adult films. The theaters were located within the area proscribed by Ordinance No. 3526. At about the same time, respondents filed the previously mentioned lawsuit challenging the ordinance on First and Fourteenth Amendment grounds, and seeking declaratory and injunctive relief. While the federal action was pending, the City Council amended the ordinance in several respects, adding a statement of reasons for its enactment and reducing the minimum distance **[****9]** from any school to 1,000 feet.

In November 1982, the Federal Magistrate to whom respondents' action had been referred recommended the entry of a preliminary injunction against enforcement of the Renton ordinance and the denial of Renton's motions to dismiss and for summary judgment. The District Court adopted the Magistrate's recommendations and entered the preliminary injunction, and respondents began showing adult films at their two theaters in Renton. Shortly thereafter, the parties agreed to submit the case for a final decision on whether a permanent **[**928]** injunction should issue on the basis of the record as already developed.

The District Court then vacated the preliminary injunction, denied respondents' requested permanent injunction, and entered summary judgment in favor of Renton. The court found that the Renton ordinance did not substantially restrict First Amendment interests, that Renton was not required to show specific adverse impact on Renton from the operation of adult theaters

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but could rely on the experiences of other cities, that the purposes of the ordinance were unrelated to the suppression of speech, and that the restrictions on speech imposed by the **[****10]** ordinance were no greater than necessary to further the governmental interests involved. Relying on *Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976),* and *United States v. O'Brien, 391 U.S. 367 (1968),* the court held that the Renton ordinance did not violate the First Amendment.

[*46] The Court of Appeals for the Ninth Circuit reversed. The Court of Appeals first concluded, contrary to the finding of the District Court, that the Renton ordinance constituted a substantial restriction on First Amendment interests. Then, using the standards set forth in *United States v. O'Brien, supra,* the Court of Appeals held that Renton had improperly relied on the experiences **[***37]** of other cities in lieu of evidence about the effects of adult theaters on Renton, that Renton had thus failed to establish adequately the existence of a substantial governmental interest in support of its ordinance, and that in any event Renton's asserted interests had not been shown to be unrelated to the suppression of expression. The Court of Appeals remanded the case to the District Court for reconsideration of Renton's asserted **[****11]** interests.

[*LEdHR2A]** [2A]In our view, the resolution of this case is largely dictated by our decision in *Young v. American Mini Theatres, Inc., supra.* There, although five Members of the Court did not agree on a single rationale for the decision, we held that the city of Detroit's zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other "regulated uses" or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments. *Id., at 72-73* (plurality opinion of STEVENS, J., joined by BURGER, C. J., and WHITE and REHNQUIST, JJ.); *id., at 84* (POWELL, J., concurring). The Renton ordinance, like the one in *American Mini Theatres*, does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The ordinance is therefore properly analyzed as a form of time, place, and manner regulation. *Id., at 63, and n. 18; id., at 78-79* (POWELL, J., concurring).

[*LEdHR3]** [3]Describing the ordinance as a time, place, **[****12]** and manner regulation is, of course, only the first step in our inquiry. This Court has long held that regulations enacted for the **[*47]** purpose of restraining speech on the basis of its content presumptively violate the First Amendment. See *Carey v. Brown, 447 U.S. 455, 462-463, and n. 7 (1980); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95, 98-99 (1972).* On the other hand, so-called "content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. See *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647-648 (1981).*

[929]**

[*LEdHR2B]** [2B] **[***LEdHR4]** [4]At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres*, does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance **[****13]** treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the *content* of the films shown at "adult motion picture theatres," but rather at the *secondary effects* of such theaters on the surrounding community. The District Court found that the City Council's *"predominate* concerns" were with the secondary effects of adult theaters, and not with the content of adult films **[***38]** themselves. App. to Juris. Statement 31a (emphasis added). But the Court of Appeals, relying on its decision in *Tovar v. Billmeyer, 721 F.2d 1260, 1266 (CA9 1983),* held that this was not enough to sustain the ordinance. According to the Court of Appeals, if *"a motivating factor"* in enacting the ordinance was to restrict respondents' exercise of First Amendment rights the ordinance would be invalid, apparently no matter how small a part this motivating factor may have played in the City Council's decision. *748 F.2d, at 537* (emphasis in original). This view of the law was rejected in *United States v. O'Brien, 391 U.S., at 382-386,* **[****14]** the very case that the Court of Appeals said it was applying:

[*48] "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . .

. . . .

". . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *Id., at 383-384.*

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[*LEdHR2C]** [2C]The District Court's finding as to "predominate" intent, left undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression. The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "[protect] and [preserve] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views. See App. to Juris. Statement 90a. As JUSTICE POWELL observed in *American Mini Theatres*, "[if] [the city] had been concerned with restricting the **[****15]** message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location." *427 U.S., at 82, n. 4.*

[*LEdHR2D]** [2D] **[***LEdHR5]** [5]In short, the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are *justified* without reference to the content of the regulated speech." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)* (emphasis added); *Community for Creative Non-Violence, supra, at 293; International Society for Krishna Consciousness, supra, at 648.* The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express **[*49]** less favored or more controversial views." *Mosley, supra, at 95-96.*

It was with this understanding in mind that, in *American Mini Theatres*, a majority of this Court decided that, at least with respect to businesses **[****16]** that purvey sexually explicit **[***39]** materials, n2 zoning ordinances designed **[**930]** to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to "content-neutral" time, place, and manner regulations. JUSTICE STEVENS, writing for the plurality, concluded that the city of Detroit was entitled to draw a distinction between adult theaters and other kinds of theaters "without violating the government's paramount obligation of neutrality in its regulation of protected communication," *427 U.S., at 70,* noting that "[it] is [the] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech," *id., at 71, n. 34.* JUSTICE POWELL, in concurrence, elaborated:

"[The] dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings. . . . Moreover, even if this were **[****17]** a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated. **[*50]** See, *e. g., Tinker v. Des Moines School Dist., 393 U.S. 503, 509-511 (1969); Procunier v. Martinez, 416 U.S. 396, 413-414 (1974); Greer v. Spock, 424 U.S. 828, 842-844 (1976)* (POWELL, J., concurring); cf. *CSC v. Letter Carriers, 413 U.S. 548 (1973)*." *Id.*, at 82, n. 6.

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n2 See *American Mini Theatres, 427 U.S., at 70* (plurality opinion) ("[It] is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . .").

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[*LEdHR6]** [6] **[***LEdHR7A]** [7A]The appropriate inquiry in this case, then, is whether **[****18]** the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. See *Community for Creative Non-Violence, 468 U.S., at 293; International Society for Krishna Consciousness, 452 U.S., at 649, 654.* It is clear that the ordinance meets such a standard. As a majority of this Court recognized in *American Mini Theatres*, a city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *427 U.S., at 71* (plurality opinion); see *id., at 80* (POWELL, J., concurring) ("Nor is there doubt that the interests furthered by this ordinance are both important and substantial"). Exactly the same vital governmental interests are at stake here.

The Court of Appeals ruled, however, that because the Renton ordinance was enacted without the benefit **[***40]** of studies specifically relating to "the particular problems or needs of Renton," the city's justifications for the ordinance were "conclusory and speculative." *748 F.2d, at 537.* We think the Court of Appeals imposed on the city **[****19]** an unnecessarily rigid burden of proof. The record in this

case reveals that Renton relied heavily on the experience of, and studies produced by, the city of Seattle. In Seattle, as in Renton, the adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood. See *Northend Cinema, Inc.* v. *Seattle, 90 Wash. 2d 709, 585 P. 2d 1153 (1978).* The opinion of the Supreme Court of Washington in *Northend Cinema*, which **[*51]** was before the Renton City Council when it enacted the ordinance in question here, described Seattle's experience as follows:

"The amendments to the City's zoning code which are at issue here are the **[**931]** culmination of a long period of study and discussion of the problems of adult movie theaters in residential areas of the City. . . . [The] City's Department of Community Development made a study of the need for zoning controls of adult theaters . . . . The study analyzed the City's zoning scheme, comprehensive plan, and land uses around existing adult motion picture theaters. . . ." *Id., at 711, 585 P. 2d, at 1155.* **[****20]**

"[The] [trial] court heard extensive testimony regarding the history and purpose of these ordinances. It heard expert testimony on the adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts. The court's detailed findings, which include a finding that the location of adult theaters has a harmful effect on the area and contribute to neighborhood blight, are supported by substantial evidence in the record." *Id., at 713, 585 P. 2d, at 1156.*

"The record is replete with testimony regarding the effects of adult movie theater locations on residential neighborhoods." *Id., at 719, 585 P. 2d, at 1159.*

[*LEdHR8]** [8]We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the **[****21]** city relies upon is reasonably believed to be relevant to the **[*52]** problem that the city addresses. That was the case here. Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.

[*41]**

[*LEdHR9]** [9]We also find no constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [The] city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *American Mini Theatres, 427 U.S., at 71* (plurality opinion). Moreover, the Renton ordinance is "narrowly tailored" to affect only that category of theaters **[****22]** shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad v. Mount Ephraim, 452 U.S. 61 (1981),* and *Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).*

[*LEdHR10]** [10]Respondents contend that the Renton ordinance is "under-inclusive," in that it fails to regulate other kinds of adult businesses that are likely to produce secondary effects similar to those produced by adult theaters. On this record the contention must fail. There is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton. In fact, Resolution No. 2368, enacted in October 1980, states that "the City of Renton does not, at the present time, have any business whose primary purpose is the sale, rental, or showing of sexually explicit materials." App. 42. That Renton chose first to address the potential problems created **[*53]** by one particular kind of adult business in no way suggests that the city has "singled out" adult theaters for discriminatory treatment. We simply have no basis on **[**932]** this record for assuming that Renton **[****23]** will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters. See *Williamson v. Lee Optical Co., 348 U.S. 483, 488-489 (1955).*

[*LEdHR7B]** [7B]Finally, turning to the question whether the Renton ordinance allows for reasonable alternative avenues of communication, we note that the ordinance leaves some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites. The District Court found, and the Court of Appeals did not dispute the finding, that the 520 acres of land consists of "[ample], accessible real estate," including "acreage in all stages of development

from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads." App. to Juris. Statement 28a.

Respondents argue, however, that some of the land in question is already occupied by existing businesses, that "practically none" of the undeveloped land is currently for sale or lease, and that in general there are no "commercially viable" adult theater sites within the 520 acres left open by the **[****24]** Renton ordinance. Brief for Appellees 34-37. The Court of Appeals accepted these **[***42]** arguments, n3 concluded that **[*54]** the 520 acres was not truly "available" land, and therefore held that the Renton ordinance "would result in a substantial restriction" on speech. *748 F.2d, at 534.*

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n3 The Court of Appeals' rejection of the District Court's findings on this issue may have stemmed in part from the belief, expressed elsewhere in the Court of Appeals' opinion, that, under *Bose Corp.* v. *Consumers Union of United States, Inc., 466 U.S. 485 (1984),* appellate courts have a duty to review *de novo* all mixed findings of law and fact relevant to the application of First Amendment principles. See *748 F.2d 527, 535 (1984).* We need not review the correctness of the Court of Appeals' interpretation of *Bose Corp.*, since we determine that, under any standard of review, the District Court's findings should not have been disturbed.

---------- End Footnotes ----------

We disagree with both the **[****25]** reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," *American Mini Theatres, 427 U.S., at 71, n. 35* (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See *id., at 78* (POWELL, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact"). In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

[*LEdHR11]** [11] **[***LEdHR12A]** [12A] **[***LEdHR13A]** [13A]In sum, we find that the Renton ordinance represents a valid governmental response to the "admittedly **[****26]** serious problems" created by adult theaters. See *id., at 71* (plurality opinion). Renton has not used "the power to zone as a pretext for suppressing expression," *id., at 84* (POWELL, J., concurring), but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning. Here, as in *American Mini Theatres*, the city has enacted a zoning ordinance that meets these goals while also satisfying the dictates of the **[*55]** **[**933]** First Amendment. n4 The judgment of **[***43]** the Court of Appeals is therefore

[*LEdHR12B]** [12B] **[***LEdHR13B]** [13B]

---------- Footnotes ----------

----- -n4 Respondents argue, as an"alternative basis" for affirming the decision of the Court of Appeals, that the Renton ordinance violates their rights under the Equal Protection Clause of the Fourteenth Amendment. As should be apparent from our preceding discussion, respondents can fare no better under the Equal Protection Clause than under the First Amendment itself. See *Young v. American Mini Theatres, Inc., 427 U.S., at 63-73.* Respondents also argue that the Renton ordinance is unconstitutionally vague. More particularly, respondents challenge the ordinance's application to buildings "used" for presenting sexually explicit films, where the term "used" describes "a continuing course of conduct of exhibiting [sexually explicit films] in a manner which appeals to a prurient interest." App. to Juris. Statement 96a. We reject respondents' "vagueness" argument for the same reasons that led us to reject a similar challenge in *American Mini Theatres, supra.* There, the Detroit ordinance applied to theaters "used to present material distinguished or characterized by an emphasis on [sexually explicit matter]." *Id., at 53.* We held that

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"even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents." *Id., at 58-59.* We also held that the Detroit ordinance created no "significant deterrent effect" that might justify invocation of the First Amendment "over-breadth" doctrine. *Id., at 59-61.*

---------- End Footnotes ----------

[**27]**

Reversed.

JUSTICE BLACKMUN concurs in the result.

DISSENTBY: BRENNAN

DISSENT: JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Renton's zoning ordinance selectively imposes limitations on the location of a movie theater based exclusively on the content of the films shown there. The constitutionality of the ordinance is therefore not correctly analyzed under standards applied to content-neutral time, place, and manner restrictions. But even assuming that the ordinance may fairly be characterized as content neutral, it is plainly unconstitutional under the standards established by the decisions of this Court. Although the Court's analysis is limited to **[*56]** cases involving "businesses that purvey sexually explicit materials," *ante*, at 49, and n. 2, and thus does not affect our holdings in cases involving state regulation of other kinds of speech, I dissent.

I

"[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y., 447 U.S. 530, 536 (1980).* The Court asserts that the ordinance is "aimed not at the *content* **[****28]** of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community," *ante*, at 47 (emphasis in original), and thus is simply a time, place, and manner regulation. n1 This analysis is misguided.

---------- Footnotes ----------

n1 The Court apparently finds comfort in the fact that the ordinance does not "deny use to those wishing to express less favored or more controversial views." *Ante*, at 48-49. However, content-based discrimination is not rendered "any less odious" because it distinguishes "among entire classes of ideas, rather than among points of view within a particular class." *Lehman v. City of Shaker Heights, 418 U.S. 298, 316 (1974)* (BRENNAN, J., dissenting); see also *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y., 447 U.S. 530, 537 (1980)* ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic"). Moreover, the Court's conclusion that the restrictions imposed here were viewpoint neutral is patently flawed. "As a practical matter, the speech suppressed by restrictions such as those involved [here] will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores. Such restrictions, in other words, have a potent viewpoint-differential impact. . . . To treat such restrictions as viewpoint-neutral seems simply to ignore reality." Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Chi. L. Rev. 81, 111-112 (1978).

---------- End Footnotes ----------

[**29]**

The fact that adult movie theaters **[***44]** may cause harmful "secondary" land-use effects may arguably give Renton a compelling **[**934]** reason to regulate such establishments; it does not mean, however, that such regulations are content neutral. **[*57]** Because the ordinance imposes special restrictions on certain kinds of speech on the basis of *content*, I cannot simply accept, as the Court does, Renton's claim that the ordinance was not designed to suppress the content of adult movies. "[When] regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'" *Consolidated Edison Co., supra*, at 536 (quoting *Niemotko v. Maryland, 340 U.S. 268, 282 (1951)* (Frankfurter, J., concurring in result)). "[Before] deferring to [Renton's] judgment, [we] must be convinced that the city is seriously and comprehensively addressing" secondary land-use effects associated with adult movie theaters.

Metromedia, Inc. v. *San Diego, 453 U.S. 490, 531 (1981)* (BRENNAN, J., concurring in judgment). **[****30]** In this case, both the language of the ordinance and its dubious legislative history belie the Court's conclusion that "the city's pursuit of its zoning interests here was unrelated to the suppression of free expression." *Ante*, at 48.

A

The ordinance discriminates on its face against certain forms of speech based on content. Movie theaters specializing in "adult motion pictures" may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Other motion picture theaters, and other forms of "adult entertainment," such as bars, massage parlors, and adult bookstores, are not subject to the same restrictions. This selective treatment strongly suggests that Renton was interested not in controlling the "secondary effects" associated with adult businesses, but in discriminating against adult theaters based on the content of the films they exhibit. The Court ignores this discriminatory treatment, declaring that Renton is free "to address the potential problems created by one particular kind of adult business," *ante*, at 52-53, and to amend the ordinance in the **[*58]** future to include other adult enterprises. *Ante* **[****31]** , at 53 (citing *Williamson v. Lee Optical Co., 348 U.S. 483, 488-489 (1955))*. n2 However, because of the First Amendment interests at stake here, this one-step-at-a-time analysis is wholly inappropriate.

"This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. See *e. g., Williamson v. Lee Optical* **[***45]** *Co., 348 U.S. 483, 488-489 (1955).* This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. '[Above] all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' *Police Dept. of Chicago v. Mosley, 408 U.S., at 95.*" *Erznoznik v. City of Jacksonville, 422 U.S. 205, 215 (1975).*

---------- Footnotes ----------

n2 The Court also explains that "[there] is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton." *Ante*, at 52. However, at the time the ordinance was enacted, there was no evidence that any *adult movie theaters* were located in, or considering moving to, Renton. Thus, there was no legitimate reason for the city to treat adult movie theaters differently from other adult businesses.

---------- End Footnotes ----------

[**32]**

In this case, the city has not justified treating adult movie theaters differently from other adult entertainment businesses. The ordinance's underinclusiveness is cogent evidence that it was aimed at the *content* of the films shown in adult movie theaters.

[935]** B

Shortly *after* this lawsuit commenced, the Renton City Council amended the ordinance, adding a provision explaining that its intention in adopting the ordinance had been "to promote the City of Renton's great interest in protecting and preserving the quality of its neighborhoods, commercial districts, and the quality of urban life through effective land **[*59]** use planning." App. to Juris. Statement 81a. The amended ordinance also lists certain conclusory "findings" concerning adult entertainment land uses that the Council purportedly relied upon in adopting the ordinance. *Id.*, at 81a-86a. The city points to these provisions as evidence that the ordinance was designed to control the secondary effects associated with adult movie theaters, rather than to suppress the content of the films they exhibit. However, the "legislative history" of the ordinance strongly suggests otherwise.

Prior to the amendment, **[****33]** there was no indication that the ordinance was designed to address any "secondary effects" a single adult theater might create. In addition to the suspiciously coincidental timing of the amendment, many of the City Council's "findings" do not relate to legitimate land-use concerns. As the Court of Appeals observed, "[both] the magistrate and the district court recognized that many of the stated reasons for the ordinance were no more than expressions of dislike for the subject matter." *748 F.2d 527, 537 (CA9 1984).* n3 That some residents may be offended by the *content* of the films shown at adult movie theaters cannot form the basis for state regulation of speech. See *Terminiello v. Chicago, 337 U.S. 1 (1949).*

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n3 For example, "finding" number 2 states that

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"[location] of adult entertainment land uses on the main commercial thoroughfares of the City gives an impression of legitimacy to, and causes a loss of sensitivity to the adverse effect of pornography upon children, established family relations, respect for marital relationship and for the sanctity of marriage relations of others, and the concept of non-aggressive, consensual sexual relations." App. to Juris. Statement 86a.

"Finding" number 6 states that

"[location] of adult land uses in close proximity to residential uses, churches, parks, and other public facilities, and schools, will cause a degradation of the community standard of morality. Pornographic material has a degrading effect upon the relationship between spouses." *Ibid.*

---------- End Footnotes ----------

[**34]**

Some of the "findings" added by the City Council do relate to supposed "secondary effects" associated **[***46]** with adult movie **[*60]** theaters. n4 However, the Court cannot, as it does, merely accept these *post hoc* statements at face value. "[The] presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment." *Schad v. Mount Ephraim, 452 U.S. 61, 77 (1981)* (BLACKMUN, J., concurring). As the Court of Appeals concluded, "[the] record presented by Renton to support its asserted interest in enacting the zoning ordinance is very thin." *748 F.2d, at 536.*

---------- Footnotes ----------

n4 For example, "finding" number 12 states that

"[location] of adult entertainment land uses in proximity to residential uses, churches, parks and other public facilities, and schools, may lead to increased levels of criminal activities, including prostitution, rape, incest and assaults in the vicinity of such adult entertainment land uses." *Id.*, at 83a.

---------- End Footnotes ----------

[**35]**

The amended ordinance states that its "findings" summarize testimony received by the City Council at certain public hearings. While none of this testimony was ever recorded or preserved, a city official reported that residents had objected to having adult movie theaters located in their community. However, the official was unable to recount any testimony as to how adult movie theaters would specifically affect the schools, churches, parks, or residences "protected" by the ordinance. See App. 190-192. The City Council conducted no studies, and heard no expert testimony, on how the protected uses would be affected by the presence of an adult movie theater, and never considered whether residents' concerns could be met by "restrictions **[**936]** that are less intrusive on protected forms of expression." *Schad, supra, at 74.* As a result, any "findings" regarding "secondary effects" caused by adult movie theaters, or the need to adopt specific locational requirements to combat such effects, were not "findings" at all, but purely speculative conclusions. Such "findings" were not such as are required to justify the burdens **[*61]** the ordinance imposed upon constitutionally **[****36]** protected expression.

The Court holds that Renton was entitled to rely on the experiences of cities like Detroit and Seattle, which had enacted special zoning regulations for adult entertainment businesses after studying the adverse effects caused by such establishments. However, even assuming that Renton was concerned with the same problems as Seattle and Detroit, it never actually reviewed any of the studies conducted by those cities. Renton had no basis for determining if any of the "findings" made by these cities were relevant to *Renton*'s problems or needs. n5 Moreover, **[***47]** since Renton ultimately adopted zoning regulations different from either Detroit or Seattle, these "studies" provide no basis for assessing the effectiveness of the particular restrictions adopted under the ordinance. n6 Renton cannot merely rely on the general experiences **[*62]** of Seattle or Detroit, for it must "justify its ordinance in the context of *Renton*'s problems -- not Seattle's or Detroit's problems." *748 F.2d, at 536* (emphasis in original).

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n5 As part of the amendment passed after this lawsuit commenced, the City Council added a statement that it had intended to rely on the Washington Supreme Court's opinion in *Northend Cinema, Inc.* v.

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Seattle, 90 Wash. 2d 709, 585 P. 2d 1153 (1978), cert. denied *sub nom. Apple Theatre, Inc.* v. *Seattle, 441 U.S. 946 (1979),* which upheld Seattle's zoning regulations against constitutional attack. Again, despite the suspicious coincidental timing of the amendment, the Court holds that "Renton was entitled to rely . . . on the 'detailed findings' summarized in the . . . *Northend Cinema* opinion." *Ante*, at 51. In *Northend Cinema*, the court noted that "[the] record is replete with testimony regarding the effects of adult movie theater locations on residential neighborhoods." *90 Wash. 2d, at 719, 585 P. 2d, at 1159.* The opinion however, does not explain the evidence it purports to summarize, and provides no basis for determining whether Seattle's experience is relevant to Renton's.

[**37]**

n6 As the Court of Appeals observed:

"Although the Renton ordinance *purports* to copy Detroit's and Seattle's, it does not solve the same problem in the same manner. The Detroit ordinance was intended to disperse adult theaters throughout the city so that no one district would deteriorate due to a concentration of such theaters. The Seattle ordinance, by contrast, was intended to *concentrate* the theaters in one place so that the whole city would not bear the effects of them. The Renton Ordinance is allegedly aimed at protecting certain uses -- schools, parks, churches and residential areas -- from the perceived unfavorable effects of an adult theater." *748 F.2d, at 536* (emphasis in original).

---------- End Footnotes ----------

In sum, the circumstances here strongly suggest that the ordinance was designed to suppress expression, even that constitutionally protected, and thus was not to be analyzed as a content-neutral time, place, and manner restriction. The Court allows Renton to conceal its illicit motives, however, by reliance on the fact that other communities adopted similar restrictions. The Court's **[****38]** approach largely immunizes such measures from judicial scrutiny, since a municipality can readily find other municipal ordinances to rely upon, thus always retrospectively justifying special zoning regulations for adult theaters.

n7 Rather than speculate about Renton's motives for adopting such measures, our cases require the conclusion that the ordinance, like any other content-based restriction on speech, is constitutional "only if the [city] can show **[**937]** that [it] is a precisely drawn means of serving a compelling [governmental] interest." *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y., 447 U.S., at 540;* see also *Carey v. Brown, 447 U.S. 455, 461-462 (1980); Police Department of Chicago v. Mosley, 408 U.S. 92, 99 (1972).* Only this strict approach can insure that cities will not use their zoning powers as a pretext for suppressing constitutionally protected expression.

---------- Footnotes ----------

n7 As one commentator has noted:

"[Anyone] with any knowledge of human nature should naturally assume that the decision to adopt almost any content-based restriction might have been affected by an antipathy on the part of at least some legislators to the ideas or information being suppressed. The logical assumption, in other words, is not that there is not improper motivation but, rather, because legislators are only human, that there is a substantial risk that an impermissible consideration has in fact colored the deliberative process." Stone, *supra* n. 1, at 106.

---------- End Footnotes ----------

[**39]**

[*63] Applying this standard to the facts of this case, the ordinance is patently unconstitutional. Renton has not shown that locating adult movie theaters in proximity to its churches, schools, parks, and residences will necessarily result in undesirable "secondary effects," or that these problems could not be effectively addressed by less intrusive restrictions.

II

Even assuming that the ordinance should be treated like a content-neutral **[***48]** time, place, and manner restriction, I would still find it unconstitutional. "[Restrictions] of this kind are valid provided . . . that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); Heffron v. International Society for Krishna Consciousness, Inc.,*

452 U.S. 640, 648 (1981). In applying this standard, the Court "fails to subject the alleged interests of the [city] to the degree of scrutiny required to ensure that expressive activity protected by the First Amendment remains free of unnecessary limitations." **[****40]** *Community for Creative Non-Violence, 468 U.S., at 301* (MARSHALL, J., dissenting). The Court "evidently [and wrongly] assumes that the balance struck by [Renton] officials is deserving of deference so long as it does not appear to be tainted by content discrimination." *Id., at 315*. Under a *proper* application of the relevant standards, the ordinance is clearly unconstitutional.

A

The Court finds that the ordinance was designed to further Renton's substantial interest in "[preserving] the quality of urban life." *Ante*, at 50. As explained above, the record here is simply insufficient to support this assertion. The city made no showing as to how uses "protected" by the ordinance would be affected by the presence of an adult movie theater. Thus, the Renton ordinance is clearly distinguishable from **[*64]** the Detroit zoning ordinance upheld in *Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)*. The Detroit ordinance, which was designed to disperse adult theaters throughout the city, was supported by the testimony of urban planners and real estate experts regarding the adverse effects of locating several **[****41]** such businesses in the same neighborhood. *Id., at 55;* see also *Northend Cinema, Inc.* v. *Seattle, 90 Wash. 2d 709, 711, 585 P. 2d 1153, 1154-1155 (1978)*, cert. denied *sub nom. Apple Theatre, Inc.* v. *Seattle, 441 U.S. 946 (1979)* (Seattle zoning ordinance was the "culmination of a long period of study and discussion"). Here, the Renton Council was aware only that some residents had complained about adult movie theaters, and that other localities had adopted special zoning restrictions for such establishments. These are not "facts" sufficient to justify the burdens the ordinance imposed upon constitutionally protected expression.

B

Finally, the ordinance is invalid because it does not provide for reasonable alternative avenues of communication. The District Court found that the ordinance left 520 acres in Renton available for adult theater sites, an area comprising about five **[**938]** percent of the city. However, the Court of Appeals found that because much of this land was already occupied, "[limiting] adult theater uses to these areas is a substantial restriction on speech." *748 F.2d, at 534*. **[****42]** Many "available" sites are also largely unsuited for use by movie theaters. See App. 231, 241. **[***49]** Again, these facts serve to distinguish this case from *American Mini Theatres*, where there was no indication that the Detroit zoning ordinance seriously limited the locations available for adult businesses. See *American Mini Theatres, supra, at 71, n. 35* (plurality opinion) ("The situation would be quite different if the ordinance had the effect of . . . greatly restricting access to . . . lawful speech"); see also *Basiardanes v. City of Galveston, 682 F.2d 1203, 1214 (CA5 1982)* (ordinance effectively banned adult theaters **[*65]** by restricting them to "'the most unattractive, inaccessible, and inconvenient areas of a city'"); *Purple Onion, Inc.* v. *Jackson, 511 F.Supp. 1207, 1217 (ND Ga. 1981)* (proposed sites for adult entertainment uses were either "unavailable, unusable, or so inaccessible to the public that . . . they amount to no locations").

Despite the evidence in the record, the Court reasons that the fact "[that] respondents must fend for themselves in the real estate market, on an equal footing **[****43]** with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Ante*, at 54. However, respondents are not on equal footing with other prospective purchasers and lessees, but must conduct business under severe restrictions not imposed upon other establishments. The Court also argues that the First Amendment does not compel "the government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." *Ibid.* However, respondents do not ask Renton to guarantee low-price sites for their businesses, but seek only a reasonable opportunity to operate adult theaters in the city. By denying them this opportunity, Renton can effectively ban a form of protected speech from its borders. The ordinance "greatly [restricts] access to . . . lawful speech," *American Mini Theatres, supra, at 71, n. 35* (plurality opinion), and is plainly unconstitutional.

REFERENCES:

Return To Full Text Opinion Go To Supreme Court Brief(s) Go To Oral Argument Transcript

16 Am Jur 2d, Constitutional Law 521; *82 Am Jur 2d, Zoning and Planning 11, 12, 14, 122*

16 Am Jur Trials 99, Relief From Zoning Ordinance

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US L Ed Digest, Constitutional Law 404, 934, 936; Municipal Corporations 37.7

Index to Annotations, Freedom of Speech and Press; Theaters and Motion Pictures; Zoning

Annotation References:

Supreme Court's application of vagueness doctrine to noncriminal statutes or ordinances. *40 L Ed 2d 823.*

The Supreme Court and the right of free speech and press. *93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.*

Validity of "war zone" ordinances restricting location of sex -oriented businesses. *1 ALR4th 1297.*

Citation #5
426 U.S. 50

426 U.S. 26; 96 S. Ct. 1917; 48 L. Ed. 2d 450; 1976 U.S. LEXIS 152; 76-1 U.S. Tax Cas. (CCH) P9439; 38 A.F.T.R.2d (RIA) 5027

SIMON, SECRETARY OF THE TREASURY, ET AL. v. EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION ET AL.

No. 74-1124

SUPREME COURT OF THE UNITED STATES

426 U.S. 26; 96 S. Ct. 1917; 48 L. Ed. 2d 450; 1976 U.S. LEXIS 152; 76-1 U.S. Tax Cas. (CCH) P9439; 38 A.F.T.R.2d (RIA) 5027

Argued December 10, 1975
June 1, 1976 *

* Together with No. 74-1110, Eastern Kentucky Welfare Rights Organization et al. v. Simon, Secretary of the Treasury, et al., also on certiorari to the same court.

PRIOR HISTORY: [**1]**

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUMMARY: After the Internal Revenue Service had issued a Ruling allowing favorable tax treatment to a nonprofit hospital that offered only emergency room services to indigents, organizations composed of indigents, acting on behalf of their members, and 12 individual indigents, acting on their own behalf and as representatives of all other persons similarly situated, brought an action, in the United States District Court for the District of Columbia, against the Secretary of the Treasury and the Commissioner of Internal Revenue, asserting that the Ruling violated the Internal Revenue Code of 1954 *(26 USCS 1* et seq.) and the rulemaking procedures prescribed in the Administrative Procedure Act *(5 USCS 553)*. The complaint alleged, in substance, that each of the indigents had been disadvantaged in seeking needed hospital service because of their indigency, that each of the hospitals involved in these incidents had been determined to be a tax-exempt charitable corporation, and that by extending tax benefits to such hospitals the defendants were "encouraging" the hospitals to deny service to the plaintiffs. The District Court rendered summary judgment for the plaintiffs *(370 F Supp 325)*, but the Court of Appeals for the District of Columbia Circuit reversed on the merits *(165 App DC 239, 506 F2d 1278)*.

On certiorari, the United States Supreme Court vacated the judgment of the Court of Appeals and remanded the cause to the District Court with instructions to dismiss the complaint. In an opinion by Powell, J., expressing the view of six members of the court, it was held that the plaintiffs lacked standing to bring the suit because they failed to carry the burden of establishing that, in fact, the asserted injury to indigents was the consequence of the defendants' actions or that prospective relief would remove the harm.

Stewart, J., joining the court's opinion, added that in his view no case, at least outside the First Amendment area, could be imagined where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else.

Brennan, J., joined by Marshall, J., concurred in the judgment, but dissented from the court's reasoning on the standing issue.

Stevens, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[*LEdHN1]**
LAW §220
standing to sue -- indigents and their organizations -- class suits -- challenge to Revenue Ruling --
Headnote: [1A] [1B] [1C] [1D] [1E] [1F]
Indigents and their organizations lack standing to bring a suit (the individuals as plaintiffs in a class suit and the organizations in a suit on behalf of their members) asserting that the Internal Revenue Service violated the Internal Revenue Code *(26 USCS 1* et seq.) and the Administrative Procedure Act *(5 USCS 553)* by issuing a Revenue Ruling allowing favorable tax treatment to a nonprofit hospital that offered only emergency room services to indigents--the complaint also alleging that each of the indigents had been disadvantaged in seeking needed hospital service because of their indigency, that each of the hospitals involved in these incidents had been determined to be a tax-exempt charitable corporation, and that by extending tax benefits to such hospitals the defendants were "encouraging" the hospitals to deny services to indigents--since (1) the organizations alleged no injury

to themselves as organizations and standing is not established by their special interest in the health problems of the poor; (2) even though some indigents have been denied hospital service, injury at the hands of a hospital is insufficient to establish a case or controversy in a suit in which no hospital is a defendant; (3) it is purely speculative whether the alleged denials of hospital service fairly can be traced to the alleged encouragement of hospitals or instead resulted from decisions made by the hospitals without regard to the tax implications and whether the desired exercise of a federal court's remedial powers would result in the availability to the plaintiffs of such services; and (4) the plaintiffs failed to carry the burden of establishing that the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.

[*LEdHN2]**
PARTIES §1
PLEADING §114
standing to sue -- analysis of question -- after summary judgment --
Headnote: [2A] [2B]
The analysis of the question as to a party's standing to sue is no different, as a result of the case having proceeded to summary judgment, than it would have been at the pleading stage, where the affidavits submitted by the plaintiffs merely support the allegations of the complaint relative to establishing standing, rather than going beyond them.

[*LEdHN3]**
COURTS §229
PARTIES §1
federal jurisdiction -- limitation to cases or controversies --
Headnote: [3]
No principle is more fundamental to the federal judiciary's proper role in the American system of government than the constitutional limitation, in Article III of the Federal Constitution, of federal court jurisdiction to actual cases or controversies; the concept of standing to sue is part of this limitation.

[*LEdHN4]**
PARTIES §3
standing to sue -- concept --
Headnote: [4]
The concept of standing to sue focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.

[*LEdHN5]**
PARTIES §3
standing to sue -- personal stake in outcome --
Headnote: [5A] [5B]
Under Article III of the Federal Constitution, defining the judicial powers of the United States, the question of a plaintiff's standing to sue is whether he has alleged such a personal stake in the outcome of the controversy to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf; a significant personal stake serves to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for elimination of difficult questions.

[*LEdHN6]**
COURTS §235
PARTIES §3
federal jurisdiction -- standing to sue -- relevant inquiry --
Headnote: [6]
When a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision; absent such a showing, exercise of power by a federal court would be gratuitous and thus inconsistent with Article III of the Federal Constitution, limiting federal jurisdiction to cases or controversies.

[*LEdHN7]**
COURTS §235
PARTIES §3
federal jurisdiction -- standing to sue --
Headnote: [7]
A requirement of Article III of the Federal Constitution, which defines the judicial powers of the United States, is the necessity that a plaintiff who seeks to invoke judicial power stands to profit in some personal interest; a federal court cannot ignore this requirement without overstepping its assigned role in the American system of adjudicating only actual cases or controversies.

[*LEdHN8]**
PARTIES §24
organization's standing to sue -- suit on behalf of its members --
Headnote: [8]
The standing of an organization to sue on behalf of its members is not established simply on the basis of its goal; an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Article III of the Federal Constitution, defining the judicial powers of the United States.

[*LEdHN9]**
PARTIES §24
PLEADING §114
class suit -- necessity of showing injury --
Headnote: [9A] [9B]
That a suit may be a class action adds nothing to the question of standing to sue, since even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.

[*LEdHN10]**
PARTIES §3
PLEADING §114
standing to sue -- allegations as to injury --
Headnote: [10A] [10B]
In the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from a putatively illegal action before a federal court may assume jurisdiction; even if a statute expressly confers standing, the requirements of Article III of the Federal Constitution, defining the judicial powers of the United States, remain: the plaintiff still must allege a distinct and palpable injury to himself, even though it is an injury shared by a large class of other possible litigants.

[*LEdHN11]**
COURTS §235
federal jurisdiction -- scope -- cause of injury --
Headnote: [11]
The "case or controversy" limitation of Article III of the Federal Constitution, defining the judicial powers of the United States, requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.

[*LEdHN12]**
COURTS §229
federal jurisdiction -- speculation --
Headnote: [12]
Unadorned speculation will not suffice to invoke the federal judicial power.

[*LEdHN13]**
PARTIES §3
standing to sue -- indirect injury --
Headnote: [13]
Indirectness of injury, while not necessarily fatal to a party's standing to sue, may make it substantially more difficult to meet the minimum requirements of Article III of the Federal Constitution, defining the judicial powers of the United States: to establish that, in fact, the asserted injury was the consequence of the defendant's actions, or that prospective relief will remove the harm.

[*LEdHN14]**
PLEADING §103
dismissal of complaint -- causal nexus of injury --
Headnote: [14A] [14B]
A complaint is insufficient even to survive a motion to dismiss where it fails to allege an injury that fairly can be traced to the defendant's challenged action.

SYLLABUS:

Respondents in No. 74-1124 (hereinafter respondents), several low income individuals and organizations representing such individuals, brought this class action in District Court on behalf of all persons unable to afford hospital services, against the Secretary of the Treasury and the Commissioner of Internal Revenue. They claimed thatRevenue Ruling 69-545, which announced an Internal Revenue Service policy of extending favorable tax treatment under the Internal Revenue Code of 1954 (Code) to hospitals that did not serve indigents to the extent of the hospitals' financial ability, "encouraged" hospitals to deny services to indigents, and was invalid because it was an erroneous interpretation of the Code and because it had been issued in violation of the Administrative Procedure Act (APA). The complaint described instances in which the individual respondents had been refused treatment, because of their indigency, at hospitals enjoying favorable tax treatment under the policy announced **[****2]** in the challenged Revenue Ruling and alleged to be receiving substantial contributions as a result of that treatment. The District Court overruled the motion to dismiss of petitioners in No. 74-1124 (hereinafter petitioners), which included a challenge to respondents' standing, and, on cross-motions for summary judgment, heldRevenue Ruling 69-545 void as contrary to the Code. The Court of Appeals also found standing in respondents, but upheldRevenue Ruling 69-545. Held: The District Court should have granted petitioners' motion to dismiss because respondents failed to establish their standing to bring this suit. Pp. 37-46.

(a) When a plaintiff's standing is challenged the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision, and unless such a showing is made a federal court cannot exercise its power consistent with the "case or controversy" limitation of Art. III of the Constitution. Pp. 37-39.

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(b) The respondent organizations, which alleged no injury to themselves qua organizations, cannot establish standing simply on the basis that they are dedicated to promoting [****3] access of the poor to health services. An organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III. *Sierra Club v. Morton, 405 U.S. 727.* Pp. 39-40.

(c) Allegations that the individual respondents and members of respondent organizations were denied hospital services because of indigency do not establish a case or controversy in this suit, which is not brought against any hospital but against Treasury officials. The Art. III "case or controversy" limitation requires that a federal court act only to redress injury that fairly can be traced to the challenged action of a defendant, and not solely to some third party. Pp. 40-42.

(d) Though petitioners alleged that the adoption ofRevenue Ruling 69-545 "encouraged" hospitals to deny services to indigents, it is purely speculative (1) whether the alleged denials of service are ascribable to petitioners' "encouragement" or resulted from the hospitals' decisions apart from tax considerations, and (2) whether the exercise of the District Court's remedial powers would make such services available to respondents. Respondents' [****4] allegation that the hospitals that denied them service receive substantial contributions, without more, does not establish that those hospitals are dependent upon such contributions. It thus appears that respondents relied "on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had [petitioners] acted otherwise, and might improve were the [District Court] to afford relief." *Warth v. Seldin, 422 U.S. 490, 507.* Consequently, respondents failed to carry their burden of showing that their injury is the consequence of petitioners' action or that prospective relief will remove the harm. *Warth v. Seldin, supra; Linda R.S. v. Richard D., 410 U.S. 614,* followed. Pp. 42-46.

165 U.S. App. D.C. 239, 506 F. 2d 1278, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C.J., and STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. STEWART, J., filed a concurring statement, post, p. 46. BRENNAN, J., filed an opinion concurring in the judgment in which MARSHALL, J., joined, post, p. 46. STEVENS, J., took no part in the consideration [****5] or decision of the cases.

COUNSEL: Stuart A. Smith argued the cause for petitioners in No. 74-1124 and respondents in No. 74-1110. With him on the brief were Solicitor General Bork, Assistant Attorney General Crampton, Ernest J. Brown, Leonard J. Henzke, Jr., and Robert A. Bernstein.

Marilyn G. Rose argued the cause for respondents in No. 74-1124 and petitioners in No. 74-1110. With her on the briefs was Joseph N. Onek. n+

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n+ Briefs of amici curiae urging reversal were filed by Stanton J. Price for the American Public Health Assn., and by Stanley Christopher and Russell D. Jacobson for Jackson County, Mo.

Robert S. Bromberg filed a brief for the American Hospital Assn. as amicus curiae urging affirmance.

---------- End Footnotes ----------

JUDGES: Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist; Stevens took no part in the consideration or decision of the case.

OPINIONBY: POWELL

OPINION: [*28] [***455] [**1919] MR. JUSTICE POWELL delivered the opinion of the Court.

[***LEdHR1A] [1A] [****7] Several indigents and organizations composed of indigents brought this suit against the Secretary of the Treasury and the Commissioner of Internal Revenue. They asserted [**1920] that the Internal Revenue Service (IRS) violated the Internal Revenue Code of 1954 (Code) and the Administrative Procedure Act (APA) by issuing a Revenue Ruling allowing favorable tax treatment to a nonprofit hospital that offered only emergency-room services to indigents. We conclude that these plaintiffs lack standing to bring this suit.

I

The Code, in its original version and by subsequent amendment, accords advantageous treatment to several types of nonprofit corporations, including exemption of [*29] their income from taxation and deductibility by benefactors of the amounts of their donations. Nonprofit hospitals have never received these benefits

as a favored general category, but an individual nonprofit hospital has been able to claim them if it could qualify as a corporation "organized and operated exclusively for... charitable... purposes" within the meaning of § 501(c)(3) of the Code, *26 U.S.C. § 501*(c)(3). n1 As the Code does not define the term "charitable, **[****8]** " the status of each nonprofit hospital is determined on a case-by-case basis by the IRS.

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n1 Section 501 is the linchpin of the statutory benefit system. Subsection (a) states that organizations described in subsection (c) "shall be exempt from taxation under this subtitle...." Among the organizations described in current subsection (c)(3) are nonprofit corporations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals." (Emphasis added.) Deduction by either an individual or a corporate taxpayer of a contribution to a nonprofit charitable corporation is allowed by §§ 170(a), (c)(2). *26 U.S.C. §§ 170*(a), (c)(2). Other indirect benefits to such a corporation, similar in nature to the benefit it derives from third-party deductibility of contributions, are provided by various other sections of the Code. See *26 U.S.C. §§ 642*(c), 2055(a)(2), 2106(a)(2)(A)(ii), 2522(a)(2) and (b)(2).

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[**9]**

In recognition of the need of nonprofit hospitals for some guidelines on qualification as "charitable" corporations, the IRS in 1956 issuedRevenue Ruling 56-185. n2 This Ruling established the position of the IRS to be "that the term 'charitable' in its legal sense and as it is used in section 501(c)(3) of the Code contemplates an implied public trust constituted for some public benefit...." In addition, the Ruling set out four "general requirements" that a hospital had to meet, "among other **[*30]** **[***456]** things," to be considered a charitable organization by the IRS. Only one of those requirements is important here, and it reads as follows:

"It must be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay. It is normal for hospitals to charge those able to pay for services rendered in order to meet the operating expenses of the institution, without denying medical care or treatment to others unable to pay. The fact that its charity record is relatively low is not conclusive that a hospital is not operated for charitable purposes to the full extent of its financial **[****10]** ability. It may furnish services at reduced rates which are below cost, and thereby render charity in that manner. It may also set aside earnings which it uses for improvements and additions to hospital facilities. It must not, however, refuse to accept patients in need of hospital care who cannot pay for such services. Furthermore, if it operates with the expectation of full payment from all those to whom it renders services, it does not dispense charity merely because some of its patients fail to pay for the services rendered."

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n2 *1956-1 Cum. Bull. 202.*

---------- End Footnotes ----------

Revenue Ruling 56-185 remained the announced policy with respect to a nonprofit hospital's "charitable" status for 13 years, until the IRS issuedRevenue Ruling 69-545 on November 3, 1969. n3 This new Ruling described two unidentified hospitals, referred **[**1921]** to simply as Hospital A and Hospital B, which differed significantly in both **[*31]** corporate structure and operating policies. n4 The description of Hospital A included **[****11]** the following paragraph:

"The hospital operates a full time emergency room and no one requiring emergency care is denied treatment. The hospital otherwise ordinarily limits admissions to those who can pay the cost of their hospitalization, either themselves, or through private health insurance, or with the aid of public programs such as Medicare. Patients who cannot meet the financial requirements for admission are ordinarily referred to another hospital in the community that does serve indigent patients."

Despite Hospital A's apparent failure to operate "to the extent of its financial ability for those not able to pay for the services rendered," as required byRevenue Ruling 56-185, the IRS in this new Ruling held

Hospital A exempt as a charitable corporation under § 501(c)(3). n5 Noting **[***457]** thatRevenue Ruling 56-185 had set out requirements **[*32]** for serving indigents "more restrictive" than those applied to Hospital A, the IRS stated that "Revenue Ruling 56-185 is hereby modified to remove therefrom the requirements relating to caring for patients without charge or at rates below cost."

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n3 *1969-2 Cum. Bull. 117.* The substance of this Ruling had been issued as a policy pronouncement approximately one month earlier. Technical Info. Rel. 1022 (Oct. 8, 1969).

n4 The descriptions fit, in whole or in part, actual hospitals as to whose tax status either a taxpayer or an IRS field office had requested advice. The anonymous reference to the hospitals inRevenue Ruling 69-545 conformed to the IRS practice of deleting "identifying details and confidential information" contained in such requests, which are dealt with privately before the underlying fact situation is used in a published Revenue Ruling. See 1969-2 Cum. Bull. xxii.

n5 In reaching this conclusion the IRS cited the law of trusts for the premise that promotion of health was a "charitable" purpose provided only that the class of direct beneficiaries was sufficiently large that its receipt of health services could be said to benefit the community as a whole. See *Restatement (Second) of Trusts §§ 368*, 372 (1959); 4 A. Scott, Law of Trusts §§ 368, 372 (3d ed. 1967). The IRS then applied that premise to Hospital A and concluded that by maintaining an open emergency room and providing hospital care to all persons able to pay, either directly or through insurance, the hospital served a large enough class to qualify as charitable.

---------- End Footnotes ----------

[**12]**

II

Issuance ofRevenue Ruling 69-545 led to the filing of this suit in July 1971 in the United States District Court for the District of Columbia, by a group of organizations and individuals. The plaintiff organizations described themselves as an unincorporated association n6 and serveral nonprofit corporations n7 each of which included low-income persons among its members and represented the interests of all such persons in obtaining hospital care and services. The 12 individual plaintiffs n8 described themselves as subsisting below the poverty income levels established by the Federal Government and suffering from medical conditions requiring hospital services. The organizations sued on behalf of their members, and each individual sued on his own behalf and as representative of all other persons similarly situated.

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n6 California Welfare Rights Organization.

n7 Eastern Kentucky Welfare Rights Organization; National Tenants Organization; Association of Disabled Miners and Widows, Inc.; Health, Education, Advisory Team, Inc.

n8 One of the 12, a minor, sued by and through his parents, who also were named plaintiffs.

---------- End Footnotes ----------

[**13]**

Each of the individuals described an occasion on which he or a member of his family had been disadvantaged in seeking needed hospital services because of indigency. Most involved the refusal of a hospital to admit the person because of his inability to pay a deposit or an advance fee, even though in some instances the **[*33]** person was enrolled in the Medicare program. At least one plaintiff was denied emergency-room treatment because of his inability to pay immediately. And another was treated in the emergency room but then billed and threatened with suit although his indigency had been known at the time of treatment.

According to the complaint, each of the hospitals involved in these incidents had **[**1922]** been determined by the Secretary and the Commissioner to be a tax-exempt charitable corporation, and each received substantial private contributions. The Secretary and the Commissioner were the only defendants. The complaint alleged that by extending tax benefits to such hospitals despite their refusals fully to serve the indigent, the defendants were

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"encouraging" the hospitals to deny services to the individual plaintiffs and to the members and clients of the **[****14]** plaintiff organizations. Those persons were alleged to be suffering "injury in their opportunity and ability to receive hospital services in nonprofit hospitals which receive... benefits... as 'charitable' organizations" under the Code. They also were alleged to be among the intended beneficiaries of the Code sections that grant favorable tax treatment to "charitable" organizations.

[*458]** Plaintiffs made two principal claims. The first was that in issuingRevenue Ruling 69-545 the defendants had violated the Code, and that in granting charitable-corporation treatment to nonprofit hospitals that refused fully to serve indigents the defendants continued the violation. Their theory was that the legislative history of the Code, regulations of the IRS, and judicial precedent had established the term "charitable" in the Code to mean "relief of the poor," and that the challenged Ruling and current practice of the IRS departed from that interpretation. Plaintiffs' second claim was that the issuance ofRevenue Ruling 69-545 without a **[*34]** public hearing and an opportunity for submission of views had violated the rulemaking procedures of the APA, *5 U.S.C. § 553.* **[****15]** The theory of this claim was that the Ruling should be considered a "substantive" rule as opposed to the "interpretative" type of rule that is exempted from the requirements of § 553. n9 Plaintiffs sought various forms of declaratory and injunctive relief. n10

---------- Footnotes ----------

n9 Section 553(b) states that "[e]xcept when notice or hearing is required by statute, this subsection does not apply - (A) to interpretative rules...."

Plaintiffs also claimed that issuance ofRevenue Ruling 69-545 amounted to an abuse of discretion and denied them due process of law. These claims were treated summarily or not at all by the courts below, and plaintiffs have not pressed them in this Court.

n10 Plaintiffs requested judicial declarations that defendants had violated the Code and the APA, and that a hospital's charitable status required provision of full services to persons unable to pay and those on Medicaid. In addition, they sought to enjoin defendants to suspend charitable organization treatment of and to refrain from extending such treatment to, any hospital that failed to submit proof, on forms to be approved by the District Court, that it served indigents and those on Medicaid without either requiring advance deposits or attempting to collect, once service had been rendered. Plaintiffs also asked the District Court to order collection of all taxes "due and owing" because of the allegedly "illegal" extension of charitable status to hospitals that refused to serve indigents.

---------- End Footnotes ----------

[**16]**

By a motion to dismiss, defendants challenged plaintiffs' standing, suggested the nonjusticiability of the subject matter of the suit, and asserted that in any event the action was barred by the Anti-Injunction Act, n11 the tax limitation in the Declaratory Judgment Act, n12 and the **[*35]** doctrine of sovereign immunity. The District Court denied this motion without opinion. On subsequent cross-motions for summary judgment the court considered but rejected each of defendants' arguments against its reaching the merits. The court then held thatRevenue Ruling 69-545 was "improperly promulgated" and "without effect" insofar as it permitted nonprofit hospitals to qualify for tax treatment as charities without their offering "special financial consideration to **[**1923]** persons unable to pay." *370 F. Supp. 325, 338 (1973).* n13

---------- Footnotes ----------

n11 "[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." *26 U.S.C. § 7421*(a).

n12 "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *28 U.S.C. § 2201* (emphasis added).

n13 The court entered a declaratory judgment to that effect and enjoined defendants from extending tax-exempt status to a nonprofit hospital, or allowing

deductions for contributions to it, until the hospital had satisfied the requirements of previousRevenue Ruling 56-185 regarding service to indigents and had posted in its public areas a court-approved notice reciting those requirements.

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[**17]**

The **[***459]** Court of Appeals for the District of Columbia Circuit reversed. *165 U.S. App. D.C. 239, 506 F. 2d 1278 (1974).* It agreed with the District Court's rejection of defendants' jurisdictional contentions, but held on the merits thatRevenue Ruling 69-545 was founded upon a permissible definition of "charitable" and was not contrary to congressional intent in the Code. As to the plaintiffs' APA claim, which the District Court had not reached, the Court of Appeals held thatRevenue Ruling 69-545 was an "interpretative" ruling and thus exempt from the APA's rulemaking requirements.

Plaintiffs sought a writ of certiorari in No. 74-1110 to review the Court of Appeals' judgment on the merits. Defendants filed a cross-petition in No. 74-1124 seeking review of that court's decision on the jurisdictional issues if plaintiffs' petition should be granted. We granted both petitions and consolidated them. *421* **[*36]** *U.S. 975 (1975).* Since we deal with defendants' contentions in No. 74-1124 first, and find it unnecessary to reach the issues raised by plaintiffs in No. 74-1110, we shall refer to defendants below as petitioners and to plaintiffs below **[****18]** as respondents.

III

In this Court petitioners have argued that a policy of the IRS to tax or not to tax certain individuals or organizations, whether embodied in a Revenue Ruling or otherwise developed, cannot be challenged by third parties whose own tax liabilities are not affected. Their theory is that the entire history of this country's revenue system, including but not limited to the evolution of the Code, manifests a consistent congressional intent to vest exclusive authority for the administration of the tax laws in the Secretary and his duly authorized delegates, subject to oversight by the appropriate committees of Congress itself. It is argued that allowing third-party suits questioning the tax treatment accorded other taxpayers would transfer determination of general revenue policy away from those to whom Congress has entrusted it and vest it in the federal courts. n14

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n14 Petitioners rely in part upon this Court's decision in *Louisiana v. McAdoo, 234 U.S. 627 (1914),* as precedent for their position. In that case the State of Louisiana, as a producer of sugar, brought suit challenging the tariff rates applied by the Secretary of the Treasury to sugar imported from Cuba. This Court ordered the suit dismissed. Petitioners rely particularly upon statements in the opinion that maintenance of such actions "would operate to disturb the whole revenue system of the Government," and that "[i]nterference [by the courts] in such a case would be to interfere with the ordinary functions of government." *Id., at 632, 633.* In view of our disposition, we express no opinion on the application of McAdoo to this kind of case.

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[**19]**

[*37] In addition, petitioners analogize the discretion vested in the IRS with respect to administration of the tax laws to the discretion of a public prosecutor as to when and whom to prosecute. They thus invoke the settled doctrine that the exercise of prosecutorial discretion cannot be challenged by one who is himself neither prosecuted nor threatened with prosecution. See *Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973).* Petitioners **[***460]** also renew their jurisdictional contentions that this action is barred by the Anti-Injunction Act, the Declaratory Judgment Act, and the doctrine of sovereign immunity.

[*LEdHR2A]** [2A]We do not reach either the question of whether a third party ever may challenge IRS treatment of another, or the question of whether there is a statutory or an immunity bar to this suit. We conclude that the **[**1924]** District Court should have granted petitioners' motion to dismiss on the ground that respondents' complaint failed to establish their standing to sue. n15

[*LEdHR2B]** [2B] **[****20]**

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-n15 As noted, supra, at 34-35, the District Court considered petitioners' jurisdictional arguments, including their challenge to respondents' standing, when it

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ruled on cross-motions forsummary judgment. The affidavits submitted by respondents merely supported the allegations of the complaint relative to establishing standing, rather than going beyond them. Thus, the standing analysis is no different, as a result of the case having proceeded to summary judgment, than it would have been at the pleading stage. Cf. *Warth v. Seldin, 422 U.S. 490, 501-502 (1975).*

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IV

[*LEdHR3]** [3] **[***LEdHR4]** [4] **[***LEdHR5A]** [5A] **[***LEdHR6]** [6]No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. See *Flast v. Cohen, 392 U.S. 83, 95 (1968).* The concept of standing is part of this limitation. Unlike other associated doctrines, for example, that **[****21]** which restrains federal courts from deciding **[*38]** political questions, standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Id., at 99.* As we reiterated last Term, the standing question in its Art. III aspect "is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin, 422 U.S. 490, 498-499 (1975)* (emphasis in original). In sum, when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation. n16

[*LEdHR5B]** [5B]

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n16 This Court often has noted that the focus upon the plaintiff's stake in the outcome of the issue he seeks to have adjudicated serves a separate and equally important function bearing upon the nature of the judicial process. As stated in *Baker v. Carr, 369 U.S. 186, 204 (1962),* a significant personal stake serves "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult... questions."

---------- End Footnotes ----------

[**22]**

[*LEdHR7]** [7]Respondents brought this action under § 10 of the APA, *5 U.S.C. § 702,* which gives a right to judicial review to any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute." n17 In *Data Processing Serv. v. Camp, 397 U.S. 150 (1969),* this Court held the constitutional **[***461]** standing requirement under this section to be allegations which, if true, would establish that the plaintiff had been injured in fact by **[*39]** the action he sought to have reviewed. Reduction of the threshold requirement to actual injury redressable by the court represented a substantial broadening of access to the federal courts over that previously thought to be the constitutional minimum under this statute. n18 But, as this Court emphasized in *Sierra Club v. Morton, 405 U.S. 727, 738 (1972),* "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." See also *United States v. Richardson, 418 U.S. 166, 194 (1974)* **[**1925]** (POWELL, **[****23]** J., concurring). The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement. A federal court cannot ignore this requirement without overstepping its assigned role in our system of adjudicating only actual cases and controversies. n19 It is according to this settled principle that the allegations of both the individual respondents and the respondent organizations must be tested for sufficiency.

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n17 "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *5 U.S.C. § 702.*

n18 The previous view can be found in *Kansas City Power & Light Co. v. McKay, 96 U.S. App. D.C. 273, 281, 225 F. 2d 924, 932 (1955).* See *Sierra Club v. Morton, 405 U.S. 727, 733 (1972).*

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n19 The Data Processing decision established a second, nonconstitutional standing requirement that the interest of the plaintiff, regardless of its nature in the absolute, at least be "arguably within the zone of interests to be protected or regulated" by the statutory framework within which his claim arises. See *397 U.S., at 153.* As noted earlier, respondents in this case claim that they, and of course their particular interests involved in this suit, are the intended beneficiaries of the charitable organization provisions of the Code. In view of our disposition of this case, we need not consider this "zone of interests" test.

---------- End Footnotes ----------

[**24]**

A

[*LEdHR1B]** [1B] **[***LEdHR8]** [8] **[***LEdHR9A]** [9A]We note at the outset that the five respondent organizations, which described themselves as dedicated to **[*40]** promoting access of the poor to health services, could not establish their standing simply on the basis of that goal. Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III. *Sierra Club v. Morton, supra;* see *Warth v. Seldin, supra.* Insofar as these organizations seek standing based on their special interest in the health problems of the poor their complaint must fail. Since they allege no injury to themselves as organizations, and indeed could not in the context of this suit, they can establish standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right. *Warth v. Seldin, supra, at 511.* The standing question in this suit therefore turns upon whether any individual respondent has established an actual injury, n20 or whether the respondent **[***462]** **[****25]** organizations have established actual injury to any of their indigent members.

[*LEdHR9B]** [9B]

---------- Footnotes ----------

-n20 The individual respondents sought to maintain this suit as a class action on behalf of all persons similarly situated. That a suit may be a class action, however, adds nothing to the question of standing, for even named plaintiffs who represent a class"must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin, 422 U.S., at 502.*

---------- End Footnotes ----------

B

[*LEdHR1C]** [1C] **[***LEdHR10A]** [10A] **[***LEdHR11]** [11] The obvious interest of all respondents, to which they claim actual injury, is that of access to hospital services. In one sense, of course, they have suffered injury to that interest. The complaint alleges specific occasions on which each of the individual respondents sought but was denied hospital services solely due to his indigency, **[****26]** n21 and **[*41]** in at least some of the cases it is clear that the needed treatment was unavailable, as a practical matter, anywhere else. The complaint also alleges that members of the respondent organizations need hospital services but live in communities in which the private hospitals do not serve indigents. We thus assume, for purpose of analysis, that some members have been denied service. But injury at the hands of a hospital is insufficient by itself to establish a case or controversy in the context of this suit, for no hospital is a defendant. The only defendants are officials of the Department of the Treasury, and the only claims of illegal action respondents desire the courts to adjudicate are charged to those officials. "Although the law of standing has been greatly **[**1926]** changed in [recent] years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Linda R. S. v. Richard D., 410 U.S., at 617.* n22 In other words, the "case **[****27]** or controversy" limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury **[*42]** that results from the independent action of some third party not before the court.

[*LEdHR10B]** [10B]

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n21 One of the individual respondents complains, not that he was denied service, but that he was treated and then billed despite the hospital's knowledge of his indigency. This variation of the injury does not change the standing analysis.

n22 The reference in Linda R S. to "a statute expressly conferring standing" was in recognition of Congress' power to create new interests the invasion of which will confer standing. See *410 U.S., at 617 n. 3; Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).* When Congress has so acted, the requirements of Art. III remain: "[T]he plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth v. Seldin, supra, at 501.* See also *United States v. SCRAP, 412 U.S. 669 (1973);* cf. *Sierra Club v. Morton, supra, at 732 n. 3.*

---------- End Footnotes ----------

[**28]**

[*LEdHR1D]** [1D]The complaint here alleged only that petitioners, by the adoption ofRevenue Ruling 69-545, had "encouraged" hospitals to deny services to indigents. n23 The implicit corollary **[***463]** of this allegation is that a grant of respondents' requested relief, resulting in a requirement that all hospitals serve indigents as a condition to favorable tax treatment, would "discourage" hospitals from denying their services to respondents. But it does not follow from the allegation and its corollary that the denial of access to hospital services in fact results from petitioners' new Ruling, or that a court-ordered return by petitioners to their previous policy would result in these respondents' receiving the hospital services they desire. It is purely speculative whether the denials of service **[*43]** specified in the complaint fairly can be traced to petitioners' "encouragement" or instead result from decisions made by the hospitals without regard to the tax implications.

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n23 The Court of Appeals, in sustainingRevenue Ruling 69-545 on the merits, relied in part upon its conclusion that the new IRS policy, which apparently requires a hospital to provide free emergency care to indigents, may result in as much or more relief to the poor than the policy of the previous Ruling. Much of respondents' argument, and that of several of the amici, have been directed against that conclusion. As we do not reach the merits, we need not consider this question. But we accept for purposes of the standing inquiry respondents' averment that the IRS's new policy encourages a hospital to provide fewer services to indigents than it might have under the previous policy.

We do note, however, that it is entirely speculative whether even the earlier Ruling would have assured the medical care they desire. It required a hospital to provide care for the indigent only "to the extent of its financial ability," and stated that a low charity record was not conclusive that a hospital had failed to meet that duty. See supra, at 30. Thus, a hospital could not maintain, consistently withRevenue Ruling 56-185, a general policy of refusing care to all patients unable to pay. But the number of such patients accepted, and whether any particular applicant would be admitted, would depend upon the financial ability of the hospital to which admittance was sought.

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[**29]**

[*LEdHR1E]** [1E]It is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services. It is true that the individual respondents have alleged, upon information and belief, that the hospitals that denied them service receive substantial donations deductible by the donors. This allegation could support an inference that these hospitals, or some of them, are so financially dependent upon the favorable tax treatment afforded charitable organizations that they would admit respondents **[**1927]** if a court required such admission as a condition to receipt of that treatment. But this inference is speculative at best. n24 The

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Solicitor General states in his brief that, nationwide, private philanthropy accounts for only 4% of private hospital revenues. Respondents introduced in the District Court a statement to Congress **[****30]** by an official of a hospital association describing the importance to nonprofit hospitals of the favorable tax treatment they receive as charitable corporations. Such conflicting evidence supports the commonsense proposition that the dependence upon special tax benefits may vary from hospital to hospital. Thus, respondents' allegation that **[*44]** certain hospitals receive substantial charitable contributions, without more, does not establish the further proposition that those hospitals are dependent upon such contributions.

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n24 The complaint reveals nothing at all about the dependence upon charitable contributions of any hospitals that might have denied services to members of respondent organizations. See supra, at 40-41.

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[*LEdHR12]** [12]Prior decisions of this Court **[***464]** establish that unadorned speculation will not suffice to invoke the federal judicial power. In Linda R. S. v. Richard D., the mother of an illegitimate child averred that state-court interpretation of a criminal child **[****31]** support statute as applying only to fathers of legitimate children violated the Equal Protection Clause of the Fourteenth Amendment. She sought an injunction requiring the district attorney to enforce the statute against the father of her child. We held that the mother lacked standing, because she had "made no showing that her failure to secure support payments results from the nonenforcement, as to her child's father, of [the statute]." *410 U.S., at 618.* The prospect that the requested prosecution in fact would result in the payment of child support - instead of jailing the father - was "only speculative." Ibid. Similarly, last Term in Warth v. Seldin we held that low-income persons seeking the invalidation of a town's restrictive zoning ordinance lacked standing because they had failed to show that the alleged injury, inability to obtain adequate housing within their means, was fairly attributable to the challenged ordinance instead of to other factors. In language directly applicable to this litigation, we there noted that plaintiffs relied "on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been **[****32]** better had [defendants] acted otherwise, and might improve were the court to afford relief." *422 U.S., at 507.*

[*LEdHR1F]** [1F] **[***LEdHR13]** [13] **[***LEdHR14A]** [14A]The principle of Linda R. S. and Warth controls this case. As stated in Warth, that principle is that indirectness of injury, while not necessarily fatal to standing, **[*45]** "may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *422 U.S., at 505.* Respondents have failed to carry this burden. Speculative inferences are necessary to connect their injury to the challenged actions of petitioners. n25 Moreover, **[***465]** the complaint suggests no **[**1928]** substantial likelihood that victory in this suit would result **[*46]** in respondents' receiving the hospital treatment they desire. A federal court, properly cognizant of the Art. III limitation upon its jurisdiction, must require more than respondents have shown before proceeding to the merits.

[*LEdHR14B]** **[****33]** [14B]

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----- -n25 The courts below erroneously believed that United States v. SCRAP supported respondents' standing. In SCRAP, although the injury was indirect and"the Court was asked to follow [an] attenuated line of causation," *412 U.S., at 688,* the complaint nevertheless "alleged a specific and perceptible harm" flowing from the agency action. *Id., at 689.* Such a complaint withstood a motion to dismiss, although it might not have survived challenge on a motion for summary judgment. *Id., at 689, and n. 15.* But in this case the complaint is insufficient even to survive a motion to dismiss, for it fails to allege an injury that fairly can be traced to petitioners' challenged action. See supra, at 40-43. Nor did the affidavits before the District Court at the summary judgment stage supply the missing link.

Our decision is also consistent with *Data Processing Serv. v. Camp, 397 U.S. 150 (1969).* The Court there stated: "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." *Id., at 152.* The complaint in Data Processing alleged injury that was directly traceable to the action of the defendant federal official,

for it complained of injurious competition that would have been illegal without that action. Accord, *Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Investment Co. Institute v. Camp, 401 U.S. 617, 620-621 (1971)*. Similarly, the complaint in Data Processing's companion case of *Barlow v. Collins, 397 U.S. 159 (1970),* was sufficient because it alleged extortionate demands by plaintiffs' landlord made possible only by the challenged action of the defendant federal official. See *id., at 162-163*. In the instant case respondents' injuries might have occurred even in the absence of the IRS Ruling that they challenge; whether the injuries fairly can be traced to that Ruling depends upon unalleged and unknown facts about the relevant hospitals.

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[**34]**

Accordingly, the judgment of the Court of Appeals is vacated, and the cause is remanded to the District Court with instructions to dismiss the complaint.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of these cases.

CONCURBY: STEWART

CONCUR: MR. JUSTICE STEWART concurring.

I join the opinion of the Court holding that the plaintiffs in this case did not have standing to sue. I add only that I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

I agree that in this litigation as it is presently postured, respondents (herein used to refer to plaintiffs below) have not met their burden of establishing a concrete and reviewable controversy betwen themselves and the Government with respect to the disputed Revenue Ruling. That is, however, the full extent of my agreement with the Court in this case. I must dissent from the Court's reasoning on the standing issue, reasoning that is unjustifiable under **[****35]** any proper theory of standing and clearly contrary to the relevant precedents. The Court's further obfuscation of the law of standing is particularly unnecessary when there are obvious and reasonable alternative grounds upon which to decide this litigation.

[*47]

I

Respondents brought this action for declaratory and injunctive relief, seeking, inter alia, a declaration thatRevenue Ruling 69-545 is inconsistent with the relevant provisions of the Internal Revenue Code and promulgated in violation of the rulemaking provisions of the Administrative Procedure Act, *5 U.S.C. § 553*. Respondents claimed to be indigents, to be in need of free or below-cost medical care provided by private, nonprofit hospitals accorded tax-exempt status under the Internal Revenue Code, and to be protected by and beneficiaries of the provisions of the Code providing for tax-exempt status for nonprofit organizations engaging in "charitable" activities. Respondents alleged that they had in specified instances been denied provision of free or below-cost medical services **[***466]** by nonprofit hospitals accorded tax-exempt status under the Code, and that by issuing the disputed **[****36]** Revenue Ruling the Internal Revenue Service was "encouraging" tax-exempt hospitals to deny them such services. Accordingly, respondents alleged, the IRS was injuring them in their "opportunity and ability" to receive medical services and doing so illegally, in derogation of the results intended by the "charitable" provisions of the Code.

However, as noted by the Court, the disputed Ruling on its face applies only to a narrow category of nonprofit hospitals - those **[**1929]** fairly characterized by the factual and legal circumstances described in the Ruling as pertaining to "Hospital A." The Ruling does not indicate what treatment will be accorded hospitals not within the situation described in the hypothesis. n1 The **[**1930]** most hotly **[*48]** **[***467]** contested portion of the disputed ruling, that modifying the earlierRevenue Ruling 56-185 by "remov[ing] therefrom the requirements relating to caring for patients **[*49]** without charge or at rates below cost," is at best ambiguous regarding its application or effect respecting nonprofit hospitals not within the factual and legal situation **[*50]** of Hospital A. Accordingly, there is simply no ripe controversy **[****37]** with respect to a claim that the disputed ruling illegally "encourages" all nonprofit hospitals to withdraw the provision of indigent services by removing from all hospitals the requirement of such services as a prerequisite to tax-exempt status.

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n1 *Revenue Ruling 69-545, 1969-2 Cum. Bull. 117,* provides in pertinent part:

"Advice has been requested whether the two nonprofit hospitals described below qualify for exemption from Federal income tax under *section 501(c)(3) of the Internal Revenue Code* of 1954...

"Situation 1. Hospital A is a 250-bed community hospital. Its board of trustees is composed of prominent citizens in the community. Medical staff privileges in the hospital are available to all qualified physicians in the area, consistent with the size and nature of its facilities. The hospital has 150 doctors on its active staff and 200 doctors on its courtesy staff. It also owns a medical office building on its premises with space for 60 doctors. Any member of its active medical staff has the privilege of leasing available office space. Rents are set at rates comparable to those of other commercial buildings in the area.

"The hospital operates a full time emergency room and no one requiring emergency care is denied treatment. The hospital otherwise ordinarily limits admissions to those who can pay the cost of their hospitalization, either themselves, or through private health insurance, or with the aid of public programs such as Medicare. Patients who cannot meet the financial requirements for admission are ordinarily referred to another hospital in the community that does serve indigent patients.

"The hospital usually ends each year with an excess of operating receipts over operating disbursements from its hospital operations. Excess funds are generally applied to expansion and replacement of existing facilities and equipment, amortization of indebtedness, improvement in patient care, and medical training, education, and research.

.....

"To qualify for exemption from Federal income tax under section 501(c)(3) of the Code, a nonprofit hospital must be organized and operated exclusively in furtherance of some purpose considered 'charitable' in the generally accepted legal sense of that term, and the hospital may not be operated, directly or indirectly, for the benefit of private interests.

"In the general law of charity, the promotion of health is considered to be a charitable purpose. *Restatement (Second), Trusts, sec. 368* and sec. 372; IV Scott on Trusts (3rd ed. 1967), sec. 368 and sec. 372. A nonprofit organization whose purpose and activity are providing hospital care is promoting health and may, therefore, qualify as organized and operated in furtherance of a charitable purpose. If it meets the other requirements of section 501(c)(3) of the Code, it will qualify for exemption from Federal income tax under section 501(a).

"Since the purpose and activity of Hospital A, apart from its related educational and research activities and purposes, are providing hospital care on a nonprofit basis for members of its community, it is organized and operated in furtherance of a purpose considered 'charitable' in the generally accepted legal sense of that term. The promotion of health, like the relief of proverty and the advancement of education and religion, is one of the purposes in the general law of charity that is deemed beneficial to the community as a whole even though the class of beneficiaries eligible to receive a direct benefit from its activities does not include all members of the community, such as indigent members of the community, provided that the class is not so small that its relief is not of benefit to the community. *Restatement (Second), Trusts, sec. 368*, comment (b) and sec. 372, comments (b) and (c); IV Scott on Trusts (3rd ed. 1967), sec. 368 and sec. 372.2. By operating an emergency room open to all persons and by providing hospital care for all those persons in the community able to pay the cost thereof either directly or through third party reimbursement, Hospital A is promoting the health of a class of persons that is broad enough to benefit the community.

"The fact that Hospital A operates at an annual surplus of receipts over

> disbursements does not preclude its exemptions. By using its surplus funds to improve the quality of patient care, expand its facilities, and advance its medical training, education, and research programs, the hospital is operating in furtherance of its exempt purposes.
>
> . . . . .
>
> "Accordingly, it is held that Hospital A is exempt from Federal income tax under section 501(c)(3) of the Code.
>
> . . . . .
>
> "Even though an organization considers itself within the scope of Situation 1 of this Revenue Ruling, it must file an application on Form 1023, Exemption Application, in order to be recognized by the Service as exempt under section 501(c)(3) of the Code.
>
> "Revenue Ruling 56-185, C.B. 1956-1, 202 sets forth requirements for exemption of hospitals under section 501(c)(3) more restrictive than those contained in this Revenue Ruling with respect to caring for patients without charge or at rates below cost...
>
> "Revenue Ruling 56-185 is hereby modified to remove therefrom the requirements relating to caring for patients without charge or at rates below cost."
>
> ---------- End Footnotes ----------

[**38]**

This was the position of the Secretary of the Treasury and the Commissioner of Internal Revenue with respect to the disputed Ruling at oral argument, n2 and no representation **[*51]** to **[***468]** the contrary appears in the record. Moreover, no facts were alleged or introduced in the District Court that any way indicated with more specificity that the disputed Ruling had or was intended to have application to all nonprofit hospitals. Respondents apparently made no attempt to clarify the meaning of the Ruling in this regard, as, for exa mple, by filing with the IRS a petition for clarification of the Ruling pursuant to the Administrative Procedure Act, *5 U.S.C.§ 555*(e), see, e.g., *Dunlop v. Bachowski, 421 U.S. 560, 573 (1975),* or by petitioning for a revision of the Ruling pursuant to that Act, *5 U.S.C. § 553*(e), cf. *Oljato Chapter of Navajo Tribe v. Train, 169 U.S. App. D.C. 195, 207, 515 F. 2d 654, 666-667 (1975),* or by seeking clarification by means of discovery or an informal request. Accordingly, with respect to any claim that the Ruling illegally withdraws the requirement of the provision of indigent **[****39]** services from all hospitals seeking tax-exempt status under the "charitable" provisions of the Code, a "lack of ripeness [inheres] in the fact that the need for some further procedure, some further contingency of application **[*52]** or interpretation... serv[es] to make remote the issue which was sought to be presented to the Court." *Poe v. Ullman, 367 U.S. 497, 528 (1961)* (Harlan, J., dissenting). Cf. *Toilet Goods Assn. v. Gardner, 387 U.S. 158, 163-164* **[**1931]** *(1967).* n3 "It is clear beyond question... that [the disputed Ruling] on [its] face raise[s] questions which should not be adjudicated in the abstract and in the general, but which require a 'concrete setting' for determination." *Gardner v. Toilet Goods Assn., 387 U.S. 167, 197 (1967)* (opinion of Fortas, J.).

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n2 E.g., "Now, this ruling itself demonstrates the hypothetical quality of what the plaintiffs are seeking, the hypothetical quality of the relief they are seeking, because as the Court can readily see in [perusing] this Revenue Ruling, it sets forth two polar situations, situation 1 and situation 2, dealing with two hospitals, Hospital A and Hospital B. In Hospital A, there are a variety of facts in connection with Hospital A, it has an open board of trustees, it gives open staff privileges, it is involved in research and educational activities, it maintains a full-time emergency room, and no one requiring emergency care is denied treatment. To the contrary, [H]ospital B is almost proprietary in nature, it's owned by a small group of doctors, they limit the staff privileges to people they know, and they comprise the medical committee generally to keep out qualified physicians, et cetera, et cetera, and it maintains an emergency room, but basically to treat the patients of its own doctors.

"Now, these two polar examples were designed to educate the public generally and hospital administrators as to clear-cut situations. Hospital A is a situation, if you are like Hospital A, you will be fairly certain of exemption, but, of course, the ruling does conclude that you can't be

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certain of that itself. You have got to yourself submit an application for exemption to the Internal Revenue Service.

"If you are like [H]ospital B, which is a polar example of a hospital that doesn't seem to provide any community benefit, it seems to be run pretty much strictly for the private inurement of its owner-doctors. In that situation you are not going to get a tax-exempt status.

"Now, the important thing which we emphasize is that the ruling doesn't even begin to attempt to deal with the hundreds of gradations in between Hospital A and Hospital B. Hospital A, assuming for a moment that it doesn't give free care to indigents on a broad scale, let's say it dropped its emergency room completely for, let's say, the particular example that it might be engaged in treating cancer patients or a particular kind of disease. Under those circumstances an emergency room would be superfluous because such a hospital would rarely have need for an emergency room. Or, for example, a consortium of hospitals in a particular community could get together and one could say, 'We will have the emergency room, you have the nursing school, and a third' - " Tr. of Oral Arg. 23-25.

n3 Of course, the ripeness determination has as an integral component the question of whether the agency action is sufficiently "final" for judicial review within the meaning of the Administrative Procedure Act, *5 U.S.C. § 704.* See *Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967).*

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[**40]**

Further, if respondents wished to challenge the legality of the Ruling in respect to the unambiguous aspects of its application - its application to hospitals fairly coming within the situation described as pertaining to Hospital A - it was incumbent upon them to allege, and, at the appropriate stage of the litigation, to offer evidence to show that the hospitals whose conduct affected them were hospitals whose operations could fairly be characterized as implicated by the terms of the Ruling. Such allegations and showings were necessary to demonstrate some logical connection or nexus between the wrongful action alleged, the issuance of the disputed Ruling, and the harm of which respondents complain, injury to their "opportunity and ability" to secure medical services. This is required, of course, by the only constitutional, "case or controversy," policy affecting the law of standing - to ensure that the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens **[***469]** the presentation of issues upon which the [C]ourt so largely **[*53]** depends for illumination of difficult... questions. **[****41]** " *Baker v. Carr, 369 U.S. 186, 204 (1962).*

The allegations of the complaint are probably sufficient to state this claim with respect to certain of the respondents. n4 In any event, however, the petitioners (used herein to refer to defendants below) later moved for summary judgment on the standing issue, specifically arguing that "[t]he plaintiffs have failed to demonstrate that the alleged injuries complained of herein were incurred as a result of any actions on the part of the defendants." App. 154. At this point in the litigation, it was clearly incumbent upon the respondents to make a showing sufficient to create a material issue of fact whether there was any connection between the hospitals affecting them and the ruling alleged to be illegally "encouraging" tax-exempt hospitals to withdraw the provision of indigents' services, thereby injuring respondents' "opportunity and ability" for such services. **[*54]** See *Barlow v. Collins, 397 U.S. 159, 175, and n. 10 (1970)* (opinion of BRENNAN, J.). n5 No such showing **[**1932]** was made. There is absolutely no indication in the record that the contested Ruling altered the operation of these hospitals **[****42]** in any way, or that the tax-exempt status of these hospitals was in any way related to the Ruling. Accordingly, the petitioners were entitled to judgment in their favor on their motion for summary judgment.

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n4 With respect to certain of the respondents, the allegations of the complaint would seem to controvert a connection between the hospitals whose past conduct affected them and the disputed Revenue Ruling. For example, certain of the respondents alleged they were enrolled in the Medicaid program, but were denied treatment in the absence of a further cash deposit by the hospitals to which they applied for admission. This

would appear to refute an inference that the hospitals involved came within the terms of the disputed Ruling and were granted tax-exempt status on that basis. No further allegations or, at summary judgment, showings were made to clarify this aspect of the case.

In fairness to respondents, it is noted that the wrongs alleged in the complaint and the relief sought went beyond simply challenging the disputed Ruling; respondents further sought to declare illegal and enjoin the IRS from granting tax-exempt status to hospitals whose operations, apart from the disputed Ruling, did not properly fall within the definition of "charitable" as required by the Internal Revenue Code. However, only issues concerning the disputed Revenue Ruling are before us on the petition for certiorari.

n5 Such a showing was required to demonstrate standing in respect to respondents' claim that the Revenue Ruling was promulgated in violation of the rulemaking provisions of the Administrative Procedure Act as well as for purposes of their other claims. It is true that the rulemaking section of the Act provides for notice and opportunity to comment for "interested persons," *5 U.S.C. § 553*(c). However, it is unnecessary to decide in this case whether Congress by so providing has created a cognizable interest in such participation and standing to complain of its wrongful deprivation apart from any other injury in fact flowing from the agency action. Cf. *Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972)*. Respondents in this litigation made no allegation or showing that they desired an opportunity to participate, or that they would have availed themselves of such an opportunity had it been presented. Therefore, in regard to this procedural claim no less than the other claims raised, respondents were required to demonstrate some connection between the disputed Ruling and the hospitals affecting them in order to make out some injury in fact resulting from the challenged action.

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[**43]**

II

The Court today, however, wholly ignores the foregoing aspects of this **[***470]** case. Rather, it assumes that the governmental action complained of is encouraging the hospitals affecting respondents to provide fewer medical services to indigents. Ante, at 42, and n. 23. This is done in order to make the gratuitous and erroneous point that respondents, as a prerequisite to pursuing any legal claims regarding the Revenue Ruling, must allege and later prove that the hospitals affecting respondents **[*55]** "are dependent upon" their tax-exempt status, ante, at 44, that they would not in the absence of the Ruling's assumed "encouragement" "elect to forgo favorable tax treatment," and that the absence of the allegedly illegal inducement would "result in the availability to respondents of such services," ante, at 43. In reaching this conclusion, the Court abjures analysis either of the Art. III policies heretofore assumed to inhere in the constitutional dimension of the standing doctrine, or of the relevant precedents of this Court. n6

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n6 Moreover, by requiring that this "'line of causation,'" ante, at 45 n. 25, be precisely and intricately elaborated in the complaint, the Court continues its recent policy of "reverting to the form of fact pleading long abjured in the federal courts." *Warth v. Seldin, 422 U.S. 490, 528 (1975)* (BRENNAN, J., dissenting). One waits in vain for an explanation for this selectively imposed pleading requirement; a requirement so at odds with our usual view that under the Federal Rules of Civil Procedure "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46 (1957)*. The want of an explanation is even more striking when considered in light of our reaffirmation of Conley only this *Term, Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746 (1976),* and our observation therein that the same standard is applicable to testing the sufficiency of the complaint for subject-matter jurisdiction, *id., at 742 n. 1.*

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[**44]**

A

First, the Court's treatment of the injury-in-fact standing requirement is simply unsupportable in the context of this case. The wrong of which respondents complain is that the disputed Ruling gives erroneous economic signals to nonprofit hospitals whose subsequent responses affect respondents; they claim the IRS is offering the economic inducement of tax-exempt status to such hospitals under terms illegal under the Internal **[*56]** Revenue Code. Respondents' claim is not, and by its very nature could not be, that they have been and will be illegally denied the provision of indigent medical services by the hospitals. Rather, if respondents have a claim cognizable under the law, it is that the Internal Revenue Code requires the Government to offer economic inducements to the relevant hospitals only under conditions which are likely to benefit respondents. The relevant injury in light of this claim is, then, injury to this beneficial interest - as respondents alleged, injury to their "opportunity and ability" to receive medical services. Respondents sufficiently alleged this injury and if, as the Court so readily assumes, they had made a **[**1933]** showing sufficient to **[****45]** create an issue of material fact that the Government was injuring this interest, they would continue to possess standing to press the claim on the merits.

Clearly such conditions if met would provide the essence of the only constitutionally mandated element **[***471]** of standing - a personal stake sufficient to create concrete adverseness meeting minimal conditions for Art. III justiciability. *Baker v. Carr, 369 U.S., at 204; Barlow v. Collins, supra, at 164.* See also *United States v. Richardson, 418 U.S. 166, 196 n. 18 (1974)* (POWELL, J., concurring). Nothing in the logic or policy of constitutionally required standing is added by the further injury-in-fact dimension required by the Court today - that respondents allege that the hospitals affecting them would not have elected to forgo the favorable tax treatment and that this would "result in the availability to respondents of" free or below-cost medical services.

Furthermore, the injury of which respondents complain is of a continuing and continuous nature, and the additional allegations and showings that the Court requires would not be determinative of the hospitals' future conduct. **[****46]** Even if a given hospital affecting respondents had in the past made its determination regarding indigent **[*57]** services without regard to the tax consequences of that determination - would have elected to forgo favorable tax treatment in the absence of the allegedly illegal "encouragement" - such a choice presumably would be subject to continuous re-evaluation in the future, as the hospital's circumstances, the economic climate, and expectations regarding donor contributions changed over time. Respondents complain of and seek relief from the threat of future policy determinations by the hospitals based on the allegedly illegal tax Ruling, not redress for past "encouragement." We have often found standing in plaintiffs to complain of such future harm irrespective of any showing of the realization of such threatened injuries in the past. E.g., *Doe v. Bolton, 410 U.S. 179, 188 (1973); Epperson v. Arkansas, 393 U.S. 97, 101-102 (1968).*

Indeed, to the extent that there is Art. III substance to the concerns addressed by the Court today, it is not a question of standing - of identifying the proper party to bring the action - but rather whether the threat **[****47]** of the more ultimate future harm is of sufficient immediacy to meet the minimum requirements of Art. III justiciability. The task is one of distinguishing between a "justiciable controversy" and a "difference or dispute of a hypothetical or abstract character," *Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937),* and the question is "necessarily one of degree." *Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941); Golden v. Zwickler, 394 U.S. 103, 108 (1969).*

"[I]t would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality **[*58]** to warrant the issuance of a declaratory judgment." Ibid.

If, as the Court assumes, respondents had demonstrated that the disputed Ruling had application to the **[***472]** hospitals affecting them, I would have no doubt that this standard had been met. In such a case I would readily **[****48]** conclude:

"[T]he challenged governmental activity... is not contingent,... and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the [responding] parties.

. . . . .

[1934]** Where such state action or its imminence adversely affects the status of private parties, the courts should be available to render appropriate relief and judgments affecting the parties' rights and interests."

Super Tire Engineering Co. v. McCorkle, 416 US. 115, 122, 125 (1974).

B

Second, the Court's treatment of the injury-in-fact requirement directly conflicts with past decisions. Respondents brought this action seeking general statutory review of administrative action under the provisions of the Administrative Procedure Act. Hence, the governing precedents respecting standing are those developed in *Data Processing Serv. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Sierra Club v. Morton, 405 U.S. 727 (1972);* and *United States v. SCRAP, 412 U.S. 669 (1973).* See also *Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968).* **[****49]** Any prudential, nonconstitutional considerations that underlay the Court's disposition of the injury-in-fact standing requirement in cases such as *Linda R. S. v. Richard D., 410* **[*59]** *U.S. 614 (1973),* n7 and *Warth v. Seldin, 422 U.S. 490 (1975),* are simply inapposite when review is sought under a congressionally enacted statute conferring standing and providing for judicial review. n8 In such a case considerations **[***473]** respecting "the allocation of power at the national level [and] a shift away from a democratic form of government," *United States v. Richardson, 418 U.S., at 188* (POWELL, J., concurring), are largely ameliorated, and such prudential limitations as remain are supposedly **[*60]** subsumed under the "zone of interests" test developed in *Data Processing Serv. v. Camp, supra.* n9 See *United States v. Richardson, supra, at 196 n. 18* (POWELL, J., concurring).

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n7 We were originally told in *Linda R. S. v. Richard D., 410 U.S., at 617, 619,* that the treatment of the injury-in-fact standing requirement, and the consequent dismissal of the case owing to the lack of a "direct nexus" between the injury incurred and the wrongful action alleged, was a consequence of the "unique context of a challenge to a criminal statute," and the "special status of criminal prosecutions in our system." Although this conclusion was arguable even in its specific context, see *id., at 621* (WHITE, J., dissenting), last *Term's Warth v. Seldin, 422 U.S. 490 (1975),* taught that the raising of the threshold requirement for pleading injury in fact in Linda R. S. was not "unique" after all. But whatever the merits of the treatment of the injury-in-fact requirement in those cases, it is distressing that the Court should mechanically apply the approach developed therein to a case brought under the Administrative Procedure Act without any analysis, see ante, at 37-39, and n. 16, of the only constitutional dimension of standing - the requirement of concrete adverseness flowing from a personal stake in the outcome. See *United States v. Richardson, 418 U.S. 166, 181 (1974)* (POWELL, J., concurring).

n8 The Court has read the standing provision of the Administrative Procedure Act, *5 U.S.C. § 702,* which provides for review for any "person... adversely affected or aggrieved by agency action within the meaning of a relevant statute," as conferring standing upon any person whose interest is adversely affected in fact, so long as that interest comes within the purposes and policies of the statute or statutes authorizing the agency action in question ("within the meaning of a relevant statute"). See *Sierra Club v. Morton, 405 U.S., at 732-733;* Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief, 83 Yale L.J. 425, 451-452, n. 105 (1974).

n9 It is my view, however, that such considerations go only to other questions of justiciability or to questions of the reviewability of the administrative action, and not properly to the question of standing. *Barlow v. Collins, 397 U.S., at 168-170, 171 n. 3, 173-175* (opinion of BRENNAN, J.).

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Our previous decisions concerning standing to sue under the Administrative Procedure **[**1935]** Act conclusively show that the injury in fact demanded is the constitutional minimum identified in *Baker v. Carr, 369 U.S., at 204* - the allegation of such a "personal stake in the outcome of the controversy as to assure" concrete adverseness. *Sierra Club v. Morton, supra, at 732-733; Data Processing Serv. v. Camp, supra, at 151-152.* True, the Court has required that the person seeking review allege that he personally has suffered or will suffer the injury sought to be avoided, *Sierra Club, supra, at 740.* But there can be no doubt that

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respondents here, by demonstrating a connection between the disputed Ruling and the hospitals affecting them, could have adequately served the policy implicated by the pleading requirement of Sierra Club - putting "the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." Ibid. In such a case respondents would not be attempting merely to "vindicate their own value preferences through the judicial process." Ibid. See Albert, supra, Id., at 485-489. **[****51]** If such a showing were made, a real and recognizable harm to a tangible interest would have been alleged, indeed more so than we have required in other circumstances. *United States v. SCRAP, supra; Sierra Club v. Morton, supra;* **[*61]** cf. *Barlow v. Collins, supra, at 163.* n10 **[***474]** Moreover, the injury alleged would be a "'distinctive or discriminating'... harm," *id., at 172 n. 5* (opinion of BRENNAN, J.), clearly a "particularized injury [setting respondents] apart from the man on the street." *United States v. Richardson, supra, at 194* (POWELL, J., concurring).

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n10 It clearly cannot be determinative for purposes of constitutionally required standing that there is only a probabilistic connection between the immediate interest, to which injury is alleged, and some more ultimate injury to the complaining party. *United States v. SCRAP, 412 U.S., at 689 n. 14,* specifically rejected the argument that for standing purposes "significant" injury must be alleged. Rather, the Court held that Art. III policies were adequately fulfilled even though the ultimate injury is very small indeed. Ibid. Clearly there is no difference for purposes of Art. III standing - personal interest sufficient for concrete adverseness - between a small but certain injury and a harm of a larger magnitude discounted by some probability of its nonoccurrence. If the probability of the more ultimate harm is so small as to make the claim clearly frivolous, "the plaintiff can be hastened from the court by summary judgment." *Barlow v. Collins, supra, at 175 n. 10* (opinion of BRENNAN, J.); *United States v. SCRAP, supra, at 689, and n. 15.* See, e.g., *Granite Falls State Bank v. Schneider, 319 F. Supp. 1346 (WD Wash. 1970),* summarily aff'd, *402 U.S. 1006 (1971).* Obviously, however, if the respondents had demonstrated that the IRS was "encouraging" the hospitals affecting them to withdraw provision of medical services for indigents, the probability of the occurrence of the more ultimate injury would be sufficient to confer standing upon the respondents to challenge the action.

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Furthermore, our decisions regarding standing to sue in actions brought under the Administrative Procedure Act make plain that standing is not to be denied merely because the ultimate harm alleged is a threatened future one rather than an accomplished fact. *United States v. SCRAP, supra; Sierra Club v. Morton, supra.* Nor has the fact that the administrative action ultimately **[*62]** affects the complaining party only through responses to incentives by third parties been fatal to the standing of those who would challenge that action. *United States v. SCRAP, supra; Barlow v. Collins, supra.* And the ultimate harm to respondents threatened here is obviously much more "direct and perceptible" and the "line of causation" less "attenuated" than that found sufficient for standing in *United States v. SCRAP, 412 U.S., at 688.*

[1936]** Certainly the Court's attempted distinction of SCRAP will not "wash." The Court states that in SCRAP, "although the injury was indirect and 'the Court was asked to follow an attenuated line of causation,'... the complaint nevertheless 'alleged a specific and perceptible harm' flowing from **[****53]** the agency action." Ante, at 45 n. 25. The instant case is different, the Court says, because the complaint "fails to allege an injury that fairly can be traced" to the allegedly wrongful action. I find it simply impossible fairly and meaningfully to differentiate between the allegations of the two sets of pleadings. Compare App. 13-25 in this case with App. 8-12 in No. 72-562, O.T. 1972, Aberdeen & Rockfish R. Co. v. SCRAP. The Court complains that "whether the injuries fairly can be traced to [the disputed] Ruling depends upon unalleged and unknown facts about the relevant hospitals." Ante, at 45 n. 25. It is obvious that the complaint in SCRAP lacked precisely the same specific factual allegations; there, however, the Court's response was much more in keeping with modern notions of civil procedure. *412 U.S., at 689-690, and n. 15.*

Moreover, apart from the specificity required of the pleadings, it is not apparent why these "unalleged and unknown facts about the relevant hospitals" are

required to establish injury in fact at all. As the Court notes, ante, at 42 n. 23, the earlier Revenue Ruling requires a hospital only to provide medical care "to the extent **[****54]** **[*63]** of **[***475]** its financial ability" and stated that a low charitable record was not conclusive on the point. Accordingly, in the absence of some showing to the contrary by the petitioners, it readily can be inferred that a hospital under the earlier Ruling would provide some indigent services, the maximum extent being the point at which the benefits received from the favorable tax status were exactly offset by the cost of the services conferred. If respondents had demonstrated at the summary judgment stage a connection between the disputed Ruling withdrawing this incentive and the hospitals affecting them, they would have certainly made a showing of injury to their "opportunity and ability" to receive medical care sufficient under SCRAP for standing to challenge the governmental action.

We may properly wonder where the Court, armed with its "fatally speculative pleadings" tool, will strike next. To pick only the most obvious examples, Will minority schoolchildren now have to plead and show that in the absence of illegal governmental "encouragement" of private segregated schools, such schools would not "elect to forgo" their favorable tax treatment, and that this **[****55]** will "result in the availability" to complainants of an integrated educational system? See *Green v. Kennedy, 309 F. Supp. 1127 (DC 1970),* later decision reported sub nom. *Green v. Connally, 330 F. Supp. 1150* (DC), summarily aff'd sub nom. *Coit v. Green, 404 U.S. 997 (1971).* n11 Or will black Americans be required to plead and show that in the absence of illegal governmental encouragement, private institutions would not "elect to **[*64]** forgo" favorable tax treatment, and that this will "result in the availability" to complainants of services previously denied? See *McGlotten v. Connally, 338 F. Supp. 448 (D.C. 1972); Pitts v. Wisconsin Dept. of Revenue, 333 F. Supp. 662 (ED Wis. 1971).* As perusal of these reported decisions reveals, the lower courts have not assumed that such allegations and proofs were somehow required by Art. III.

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n11 I note that this Court summarily affirmed in Coit v. Green, a case in which the standing issue was expressly raised on appeal. See Jurisdictional Statement 11 in No. 71-425, O.T. 1971. The court below in that case found standing without any such gratuitous allegations or showings respecting injury in fact. *309 F. Supp., at 1132.*

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Of course, the most disturbing aspect of today's opinion is the Court's insistence on resting its decision regarding standing squarely on the irreducible Art. III minimum of injury in fact, thereby effectively **[**1937]** placing its holding beyond congressional power to rectify. Thus, any time Congress chooses to legislate in favor of certain interests by setting up a scheme of incentives for third parties, judicial review of administrative action that allegedly frustrates the congressionally intended objective will be denied, because any complainant will be required to make an almost impossible showing. Clearly the Legislative Branch of the Government cannot supply injured individuals with the means to make the factual showing in a specific context that the Court today requires. More specific indications of a congressional desire to confer standing upon such individuals would be germane, **[***476]** not to the Art. III injury-in-fact requirement, but only to the Court's "zone of interests" test for standing, that branch of standing lore which the Court assiduously avoids reaching. Ante, at 39 n. 19. n12

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n12 This is apparently the point the Court wishes to drive home by means of the following statement, ante, at 41 n. 22:

"The reference in Linda R. S. to 'a statute expressly conferring standing' was in recognition of Congress' power to create new interests the invasion of which will confer standing... When Congress has so acted, the requirements of Art. III remain: 'the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.'"

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[*65] In our modern-day society, dominated by complex legislative programs and large-scale governmental involvement in the everyday lives of all of us, judicial review of administrative action is

essential both for protection of individuals illegally harmed by that action, *Flast v. Cohen, 392 U.S. 83, 111 (1968)* (Douglas, J., concurring), and to ensure that the attainment of congressionally mandated goals is not frustrated by illegal action, *Barlow v. Collins, 397 U.S., at 173-175, and n. 9* (opinion of BRENNAN, J.). See Albert, 83 Yale L.J., supra, n. 8, at 451-456. In dissenting from the Court's earlier creation of the "zone of interests" test applicable to standing for review under the Administrative Procedure Act, an inquiry that confuses standing with aspects of reviewability and the merits, I said:

"[I]n my view alleged injury in fact, reviewability, and the merits pose questions that are largely distinct from one another, each governed by its own considerations. To fail to isolate and treat each inquiry independently of the other two, so far as possible, is to risk obscuring what is at issue in a given case, and thus to risk uninformed, **[****58]** poorly reasoned decisions that may result in injustice. Too often these various questions have been merged into one confused inquiry, lumped under the general rubric of 'standing.' The books are full of opinions that dismiss a plaintiff for lack of 'standing' when dismissal, if proper at all, actually rested either upon the plaintiff's failure to prove on the merits the existence of the legally protected interest that he claimed, or on his failure to prove that the challenged agency action **[*66]** was reviewable at his instance." *Barlow v. Collins, supra, at 176.* n13 ev. 450, 469 (1970). After today's decision the lower courts will understandably continue to lament the intellectual confusion created by this Court under the rubric of the law of standing. E.g., *Scanwell Laboratories v. Shaffer, 137 U.S. App. D.C. 371, 373, 424 F. 2d 859, 861 (1970):* "The law of standing as developed by the Supreme Court has become an area of incredible complexity. Much that the Court has written appears to have been designed to supply retrospective satisfaction rather than future guidance. The Court has itself characterized its law of standing as a 'complicated specialty **[****59]** of federal jurisdiction.'... One cannot help asking why this should be true."

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Today, however, the Court achieves an even worse result through its manipulation of injury in fact, stretching that conception far beyond the narrow bounds within which it usefully measures a dimension of Art. III justiciability. The Court's treatment of injury in fact without any "particularization" in light of either the policies properly **[***477]** implicated or our relevant precedents threatens that it shall "become a catchall for an unarticulated **[**1938]** discretion on the part of this Court" to insist that the federal courts "decline to adjudicate" claims that it prefers they not hear. *Poe v. Ullman, 367 U.S., at 530*

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n13 See also Davis, The Liberalized Law of Standing, 37 U. Chi. L. R (Harlan, J., dissenting).

REFERENCES:
Return To Full Text Opinion

59 Am Jur 2d, Parties 27 et seq.

USCS, Constitution, Art III

US L Ed Digest, Parties 22

ALR **[****60]** Digests, Parties 72

L Ed Index to Annos, Parties

ALR Quick Index, Capacity to Sue or Be Sued; Parties

Federal Quick Index, Parties; Poor Persons; Taxpayers' Actions

Annotation References:

Supreme Court's view as to what is a "case or controversy" within the meaning of Article III of the Federal Constitution or an "actual controversy" within the meaning of the Declaratory Judgment Act *(28 USCS 2201). 40 L Ed 2d 783.*

Interest necessary to maintenance of declaratory determination of validity of statute or ordinance. *174 ALR 549.*

Citation #6
501 U.S. 560

501 U.S. 560; 111 S. Ct. 2456; 115 L. Ed. 2d 504; 1991 U.S. LEXIS 3633; 59 U.S.L.W. 4745; 91 Cal. Daily Op. Service 4731; 91 Daily Journal DAR 7362

MICHAEL BARNES, PROSECUTING ATTORNEY OF ST. JOSEPH COUNTY, INDIANA, ET AL. *v.* GLEN THEATRE, INC., ET AL.

No. 90-26

SUPREME COURT OF THE UNITED STATES

501 U.S. 560; 111 S. Ct. 2456; 115 L. Ed. 2d 504; 1991 U.S. LEXIS 3633; 59 U.S.L.W. 4745; 91 Cal. Daily Op. Service 4731; 91 Daily Journal DAR 7362

January 8, 1991, Argued
June 21, 1991, Decided

PRIOR HISTORY: [****1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DISPOSITION: *904 F.2d 1081,* reversed.

DECISION: Indiana's public indecency law, as applied to prohibit nude dancing performed as entertainment, held not to violate free expression guarantee of Federal Constitution's First Amendment.

SUMMARY: An Indiana statute made it a misdemeanor to appear in a public place "in a state of nudity." Within the statutory definition of "nudity" was the showing of (1) the female genitals, pubic area, or buttocks with less than a fully opaque covering, or (2) the female breast with less than a fully opaque covering of any part of the nipple. Two entertainment establishments in South Bend, Indiana wished to provide totally nude dancing as entertainment, although the statute effectively required female dancers to wear at least "pasties" and a "G-string" while dancing. The two establishments, together with individual dancers employed at those establishments, brought suit in the United States District Court for the Northern District of Indiana against the city of South Bend and various state and local officials to enjoin the enforcement of the statute, on the ground that the statute violated the Federal Constitution's First Amendment. The District Court, granting an injunction, held that the statute was facially overbroad. The United States Court of Appeals for the Seventh Circuit, reversing on appeal, remanded the case to the District Court in order to determine whether the First Amendment was violated by the statute as applied to the type of dancing at issue *(802 F2d 287).* On remand, the District Court held that such dancing was not protected expressive activity, and accordingly judgment was rendered in favor of the defendants *(695 F Supp 414).* A panel of the Court of Appeals, reversing on appeal, held that the dancing at issue was expressive conduct protected by the *First Amendment (887 F2d 826).* On rehearing en banc, the Court of Appeals (1) held that the Indiana statute was an improper infringement of expressive activity, because the statute's purpose was to prevent the message of eroticism and sexuality conveyed by the dancers in question; and (2) enjoined the state from enforcing the statute against the plaintiffs so as to prohibit nonobscene nude dancing as entertainment *(904 F2d 1081).*

On certiorari, the United States Supreme Court reversed. Although unable to agree on an opinion, five members of the court agreed that the Indiana statute, as applied to prohibit nude dancing performed as entertainment, did not violate the First Amendment.

Rehnquist, Ch. J., announced the judgment of the court, and in an opinion joined by O'Connor and Kennedy, JJ., expressed the view that (1) nude dancing as entertainment is expressive conduct within the outer perimeters of the First Amendment; but (2) application of the Indiana statute to such dancing was justified, despite the statute's incidental limitations on some expressive activity, because (a) the statute was within the state's constitutional power, (b) the statute was designed to protect morals and public order and thus furthered a substantial government interest, (c) this interest was unrelated to the suppression of free expression, in that the perceived evil that Indiana sought to address was not erotic dancing but rather public nudity, and (d) the requirement that the dancers wear at least "pasties" and a "G-string" was narrowly tailored to achieve the state's purpose.

Scalia, J., concurring in the judgment, expressed the view that (1) the Indiana statute was not subject to First Amendment scrutiny at all, because the statute was a general law regulating conduct and was not specifically directed at expression; (2) there is no intermediate level of First Amendment scrutiny

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requiring that an incidental restriction on expression be justified by an important or substantial government interest; and (3) the Indiana statute was valid--even as enforced against those who chose to use public nudity as a means of communication--because moral opposition to public nudity supplied a rational basis for the statute's prohibition.

Souter, J., concurring in the judgment, expressed the view that (1) nude dancing as a performance carries an endorsement of erotic experience and thus is expressive activity that is subject to a degree of First Amendment protection; (2) the four-part inquiry applied by the court was the appropriate analysis to determine the actual protection required by the First Amendment; (3) the state's interest justifying the statute was not society's moral views, but rather the interest in combating the secondary effects--such as prostitution and other criminal activity--of live nude dancing in adult entertainment establishments; and (4) this interest was unrelated to the suppression of free expression, since such secondary effects would not necessarily result from the persuasive effect of the expression inherent in nude dancing.

White, J., joined by Marshall, Blackmun, and Stevens, dissenting, expressed the view that the Indiana statute should have been held invalid as applied to nonobscene nude dancing performed as entertainment, because (1) such dancing enjoys First Amendment protection; (2) the statute's goal--to deter prostitution and other associated activities--was not unrelated to the suppression of free expression, since the purpose of applying the law to nude dancing performances in entertainment establishments was to prevent customers from being exposed to the distinctive communicative aspects of such dancing; and (3) the statute was not narrowly drawn, in that it banned an entire category of expressive activity rather than imposing restrictions that did not interfere with the expressiveness of nonobscene nude dancing performances.

LAWYERS' EDITION HEADNOTES:

[*LEdHN1]**
CONSTITUTIONAL LAW §945
freedom of expression -- nude dancing --
Headnote: [1A] [1B] [1C] [1D] [1E] [1F]
As applied to prohibit nude dancing performed as entertainment, a state's public indecency statute--which (1) makes it a misdemeanor to appear in a state of nudity in a public place, and (2) effectively requires female dancers to wear at least "pasties" and a "G-string" when they dance--does not violate the free expression guarantee of the Federal Constitution's First Amendment. [Per Rehnquist, Ch. J., and O'Connor, Kennedy, Scalia, and Souter, JJ. Dissenting: White, Marshall, Blackmun, and Stevens, JJ.]

[*LEdHN2]**
CONSTITUTIONAL LAW §932
expressive conduct -- nude dancing --
Headnote: [2A] [2B] [2C]
Nude dancing performed as entertainment is expressive conduct for purposes of the Federal Constitution's First Amendment. [Per Rehnquist, Ch. J., and O'Connor, Kennedy, Souter, White, Marshall, Blackmun, and Stevens, JJ.]

[*LEdHN3]**
CONSTITUTIONAL LAW §932
regulation of expressive conduct --
Headnote: [3A] [3B] [3C]
The appropriate analysis to determine the limits, under the Federal Constitution's First Amendment, of appropriate state action burdening expressive acts is a four-part inquiry as to (1) whether the government regulation at issue is within the government's constitutional power, (2) whether the regulation furthers an important or substantial governmental interest, (3) whether the governmental interest is unrelated to the suppression of free expression, and (4) whether the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. [Per Rehnquist, Ch. J., and O'Connor, Kennedy, Souter, White, Marshall, Blackmun, and Stevens, JJ. Dissenting in part: Scalia, J.]

[*LEdHN4]**
INDECENCY, LEWDNESS, AND OBSCENITY §1
consent --
Headnote: [4A] [4B]
Indiana's public indecency statute, which makes it a misdemeanor to appear in a state of nudity in a public place, is violated where 60,000 fully consenting adults display their genitals to one another in a stadium. [Per Scalia, White, Marshall, Blackmun, and Stevens, JJ.]

[*LEdHN5]**
CONSTITUTIONAL LAW §932
expressive conduct --
Headnote: [5A] [5B]
The United States Supreme Court will hold a government regulation invalid under the Federal Constitution's First Amendment, where the regulation prohibits conduct precisely because of its communicative attributes. [Per Scalia, White, Marshall, Blackmun, and Stevens, JJ.]

SYLLABUS: Respondents, two Indiana establishments wishing to provide totally nude dancing as entertainment and individual dancers employed at those establishments, brought suit in the District Court to enjoin enforcement of the state public indecency law -- which requires respondent dancers to wear pasties and G-strings -- asserting that the law's prohibition against total nudity in public places violates the First Amendment. The court held that the nude dancing involved here was not expressive conduct. The Court of Appeals reversed, ruling that nonobscene nude dancing performed for entertainment is protected expression, and that the statute was an improper infringement of that activity because its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers.

Held: The judgment is reversed.

THE CHIEF JUSTICE, joined by JUSTICE O'CONNOR and JUSTICE KENNEDY, concluded that the enforcement of Indiana's public indecency **[****2]** law to prevent totally nude dancing does not violate the First Amendment's guarantee of freedom of expression. Pp. 565-572.

(a) Nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, although only marginally so. See, *e. g., Doran v. Salem Inn, Inc., 422 U.S. 922, 932. Pp. 565-566, 45 L. Ed. 2d 648, 95 S. Ct. 2561.*

(b) Applying the four-part test of *United States v. O'Brien, 391 U.S. 367, 376-377, 20 L. Ed. 2d 672, 88 S. Ct. 1673* -- which rejected the contention that symbolic speech is entitled to full First Amendment protection -- the statute is justified despite its incidental limitations on some expressive activity. The law is clearly within the State's constitutional power. And it furthers a substantial governmental interest in protecting societal order and morality. Public indecency statutes reflect moral disapproval of people appearing in the nude among strangers in public places, and this particular law follows a line of state laws, dating back to 1831, banning public nudity. The States' traditional police power is defined as the authority to provide for the public health, safety, and morals, and such a basis for legislation has been upheld. See, *e. g., Paris Adult* **[****3]** *Theatre I v. Slaton, 413 U.S. 49, 61, 37 L. Ed. 2d 446, 93 S. Ct. 2628.* This governmental interest is unrelated to the suppression of free expression, since public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity. The law does not proscribe nudity in these establishments because the dancers are conveying an erotic message. To the contrary, an erotic performance may be presented without any state interference, so long as the performers wear a scant amount of clothing. Finally, the incidental restriction on First Amendment freedom is no greater than is essential to the furtherance of the governmental interest. Since the statutory prohibition is not a means to some greater end, but an end itself, it is without cavil that the statute is narrowly tailored. Pp. 566-572.

JUSTICE SCALIA concluded that the statute -- as a general law regulating conduct and not specifically directed at expression, either in practice or on its face -- is not subject to normal First Amendment scrutiny and should be upheld on the ground that moral opposition to nudity supplies a rational basis for its prohibition. Cf. *Employment Div., Dept. of Human Resources of Ore. v. Smith,* **[****4]** *494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595.* There is no intermediate level of scrutiny requiring that an incidental restriction on expression, such as that involved here, be justified by an important or substantial governmental interest. Pp. 572-580.

JUSTICE SOUTER, agreeing that the nude dancing at issue here is subject to a degree of First Amendment protection, and that the test of *United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673,* is the appropriate analysis to determine the actual protection required, concluded that the State's interest in preventing the secondary effects of adult entertainment establishments -- prostitution, sexual assaults, and other criminal activity -- is sufficient under *O'Brien* to justify the law's enforcement against nude dancing. The prevention of such effects clearly falls within the State's constitutional power. In addition, the asserted interest is plainly substantial, and the State could have concluded that it is furthered by a prohibition on nude dancing, even without localized proof of the harmful effects. See *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50, 51, 89 L. Ed. 2d 29, 106 S. Ct. 925.* Moreover, the interest is unrelated to the suppression of free expression, since the pernicious effects **[****5]** are merely associated with nude dancing establishments and are not the result of the expression inherent in nude dancing. *Id., at 48.* Finally, the restriction is no greater than is essential to further the governmental interest, since pasties and a G-string moderate expression to a minor degree when measured against the dancer's remaining capacity and opportunity to express an erotic message. Pp. 581-587.

COUNSEL: Wayne E. Uhl, Deputy Attorney General of Indiana, argued the cause for petitioners. With him on the briefs was Linley E. Pearson, Attorney General.

Bruce J. Ennis, Jr., argued the cause for respondents. Lee J. Klein and Bradley J. Shafer filed a brief for respondents Glen Theatre, Inc., et al. Patrick Louis Baude and Charles A. Asher filed a brief for respondents Darlene Miller et al. *

* Briefs of amici curiae urging reversal were filed for the State of Arizona et al. by Robert K. Corbin, Attorney General of Arizona, and Steven J. Twist, Chief Assistant Attorney General, Clarine Nardi Riddle, Attorney General of Connecticut, and John J. Kelly, Chief State's Attorney, William L. Webster, Attorney General of Missouri, Lacy H. Thornburg, Attorney General of North Carolina, and Rosalie Simmonds Ballentine, Acting Attorney General of the Virgin Islands; for the American Family Association, Inc., et al. by Alan E. Sears, James Mueller, and Peggy M. Coleman; and for the National Governors' Association et al. by Benna Ruth Solomon and Peter Buscemi.

Briefs of amici curiae urging affirmance were filed for the American Civil Liberties Union et al. by Spencer Neth, Thomas D. Buckley, Jr., Steven R. Shapiro, and John A. Powell; for the Georgia on Premise & Lounge Association, Inc., by James A. Walrath; for People for the American Way et al. by Timothy B. Dyk, Robert H. Klonoff, Patricia A. Dunn, Elliot M. Mincberg, Stephen F. Rohde, and Mary D. Dorman.

James J. Clancy filed a brief pro se as amicus curiae.

JUDGES: REHNQUIST, C. J., announced the judgment of the Court and delivered an opinion, in which O'CONNOR and KENNEDY, JJ., joined. SCALIA, J., post, p. 572, and SOUTER, J., post, p. 581, filed opinions concurring in the judgment. WHITE, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, post, p. 587.

OPINIONBY: REHNQUIST

OPINION: **[*562]** **[***509]** **[**2458]** CHIEF JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion, in which JUSTICE O'CONNOR and JUSTICE KENNEDY join.

[*LEdHR1A]** [1A]Respondents are two establishments in South Bend, Indiana, that wish to provide totally nude dancing as entertainment, and individual dancers who are employed at these **[*563]** establishments. They claim that the First Amendment's guarantee of freedom of expression prevents the State of Indiana from enforcing its public indecency law to prevent this form of dancing. We reject their claim.

The facts **[****6]** appear from the pleadings and findings of the District Court and are uncontested here. The Kitty Kat Lounge, Inc. (Kitty Kat), is located in the city of South Bend. It sells alcoholic beverages and presents "go-go dancing." Its proprietor desires to present "totally nude dancing," but an applicable Indiana statute regulating public nudity requires that the dancers wear "pasties" **[**2459]** and "G-strings" when they dance. The dancers are not paid an hourly wage, but work on commission. They receive a 100 percent commission on the first $ 60 in drink sales during their performances. Darlene Miller, one of the respondents in the action, had worked at the Kitty Kat for about two years at the time this action was brought. Miller wishes to dance nude because she believes she would make more money doing so.

Respondent Glen Theatre, Inc., is an Indiana corporation with a place of business in South Bend. Its primary business is supplying so-called adult entertainment through written and printed materials, movie showings, and live entertainment at an enclosed "bookstore." The live entertainment at the "bookstore" consists of nude and seminude performances and showings of the female body through glass **[****7]** panels. Customers sit **[***510]** in a booth and insert coins into a timing mechanism that permits them to observe the live nude and seminude dancers for a period of time. One of Glen Theatre's dancers, Gayle Ann Marie Sutro, has danced, modeled, and acted professionally for more than 15 years, and in addition to her performances at the Glen Theatre, can be seen in a pornographic movie at a nearby theater. App. to Pet. for Cert. 131-133.

Respondents sued in the United States District Court for the Northern District of Indiana to enjoin the enforcement of the Indiana public indecency statute, *Ind. Code § 35-45-4-1* **[*564]** (1988), asserting that its prohibition against complete nudity in public places violated the First Amendment. The District Court originally granted respondents' prayer for an injunction, finding that the statute was facially overbroad. The Court of Appeals for the Seventh Circuit reversed, deciding that previous litigation with respect to the statute in the Supreme Court of Indiana and this Court precluded the possibility of such a

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challenge, n1 and remanded to the District Court in order for the plaintiffs to pursue their claim that the statute violated the First Amendment as applied **[****8]** to their dancing. *Glen Theatre, Inc. v. Pearson, 802 F.2d 287, 288-290 (1986).* On remand, the District Court concluded that **[*565]** "the type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States," and rendered judgment in favor of the defendants. *Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 419 (1988).* The case was again appealed to the Seventh Circuit, and a panel of that court reversed the District Court, holding that the nude dancing involved here was expressive conduct protected by the First Amendment. **[**2460]** *Miller v. Civil City of South Bend, 887 F.2d 826 (1989).* The Court of Appeals then heard the case en banc, and the court rendered a series of comprehensive and thoughtful opinions. The majority concluded that nonobscene nude dancing performed **[***511]** for entertainment is expression protected by the First Amendment, and that the public indecency statute was an improper infringement of that expressive activity because its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers. *Miller v. Civil City of South Bend, 904 F.2d 1081 (1990).* **[****9]** We granted certiorari, *498 U.S. 807 (1990),* and now hold that the Indiana statutory requirement that the dancers in the establishments involved in this case must wear pasties and G-strings does not violate the First Amendment.

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n1 The Indiana Supreme Court appeared to give the public indecency statute a limiting construction to save it from a facial overbreadth attack:

"There is no right to appear nude in public. Rather, it *may* be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *State v. Baysinger, 272 Ind. 236, 247, 397 N.E.2d 580, 587 (1979)* (emphasis added), appeals dism'd *sub nom. Clark v. Indiana, 446 U.S. 931, 64 L. Ed. 2d 783, 100 S. Ct. 2146,* and *Dove v. Indiana, 449 U.S. 806, 66 L. Ed. 2d 10, 101 S. Ct. 52 (1980).*

Five years after *Baysinger*, however, the Indiana Supreme Court reversed a decision of the Indiana Court of Appeals holding that the statute did "not apply to activity such as the theatrical appearances involved herein, which may not be prohibited absent a finding of obscenity," in a case involving a partially nude dance in the "Miss Erotica of Fort Wayne" contest. *Erhardt v. State, 468 N.E.2d 224 (Ind. 1984).* The Indiana Supreme Court did not discuss the constitutional issues beyond a cursory comment that the statute had been upheld against constitutional attack in *Baysinger*, and Erhardt's conduct fell within the statutory prohibition. Justice Hunter dissented, arguing that "a public indecency statute which prohibits nudity in any public place is unconstitutionally overbroad. My reasons for so concluding have already been articulated in *State v. Baysinger, (1979) 272 Ind. 236, 397 N.E.2d 580* (Hunter and DeBruler, JJ., dissenting)." *468 N.E.2d at 225-226.* Justice DeBruler expressed similar views in his dissent in *Erhardt. Id., at 226.* Therefore, the Indiana Supreme Court did not affirmatively limit the reach of the statute in *Baysinger*, but merely said that to the extent the First Amendment would require it, the statute might be unconstitutional as applied to some activities.

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[**10]**

[*LEdHR2A]** [2A]Several of our cases contain language suggesting that nude dancing of the kind involved here is expressive conduct protected by the First Amendment. In *Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975),* we said: "Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue, 409 U.S. 109, 118, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972),* that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." In *Schad v. Mount Ephraim, 452 U.S. 61, 66, 68 L. Ed. 2d 671, 101 S. Ct. 2176 (1981),* we said that "furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation" (citations omitted). These statements support the conclusion of the Court of Appeals **[*566]** that nude dancing of the kind sought to be performed

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here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so. This, of course, does not end our inquiry. We must determine the level of protection to be afforded to the expressive conduct at issue, **[****11]** and must determine whether the Indiana statute is an impermissible infringement of that protected activity.

Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board. The Supreme Court of Indiana has construed the Indiana statute to preclude nudity in what are essentially places of public accommodation such as the Glen Theatre and the Kitty Kat Lounge. In such places, respondents point out, minors are excluded and there are no nonconsenting viewers. Respondents contend that while the State may license establishments such as the ones involved here, and limit the geographical area in which they do business, it may not in any way limit the performance of the dances within them without violating the First Amendment. The petitioners contend, on the other hand, that Indiana's restriction on nude dancing is a valid "time, place, or manner" restriction under cases such as *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984).*

[*LEdHR3A]** [3A]The "time, place, or manner" test was developed for evaluating restrictions on expression taking place on public property which had been dedicated as a "public forum," *Ward v. Rock Against Racism, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989),* **[****12]** although we have on at least one occasion applied it to conduct occurring on private property. See *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).* In *Clark* we observed that this test has been interpreted **[***512]** to embody much the same standards as those set forth in *United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968),* and we turn, therefore, to the rule enunciated in *O'Brien.*

O'Brien burned his draft card on the steps of the South Boston Courthouse in the presence of a sizable crowd, and **[*567]** was convicted **[**2461]** of violating a statute that prohibited the knowing destruction or mutilation of such a card. He claimed that his conviction was contrary to the First Amendment because his act was "symbolic speech" -- expressive conduct. The Court rejected his contention that symbolic speech is entitled to full First Amendment protection, saying:"Even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' **[****13]** elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id., at 376-377* (footnotes omitted). **[***LEdHR1B]** [1B]Applying the four-part *O'Brien* test enunciated above, we find that Indiana's public indecency statute is justified despite its incidental limitations on some expressive activity. The public indecency statute is clearly within the constitutional power of the State and furthers **[****14]** substantial governmental interests. It is impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislators had in mind when they enacted **[*568]** this statute, for Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose. Nonetheless, the statute's purpose of protecting societal order and morality is clear from its text and history. Public indecency statutes of this sort are of ancient origin and presently exist in at least 47 States. Public indecency, including nudity, was a criminal offense at common law, and this Court recognized the common-law roots of the offense of "gross and open indecency" in *Winters v. New York, 333 U.S. 507, 515, 92 L. Ed. 840, 68 S. Ct. 665 (1948).* Public nudity was considered an act *malum in se. Le Roy* v. *Sidley*, 1 Sid. 168, 82 Eng. Rep. 1036 (K. B. 1664). Public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places.

[*513]** This public indecency statute follows a long line of earlier Indiana statutes banning all public nudity. **[****15]** The history of Indiana's public indecency statute shows that it predates barroom nude dancing and was enacted as a general prohibition. At least as early as 1831, Indiana had a statute punishing

"open and notorious lewdness, or . . . any grossly scandalous and public indecency." Rev. Laws of Ind., ch. 26, § 60 (1831); Ind. Rev. Stat., ch. 53, § 81 (1834). A gap during which no statute was in effect was filled by the Indiana Supreme Court in *Ardery v. State, 56 Ind. 328 (1877),* which held that the court could sustain a conviction for exhibition of "privates" in the presence of others. The court traced the offense to the Bible story of Adam and Eve. *Id., at 329-330.* In 1881, a statute was enacted that would remain essentially unchanged for nearly a century:"Whoever, being over fourteen years of age, makes an indecent exposure of his person in a public place, or in any place where there are other persons to be offended or annoyed thereby, . . . is guilty of **[**2462]** public indecency . . . ." 1881 Ind. Acts, ch. 37, § 90. **[*569]** The language quoted above remained unchanged until it was simultaneously repealed and replaced with the present statute in 1976. **[****16]** 1976 Ind. Acts, Pub. L. 148, Art. 45, ch. 4, § 1. n2

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n2 *Indiana Code § 35-45-4-1* (1988) provides:

"Public indecency; indecent exposure

"Sec. 1. (a) A person who knowingly or intentionally, in a public place:

"(1) engages in sexual intercourse;

"(2) engages in deviate sexual conduct;

"(3) appears in a state of nudity; or

"(4) fondles the genitals of himself or another person;

commits public indecency, a Class A misdemeanor.

"(b) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state."

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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. In *Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973),* **[****17]** we said:"In deciding *Roth [v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957)],* this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.' *[Id.],* at 485." (Emphasis omitted.)And in *Bowers v. Hardwick, 478 U.S. 186, 196, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986),* we said:"The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."

Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.

[*570] This interest is unrelated to the suppression of free expression. Some may view restricting nudity on moral grounds as necessarily **[***514]** related to expression. We disagree. It can be argued, of course, that almost limitless types of conduct -- including appearing in the nude in public -- are "expressive," and in one sense of the word this is true. People who go about in the nude in public may be expressing something about themselves by so doing. But the court rejected this expansive notion of "expressive conduct" **[****18]** in *O'Brien*, saying:"We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *391 U.S. at 376.*

And in *Dallas v. Stanglin, 490 U.S. 19, 104 L. Ed. 2d 18, 109 S. Ct. 1591 (1989),* we further observed:"It is possible to find some kernel of expression in almost every activity a person undertakes -- for example, walking down the street or meeting one's friends at a shopping mall -- but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons -- coming together to engage in recreational dancing -- is not protected by the First Amendment." *Id., at 25.*

Respondents contend that even though prohibiting nudity in public generally may not be related to suppressing expression, prohibiting the performance of nude dancing is related to expression because the State seeks to prevent its erotic message. Therefore, they reason that the application of the Indiana statute to the nude dancing in this case violates the First Amendment, because it fails the third part **[****19]** of the *O'Brien* test, viz: **[**2463]** the governmental

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interest must be unrelated to the suppression of free expression.

But we do not think that when Indiana applies its statute to the nude dancing in these nightclubs it is proscribing nudity because of the erotic message conveyed by the dancers. **[*571]** Presumably numerous other erotic performances are presented at these establishments and similar clubs without any interference from the State, so long as the performers wear a scant amount of clothing. Likewise, the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity.

This conclusion is buttressed by a reference to the facts of *O'Brien*. An Act of Congress provided that anyone who knowingly destroyed a Selective Service **[****20]** registration certificate committed an offense. O'Brien burned his certificate on the steps of the South Boston Courthouse to influence others to adopt his antiwar beliefs. This Court upheld his conviction, reasoning that the continued availability of issued certificates served a legitimate and substantial purpose in the administration of the Selective Service System. O'Brien's deliberate destruction of his certificate **[***515]** frustrated this purpose and "for this noncommunicative impact of his conduct, and for nothing else, he was convicted." *391 U.S. at 382.* It was assumed that O'Brien's act in burning the certificate had a communicative element in it sufficient to bring into play the First Amendment, *id., at 376,* but it was for the noncommunicative element that he was prosecuted. So here with the Indiana statute; while the dancing to which it was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.

The fourth part of the *O'Brien* test requires that the incidental restriction on First Amendment freedom be no greater than is essential to the furtherance of the governmental interest. **[****21]** As indicated in the discussion above, the **[*572]** governmental interest served by the text of the prohibition is societal disapproval of nudity in public places and among strangers. The statutory prohibition is not a means to some greater end, but an end in itself. It is without cavil that the public indecency statute is "narrowly tailored"; Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose.

The judgment of the Court of Appeals accordingly is

Reversed.

CONCURBY: SCALIA; SOUTER

CONCUR: JUSTICE SCALIA, concurring in the judgment.

[*LEdHR1C]** [1C]I agree that the judgment of the Court of Appeals must be reversed. In my view, however, the challenged regulation must be upheld, not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all.

I

Indiana's public indecency statute provides:

"(a) A person who knowingly or intentionally, in a public place:

"(1) engages in sexual intercourse;

"(2) engages in deviate sexual conduct;

"(3) appears in a state of nudity; or

"(4) fondles **[****22]** the genitals of himself or another person; commits public indecency, a Class A misdemeanor.

" **[**2464]** (b) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state." *Ind. Code § 35-45-4-1* (1988).

On its face, this law is not directed at expression in particular. As Judge Easterbrook put it in his dissent below: "Indiana **[*573]** does not regulate dancing. It regulates public nudity. . . . Almost the entire domain of Indiana's statute is unrelated to expression, unless we view nude beaches and topless hot dog vendors as speech." *Miller v. Civil City of* **[***516]** *South Bend, 904 F.2d 1081, 1120 (CA7 1990).* The intent to convey a "message of eroticism" (or any other message) is not a necessary element of the statutory offense of public indecency; nor does one commit that statutory offense by conveying the most explicit "message of eroticism," so long as he does not commit any of the four specified acts in the process. n1

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n1 Respondents assert that the statute cannot be characterized as a general regulation of conduct, unrelated to suppression of expression, because one defense put forward in oral argument below by the attorney general referred to the "message of eroticism" conveyed by respondents. But that argument seemed to go to whether the statute could constitutionally be applied to the present performances, rather than to what was the purpose of the legislation. Moreover, the State's argument below was in the alternative: (1) that the statute does not implicate the First Amendment because it is a neutral rule not directed at expression, and (2) that the statute in any event survives First Amendment scrutiny because of the State's interest in suppressing nude barroom dancing. The second argument can be claimed to contradict the first (though I think it does not); but it certainly does not waive or abandon it. In any case, the clear purpose shown by both the text and historical use of the statute cannot be refuted by a litigating statement in a single case.

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[**23]** **[****24]** Indiana's statute is in the line of a long tradition of laws against public nudity, which have never been thought to run afoul of traditional understanding of "the freedom of speech." Public indecency -- including public nudity -- has long been an offense at common law. See *50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity § 17*, pp. 449, 472-474 (1970); Annot., Criminal offense predicated on indecent exposure, *93 A. L. R. 996, 997-998 (1934); Winters v. New York, 333 U.S. 507, 515, 92 L. Ed. 840, 68 S. Ct. 665 (1948)*. Indiana's first public nudity statute, Rev. Laws of Ind., ch. 26, § 60 (1831), predated by many years the appearance of nude barroom dancing. It was general in scope, directed at all public nudity, and not just at public nude expression; and all succeeding statutes, down to **[*574]** the present one, have been the same. Were it the case that Indiana *in practice* targeted only expressive nudity, while turning a blind eye to nude beaches and unclothed purveyors of hot dogs and machine tools, see *Miller, 904 F.2d at 1120, 1121,* it might be said that what posed as a regulation of conduct in general was in reality a regulation of only communicative conduct. Respondents have adduced no evidence of that. Indiana officials have brought many public **[****25]** indecency prosecutions for activities having no communicative element. See *Bond v. State, 515 N.E.2d 856, 857 (Ind. 1987); In re Levinson, 444 N.E.2d 1175, 1176 (Ind. 1983); Preston v. State, 259 Ind. 353, 354-355, 287 N.E.2d 347, 348 (1972); Thomas v. State, 238 Ind. 658, 659-660, 154 N.E.2d 503, 504-505 (1958); Blanton v. State, 533 N.E.2d 190, 191 (Ind. App. 1989); Sweeney v. State, 486 N.E.2d 651, 652 (Ind. App. 1985); Thompson v. State, 482 N.E.2d 1372, 1373-1374 (Ind. App. 1985); Adims v. State, 461 N.E.2d 740, 741-742 (Ind. App. 1984); State v. Elliott, 435 N.E.2d 302, 304 (Ind. App. 1982); Lasko v. State, 409 N.E.2d 1124, 1126 (Ind. App. 1980).* n2

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n2 Respondents also contend that the statute, as interpreted, is not content neutral in the expressive conduct to which it applies, since it allegedly does not apply to nudity in theatrical productions. See *State v. Baysinger, 272 Ind. 236, 247, 397 N.E.2d 580, 587 (1979)*. I am not sure that theater versus nontheater represents a distinction based on content rather than format, but assuming that it does, the argument nonetheless fails for the reason the plurality describes, *ante*, at 564, n. 1.

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[**26]** **[***517]** **[**2465]**

[*LEdHR4A]** [4A]The dissent confidently asserts, *post*, at 590-591, that the purpose of restricting nudity in public places in general is to protect nonconsenting parties from offense; and argues that since only consenting, admission-paying patrons see respondents dance, that purpose cannot apply and the only remaining purpose must relate to the communicative elements of the performance. Perhaps the dissenters believe that "offense to others" *ought* to be the only reason for restricting nudity in public places generally, but there is no **[*575]** basis for thinking that our society has ever shared that Thoreauvian "you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else" beau ideal -- much less for thinking that it was written into the Constitution. The purpose of Indiana's

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nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd. Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, *"contra bonos mores," i. e.*, immoral. In American **[****27]** society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them), there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality." See *Bowers v. Hardwick, 478 U.S. 186, 196, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986)* (upholding prohibition of private homosexual sodomy enacted solely on "the presumed belief of a majority of the electorate in [the jurisdiction] that homosexual sodomy is immoral and unacceptable"). See also *Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68, n. 15, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973); Dronenburg v. Zech, 239 U.S. App. D.C. 229, 238, 741 F.2d 1388, and n. 6, 239 U.S. App. D.C. 229, 741 F.2d 1388, 1397, and n. 6 (1984)* (opinion of Bork, J.). The purpose of the Indiana statute, as both its text and the manner of its enforcement demonstrate, is to enforce the traditional moral belief that people should not expose their private parts **[****28]** indiscriminately, regardless of whether those who see them are disedified. Since that is so, the dissent has no basis for positing that, where only thoroughly edified adults are present, the purpose must be repression of communication. n3

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n3 The dissent, *post*, at 590, 595-596, also misunderstands what is meant by the term "general law." I do not mean that the law restricts the targeted conduct in all places at all times. A law is "general" for the present purposes if it regulates conduct without regard to whether that conduct is expressive. Concededly, Indiana bans nudity in public places, but not within the privacy of the home. (That is not surprising, since the common-law offense, and the traditional moral prohibition, runs against *public* nudity, not against all nudity. *E. g., 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity § 17*, pp. 472-474 (1970)). But that confirms, rather than refutes, the general nature of the law: One may not go nude in public, whether or not one intends thereby to convey a message, and similarly one *may* go nude in private, again whether or not that nudity is expressive.

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[*576] **[****29]** II

[*LEdHR1D]** [1D]Since the Indiana regulation is a general law not specifically targeted **[***518]** at expressive conduct, its application to such conduct does not in my view implicate the First Amendment.

The First Amendment explicitly protects "the freedom of speech [and] of the press" -- oral and written speech -- not "expressive conduct." When any law restricts speech, even for a purpose that has nothing to do with the suppression of communication (for instance, to reduce noise, see *Saia v. New York, 334 U.S. 558, 561, 92 L. Ed. 1574, 68 S. Ct. 1148 (1948),* to regulate election campaigns, see *Buckley v. Valeo, 424 U.S. 1, 16, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976),* or to prevent littering, see *Schneider v. State (Town of Irvington), 308 U.S. 147, 163, 84 L. Ed. 155, 60 S. Ct. 146 (1939)),* we insist that **[**2466]** it meet the high, First Amendment standard of justification. But virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose -- if only expressive of the fact that the actor disagrees with the prohibition. See, *e. g., Florida Free Beaches, Inc. v. Miami, 734 F.2d 608, 609 (CA11 1984)* (nude sunbathers challenging public indecency law claimed their "message **[****30]** " was that nudity is not indecent). It cannot reasonably be demanded, therefore, that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny, or even -- as some of our cases have suggested, see, *e. g., United States v. O'Brien, 391 U.S. 367, 377, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968)* -- that it be justified by an "important or substantial" **[*577]** government interest. Nor do our holdings require such justification: We have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest.

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[*LEdHR5A]** [5A]This is not to say that the First Amendment affords no protection to expressive conduct. Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional. See, *e. g., United States v. Eichman, 496 U.S. 310, 110 L. Ed. 2d 287, 110 S. Ct. 2404 (1990)* (burning flag); *Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989)* (same); *Spence v. Washington, 418 U.S. 405, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974)* (defacing flag); *Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969)* **[****31]** (wearing black arm bands); *Brown v. Louisiana, 383 U.S. 131, 15 L. Ed. 2d 637, 86 S. Ct. 719 (1966)* (participating in silent sitin); *Stromberg v. California, 283 U.S. 359, 75 L. Ed. 1117, 51 S. Ct. 532 (1931)* (flying a red flag). n4 In each of the foregoing cases, we explicitly found that suppressing communication **[***519]** was the object of the regulation of conduct. Where that has not been the case, however -- where suppression of communicative use of the conduct was merely the incidental effect of forbidding the conduct for other reasons -- we have allowed the regulation to stand. *O'Brien, supra, at 377* (law banning destruction of draft card upheld in application against card burning to protest **[*578]** war); *FTC v. Superior Court Trial Lawyers Assn., 493 U.S. 411, 107 L. Ed. 2d 851, 110 S. Ct. 768 (1990)* (Sherman Act upheld in application against restraint of trade to protest low pay); cf. *United States v. Albertini, 472 U.S. 675, 687-688, 86 L. Ed. 2d 536, 105 S. Ct. 2897 (1985)* (rule barring respondent from military base upheld in application against entrance on base to protest war); *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984)* (rule barring sleeping in parks upheld **[****32]** in application against persons engaging in such conduct to dramatize plight of homeless). As we clearly expressed the point in *Johnson*:"The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements. What might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for **[**2467]** singling out that conduct for proscription." *491 U.S. at 406* (internal quotation marks and citations omitted; emphasis in original).

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n4 It is easy to conclude that conduct has been forbidden because of its communicative attributes when the conduct in question is what the Court has called "inherently expressive," and what I would prefer to call "conventionally expressive" -- such as flying a red flag. I mean by that phrase (as I assume the Court means by "inherently expressive") conduct that is normally engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else. I am not sure whether dancing fits that description, see *Dallas v. Stanglin, 490 U.S. 19, 24, 104 L. Ed. 2d 18, 109 S. Ct. 1591 (1989)* (social dance group "do[es] not involve the sort of expressive association that the First Amendment has been held to protect"). But even if it does, this law is directed against nudity, not dancing. Nudity is *not* normally engaged in for the purpose of communicating an idea or an emotion.

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[**33]** All our holdings (though admittedly not some of our discussion) support the conclusion that "the only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court then proceeds to determine whether there is substantial justification for the proscription." *Community for Creative Non-Violence v. Watt, 227 U.S. App. D.C. 19, 55-56, 703 F.2d 586, 622-623 (1983)* (en banc) (Scalia, J., dissenting), (footnote omitted; emphasis omitted), rev'd *sub nom. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984).* Such a regime ensures that the government does not act to suppress communication, without requiring that all conduct-restricting regulation **[*579]** (which means in effect all regulation) survive an enhanced level of scrutiny.

We have explicitly adopted such a regime in another First Amendment context: that of free exercise. In *Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595* **[****34]** *(1990),* we held that general laws not specifically targeted at religious practices did not require heightened First Amendment scrutiny even though they diminished some people's ability to practice their religion. "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other

aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' **[***520]** " *Id., at 885,* quoting *Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 451, 99 L. Ed. 2d 534, 108 S. Ct. 1319 (1988);* see also *Minersville School District v. Gobitis, 310 U.S. 586, 594-595, 84 L. Ed. 1375, 60 S. Ct. 1010 (1940)* (Frankfurter, J.) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs"). There is even greater reason to apply this approach to the regulation of expressive conduct. Relatively few can plausibly assert that their illegal conduct is being engaged in for religious reasons; but almost **[****35]** anyone can violate almost any law as a means of expression. In the one case, as in the other, if the law is not directed against the protected value (religion or expression) the law must be obeyed.

III

[*LEdHR1E]** [1E]While I do not think the plurality's conclusions differ greatly from my own, I cannot entirely endorse its reasoning. The plurality purports to apply to this general law, insofar as it regulates this allegedly expressive conduct, an intermediate level of First Amendment scrutiny: The government interest in the regulation must be "'important or substantial,'" *ante*, at 567, quoting *O'Brien, supra, at 377.* As I have indicated, **[*580]** I do not believe such a heightened standard exists. I think we should avoid wherever possible, moreover, a method of analysis that requires judicial assessment of the "importance" of government interests -- and especially of government interests in various aspects of morality.

Neither of the cases that the plurality cites to support the "importance" of the State's interest here, see *ante*, at 569, is in point. *Paris Adult Theatre I v. Slaton, 413 U.S. at 61,* and *Bowers v. Hardwick, 478 U.S. at 196,* **[****36]** did uphold laws prohibiting private conduct based on concerns of decency and morality; but neither opinion held that those concerns were particularly "important" or "substantial," or amounted to anything more than a *rational basis* for regulation. *Slaton* involved an exhibition which, since it was obscene **[**2468]** and at least to some extent public, was unprotected by the First Amendment, see *Roth v. United States, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957);* the State's prohibition could therefore be invalidated only if it had no rational basis. We found that the State's "right . . . to maintain a decent society" provided a "legitimate" basis for regulation -- even as to obscene material viewed by consenting adults. *413 U.S. at 59-60.* In *Bowers*, we held that since homosexual behavior is not a fundamental right, a Georgia law prohibiting private homosexual intercourse needed only a rational basis in order to comply with the Due Process Clause. Moral opposition to homosexuality, we said, provided that rational basis. *478 U.S. at 196.* I would uphold the Indiana statute on precisely the same ground: Moral opposition to nudity supplies a rational basis **[****37]** for its prohibition, and since the First Amendment **[***521]** has no application to this case no more than that is needed.

* * *

Indiana may constitutionally enforce its prohibition of public nudity even against those who choose to use public nudity as a means of communication. The State is regulating conduct, not expression, and those who choose to employ conduct **[*581]** as a means of expression must make sure that the conduct they select is not generally forbidden. For these reasons, I agree that the judgment should be reversed.

JUSTICE SOUTER, concurring in the judgment.

[*LEdHR2B]** [2B]Not all dancing is entitled to First Amendment protection as expressive activity. This Court has previously categorized ballroom dancing as beyond the Amendment's protection, *Dallas v. Stanglin, 490 U.S. 19, 24-25, 104 L. Ed. 2d 18, 109 S. Ct. 1591 (1989),* and dancing as aerobic exercise would likewise be outside the First Amendment's concern. But dancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience. **[****38]** Such is the expressive content of the dances described in the record.

Although such performance dancing is inherently expressive, nudity *per se* is not. It is a condition, not an activity, and the voluntary assumption of that condition, without more, apparently expresses nothing beyond the view that the condition is somehow appropriate to the circumstances. But every voluntary act implies some such idea, and the implication is thus so common and minimal that calling all voluntary activity expressive would reduce the concept of expression to the point of the meaningless. A search for some expression beyond the minimal in the choice to go nude will often yield nothing: a person may choose nudity, for example, for maximum sunbathing.

But when nudity is combined with expressive activity, its stimulative and attractive value certainly can enhance the force of expression, and a dancer's acts in going from clothed to nude, as in a striptease, are integrated into the dance and its expressive function. Thus I agree with the plurality and the dissent that an interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment protection.

[*582]

[*LEdHR1F]** [1F] **[***LEdHR3B]** [3B]I also agree with **[****39]** the plurality that the appropriate analysis to determine the actual protection required by the First Amendment is the four-part enquiry described in *United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968),* for judging the limits of appropriate state action burdening expressive acts as distinct from pure speech or representation. I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult **[**2469]** entertainment establishments of the sort typified by respondents' establishments.

It is, of course, true that this justification has not been articulated by **[***522]** Indiana's Legislature or by its courts. As the plurality observes, "Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose," *ante*, at 568. While it is certainly sound in such circumstances to infer general purposes "of protecting societal order and morality . . . from [the statute's] text and history," *ibid.*, I think that we need not so limit ourselves in identifying **[****40]** the justification for the legislation at issue here, and may legitimately consider petitioners' assertion that the statute is applied to nude dancing because such dancing "encourag[es] prostitution, increas[es] sexual assaults, and attract[s] other criminal activity." Brief for Petitioners 37.

This asserted justification for the statute may not be ignored merely because it is unclear to what extent this purpose motivated the Indiana Legislature in enacting the statute. Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional. Cf. *McGowan v. Maryland, 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101* **[*583]** *(1961).* At least as to the regulation of expressive conduct, n1 "we decline to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *O'Brien, supra, at 384.* In my view, the interest asserted by petitioners in preventing **[****41]** prostitution, sexual assault, and other criminal activity, although presumably not a justification for all applications of the statute, is sufficient under *O'Brien* to justify the State's enforcement of the statute against the type of adult entertainment at issue here.

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n1 Cf., *e. g., Edwards v. Aguillard, 482 U.S. 578, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987)* (striking down state statute on Establishment Clause grounds due to impermissible legislative intent).

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At the outset, it is clear that the prevention of such evils falls within the constitutional power of the State, which satisfies the first *O'Brien* criterion. See *391 U.S. at 377.* The second *O'Brien* prong asks whether the regulation "furthers an important or substantial governmental interest." *Ibid.* The asserted state interest is plainly a substantial one; the only question is whether prohibiting nude dancing of the sort at issue here "furthers" that interest. I believe that our cases have addressed this question sufficiently to establish that it does.

[**42]** In *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986),* we upheld a city's zoning ordinance designed to prevent the occurrence of harmful secondary effects, including the crime associated with adult entertainment, by protecting approximately 95% of the city's area from the placement of motion picture theaters emphasizing "'matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" . . . for observation by patrons therein.'" *Id., at 44.* Of particular importance to the **[***523]** present enquiry, we held that the city of Renton was not compelled to justify its restrictions by studies specifically relating to the problems **[*584]** that would be caused by adult theaters in that city. Rather, "Renton was entitled to rely on the experiences of Seattle and other cities," *id., at 51,* which demonstrated the harmful secondary effects correlated with the presence "of even one [adult] theater in a given neighborhood." *Id., at 50;* cf. *Young v. American Mini Theatres, Inc., 427 U.S. 50,*

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71, n. 34, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976) (legislative finding that "a concentration of 'adult' movie **[****43]** theaters causes the area to deteriorate and become a focus of crime"); *California v. LaRue, 409 U.S. 109, 111, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972)* **[**2470]** (administrative findings of criminal activity associated with adult entertainment).

The type of entertainment respondents seek to provide is plainly of the same character as that at issue in *Renton, American Mini Theatres*, and *LaRue*. It therefore is no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films displaying "specified anatomical areas" at issue in *Renton*. Other reported cases from the Circuit in which this litigation arose confirm the conclusion. See, *e. g., United States v. Marren, 890 F.2d 924, 926 (CA7 1989)* (prostitution associated with nude dancing establishment); *United States v. Doerr, 886 F.2d 944, 949 (CA7 1989)* (same). In light of *Renton*'s recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment of the type **[****44]** offered at the Kitty Kat Lounge and the Glen Theatre's "bookstore" furthers its interest in preventing prostitution, sexual assault, and associated crimes. Given our recognition that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate," *American Mini Theatres, supra, at 70,* I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every **[*585]** case. The statute as applied to nudity of the sort at issue here therefore satisfies the second prong of *O'Brien*. n2

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n2 Because there is no overbreadth challenge before us, we are not called upon to decide whether the application of the statute would be valid in other contexts. It is enough, then, to say that the secondary effects rationale on which I rely here would be open to question if the State were to seek to enforce the statute by barring expressive nudity in classes of productions that could not readily be analogized to the adult films at issue in *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986)*. It is difficult to see, for example, how the enforcement of Indiana's statute against nudity in a production of "Hair" or "Equus" somewhere other than an "adult" theater would further the State's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context of *Renton*-type adult entertainment was correlated with such secondary effects.

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[**45]** The third *O'Brien* condition is that the governmental interest be "unrelated to the suppression of free expression," *391 U.S. at 377,* and, on its face, the governmental interest in combating prostitution and other criminal activity is not at all inherently **[***524]** related to expression. The dissent contends, however, that Indiana seeks to regulate nude dancing as its means of combating such secondary effects "because . . . creating or emphasizing [the] thoughts and ideas [expressed by nude dancing] in the minds of the spectators may lead to increased prostitution," *post,* at 592, and that regulation of expressive conduct because of the fear that the expression will prove persuasive is inherently related to the suppression of free expression. *Ibid.*

The major premise of the dissent's reasoning may be correct, but its minor premise describing the causal theory of Indiana's regulatory justification is not. To say that pernicious secondary effects are associated with nude dancing establishments is not necessarily to say that such effects result from the persuasive effect of the expression inherent in nude dancing. It is to say, rather, only that the effects are correlated **[****46]** with the existence of establishments offering such dancing, without deciding what the precise causes of the correlation **[*586]** actually are. It is possible, for example, that the higher incidence of prostitution and sexual assault in the vicinity of adult entertainment locations results from the concentration of crowds of men predisposed to such activities, or from the simple viewing of nude bodies regardless of whether those bodies are engaged in expression or not. In neither case would the chain of causation run through the persuasive effect of the expressive component of nude dancing.

[2471]** Because the State's interest in banning nude dancing results from a simple correlation of such dancing with other evils, rather than from a relationship between the other evils and the expressive component of the dancing, the interest is unrelated to the suppression of free expression. *Renton* is again

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persuasive in support of this conclusion. In *Renton*, we held that an ordinance that regulated adult theaters because the presence of such theaters was correlated with secondary effects that the local government had an interest in regulating was content neutral (a determination similar to the "unrelated **[****47]** to the suppression of free expression" determination here, see *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298, 82 L. Ed. 2d 221, 104 S. Ct. 3065, and n. 8 (1984))* because it was "*justified* without reference to the content of the regulated speech." *475 U.S. at 48* (emphasis in original). We reached this conclusion without need to decide whether the cause of the correlation might have been the persuasive effect of the adult films that were being regulated. Similarly here, the "secondary effects" justification means that enforcement of the Indiana statute against nude dancing is "justified without reference to the content of the regulated [expression]," *ibid.* (emphasis omitted), which is sufficient, at least in the context of sexually explicit expression, n3 to satisfy the third prong of the *O'Brien* test.

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n3 I reach this conclusion again mindful, as was the Court in *Renton*, that the protection of sexually explicit expression may be of lesser societal importance than the protection of other forms of expression. See *Renton, supra, at 49, and n. 2,* citing *Young v. American Mini Theatres, Inc., 427 U.S. 50, 70, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976).*

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[*587] **[****48]** The fourth *O'Brien* condition, that the restriction be no greater than **[***525]** essential to further the governmental interest, requires little discussion. Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message. Nor, so far as we are told, is the dancer or her employer limited by anything short of obscenity laws from expressing an erotic message by articulate speech or representational means; a pornographic movie featuring one of respondents, for example, was playing nearby without any interference from the authorities at the time these cases arose.

Accordingly, I find *O'Brien* satisfied and concur in the judgment.

DISSENTBY: WHITE

DISSENT: JUSTICE WHITE, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

[*LEdHR2C]** [2C]The first question presented to us in this case is whether nonobscene nude dancing performed as entertainment is expressive conduct protected by the First Amendment. The Court of Appeals held that it is, observing that our prior decisions permit no other conclusion. **[****49]** Not surprisingly, then, the plurality now concedes that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment . . . ." *Ante*, at 566. This is no more than recognizing, as the Seventh Circuit observed, that dancing is an ancient art form and "inherently embodies the expression and communication of ideas and emotions." *Miller v. Civil City of South Bend, 904 F.2d 1081, 1087 (1990)* (en banc). n1

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n1 JUSTICE SCALIA suggests that performance dancing is not inherently expressive activity, see *ante*, at 577, n. 4, but the Court of Appeals has the better view: "Dance has been defined as 'the art of moving the body in a rhythmical way, usually to music, to express an emotion or idea, to narrate a story, or simply to take delight in the movement itself.' 16 The New Encyclopedia Britannica 935 (1989). Inherently, it is the communication of emotion or ideas. At the root of all 'the varied manifestations of dancing . . . lies the common impulse to resort to movement to externalise states which we cannot externalise by rational means. This is basic dance.' Martin, J. *Introduction to the Dance* (1939). Aristotle recognized in *Poetics* that the purpose of dance is 'to represent men's character as well as what they do and suffer.' The raw communicative power of dance was noted by the French poet Stephane Mallarme who declared that the dancer 'writing with her body . . . *suggests* things which the written work could *express* only in several paragraphs of dialogue or descriptive prose.'" *904 F.2d at 1085-1086.* JUSTICE SCALIA cites *Dallas v. Stanglin, 490 U.S.*

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19, 104 L. Ed. 2d 18, 109 S. Ct. 1591 (1989), but that decision dealt with social dancing, not performance dancing; and the submission in that case, which we rejected, was not that social dancing was an expressive activity but that plaintiff's *associational* rights were violated by restricting admission to dance halls on the basis of age. The Justice also asserts that even if dancing is inherently expressive, nudity is not. The statement may be true, but it tells us nothing about dancing in the nude.

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[*588] **[****50]** **[**2472]** Having arrived at the conclusion that nude dancing performed as entertainment enjoys First Amendment protection, the plurality states that it must "determine the level of protection to be afforded to the expressive conduct at issue, and must determine whether the Indiana statute is an impermissible infringement of that protected activity." *Ante*, at 566. For guidance, the plurality turns to *United* **[***526]** *States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968),* which held that expressive conduct could be narrowly regulated or forbidden in pursuit of an important or substantial governmental interest that is unrelated to the content of the expression. The plurality finds that the Indiana statute satisfies the *O'Brien* test in all respects.

The plurality acknowledges that it is impossible to discern the exact state interests which the Indiana Legislature had in mind when it enacted the Indiana statute, but the plurality nonetheless concludes that it is clear from the statute's text and history that the law's purpose is to protect "societal order and morality." *Ante*, at 568. The plurality goes on to **[*589]** conclude that Indiana's statute "was enacted as *a general prohibition," ante*, at 568 (emphasis added), **[****51]** on people appearing in the nude among strangers in public places. The plurality then points to cases in which we upheld legislation based on the State's police power, and ultimately concludes that the Indiana statute "furthers a substantial government interest in protecting order and morality." *Ante*, at 569. The plurality also holds that the basis for banning nude dancing is unrelated to free expression and that it is narrowly drawn to serve the State's interest.

The plurality's analysis is erroneous in several respects. Both the plurality and JUSTICE SCALIA in his opinion concurring in the judgment overlook a fundamental and critical aspect of our cases upholding the States' exercise of their police powers. None of the cases they rely upon, including *O'Brien* and *Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986),* involved anything less than truly *general* proscriptions on individual conduct. In *O'Brien*, for example, individuals were prohibited from destroying their draft cards at any time and in any place, even in completely private places such as the home. Likewise, in *Bowers*, the State prohibited sodomy, regardless of where the conduct might occur, including the home as was true **[****52]** in that case. The same is true of cases like *Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990),* which, though not applicable here because it did not involve any claim that the peyote users were engaged in expressive activity, recognized that the State's interest in preventing the use of illegal drugs extends even into the home. By contrast, in this case Indiana does not suggest that its statute applies to, or could be applied to, nudity wherever it occurs, including the home. We do not understand the plurality or JUSTICE SCALIA to be suggesting that Indiana could constitutionally enact such an intrusive prohibition, nor do we think such a suggestion would be tenable in light of our decision in *Stanley v. Georgia, 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969),* in which we held that States could not punish the **[*590]** mere possession of obscenity in the privacy of one's own home.

[2473]** We are told by the attorney general of Indiana that, in *State v. Baysinger, 272 Ind. 236, 397 N.E.2d 580 (1979),* the Indiana Supreme Court held that the statute at issue here cannot and does not prohibit nudity as a part of some larger form **[****53]** of expression meriting protection when the communication of ideas is involved. Brief for Petitioners 25, 30-31; **[***527]** Reply Brief for Petitioners 9-11. Petitioners also state that the evils sought to be avoided by applying the statute in this case would not obtain in the case of theatrical productions, such as "Salome" or "Hair." *Id.*, at 11-12. Neither is there any evidence that the State has attempted to apply the statute to nudity in performances such as plays, ballets, or operas. "No arrests have ever been made for nudity as part of a play or ballet." App. 19 (affidavit of Sgt. Timothy Corbett).

[*LEdHR3C]** [3C]Thus, the Indiana statute is not a *general* prohibition of the type we have upheld in prior cases. As a result, the plurality and JUSTICE SCALIA's simple references to the State's general interest in promoting societal order and morality are not sufficient justification for a statute which concededly reaches a significant amount of protected

expressive activity. Instead, in applying the *O'Brien* test, we are obligated to carefully examine the reasons the State has chosen to regulate this expressive conduct in a less than general statute. In other words, when the State enacts a law which **[****54]** draws a line between expressive conduct which is regulated and non-expressive conduct of the same type which is not regulated, *O'Brien* places the burden on the State to justify the distinctions it has made. Closer inquiry as to the purpose of the statute is surely appropriate.

Legislators do not just randomly select certain conduct for proscription; they have reasons for doing so and those reasons illuminate the purpose of the law that is passed. Indeed, a law may have multiple purposes. The purpose of **[*591]** 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. This is why *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984),* is of no help to the State: "In *Clark* . . . the damage to the parks was the same whether the sleepers were camping **[****55]** out for fun, were in fact homeless, or wished by sleeping in the park to make a symbolic statement on behalf of the homeless." *904 F.2d at 1103* (Posner, J., concurring). That cannot be said in this case: The perceived damage to the public interest caused by appearing nude on the streets or in the parks, as I have said, is not what the State seeks to avoid in preventing nude dancing in theaters and taverns. There the perceived harm is the communicative aspect of the erotic dance. As the State now tells us, and as JUSTICE SOUTER agrees, the State's goal in applying what it describes as its "content neutral" statute to the nude dancing in this case is "deterrence of prostitution, sexual assaults, criminal activity, degradation of women, and other activities which break down family structure." Reply Brief for Petitioners 11. The attainment of these goals, however, depends on preventing an expressive activity.

The plurality nevertheless holds that the third requirement of the *O'Brien* test, that the governmental interest be unrelated to the suppression of **[***528]** free expression, is satisfied because in applying the statute to nude dancing, the State is not "proscribing nudity **[****56]** because of the erotic message conveyed by the dancers." *Ante*, at 570. The plurality suggests that this is so because the State does not ban dancing that sends an erotic message; it is only nude erotic dancing that is forbidden. The perceived evil is not erotic dancing but public **[*592]** nudity, which may be prohibited despite any incidental impact on **[**2474]** expressive activity. This analysis is transparently erroneous.

In arriving at its conclusion, the plurality concedes that nude dancing conveys an erotic message and concedes that the message would be muted if the dancers wore pasties and G-strings. Indeed, the emotional or erotic impact of the dance is intensified by the nudity of the performers. As Judge Posner argued in his thoughtful concurring opinion in the Court of Appeals, the nudity of the dancer is an integral part of the emotions and thoughts that a nude dancing performance evokes. *904 F.2d at 1090-1098.* The sight of a fully clothed, or even a partially clothed, dancer generally will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed. The nudity is itself an expressive component of the dance, not merely incidental "conduct. **[****57]** " We have previously pointed out that "'nudity alone' does not place otherwise protected material outside the mantle of the First Amendment." *Schad v. Mt. Ephraim, 452 U.S. 61, 66, 68 L. Ed. 2d 671, 101 S. Ct. 2176 (1981).*

This being the case, it cannot be that the statutory prohibition is unrelated to expressive conduct. Since the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication. The nudity element of nude dancing performances cannot **[*593]** be neatly pigeonholed as mere "conduct" independent of any expressive component of the dance. n2

---------- Footnotes ----------

n2 JUSTICE SOUTER agrees with the plurality that the third requirement of the *O'Brien* test is satisfied, but only because he is not certain that there is a causal connection between the message conveyed by nude dancing and the evils which the State is seeking to prevent. See *ante*, at 585. JUSTICE SOUTER's analysis is at

least as flawed as that of the plurality. If JUSTICE SOUTER is correct that there is no causal connection between the message conveyed by the nude dancing at issue here and the negative secondary effects that the State desires to regulate, the State does not have even a rational basis for its absolute prohibition on nude dancing that is admittedly expressive. Furthermore, if the real problem is the "concentration of crowds of men predisposed" to the designated evils, *ante*, at 586, then the First Amendment requires that the State address that problem in a fashion that does not include banning an entire category of expressive activity. See *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).*

---------- End Footnotes----------

[**58]** **[***529]** That fact dictates the level of First Amendment protection to be accorded the performances at issue here. In *Texas v. Johnson, 491 U.S. 397, 411-412, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989),* the Court observed: "Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct. . . . We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to 'the most exacting scrutiny.' *Boos v. Barry, 485 U.S. [312], 321* [(1988)]." Content based restrictions "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *United States v. Grace, 461 U.S. 171, 177, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989).* Nothing could be clearer from our cases.

That the performances in the Kitty Kat Lounge may not be high art, to say the least, and may not appeal to the Court, is hardly an excuse for distorting and ignoring settled doctrine. The Court's assessment of the artistic merits of nude dancing performances **[**2475]** should not be the determining factor in deciding this **[****59]** case. In the words of Justice Harlan: "It is largely because governmental officials cannot make principled decisions **[*594]** in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California, 403 U.S. 15, 25, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971).* "While the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who . . . wants some 'entertainment' with his beer or shot of rye." *Salem Inn, Inc. v. Frank, 501 F.2d 18, 21, n. 3 (CA2 1974),* aff'd in part *sub nom. Doran v. Salem Inn, Inc., 422 U.S. 922, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975).*

The plurality and JUSTICE SOUTER do not go beyond saying that the state interests asserted here are important and substantial. But even if there were compelling interests, the Indiana statute is not narrowly drawn. If the State is genuinely concerned with prostitution and associated evils, as JUSTICE SOUTER seems to think, or the type of conduct that was occurring in *California v. LaRue, 409 U.S. 109, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972),* **[****60]** it can adopt restrictions that do not interfere with the expressiveness of nonobscene nude dancing performances. For instance, the State could perhaps require that, while performing, nude performers remain at all times a certain minimum distance from spectators, that nude entertainment be limited to certain hours, or even that establishments providing such entertainment be dispersed throughout the city. Cf. *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).* Likewise, the State clearly has the authority to criminalize prostitution and obscene behavior. Banning an entire category of expressive activity, however, generally does not satisfy the narrow tailoring requirement of strict First Amendment scrutiny. See *Frisby v. Schultz, 487 U.S. 474, 485, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988).* Furthermore, if nude dancing in barrooms, as compared with other establishments, **[***530]** is the most worrisome problem, the State could invoke its Twenty-first Amendment powers and impose appropriate regulation. *New York State Liquor Authority v. Bellanca, 452 U.S. 714, 69 L. Ed. 2d 357, 101 S. Ct. 2599 (1981) (per curiam); California v. LaRue, supra.*

[*595] As I see it, our cases require **[****61]** us to affirm absent a compelling state interest supporting the statute. Neither the plurality nor the State suggest that the statute could withstand scrutiny under that standard.

JUSTICE SCALIA's views are similar to those of the plurality and suffer from the same defects. The Justice asserts that a general law barring specified conduct does not implicate the First Amendment unless the purpose of the law is to suppress the expressive quality of the forbidden conduct, and that, absent such purpose, First Amendment protections are not triggered simply because the incidental effect of the

law is to proscribe conduct that is unquestionably expressive. Cf. *Community for Creative Non-Violence v. Watt, 227 U.S. App. D.C. 19, 703 F.2d 586, 622-623 (1983)* (Scalia, J., dissenting). The application of the Justice's proposition to this case is simple to state: The statute at issue is a general law banning nude appearances in public places, including barrooms and theaters. There is no showing that the purpose of this general law was to regulate expressive conduct; hence, the First Amendment is irrelevant and nude dancing in theaters and barrooms may be forbidden, irrespective **[****62]** of the expressiveness of the dancing.

[*LEdHR4B]** [4B]As I have pointed out, however, the premise for the Justice's position -- that the statute is a *general* law of the type our cases contemplate -- is nonexistent in this case. Reference to JUSTICE SCALIA's own hypothetical makes this clear. We agree with JUSTICE SCALIA that the Indiana statute would not permit 60,000 consenting Hoosiers to expose themselves to each other in the Hoosier Dome. No one can doubt, however, that those same 60,000 Hoosiers would be perfectly **[**2476]** free to drive to their respective homes all across Indiana and, once there, to parade around, cavort, and revel in the nude for hours in front of relatives and friends. It is difficult to see why the State's interest in morality is any less in that situation, especially if, as JUSTICE SCALIA seems to suggest, nudity is inherently evil, but clearly the statute does **[*596]** not reach such activity. As we pointed out earlier, the State's failure to enact a truly general proscription requires closer scrutiny of the reasons for the distinctions the State has drawn. See *supra*, at 590.

[*LEdHR5B]** [5B]As explained previously, the purpose of applying the law to the nude dancing performances in respondents' establishments **[****63]** is to prevent their customers from being exposed to the distinctive communicative aspects of nude dancing. That being the case, JUSTICE SCALIA's observation is fully applicable here: "Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional." *Ante*, at 577.

The *O'Brien* decision does not help JUSTICE SCALIA. Indeed, his position, like the plurality's, would eviscerate the *O'Brien* test. *Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990),* is likewise not on point. The Indiana law, as applied to nude dancing, targets the expressive activity itself; in Indiana nudity in a dancing performance is a crime because of the message such dancing communicates. In *Smith*, the use of drugs was not criminal because the use was part of or occurred within the course of an otherwise protected religious ceremony, but because a general law made it so and was supported by the same interests in the religious context as in others.

Accordingly, I would affirm the judgment of the Court of Appeals, and dissent from this Court's judgment. **[****64]**

REFERENCES:
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4 Am Jur 2d, Amusements and Exhibitions 20; *50 Am Jur 2d, Lewdness, Indecency, and Obscenity 17*, *17.5*, *18*

USCS, Constitution, Amendment 1

L Ed Digest, Constitutional Law 945

L Ed Index, Adult or X-Rated Business or Movies; Lewdness, Indecency, and Obscenity; Nude Dancing; Nudity

Index to Annotations, Adult or X-Rated Business or Movies; Indecent Exposure; Lewdness, Indecency, and Obscenity

Annotation References:

The Supreme Court and the right of free speech and press. *93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.*

Topless or bottomless dancing or similar conduct as offenses. *49 ALR3d 1084.*

Criminal offense predicated upon indecent exposure. *94 ALR2d 1353.*

2-176175

Citation #7
409 U.S. 109

2-177176

CALIFORNIA ET AL. v. LaRUE ET AL.

No. 71-36

SUPREME COURT OF THE UNITED STATES

409 U.S. 109; 93 S. Ct. 390; 34 L. Ed. 2d 342; 1972 U.S. LEXIS 128

October 10, 1972, Argued
December 5, 1972, Decided

PRIOR HISTORY: [****1]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

DISPOSITION: *326 F.Supp. 348,* reversed.

SUMMARY: After hearing evidence at public hearings relating to sexually explicit entertainment in "topless" and "bottomless" bars and nightclubs, which evidence indicated that sexual conduct had taken place between customers and entertainers, and that prostitution, rape, indecent exposure, and assaults on police officers had taken place on or immediately adjacent to licensed premises, the California Department of Alcoholic Beverage Control promulgated regulations prohibiting certain sexually explicit live entertainment or films in licensed bars and nightclubs--such regulations prohibiting the performance of specified acts, or simulated acts, including sexual intercourse, masturbation, sexual acts prohibited by law, touching or fondling of breast or genitals, displaying of genitals, and displaying films or pictures depicting such prohibited acts. Certain liquor license holders, and dancers performing at their premises, instituted a declaratory judgment action against the Department, the state, and various state officials in the United States District Court for the Central District of California, challenging the constitutionality of the regulations. The three-judge District Court held that the regulations unconstitutionally abridged the plaintiffs' freedom of expression guaranteed by the First and Fourteenth Amendments, since the regulations could not be justified under Supreme Court decisions either as a prohibition of obscenity or as a valid regulation of conduct having a communicative element *(326 F Supp 348).*

On appeal, the United States Supreme Court reversed. In an opinion by Rehnquist, J., expressing the view of six members of the court, it was held that in view of the states' broad authority to control intoxicating liquors under the Twenty-first Amendment, the challenged regulations did not, on their face, violate the Federal Constitution, notwithstanding that the regulations proscribed some acts which were not obscene and which were within the limits of the First and Fourteenth Amendments' protection of freedom of expression, since (1) the regulations were presented in the context of licensing bars and nightclubs to sell liquor by the drink, rather than the context of censoring a dramatic performance in a theater, (2) in view of the evidence before the state liquor department, its conclusion that the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place simultaneously in licensed establishments was not an irrational conclusion, (3) the department's choice of a prophylactic solution to the problem was not unreasonable, and (4) the state regulatory authority was not limited to dealing with the problem within the limits of Supreme Court decisions as to either obscenity or forms of communicative conduct.

Stewart, J., concurred, stating that in view of the states' broad power under the Twenty-first Amendment to specify the times, places, and circumstances where liquor may be disbursed within its borders, the challenged regulations, on their face, were not violative of the First and Fourteenth Amendments.

Douglas, J., dissenting, expressed the view that since the challenged regulations had not been applied to the plaintiffs by the institution of either civil or criminal proceedings, the regulations could be dealt with only in the abstract, it thus being more provident to decline to give a federal constitutional ruling until generalized provisions of the regulations were given particularized meaning.

Brennan, J., dissented on the grounds that (1) the challenged regulations clearly applied to some speech protected by the First and Fourteenth Amendments, and (2) the Twenty-first Amendment did not authorize the states to use their liquor licensing power as a means for the deliberate inhibition of protected, even if distasteful, forms of expression.

Marshall, J., dissented, expressing the views that (1) although the state could have constitutionally punished some of the activities involved under a narrowly drawn

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scheme, nevertheless the regulations, on their face, punished activities protected by the First Amendment and thus were unconstitutionally overbroad, (2) a state's power to regulate the distribution of liquor and to enforce health and safety regulations could not be exercised in a manner which broadly stifled First Amendment freedoms, (3) there was no empirical link between sex-related entertainment and criminal activity such as sex crimes and prostitution, which in any event should be punished directly, (4) even if there was such a link, it would not justify a broad-scale attack on First Amendment freedoms, and (5) the Twenty-first Amendment, which by its terms as to state control of "importation" of alcohol was intended only to permit "dry" states to control the flow of liquor across their boundaries despite potential commerce clause objections, did not authorize the states to regulate liquor in violation of First Amendment rights.

LAWYERS' EDITION HEADNOTES:
[*HN1]**

COURTS §240
federal court action -- deprivation of constitutional rights -- claim based on state law --

Headnote: [1A] [1B]
A claim that a state liquor department's regulations prohibiting certain sexually explicit live entertainment or films in licensed bars and nightclubs exceeded the authority conferred upon the department as a matter of state law, is not cognizable in a suit challenging the validity of such regulations under the Federal Constitution, brought in a Federal District Court against the department, the state, and state officials by holders of various liquor licenses, and dancers performing at their premises, under *42 USCS 1983,* which authorizes civil actions for deprivation of rights secured by the Federal Constitution.

[*HN2]**
APPEAL AND ERROR §4

COURTS §529
jurisdiction -- stipulation of parties --

Headnote: [2A] [2B]
Parties may not confer jurisdiction either upon the United States Supreme Court or a Federal District Court by stipulation.

[*HN3]**
APPEAL AND ERROR §288
actual controversy -- inquiry by Supreme Court --

Headnote: [3A] [3B]
In an action in a Federal District Court challenging the constitutionality of a state liquor department's regulations prohibiting certain sexually explicit live entertainment or films in bars and nightclubs, the request of both parties that the District Court adjudicate the merits of the constitutional claim does not foreclose the United States Supreme Court's inquiry, on appeal, into the existence of an "actual controversy" within the meaning of the Declaratory Judgment Act *(28 USCS 2201)* and Article 3, 2, clause 1 of the Constitution.

[*HN4]**
COURTS §236.5

DECLARATORY JUDGMENTS §8
actual controversy -- validity of liquor regulations --

Headnote: [4A] [4B]
An "actual controversy" within the meaning of the Declaratory Judgment Act *(28 USCS 2201)* and Article 3, 2, clause 1 of the Constitution is presented in, and a Federal District Court thus has jurisdiction of, an action against a state liquor department, the state, and state officials by various liquor license holders and dancers performing at their premises, challenging the constitutionality of recently enacted regulations prohibiting certain sexually explicit live entertainment or films in bars and nightclubs, where by pretrial stipulation, the plaintiffs admitted that they offered performances which were proscribed by the regulations, and the defendants stipulated that they would take disciplinary action against violators.

[*HN5]**
CONSTITUTIONAL LAW §855
police power -- state authority -- intoxicating liquors --

Headnote: [5]
While the states, vested as they are with general police powers, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment, prohibiting the transportation or importation of intoxicating liquors into any state in violation of the laws thereof, confers something more than the normal state authority over public health, welfare, and morals.

[*HN6]**
INTOXICATING LIQUORS §6
validity of state regulations --

Headnote: [6]

The case for upholding state regulations in the area covered by the Twenty-first Amendment is strengthened by that enactment.

[*HN7]**
COMMERCE §209

CONSTITUTIONAL LAW §13
Twenty-first Amendment -- commerce clause -- accommodation --

Headnote: [7]
Like other provisions of the Federal Constitution, the Twenty-first Amendment and the commerce clause must each be considered in the light of the other and in the context of the issues and interests at stake in any concrete case.

[*HN8]**
ADMINISTRATIVE LAW §77
legislative rule-making --

Headnote: [8]
In legislative rule-making, an agency may reason from the particular to the general.

[*HN9]**
CONSTITUTIONAL LAW §925.7

INTOXICATING LIQUORS §12
freedom of expression -- entertainment in bars and nightclubs -- state regulation --

Headnote: [9A] [9B]
In view of the states' authority under the Twenty-first Amendment to control intoxicating liquors, a state liquor department's regulations prohibiting certain sexually explicit live entertainment or films in licensed bars and nightclubs--such regulations prohibiting the performance of specified acts, or simulated acts, including sexual intercourse, masturbation, sexual acts prohibited by law, touching or fondling of breast or genitals, displaying of genitals, and displaying films or pictures depicting such prohibited acts--do not, on their face, violate the Federal Constitution, notwithstanding that the regulations on their face proscribe some forms of visual presentation which would not be obscene under United States Supreme Court decisions, and notwithstanding that some of the proscribed acts are within the limits of the First and Fourteenth Amendments' protection of freedom of expression, since (1) the regulations were presented in the context of licensing bars and nightclubs to sell liquor by the drink, rather than the context of censoring dramatic performances in a theater, the state not having proscribed the performance of the acts across the board, but merely such performance in licensed liquor establishments, (2) the liquor department's conclusion, after public hearings, that the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place simultaneously in licensed establishments was not an irrational conclusion, having been based on evidence showing that sexual conduct had taken place between customers and entertainers, and that prostitution, rape, indecent exposure, and assaults on police officers had taken place on, or immediately adjacent to, licensed premises, (3) the department's choice of a prophylactic solution, instead of one involving exclusion of intoxicated patrons from licensed premises and requiring the judging of individual instances of inebriation, was not unreasonable, and (4) the state's regulatory authority was not limited to dealing with the problem within the limits of Supreme Court decisions as to either obscenity or protected forms of communicative conduct.

[*HN10]**
INTOXICATING LIQUORS §6
regulation -- latitude of state agency --

Headnote: [10]
Wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency which is the depository of the state's power under the Twenty-first Amendment.

[*HN11]**
CONSTITUTIONAL LAW §925.7
freedom of expression -- mode of expression --

Headnote: [11]
With regard to freedom of expression under the First and Fourteenth Amendments, as the mode of expression moves from the printed page to the commission of public acts which may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases.

[*HN12]**
CONSTITUTIONAL LAW §925.8
freedom of speech -- sound trucks -- parade permits --

Headnote: [12A] [12B]
States may validly limit the manner in which First Amendment freedoms are exercised by forbidding sound trucks in residential neighborhoods, and may enforce a nondiscriminatory requirement that those who would parade on a public thoroughfare first obtain a permit.

[*HN13]**

EVIDENCE §99(2)
intoxicating liquors -- state regulations -- presumption of validity --

Headnote: [13]
The Twenty-first Amendment requires a presumption in favor of the validity of a state regulation of establishments licensed to sell intoxicating liquors.

SYLLABUS: Following hearings, the California Department of Alcoholic Beverage Control issued regulations prohibiting explicitly sexual live entertainment and films in bars and other establishments licensed to dispense liquor by the drink. A three-judge District Court held the regulations invalid under the First and Fourteenth Amendments, concluding that under standards laid down by this Court some of the proscribed entertainment could not be classified as obscene or lacking a communicative element. *Held*: In the context, not of censoring dramatic performances in a theater, but of licensing bars and nightclubs to sell liquor by the drink, the States have broad latitude under the Twenty-first Amendment to control the manner and circumstances under which liquor may be dispensed, and here the conclusion that sale of liquor by the drink and lewd or naked entertainment should not take place simultaneously in licensed establishments was not irrational nor was the prophylactic solution unreasonable. Pp. 114-119.

COUNSEL: L. Stephen Porter, Deputy Attorney General of California, **[****2]** argued the cause for appellants. With him on the brief was Evelle J. Younger, Attorney General.

Harrison W. Hertzberg and Kenneth Scholtz argued the cause for appellees. With them on the brief was Warren I. Wolfe.

JUDGES: Rehnquist, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, White, Blackmun, and Powell, JJ., joined. Stewart, J., filed a concurring opinion, post, p. 119. Douglas, J., post, p. 120, Brennan, J., post, p. 123, and Marshall, J., post, p. 123, filed dissenting opinions.

OPINIONBY: REHNQUIST

OPINION: **[*110]** **[***347]** **[**393]** MR. JUSTICE REHNQUIST delivered the opinion of the Court.

[*HR1A]** [1A]
Appellant Kirby is the director of the Department of Alcoholic Beverage Control, an administrative agency vested by the California Constitution with primary authority for the licensing of the sale of alcoholic beverages in that State, and with the authority to suspend or revoke any such license if it determines that its continuation would be contrary to public welfare or morals. Art. XX, § 22, California Constitution. Appellees include holders of various liquor licenses issued by appellant, and dancers at premises operated by such licensees. In 1970 the Department promulgated **[****3]** rules regulating the type of entertainment that might be presented in bars and nightclubs that it licensed. Appellees then brought this action in the United States District Court for the Central District of California under the provisions of *28 U. S. C. §§ 1331,* 1343, 2201, 2202, and *42 U. S. C. § 1983.* A three-judge court was convened in accordance with *28 U. S. C. §§ 2281* and 2284, and the majority of that court held that substantial portions of the regulations conflicted with the First and Fourteenth Amendments to the United States Constitution. n1

[*HR1B]** [1B]

---------- Footnotes ----------

-----n1 Appellees in their brief here suggest that theregulations may exceed the authority conferred upon the Department as a matter of state law. As the District Court recognized, however, such a claim is not cognizable in the suit brought by these appellees under *42 U. S. C. § 1983.*

---------- End Footnotes ----------

Concerned with the progression in a few years' time from "topless" dancers to "bottomless" dancers and other forms of "live entertainment" in bars and nightclubs that it licensed, the Department **[****4]** heard a number of witnesses on this subject at public hearings held prior to the promulgation of the rules. The majority opinion **[*111]** of the District Court described the testimony in these words:

"Law enforcement agencies, counsel and owners of licensed premises and investigators for the Department testified. The story that unfolded was a sordid one, primarily relating to sexual conduct between dancers and customers. . . ." *326 F.Supp. 348, 352.*

References to the transcript of the hearings submitted by the Department to the District Court **[***348]** indicated that in licensed establishments where "topless" and "bottomless" dancers, nude entertainers, and films displaying sexual acts were shown, numerous incidents of legitimate concern to the Department had occurred. Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and

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customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported **[****5]** to have occurred.

Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises.

At the conclusion of the evidence, the Department promulgated the regulations here challenged, imposing standards as to the type of entertainment that could be presented in bars and nightclubs that it licensed. Those portions of the regulations found to be unconstitutional by the majority of the District Court prohibited the following kinds of conduct on licensed premises:

(a) The performance of acts, or simulated acts, of "sexual intercourse, **[**394]** masturbation, sodomy, **[*112]** bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law";

(b) The actual or simulated "touching, caressing or fondling on the breast, buttocks, anus or genitals";

(c) The actual or simulated "displaying of the pubic hair, anus, vulva or genitals";

(d) The permitting by a licensee of "any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals **[****6]** or anus"; and, by a companion section,

(e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above. Rules 143.3 and 143.4. n2

---------- Footnotes ----------

n2 In addition to the regulations held unconstitutional by the court below, appellees originally challenged Rule 143.2 prohibiting topless waitresses, Rule 143.3 (2) requiring certain entertainers to perform on a stage at a distance away from customers, and Rule 143.5 prohibiting any entertainment that violated local ordinances. At oral argument in that court they withdrew their objections to these rules, conceding "that topless waitresses are not within the protection of the First Amendment; that local ordinances must be independently challenged depending upon their content; and that the requirement that certain entertainers must dance on a stage is not invalid." *326 F.Supp. 348, 350-351.*

---------- End Footnotes ----------

[*HR2A]** [2A]
[*HR3A]** [3A]
[*HR4A]** [4A]
Shortly before the effective date of the Department's regulations, appellees unsuccessfully sought discretionary review **[****7]** of them in both the State Court of Appeal and the Supreme Court of California. The Department then joined with appellees in requesting the three-judge District Court to decide the merits of appellees' claims that the regulations were invalid under the Federal Constitution. n3

[*HR2B]** [2B]
[*HR3B]** [3B]

---------- Footnotes ----------

-n3 MR. JUSTICE DOUGLAS in his dissenting opinion suggests that the District Court should have declined to adjudicate the merits of appellees' contention until the appellants had given the"generalized provisions of the rules . . . particularized meaning." Since parties may not confer jurisdiction either upon this Court or the District Court by stipulation, the request of both parties in this case that the court below adjudicate the merits of the constitutional claim does not foreclose our inquiry into the existence of an "actual controversy" within the meaning of *28 U. S. C. § 2201* and Art. III, § 2, cl. 1, of the Constitution.

[*HR4B]** [4B]
By pretrial stipulation, the appellees admitted they offered performances and depictions on their licensed premises that were proscribed by the challenged rules. Appellants stipulated they would take disciplinary action against the licenses of licensees violating such rules. In similar circumstances, this Court held that where a state commission had "plainly indicated" an intent to enforce an act that would affect the rights of the United States, there was a "present and concrete" controversy within the meaning of *28 U. S. C. § 2201* and of Art. III. *California Comm'n v. United States, 355 U.S. 534, 539 (1958).* The District Court therefore had jurisdiction of this action.

Whether this Court should develop a nonjurisdictional limitation on actions for declaratory judgments to invalidate statutes on their face is an issue not properly before us. Cf. *Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936)* (Brandeis, J., concurring). Certainly a number of our cases have permitted attacks on First Amendment grounds similar to those advanced by the appellees, see, *e. g., Zwickler v. Koota, 389 U.S. 241 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964),* and we are not inclined to reconsider the procedural holdings of those cases in the absence of a request by a party to do so.

---------- End Footnotes ----------

[**8]**

[*113] The **[***349]** District Court majority upheld the appellees' claim that the regulations in question unconstitutionally abridged the freedom of expression guaranteed to them by the First and Fourteenth Amendments to the United States Constitution. It reasoned that the state regulations had to be justified either as a prohibition of obscenity in accordance with the *Roth* line of decisions in this Court (*Roth v. United States, 354 U.S. 476* **[**395]** *(1957))*, or else as a regulation of "conduct" having a communicative element in it under the standards **[*114]** laid down by this Court in *United States v. O'Brien, 391 U.S. 367 (1968)*. Concluding that the regulations would bar some entertainment that could not be called obscene under the *Roth* line of cases, and that the governmental interest being furthered by the regulations did not meet the tests laid down in *O'Brien*, the court enjoined the enforcement of the regulations. *326 F.Supp. 348.* We noted probable juris diction. *404 U.S. 999.*

The state regulations here challenged come to us, not in the context of censoring a dramatic performance **[****9]** in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink. In *Seagram & Sons v. Hostetter, 384 U.S. 35, 41 (1966)*, this Court said:

"Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.'"

[*HR5]** [5]

While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something **[***350]** more than the normal state authority over public health, welfare, and morals. In *Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 330 (1964)*, the Court reaffirmed that by reason of the Twenty-first Amendment "a State is totally unconfined by traditional Commerce Clause limitations when it restricts **[****10]** the importation of intoxicants destined for use, distribution, or consumption within its borders." Still **[*115]** earlier, the Court stated in *State Board v. Young's Market Co., 299 U.S. 59, 64 (1936):*

"A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

[*HR6]** [6]
[*HR7]** [7]

These decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations. In *Wisconsin v. Constantineau, 400 U.S. 433 (1971)*, the fundamental notice and hearing requirement of the Due Process Clause of the Fourteenth Amendment was held applicable to Wisconsin's statute providing for the public posting of names of persons who had engaged in excessive drinking. But the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment:

"Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues **[****11]** and interests at stake in any concrete case." *Hostetter v. Idlewild Liquor Corp., supra, at 332.*

[*HR8]** [8]
[*HR9A]** [9A]

A common element in the regulations struck down by the District Court appears to be the Department's conclusion that the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place in bars and cocktail lounges for which it has licensing responsibility. Based on the evidence from the hearings that it cited to the District Court, and

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mindful of the principle that in legislative rulemaking the agency may reason from the particular to the general, *Assigned Car Cases, 274 U.S. 564, 583 (1927),* we do **[*116]** not think it can be said **[**396]** that the Department's conclusion in this respect was an irrational one.

[*HR10]** [10]
Appellees insist that the same results could have been accomplished by requiring that patrons already well on the way to intoxication be excluded from the licensed premises. But wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the Twenty-first Amendment. *Seagram & Sons v. Hostetter, supra, at 48.* **[****12]** Nothing in the record before us or in common experience compels the conclusion that either self-discipline on the part of the customer or self-regulation on the part of the bartender could have been relied upon by the Department to secure compliance with such an alternative plan of regulation. The Department's choice of a prophylactic solution instead of one that would have required its own personnel to judge individual instances of inebriation cannot, therefore, be **[***351]** deemed an unreasonable one under the holdings of our prior cases. *Williamson v. Lee Optical Co., 348 U.S. 483, 487-488 (1955).*

We do not disagree with the District Court's determination that these regulations on their face would proscribe some forms of visual presentation that would not be found obscene under *Roth* and subsequent decisions of this Court. See, *e. g., Sunshine Book Co.* v. *Summerfield, 355 U.S. 372 (1958),* rev'g *per curiam, 101 U. S. App. D. C. 358, 249 F.2d 114 (1957).* But we do not believe that the state regulatory authority in this case was limited to either dealing with the problem it confronted within **[****13]** the limits of our decisions as to obscenity, or in accordance with the limits prescribed for dealing with some forms of communicative conduct in *O'Brien, supra.*

Our prior cases have held that both motion pictures and theatrical productions are within the protection of **[*117]** the First and Fourteenth Amendments. In *Joseph Burstyn, Inc.* v. *Wilson, 343 U.S. 495 (1952),* it was held that motion pictures are "included within the free speech and free press guaranty of the First and Fourteenth Amendments," though not "necessarily subject to the precise rules governing any other particular method of expression." *Id., at 502-503.* In *Schacht v. United States, 398 U.S. 58, 63 (1970),* the Court said with respect to theatrical productions:

"An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance."

[*HR11]** [11]
[*HR12A]** [12A]
But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations **[****14]** significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of "conduct" or "action," *Hughes v. Superior Court, 339 U.S. 460 (1950); Giboney v. Empire Storage Co., 336 U.S. 490 (1949).* n4 In *O'Brien, supra,* the Court suggested that the extent to which "conduct" was protected **[**397]** by the First Amendment depended on the presence of a "communicative element," and stated:

"We cannot accept the view that an apparently **[*118]** limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *391 U.S., at 376.*

[*HR12B]** [12B]

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------ -n4 Similarly, States may validly limit the manner in which theFirst Amendment freedoms are exercised, by forbidding sound trucks in residential neighborhoods, *Kovacs v. Cooper, 336 U.S. 77 (1949),* and may enforce a nondiscriminatory requirement that those who would parade on a public thoroughfare first obtain a permit. *Cox v. New Hampshire, 312 U.S. 569 (1941).* Other state limitations on the "time, manner and place" of the exercise of First Amendment rights have been sustained. See, *e. g., Cameron v. Johnson, 390 U.S. 611 (1968),* and *Cox v. Louisiana, 379 U.S. 559 (1965).*

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[**15]**

The **[***352]** substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, "performances" that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which

these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.

Viewed in this light, we conceive the State's authority in this area to be somewhat broader than did the District Court. This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance **[****16]** by a scantily clad ballet troupe in a theater.

[*HR13]** [13]
[*HR9B]** [9B]
The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first **[*119]** Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution. n5

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n5 Because of the posture of this case, we have necessarily dealt with the regulations on their face, and have found them to be valid. The admonition contained in the Court's opinion in *Seagram & Sons v. Hostetter, 384 U.S. 35, 52 (1966),* is equally in point here:

"Although it is possible that specific future applications of [the statute] may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that, so considered, the legislation is constitutionally valid."

---------- End Footnotes ----------

[**17]**

The contrary holding of the District Court is therefore

Reversed.

CONCURBY: STEWART

CONCUR: MR. JUSTICE STEWART, concurring.

A State has broad power under the Twenty-first Amendment to specify the times, places, and circumstances where liquor may be dispensed within its borders. *Seagram & Sons v. Hostetter, 384 U.S. 35; Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 330; Dept. of Revenue v. James Beam Co., 377 U.S. 341, 344, 346; California v. Washington, 358 U.S. 64; Ziffrin, Inc.* v. *Reeves, 308 U.S. 132; Mahoney v. Joseph Triner Corp., 304 U.S. 401; State Board v. Young's Market Co., 299 U.S. 59.* I should suppose, therefore, that nobody would question the power of California to prevent the sale of liquor by the drink in places where food is not served, or where dancing is permitted, or where gasoline is sold. **[***353]** But here California has provided that liquor by the drink shall not be sold in places where certain grossly sexual exhibitions are performed; and that action by the State, say the appellees, violates **[**398]** **[****18]** the First and Fourteenth Amendments. I cannot agree.

Every State is prohibited by these same Amendments from invading the freedom of the press and from impinging **[*120]** upon the free exercise of religion. But does this mean that a State cannot provide that liquor shall not be sold in bookstores, or within 200 feet of a church? I think not. For the State would not thereby be interfering with the First Amendment activities of the church or the First Amendment business of the bookstore. It would simply be controlling the distribution of liquor, as it has every right to do under the Twenty-first Amendment. On the same premise, I cannot see how the liquor regulations now before us can be held, on their face, to violate the First and Fourteenth Amendments. *

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* This is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders. And it most assuredly is not to say that the Twenty-first Amendment necessarily overrides in its allotted area any other relevant provision of the Constitution. See *Wisconsin v. Constantineau, 400 U.S. 433; Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 329-*

334; Dept. of Revenue v. James Beam Co., 377 U.S. 341.

---------- End Footnotes ----------

[****19]

It is upon this constitutional understanding that I join the opinion and judgment of the Court.

DISSENTBY: DOUGLAS; BRENNAN; MARSHALL

DISSENT: MR. JUSTICE DOUGLAS, dissenting.

This is an action for a declaratory judgment, challenging Rules and Regulations of the Department of Alcoholic Beverage Control of California. It is a challenge of the constitutionality of the rules on their face; no application of the rules has in fact been made to appellees by the institution of either civil or criminal proceedings. While the case meets the requirements of "case or controversy" within the meaning of Art. III of the Constitution and therefore complies with *Aetna Life Ins. Co.* v. *Haworth, 300 U.S. 227,* the case does not mark the precise impact of these rules against licensees who sell alcoholic beverages in California. The opinion [*121] of the Court can, therefore, only deal with the rules in the abstract.

The line which the Court draws between "expression" and "conduct" is generally accurate; and it also accurately describes in general the reach of the police power of a State when "expression" and "conduct" are closely brigaded. But we still do not know how broadly or how narrowly [****20] these rules will be applied.

It is conceivable that a licensee might produce in a garden served by him a play -- Shakespearean perhaps or one in a more modern setting -- in which, for example, "fondling" in the sense of the rules appears. I cannot imagine that any such performance could constitutionally be punished or restrained, even though the police power of a State is now buttressed by the Twenty-first Amendment. n1 For, as [***354] stated by the Court, that Amendment did not supersede all other constitutional provisions "in the area of liquor regulations." Certainly a play which passes muster under the First Amendment is not made illegal because it is performed in a beer garden.

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n1 Section 2 of the Twenty-first Amendment reads as follows:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

---------- End Footnotes ----------

Chief Justice Hughes stated the controlling principle in *Electric* [****21] *Bond & Share Co.* v. *SEC, 303 U.S. 419, 443:*

"Defendants are not entitled to invoke the Federal Declaratory Judgment Act in order to obtain an advisory decree upon a hypothetical state of facts. . . . By the cross bill, defendants seek a judgment that each [**399] and every provision of the Act is unconstitutional. It presents a variety of hypothetical controversies which may never become real. We are invited to enter into a speculative inquiry for the [*122] purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation. . . ."

The same thought was expressed by Chief Justice Stone in *Federation of Labor v. McAdory, 325 U.S. 450, 470-471.* Some provisions of an Alabama law regulating labor relations were challenged as too vague and uncertain to meet constitutional requirements. The Chief Justice noted that state courts often construe state statutes so that in their application they are not open to constitutional objections. *Id., at 471.* He said that for us to decide the constitutional question [****22] "by anticipating such an authoritative construction" would be either "to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow." n2 *Ibid.* He added:

"In any event the parties are free to litigate in the state courts the validity of the statute when actually applied to any definite state of facts, with the right of appellate review in this Court. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes." *Ibid.*

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n2 Even in cases on direct appeal from a state court, when the decision below leaves

unresolved questions of state law or procedure which bear on federal constitutional questions, we dismiss the appeal. *Rescue Army v. Municipal Court, 331 U.S. 549.*

---------- End Footnotes ----------

[**23]**

Those precedents suggest to me that it would have been more provident for the District Court to have declined **[*123]** to give a federal constitutional ruling, until and unless the generalized provisions of the rules were given particularized meaning.

MR. JUSTICE BRENNAN, dissenting.

I dissent. The California regulation at issue here clearly applies to some speech protected by the First Amendment, as applied to the States through the Due Process Clause of **[***355]** the Fourteenth Amendment, and also, no doubt, to some speech and conduct which are unprotected under our prior decisions. See *Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957).* The State points out, however, that the regulation does not prohibit speech directly, but speaks only to the conditions under which a license to sell liquor by the drink can be granted and retained. But, as MR. JUSTICE MARSHALL carefully demonstrates in Part II of his dissenting opinion, by requiring the owner of a nightclub to forgo the exercise of certain rights guaranteed by the First Amendment, the State has imposed an unconstitutional condition on **[****24]** the grant of a license. See *Perry v. Sindermann, 408 U.S. 593 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958).* Nothing in the language or history of the Twenty-first Amendment authorizes the States to use their liquor licensing power as a means for the deliberate inhibition of protected, even if distasteful, forms of expression. For that reason, I would affirm the judgment of the District Court.

[400]** MR. JUSTICE MARSHALL, dissenting.

In my opinion, the District Court's judgment should be affirmed. The record in this case is not a pretty one, and it is possible that the State could constitutionally punish some of the activities described therein **[*124]** under a narrowly drawn scheme. But appellees challenge these regulations n1 on their face, rather than as applied to a specific course of conduct. n2 Cf. *Gooding v.* **[*125]** *Wilson, 405 U.S. 518* **[***356]** *(1972).* When so viewed, I think it clear that the regulations are overbroad and therefore unconstitutional. See, *e. g., Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).* **[****25]** n3 Although the State's broad power to regulate the distribution of liquor **[**401]** and to enforce health and safety regulations is not to be doubted, that power may not be exercised in a manner that broadly stifles First Amendment freedoms. Cf. *Shelton v. Tucker, 364 U.S. 479, 488 (1960).* Rather, as this Court has made clear, "precision of regulation **[*126]** must be the touchstone" when First Amendment rights are implicated. *NAACP v. Button, 371 U.S. 415, 438 (1963).* Because I am convinced that these regulations lack the precision which our prior cases require, I must respectfully dissent.

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n1 Rule 143.3 (1) provides in relevant part:

"No licensee shall permit any person to perform acts of or acts which simulate:

"(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

"(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

"(c) The displaying of the pubic hair, anus, vulva or genitals."

Rule 143.4 prohibits: "The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

"(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

"(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

"(3) Scenes wherein a person displays the vulva or the anus or the genitals.

"(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above."

[**26]**

n2 This is not an appropriate case for application of the abstention doctrine. Since these regulations are challenged on their face for overbreadth, no purpose

would be served by awaiting a state court construction of them unless the principles announced in *Younger v. Harris, 401 U.S. 37 (1971)*, govern. See *Zwickler v. Koota, 389 U.S. 241, 248-250 (1967)*. Thus far, however, we have limited the applicability of *Younger* to cases where the plaintiff has an adequate remedy in a pending *criminal* prosecution. See *Younger v. Harris, supra, at 43-44*. Cf. *Douglas v. City of Jeannette, 319 U.S. 157 (1943)*. But cf. *Berryhill v. Gibson, 331 F.Supp. 122, 124 (MD Ala. 1971)*, probable jurisdiction noted, *408 U.S. 920 (1972)*. The California licensing provisions are, of course, civil in nature. Cf. *Hearn v. Short, 327 F.Supp. 33 (SD Tex. 1971)*. Moreover, the *Younger* doctrine has been held to "have little force in the absence of a *pending* state proceeding." *Lake Carriers' Assn.* v. *MacMullan, 406 U.S. 498, 509 (1972)* (emphasis added). There are at present no proceedings of any kind pending against these appellees. Finally, since the *Younger* doctrine rests heavily on federal deference to state administration of its own statutes, see *Younger v. Harris, supra, at 44-45*, it is waivable by the State. Cf. *Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 329 (1964)*. Appellants have nowhere mentioned the *Younger* doctrine in their brief before this Court, and when the case was brought to the attention of the attorney for the appellants during oral argument, he expressly eschewed reliance on it. In the court below, appellants specifically asked for a federal decision on the validity of California's regulations and stated that they did not think the court should abstain. See *326 F.Supp. 348, 351 (CD Cal. 1971)*.

[**27]**

n3 I am startled by the majority's suggestion that the regulations are constitutional on their face even though "specific future applications of [the statute] may engender concrete problems of constitutional dimension." (Quoting with approval *Seagram & Sons v. Hostetter, 384 U.S. 35, 52 (1966)*. *Ante*, at 119 n. 5.) Ever since *Thornhill v. Alabama, 310 U.S. 88 (1940)*, it has been thought that statutes which trench upon First Amendment rights are facially void even if the conduct of the party challenging them could be prohibited under a more narrowly drawn scheme. See, *e. g., Baggett v. Bullitt, 377 U.S. 360, 366 (1964); Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971); NAACP v. Button, 371 U.S. 415, 432-433 (1963)*.

Nor is it relevant that the State here "sought to prevent [bacchanalian revelries]" rather than performances by "scantily clad ballet troupe[s]." Whatever the State "sought" to do, the fact is that these regulations cover both these activities. And it should be clear that a praiseworthy legislative motive can no more rehabilitate an unconstitutional statute than an illicit motive can invalidate a proper statute.

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[**28]**

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It should be clear at the outset that California's regulatory scheme does not conform to the standards which we have previously enunciated for the control of obscenity. n4 Before this Court's decision in *Roth v. United States, 354 U.S. 476 (1957)*, some **[***357]** American courts followed the rule of *Regina* v. *Hicklin*, L. R. 3 Q. B. 360 (1868), to the effect that the obscenity *vel non* of a piece of work could be judged by examining isolated aspects of it. See, *e. g., United States v. Kennerley, 209 F. 119 (1913); Commonwealth v. Buckley, 200 Mass. 346, 86 N. E. 910 (1909)*. But in *Roth* we held that "the *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." *354 U.S., at 489*. Instead, we held that the material must **[*127]** be "taken as a whole," *ibid.*, and, when so viewed, must appeal to a prurient interest in sex, patently offend community **[****29]** standards relating to the depiction of sexual matters, and be utterly without redeeming social value. n5 See **[**402]** *Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966)*.

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n4 Indeed, there are some indications in the legislative history that California adopted these regulations for the specific purpose of evading those standards. Thus, Captain Robert Devin of the Los Angeles Police Department testified that the Department favored adoption of the new

regulations for the following reason: "While statutory law has been available to us to regulate what was formerly considered as antisocial behavior, the federal and state judicial system has, through a series of similar decisions, effectively emasculated law enforcement in its effort to contain and to control the growth of pornography and of obscenity and of behavior that is associated with this kind of performance." See also testimony of Roy E. June, City Attorney of the City of Costa Mesa; testimony of Richard C. Hirsch, Office of Los Angeles County District Attorney. App. 117.

n5 I do not mean to suggest that this test need be rigidly applied in all situations. Different standards may be applicable when children are involved, see *Ginsberg v. New York, 390 U.S. 629 (1968);* when a consenting adult possesses putatively obscene material in his own home, see *Stanley v. Georgia, 394 U.S. 557 (1969);* or when the material by the nature of its presentation cannot be viewed as a whole, see *Rabe v. Washington, 405 U.S. 313, 317 n. 2 (1972)* (BURGER, C. J., concurring). Similarly, I do not mean to foreclose the possibility that even the *Roth-Memoirs* test will ultimately be found insufficient to protect First Amendment interests when consenting adults view putatively obscene material in private. Cf. *Redrup v. New York, 386 U.S. 767 (1967).* But cf. *United States v. Reidel, 402 U.S. 351 (1971).* But I do think that, at very least, *Roth-Memoirs* sets an absolute limit on the kinds of speech that can be altogether read out of the First Amendment for purposes of consenting adults.

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[**30]**

Obviously, the California rules do not conform to these standards. They do not require the material to be judged as a whole and do not speak to the necessity of proving prurient interest, offensiveness to community standards, or lack of redeeming social value. Instead of the contextual test approved in *Roth* and *Memoirs*, these regulations create a system of *per se* rules to be applied regardless of context: Certain acts simply may not be depicted and certain parts of the body may under no circumstances be revealed. The regulations thus treat on the same level a serious movie such as "Ulysses" and a crudely made "stag film." They ban not only obviously pornographic photographs, but also great sculpture from antiquity. n6

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n6 Cf. Fuller, Changing Society Puts Taste to the Test, The National Observer, June 10, 1972, p. 24: "Context is the essence of esthetic judgment . . . . There is a world of difference between Playboy and less pretentious girly magazines on the one hand, and on the other, *The Nude*, a picture selection from the whole history of art, by that fine teacher and interpreter of civilization, Kenneth Clark. People may be just as naked in one or the other, the bodies inherently just as beautiful, but the context of the former is vulgar, of the latter, esthetic.

"The same words, the same actions, that are cheap and tawdry in one book or play may contribute to the sublimity, comic universality, or tragic power of others. For a viable theory of taste, context is all."

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[**31]**

[*128] *Roth* held 15 years ago that the suppression of serious communication was too high a price to pay in order to vindicate the State's interest in controlling obscenity, and I see no reason to modify that judgment today. Indeed, even the appellants do not seriously contend **[***358]** that these regulations can be justified under the *Roth-Memoirs* test. Instead, appellants argue that California's regulations do not concern the control of pornography at all. These rules, they argue, deal with *conduct* rather than with *speech* and as such are not subject to the strict limitations of the First Amendment.

To support this proposition, appellants rely primarily on *United States v. O'Brien, 391 U.S. 367 (1968),* which upheld the constitutionality of legislation punishing the destruction or mutilation of Selective Service certificates. *O'Brien* rejected the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," and held that Government regulation of speech-related conduct is permissible "if it is within the constitutional power of the Government; **[****32]** if it furthers an important or substantial governmental interest; if the

governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id., at 376, 377.*

[*129] While I do not quarrel with these principles as stated in the abstract, their application in this case stretches them beyond the breaking point. n7 In *O'Brien*, the Court began its discussion by noting that the statute in question "plainly does not abridge free speech on its face." Indeed, even O'Brien himself conceded that facially the statute dealt "with conduct having no connection with speech." n8 *Id., at 375.* **[**403]** Here, the situation is quite different. A long line of our cases makes clear that motion pictures, unlike draft-card burning, are a form of expression entitled to prima facie First Amendment protection. "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political **[****33]** or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." *Joseph Burstyn, Inc.* v. *Wilson, 343 U.S. 495, 501 (1952)* (footnote omitted). See also *Interstate Circuit, Inc.* v. *City of Dallas, 390 U.S. 676 (1968); Jacobellis v. Ohio, 378 U.S. 184* **[*130]** *(1964); Pinkus v. Pitchess, 429 F.2d 416* **[***359]** *(CA9 1970),* aff'd by equally divided court *sub nom. California v. Pinkus, 400 U.S. 922 (1970).* Similarly, live performances and dance have, in recent years, been afforded broad prima facie First Amendment protection. See, *e. g., Schacht v. United States, 398 U.S. 58 (1970); P. B. I. C., Inc.* v. *Byrne, 313 F.Supp. 757 (Mass. 1970),* vacated to consider mootness, *401 U.S. 987 (1971); In re Giannini, 69 Cal. 2d 563, 446 P. 2d 535 (1968),* cert. denied *sub nom. California v. Giannini, 395 U.S. 910 (1969).* **[****34]**

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n7 Moreover, even if the *O'Brien* test were here applicable, it is far from clear that it has been satisfied. For example, most of the evils that the State alleges are caused by appellees' performances are already punishable under California law. See n. 11, *infra*. Since the less drastic alternative of criminal prosecution is available to punish these violations, it is hard to see how "the incidental restriction on alleged First Amendment freedoms is no greater than is essential" to further the State's interest.

n8 The Court pointed out that the statute "does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views . . . . A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records." *391 U.S., at 375.*

---------- End Footnotes ----------

If, as these many cases **[****35]** hold, movies, plays, and the dance enjoy constitutional protection, it follows, ineluctably I think, that their component parts are protected as well. It is senseless to say that a play is "speech" within the meaning of the First Amendment, but that the individual gestures of the actors are "conduct" which the State may prohibit. The State may no more allow movies while punishing the "acts" of which they are composed than it may allow newspapers while punishing the "conduct" of setting type.

Of course, I do not mean to suggest that anything which occurs upon a stage is automatically immune from state regulation. No one seriously contends, for example, that an actual murder may be legally committed so long as it is called for in the script, or that an actor may inject real heroin into his veins while evading the drug laws that apply to everyone else. But once it is recognized that movies and plays enjoy prima facie First Amendment protection, the standard for reviewing state regulation of their component parts shifts dramatically. For while "mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal **[****36]** activities, [they are] insufficient to justify such as diminishes the exercise of rights so vital" as freedom **[*131]** of speech. *Schneider v. State, 308 U.S. 147, 161 (1939).* Rather, in order to restrict speech, the State must show that the speech is "used in such circumstances and [is] of such a nature as to create a clear and present danger that [it] will bring about the substantive evils that [the State] has a right to prevent." *Schenck v. United States, 249 U.S. 47, 52 (1919).* Cf. *Brandenburg v. Ohio, 395 U.S. 444 (1969); Dennis v. United States, 341 U.S. 494 (1951).* n9

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n9 Of course, the State need not meet the clear and present danger test if the material in question is obscene. See *Roth v. United States, 354 U.S. 476 (1957).* But, as argued above, the difficulty with California's rules is that they do not conform to the *Roth* test and therefore regulate material that is not obscene. See *supra*, at 126-127.

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[**37]**

When the California regulations are measured against this stringent standard, **[**404]** they prove woefully inadequate. Appellants defend the rules as necessary to prevent sex crimes, drug abuse, prostitution, and a wide variety of other evils. These are precisely the same interests that have been asserted time and again before this Court as justification for laws banning frank discussion of sex and that we have consistently rejected. In fact, the empirical link between sex-related entertainment **[***360]** and the criminal activity popularly associated with it has never been proved and, indeed, has now been largely discredited. See, *e. g.*, Report of the Commission on Obscenity and Pornography 27 (1970); Cairns, Paul, & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962). Yet even if one were to concede that such a link existed, it would hardly justify a broadscale attack on First Amendment freedoms. The only way to stop murders and drug abuse is to punish them directly. But the State's interest in controlling material **[*132]** dealing with sex is secondary in nature. n10 It can control **[****38]** rape and prostitution by punishing those acts, rather than by punishing the speech that is one step removed from the feared harm. n11 Moreover, because First Amendment rights are at stake, the State must adopt this "less restrictive alternative" unless it can make a compelling demonstration that the protected activity and criminal conduct are so closely linked that only through regulation of one can the other be stopped. Cf. *United States v. Robel, 389 U.S. 258, 268 (1967).* As we said in *Stanley v. Georgia, 394 U.S. 557, 566-567 (1969),* "if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that 'among free men, the deterrents ordinarily to be applied to prevent **[*133]** crime are education and punishment for violations of the law . . . .' *Whitney v. California, 274 U.S. 357, 378 (1927)* (Brandeis, J., concurring). . . . Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial **[****39]** conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits." n12

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n10 This case might be different if the State asserted a primary interest in stopping the very acts performed by these dancers and actors. However, I have serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults. Cf. *Griswold v. Connecticut, 381 U.S. 479 (1965).* Moreover, it is unnecessary to reach that question in this case since the State's regulations are plainly not designed to stop the acts themselves, most of which are in fact legal when done in private. Rather, the State punishes the acts only when done in public as part of a dramatic presentation. Cf. *United States v. O'Brien, supra, at 375.* It must be, therefore, that the asserted state interest stems from the effect of the acts on the audience rather than from a desire to stop the acts themselves. It should also be emphasized that this case does not present problems of an unwilling audience or of an audience composed of minors.

[**40]**

n11 Indeed, California already has statutes controlling virtually all of the misconduct said to flow from appellees' activities. See *Calif. Penal Code § 647 (b)* (Supp. 1972) (prostitution); *Calif. Penal Code §§ 261,* 263 (1970) (rape); *Calif. Bus. & Prof. Code § 25657* (Supp. 1972) ("B-Girl" activity); *Calif. Health & Safety Code §§ 11500,* 11501, 11721, 11910, 11912 (1964 and Supp. 1972) (sale and use of narcotics).

n12 Of course, it is true that *Stanley* does not govern this case, since *Stanley* dealt only with the private possession of obscene materials in one's own home. But in another sense, this case is stronger than *Stanley.* In *Stanley*, we held that the State's interest in the prevention of sex crimes did

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not justify laws restricting possession of certain materials, even though they were conceded to be obscene. It follows *a fortiori* that this interest is insufficient when the materials are not obscene and, indeed, are constitutionally protected.

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[*361]** II

[405]** It should thus be evident that, under the standards previously developed by this Court, the California **[****41]** regulations are overbroad: They would seem to suppress not only obscenity outside the scope of the First Amendment, but also speech that is clearly protected. But California contends that these regulations do not involve suppression at all. The State claims that its rules are not regulations of obscenity, but are rather merely regulations of the sale and consumption of liquor. Appellants point out that California does not punish establishments which provide the proscribed entertainment, but only requires that they not serve alcoholic beverages on their premises. Appellants vigorously argue that such regulation falls within the State's general police power as augmented, when alcoholic beverages are involved, by the Twenty-first Amendment. n13

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n13 The Twenty-first Amendment, in addition to repealing the Eighteenth Amendment, provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

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[**42]**

[*134] I must confess that I find this argument difficult to grasp. To some extent, it seems premised on the notion that the Twenty-first Amendment authorizes the States to regulate liquor in a fashion which would otherwise be constitutionally impermissible. But the Amendment by its terms speaks only to state control of the *importation* of alcohol, and its legislative history makes clear that it was intended only to permit "dry" States to control the flow of liquor across their boundaries despite potential Commerce Clause objections. n14 See generally *Seagram & Sons v. Hostetter, 384 U.S. 35 (1966); Hostetter v. Idlewild Liquor Corp., 377 U.S. 324 (1964).* There is not a word in that history which indicates that Congress meant to tamper in any way with First Amendment rights. I submit that the framers of the Amendment would be astonished to **[*135]** discover that they had inadvertently enacted a *pro tanto* repealer of the rest of the Constitution. Only last Term, we held that the State's conceded power to license the distribution of intoxicating beverages did not justify use of that power in a manner that conflicted with **[****43]** the Equal Protection Clause. See *Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178-179* **[***362]** *(1972).* Cf. *Wisconsin v. Constantineau, 400 U.S. 433* **[**406]** *(1971); Hornsby v. Allen, 326 F.2d 605 (CA5 1964),* I am at a loss to understand why the Twenty-first Amendment should be thought to override the First Amendment but not the Fourteenth.

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n14 The text of the Amendment is based on the Webb-Kenyon Act, 37 Stat. 699, which antedated prohibition. The Act was entitled "An Act Divesting intoxicating liquors of their interstate character in certain cases," and was designed to allow "dry" States to regulate the flow of alcohol across their borders. See, *e. g., McCormick & Co.* v. *Brown, 286 U.S. 131, 140-141 (1932); Clark Distilling Co.* v. *Western Maryland R. Co., 242 U.S. 311, 324 (1917).* The Twenty-first Amendment was intended to embed this principle permanently into the Constitution. As explained by its sponsor on the Senate floor "to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.

"The pending proposal will give the States that guarantee. When our Government was organized and the Constitution of the United States adopted, the States surrendered control over and regulation of interstate commerce. This proposal is restoring to the States, in effect, the right to regulate commerce respecting a single commodity -- namely, intoxicating liquor." 76 Cong. Rec. 4141 (remarks of Sen. Blaine).

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---------- End Footnotes ----------

[****44]

To be sure, state regulation of liquor is important, and it is deeply embedded in our history. See, *e. g., Colonnade Catering Corp.* v. *United States, 397 U.S. 72, 77 (1970).* But First Amendment values are important as well. Indeed, in the past they have been thought so important as to provide an independent restraint on every power of Government. "Freedom of press, freedom of speech, freedom of religion are in a preferred position." *Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).* Thus, when the Government attempted to justify a limitation on freedom of association by reference to the war power, we categorically rejected the attempt. "[The] concept of 'national defense'" we held, "cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed [****45] be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties -- the freedom of association -- which [*136] makes the defense of the Nation worthwhile." *United States v. Robel, 389 U.S., at 264.* Cf. *New York Times Co.* v. *United States, 403 U.S. 713, 716-717 (1971)* (Black, J., concurring); *Home Bldg. & Loan Assn.* v. *Blaisdell, 290 U.S. 398, 426 (1934).* If the First Amendment limits the means by which our Government can ensure its very survival, then surely it must limit the State's power to control the sale of alcoholic beverages as well.

Of course, this analysis is relevant only to the extent that California has in fact encroached upon First Amendment rights. Appellants argue that no such encroachment has occurred, since appellees are free to continue providing any entertainment they choose without fear of criminal penalty. Appellants suggest that this case is somehow different because all that is at stake is the "privilege" of serving liquor by the drink.

It should be clear, however, that the absence of criminal sanctions is insufficient to immunize state regulation [****46] from constitutional attack. On the contrary, "this is only the beginning, not the end, of our inquiry." *Sherbert v. Verner, 374 U.S. 398, 403-404 (1963).* For "it is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id., at 404.* As we pointed out only last Term, "for at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may [***363] deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected [*137] speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Perry v. Sindermann, 408 U.S. 593, 597 (1972).*

Thus, unconstitutional conditions on welfare benefits, [****47] n15 unemployment compensation, n16 [**407] tax exemptions, n17 public employment, n18 bar admissions, n19 and mailing privileges n20 have all been invalidated by this Court. In none of these cases were criminal penalties involved. In all of them, citizens were left free to exercise their constitutional rights so long as they were willing to give up a "gratuity" that the State had no obligation to provide. Yet in all of them, we found that the discriminatory provision of a privilege placed too great a burden on constitutional freedoms. I therefore have some difficulty in understanding why California nightclub proprietors should be singled out and informed that they alone must sacrifice their constitutional rights before gaining the "privilege" to serve liquor.

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n15 See *Shapiro v. Thompson, 394 U.S. 618 (1969).* But cf. *Wyman v. James, 400 U.S. 309 (1971).*

n16 See *Sherbert v. Verner, 374 U.S. 398 (1963).*

n17 See *Speiser v. Randall, 357 U.S. 513 (1958).*

n18 See, *e. g., Pickering v. Board of Education, 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964).*

[****48]

n19 See, *e. g., Baird v. State Bar of Arizona, 401 U.S. 1 (1971); Konigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).* But cf. *Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971); Konigsberg v. State Bar, 366 U.S. 36 (1961).*

n20 See, *e. g., Blount v. Rizzi, 400 U.S. 410 (1971); Hannegan v. Esquire Inc., 327 U.S. 146, 156 (1946).*

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Of course, it is true that the State may in proper circumstances enact a broad regulatory scheme that incidentally restricts First Amendment rights. For example, if California prohibited the sale of alcohol altogether, I do not mean to suggest that the proprietors **[*138]** of theaters and bookstores would be constitutionally entitled to a special dispensation. But in that event, the classification would not be speech related and, hence, could not be rationally perceived as penalizing speech. Classifications that discriminate **[****49]** against the exercise of constitutional rights *per se* stand on an altogether different footing. They must be supported by a "compelling" governmental purpose and must be carefully examined to insure that the purpose is unrelated to mere hostility to the right being asserted. See, *e. g., Shapiro v. Thompson, 394 U.S. 618, 634 (1969).*

Moreover, not only is this classification speech related; it also discriminates between otherwise indistinguishable parties on the basis of the *content* of their speech. Thus, California nightclub owners may **[***364]** present live shows and movies dealing with a wide variety of topics while maintaining their licenses. But if they choose to deal with sex, they are treated quite differently. Classifications based on the content of speech have long been disfavored and must be viewed with the gravest suspicion. See, *e. g., Cox v. Louisiana, 379 U.S. 536, 556-558 (1965).* Whether this test is thought to derive from equal protection analysis, see *Police Department of Chicago v. Mosley, 408 U.S. 92 (1972); Niemotko v. Maryland, 340 U.S. 268 (1951),* or **[****50]** directly from the substantive constitutional provision involved, see *Cox* v. *Louisiana, supra; Schneider v. State, 308 U.S. 147 (1939),* the result is the same: any law that has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them . . . [is] patently unconstitutional." *United States v. Jackson, 390 U.S. 570, 581 (1968).*

As argued above, the constitutionally permissible purposes asserted to justify **[**408]** these regulations are too remote to satisfy the Government's burden when First Amendment rights are at stake. See *supra*, at 131-133. **[*139]** It may be that the Government has an interest in suppressing lewd or "indecent" speech even when it occurs in private among consenting adults. Cf. *United States v. Thirty-seven Photographs, 402 U.S. 363, 376 (1971).* But cf. *Stanley v. Georgia, 394 U.S. 557 (1969).* That interest, however, must be balanced against the overriding interest of our citizens in freedom of thought and expression. Our prior decisions on obscenity set such a balance and hold that the Government **[****51]** may suppress expression treating with sex only if it meets the three-pronged *Roth-Memoirs* test. We have said that "the door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." *Roth v. United States, 354 U.S., at 488.* Because I can see no reason why we should depart from that standard in this case, I must respectfully dissent.

REFERENCES:
Return To Full Text Opinion

Extent of state regulatory power under Twenty- first Amendment

16 Am Jur 2d, Constitutional Law 341-350; 45 Am Jur 2d, Intoxicating Liquors 283-285

10 Am Jur Trials 1, Obscenity Litigation

US L Ed Digest, Constitutional Law 925.7, 930; Intoxicating Liquors 12

ALR Digests, Constitutional Law 792(1); Intoxicating Liquors 27

L Ed Index to Anno, Freedom of Speech, Press, Religion, and Assembly; Indecency; Intoxicating Liquors

ALR Quick Index, Freedom of Speech and Press; Indecency, Lewdness, and Obscenity; Intoxicating Liquors

Federal Quick Index, Freedom of Speech and Press; Intoxicating Liquors; Lewdness, Indecency, and Obscenity

Annotation References:

Extent of state regulatory power L Ed 2d 805.

Constitutionality of regulation of under Twenty -first Amendment. 34 obscene motion pictures. 22 L Ed 2d 949.

The Supreme Court and the right of free speech and press. 93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.

Judicial decisions since Twenty-first Amendment relating to state power over intoxicating liquor. 84 L Ed 137, 88 L Ed 614.

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Public regulation and prohibition of sound amplifiers or loudspeaker broadcasts in streets and other public places. 10 ALR2d 627.

Construction and application of statute or ordinance respecting amusements on premises licensed for sale of intoxicating liquor. 4 ALR2d 1216.

Validity, construction, and application of statutes or ordinances relating to decency as regards wearing apparel or lack of it. 110 ALR 1233.

Public regulation of dancing, dance halls, dancing schools, etc. 48 ALR 144, 60 ALR 173.

Citation #8
342 F.3d 1182

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, also known as Uniao do Vegetal (USA)("UDV-USA"), a New Mexico corporation on its own behalf and on behalf of all its members in the United States; JEFFREY BRONFMAN, individually and as President of UDV-USA; DANIEL TUCKER, individually and as Vice-President of UDV-USA; CHRISTINA BARRETO, individually and as Secretary of UDV-USA; FERNANDO BARRETO, individually and as Treasurer of UDV-USA; CHRISTINE BERMAN; MITCHEL BERMAN; JUSSARA DE ALMEIDA DIAS, also known as Jussara Almeida Dias; PATRICIA DOMINGO; DAVID LENDERTS; DAVID MARTIN; MARIA EUGENIA PELAEZ; BRYAN REA; DON ST. JOHN; CARMEN TUCKER; SOLAR LAW, individually and as members of UDV-USA, Plaintiffs - Appellees, v. JOHN ASHCROFT, Attorney General of the United States; ASA HUTCHINSON, Administrator of the United States Drug, Enforcement Administration; PAUL H. O'NEILL, Secretary of the Department of Treasury of the United States; DAVID C. IGLESIAS, United States Attorney for the District of New Mexico; DAVID F. FRY, Resident Special Agent in Charge of the United States Customs Service Office of Criminal Investigation in Albuquerque, New Mexico, all in their official capacities, Defendants - Appellants, CHRISTIAN LEGAL SOCIETY; THE NATIONAL ASSOCIATION OF THE EVANGELICALS; CLIFTON KIRKPATRICK, as the Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.); QUEENS FEDERATION OF CHURCHES, Amicus Curiae.

No. 02-2323

UNITED STATES COURT OF APPEA LS FOR THE TENTH CIRCUIT

342 F.3d 1170; 2003 U.S. App. LEXIS 18373

September 4, 2003, Filed

SUBSEQUENT HISTORY: As Corrected September 9, 2003.

PRIOR HISTORY: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO. (D.C. No. CIV-00-1647 JP/RLP). *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236, 2002 U.S. Dist. LEXIS 26749 (D.N.M., 2002)*

DISPOSITION: Affirmed.

COUNSEL: Matthew M. Collette (Michael Jay Singer with him on the briefs), Attorneys, Appellate Staff Civil Division, Department of Justice, Washington, D.C., for Defendants-Appellants.

Nancy Hollander (John W. Boyd with her on the brief), of Freedom, Boyd, Daniels, Hollander, Goldberg & Cline, P.A., Albuquerque, New Mexico for Plaintiffs-Appellees.

Gregory S. Baylor, Nathan A. Adams, Kimberlee W. Colby, of Center for Law and Religious Freedom, Christian Legal Society, Annandale, Virginia, filed an amicus curiae brief on behalf of Plaintiffs-Appellees.

JUDGES: Before SEYMOUR, PORFILIO, and MURPHY, Circuit Judges. Murphy, Circuit Judge, dissenting.

OPINIONBY: PORFILIO

OPINION: [*1172] **PORFILIO**, Senior Circuit Judge.

John Ashcroft, Attorney General of the United States, et al., appeal an order in the United States District Court for the District of New Mexico preliminarily enjoining the government from prohibiting or penalizing the sacramental use of *hoasca*, a substance containing dimethyltryptamine (DMT), a drug listed in Section I of the Controlled Substances Act (CSA), *21 U.S.C. §§ 801* [**2] *-904*, by O Centro Espirita Beneficiente Uniao do Vegetal, a small religious organization. We affirm.

Uniao do Vegetal, President of the Uniao do Vegetal's United States chapter Jeffrey Bronfman, and several other church members (collectively, UDV) filed a Complaint for Declaratory and Injunctive Relief and a Motion for Preliminary Injunction against the United States Attorney General, United States Attorney for the District of New Mexico, the Drug Enforcement Administration (DEA), the United States Customs Service, and the Department of the Treasury (collectively, Government), [*1173] alleging violation of the *First*, *Fourth*, and *Fifth Amendments*, Equal Protection principles, the *Administrative Procedure Act (APA)*, international laws and treaties, and the Religious Freedom Restoration Act (RFRA), *42 U.S.C. § 2000bb-1*. UDV sought declaratory and preliminary injunctive relief against the Government's

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penalty or prohibition of the church's importation, possession, and use of *hoasca* and against any attempt to seize the drug or prosecute Uniao do Vegetal members.

After a two-week hearing, on August 12, 2002, the district court granted UDV's motion for a preliminary [**3] injunction in a unpublished Memorandum Opinion and Order. n1 The court rejected UDV's arguments that *hoasca* is not covered under the CSA and prohibiting the importation, possession, and use of the drug violates the Constitution and international law. However, the court held UDV had advanced a successful RFRA claim.

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n1 The district court rejected UDV's motion for preliminary injunction based on its Equal Protection claim in a February 25, 2002 order. In the August 12, 2002 order, the court held the CSA is a neutral law of general applicability, controlling drug consumption of religious and recreational users alike with the broad goal of protecting public health. The court rejected UDV's argument that *hoasca* is not listed in Schedule I of the CSA. Additionally, the court rejected UDV's argument that given the exemption to Brazilian drug laws for religious consumption of *hoasca*, principles of comity suggest the court should sanction sacramental use in this country. Finding the claims under the APA, the *Fourth Amendment*, and the *Fifth Amendment* primarily concern questions about the type of relief warranted, the court deferred ruling on these claims.

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[**4]

For purposes of the preliminary injunction, the Government did not dispute UDV had established a prima facie case under RFRA - a substantial burden imposed by the federal government on a sincere exercise of religion. *See* ***Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001)***. n2 The burden therefore shifted to the Government to show "the challenged regulation furthers a compelling interest in the least restrictive manner." *See 42 U.S.C. § 2000bb-1(b)*; ***United States v. Meyers, 95 F.3d 1475, 1482 (10th Cir. 1996)***. The Government asserted three compelling interests in prohibiting *hoasca*: protection of the health and safety of Uniao do Vegetal members; potential for diversion from the church to recreational users; and compliance with the 1971 United Nations Convention on Psychotropic Substances (Convention). Convention on Psychotropic Substances, opened for signature Feb. 21, 1971, 1019 U.N.T.S. 175 (ratified by the United States in 1980) [hereinafter Convention].

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n2 Note that UDV's establishment of a prima facie RFRA violation, standing alone, would have sufficed to demonstrate "a substantial likelihood of success on the merits," the first of four factors courts consider in granting a preliminary injunction. ***Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001)***. In ***Kikumura***, we held, "because Plaintiff's request for pastoral visits appear at this initial stage of the litigation to be a protected religious exercise, and because Defendants do not challenge the sincerity of Plaintiff's religious beliefs, Plaintiff need only prove that the denial of the pastoral visits was a 'substantial burden' on his 'exercise of religion' in order to show a substantial likelihood of success on the RFRA claim." ***Id. at 961***. Nevertheless, UDV's counter-evidence on the Government's alleged compelling interests serves as proof that the balance of harms and public interest, preliminary injunction factors three and four, tip in their favor.

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[**5]

The district court required the Government to prove sacramental *hoasca* consumption poses a serious health risk to Uniao do Vegetal members and, if sanctioned, would lead to significant diversion to non-religious use. Finding evidence on the health risks to UDV members "in equipoise," [*1174] evidence on risk of diversion "virtually balanced," and *hoasca* not covered by the Convention, the court held the Government failed to meet its "onerous burden" under RFRA. Because it found no compelling government interests, the court did not conduct a least restrictive means analysis.

The district court concluded UDV demonstrated "substantial likelihood of success on the merits" and satisfied the other three requirements for preliminary injunction. First, on irreparable injury, the court noted,

"Tenth Circuit law indicates that the violations of religious exercise rights protected under the RFRA represent irreparable injuries." Second, on balance of harms, the court held, "in light of the closeness of the parties' evidence regarding the safety of hoasca use and its potential for diversion, the scale tips in the Plaintiffs' favor." Finally, the court reasoned failure to vindicate religious freedom **[**6]** protected under RFRA - a statute specifically enacted by Congress, as representative of the public, to countermand a Supreme Court ruling - would be adverse to the public interest.

In an order dated November 12, 2002, the court delineated a remedy, preliminarily enjoining the Government from prohibiting or penalizing sacramental *hoasca* use by Uniao do Vegetal members. The court also required that the church, upon demand by the DEA, identify its members who handle *hoasca* outside of ceremonies, allow for on-site inspections and inventories, provide samples, identify times and locations of ceremonies, and designate a liaison to the DEA.

The Government moved for an emergency stay of the preliminary injunction pending appeal. On December 12, 2002, we granted the stay, holding UDV failed to demonstrate "clear and equivocal" right to relief. ***O Centro Espirita v. Ashcroft**, 314 F.3d 463, 467 (10th Cir. 2002).*

On appeal, UDV urged us to affirm the district court, contending the Government failed to prove *hoasca* poses health risks to church members, the Convention does not apply to *hoasca*, and Uniao do Vegetal's consumption of *hoasca* is comparable **[**7]** to the Native American Church's exempted use of peyote. Calling for a reversal, the Government's appeal focused on the compelling interests asserted below.

I. Background

A. Uniao do Vegetal

Uniao do Vegetal, a syncretic religion of Christian theology and indigenous South American beliefs, was founded in Brazil in 1961 by a rubber-tapper who discovered the sacramental use of *hoasca* (the Portuguese transliteration of ayahuasca) in the Amazon rainforests. A highly structured organization with elected administrative and clerical officials, UDV uses *hoasca*, which in the Quechua Indian language means "vine of the soul," "vine of the dead," or "vision vine," as a link to the divinities, a holy communion, and a cure for ailments physical and psychological. Church doctrine dictates members can perceive and understand God only by drinking *hoasca*. Brazil, in which there are about 8,000 Uniao do Vegetal members, recognizes Uniao do Vegetal as a religion and exempts sacramental use of *hoasca* from its prohibited controlled substances. *Hoasca* is ingested at least twice monthly at guided ceremonies lasting about four hours. Rituals during Uniao do Vegetal service **[**8]** include the recitation of sacred law, singing of chants by the leader, question-and-answer exchanges, and religious teaching.

Uniao do Vegetal has been officially in the United States since 1993, when its highest official visited and founded a branch in Santa Fe, New Mexico, subordinate to the Brasilia headquarters. Approximately **[*1175]** 130 Uniao do Vegetal members currently reside in the United States, thirty of which are Brazilian citizens. The Internal Revenue Service has granted Uniao do Vegetal tax exempt status.

Hoasca is made by brewing together two indigenous Brazilian plants, *banisteriopsis caapi* and *psychotria viridis*. *Psychotria* contains DMT; *banisteriopsis* contains harmala alkaloids, known as beta-carbolines, that allow DMT's hallucinogenic effects to occur by suppressing monoamine oxidase enzymes in the digestive system that otherwise would break down the DMT. Ingestion of the combination of plants allows DMT to reach the brain in levels sufficient to significantly alter consciousness.

Because the plants do not grow in the United States, *hoasca* is prepared in Brazil by Church officials and exported to the United States. On May 21, 1999, United States **[**9]** Customs Service agents seized a shipment of *hoasca* labeled "tea extract" bound for Jeffrey Bronfman and Uniao do Vegetal-United States. A subsequent search of Mr. Bronfman's residence resulted in the seizure of approximately 30 gallons of *hoasca*. Although the government has not filed any criminal charges stemming from church officials' possession of *hoasca*, it has threatened prosecution; accordingly, Uniao do Vegetal has ceased using the tea in the United States.

B. Legislation

The *Controlled Substances Act* makes it unlawful to "manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance, "except as authorized" by the Act. *21 U.S.C. § 841(a)(1)*. Possession is also criminalized except as authorized. ***Id.** § 844(a)*.

The CSA classifies controlled substances according to five schedules, based on required findings of a drug's safety, the extent to which it has an accepted medical use, and its potential for abuse. Schedule I, the most restrictive list, encompasses drugs with a "high potential for abuse," "no currently accepted medical use in treatment in the United States, **[**10]** " and "a lack of accepted safety for use of the drug or other

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substance under medical supervision." ***Id.*** *§ 812(b)(1)(A)-(C)*. Included in Schedule I is "any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances," including DMT. ***Id.*** *§ 812*. No individual or entity may distribute or dispense a Schedule I controlled substance except as part of a strictly controlled research project registered with the DEA and approved by the Food and Drug Administration, or for limited industrial purposes excluding human consumption of the substance. ***Id.*** *§ 823(f)*.

The 1971 United Nations Convention on Psychotropic Substances embodies an international effort "to prevent and combat abuse of [psychotropic] substances and the illicit traffic to which it gives rise." Convention, Preamble. The treaty classifies substances according to their degree of safety and medical usefulness, with Schedule I representing substances, including DMT, that are particularly unsafe and lack any medical use. Parties to the Convention, more than 160 nations in all, must "prohibit all use except for scientific and very limited medical purposes. **[**11]** " ***Id.*** Art. 7(a).

The Convention also bans unauthorized import and export of the substances and provides, "a preparation is subject to the same measures of control as the substance which it contains." ***Id.*** Art. 3(1). With respect to religious use of Schedule I substances, the Convention allows signatories to make "reservations" exempting a substance from the provisions of Article 7 under the following circumstances: **[*1176]** A State on whose territory plants are growing wild which contain psychotropic substances from among those in Schedule I and which are traditionally used by certain small, clearly determined groups in magical or religious rights, may, at the time of signature, ratification, or accession, make reservations concerning these plants, in respect of the provisions of article 7, except for provisions relating to international trade.***Id.*** Art. 32(4). Under this provision, the United States made a reservation for Native American religious use of peyote. Neither the United States nor Brazil has made a reservation for DMT.

The *First Amendment* states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free **[**12]** exercise thereof." U.S. Const. amend. I. *Employment Division, Dep't of Human Resources v. Smith* held the *Free Exercise Clause* did not require Oregon to exempt from its criminal drug laws the sacramental ingestion of peyote by members of the Native American Church. *494 U.S. 872, 885-890, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990)*. Generally applicable laws, the Court concluded, may be applied to religious exercises regardless of whether the Government demonstrates a compelling interest for its rule. ***Id.*** By contrast, a law that is not neutral and not generally applicable "must be justified by a compelling government interest and must be narrowly tailored to advance that interest." ***Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah***, *508 U.S. 520, 531-32, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993)*.

The *Religious Freedom Restoration Act*, enacted after ***Smith***, provides:(a) In generalGovernment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.(b) ExceptionGovernment may substantially burden **[**13]** a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial ReliefA person whose religious exercise has been burdened in violation of this section may assert that violation as a claim . . . in a judicial proceeding and obtain appropriate relief against a government.*42 U.S.C. § 2000bb-1*. RFRA restores the pre-***Smith*** compelling interest test espoused in ***Sherbert v. Verner***, *374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963)*, and ***Wisconsin v. Yoder***, *406 U.S. 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972)*. Congress explicitly stated, "the term 'demonstrates' means meets the burden of going forward with the evidence and of persuasion." *42 U.S.C. § 2000bb-2*.

Following Congress' passage of *RFRA*, the Supreme Court found it unconstitutional as applied to the states. ***City of Boerne v. Flores***, *521 U.S. 507, 519, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997)*. **[**14]** However, because we held RFRA is binding on the federal government, ***Kikumura***, *242 F.3d at 959*, pre-***Boerne*** case law is applicable here.

II. Analysis

"This court reviews the grant of a preliminary injunction for abuse of discretion," which occurs when a district court "commits an error of law, or is clearly erroneous in its preliminary factual findings." ***Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.***, *269 F.3d 1149, 1153* **[*1177]** *(10th Cir. 2001)* (citation omitted). We review a district court's decision on whether an interest qualifies as "compelling," a question of law, de novo. ***United States v. Hardman***, *297 F.3d 1116, 1120, 1127 (10th Cir. 2002)*. Although we have not ruled on the appropriate standard of review for a district court's analysis of "least restrictive

means," ***id.*** *at 1130*, we review de novo the "ultimate determination as to whether the RFRA has been violated." ***Meyers,*** *95 F.3d at 1482*. Likewise, we consider de novo the interpretation of the Convention. *See* ***Utah v. Babbitt,*** *53 F.3d 1145, 1148 (10th Cir. 1995)*. We review **[**15]** factual findings underlying the district court's legal conclusions for clear error. ***Hardman,*** *297 F.3d at 1120*.

The standard for a preliminary injunction is well known. A court will grant a preliminary injunction if a plaintiff shows "(1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest." ***Kikumura,*** *242 F.3d at 955*.

If a preliminary injunction alters the status quo, a plaintiff must "show that on balance, the four [preliminary injunction] factors weigh heavily and compellingly in [its] favor." ***SCFC ILC, Inc. v. Visa USA, Inc.,*** *936 F.2d 1096, 1099 (10th Cir. 1991)*. Altering the status quo requires a court to grant mandatory relief under which the non-moving party must take affirmative action, whereas prohibitory injunctive relief simply preserves the status quo. *See* ***id.*** (*citing* Note, 78 Harv.L.Rev. 994, 1062-63 (1965)). Here, **[**16]** the Government claimed the preliminary injunction alters the status quo - enforcement of the CSA and compliance with the Convention - and therefore asserted the right to relief must be proven "heavily and compellingly."

The requirement that a plaintiff seeking to alter the status quo prove the four preliminary injunction factors "heavily and compellingly" is not followed universally by federal courts. n3 Moreover, an examination of cases from our circuit demonstrates we support Wright and Miller's statement that "it often is difficult to determine what date is appropriate for fixing the status quo." 11A *Charles Alan Wright, Arthur R. Miller, & May Kay Kane, Federal* **[*1178]** *Practice and Procedure*, § 2948 at 137 (2nd ed. 1995). Some of our cases define the status quo as that which *immediately* preceded the litigation. *See* ***Prairie Band of Potawatomi Indians v. Pierce,*** *253 F.3d 1234, 1250 (10th Cir. 2001)*(status quo is situation existing at time litigation is instigated.); ***SCFC ILC, Inc. v. VISA USA, Inc.*** *936 F.2d 1096, 1099-1100 (10th Cir. 1991)*(status quo is existing status between parties at time court considers request for injunctive **[**17]** relief.); ***Kikumura v. Hurley,*** *242 F.3d 950, 955 (10th Cir. 2001)*(plaintiff sought to alter status quo through preliminary injunction demanding prison change existing pastoral visit policy).

---------- Footnotes ----------

n3 The requirement that a plaintiff seeking to alter the status quo prove the four preliminary injunction factors "heavily and compellingly" is not followed universally by federal courts. The Sixth Circuit, for instance, has wholly rejected the distinction between different standards of proof for mandatory versus prohibitory injunctive relief. In *United Food and Commercial Workers Union, Local 1099 v. Southwestern Ohio Regional Transit Auth., 163 F.3d 341, 348 (6th Cir. 1998)*, it held:We therefore see little consequential importance to the concept of status quo, and conclude that the distinction between mandatory and prohibitory injunctive relief is not meaningful. Accordingly, we reject the Tenth Circuit's 'heavily and compellingly' standard and hold that the traditional preliminary injunctive standard - the balancing of equities - applies to motions for mandatory preliminary injunctive relief as well as motions for prohibitory injunctive relief.*See also* ***Sluiter v. Blue Cross and Blue Shield of Michigan,*** *979 F. Supp. 1131, 1136 (E.D. Mich. 1997)* (refusing to apply the "heavily and compellingly" test, even though the Eastern District of Michigan had previously done so, because "maintenance of the status quo would threaten [plaintiffs'] lives"). Nor is it well developed in our circuit. We have not articulated the precise meaning of "heavily and compellingly;" instead, the heightened burden appears to influence our determination of how to balance the evidence presented on the preliminary injunction factors. Regardless, the "heavily and compellingly" standard remains a part of our jurisprudence.

---------- End Footnotes ----------

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Not all of our cases take such an absolute approach in defining the status quo, however. In ***Valdez v. Applegate,*** *616 F.2d 570 (10th Cir. 1980)*, livestock grazers brought an action to enjoin the New Mexico Bureau of Land Management's (BLM) implementation of a grazing plan which reduced the plaintiffs' ability to graze livestock. If we were to follow the approach

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supported by the government here, we must read BLM's implementation of grazing limits as the status quo because that was the state of affairs immediately preceding the litigation. Without much explanation, however, the *Valdez* court held implementation of the grazing plan should be enjoined to maintain the status quo. *Id. at 573*. It follows, then, the status quo in *Valdez* was the grazing rights enjoyed by the plaintiffs prior to the implementation of the grazing plan.

Likewise, in ***Dominion Video,*** the court refused to "extend the definition of the status quo to *invariably* include the last status immediately before the filing of injunctive relief." *269 F.3d at 1155* (emphasis added). In *Dominion Video*, Defendant EchoStar argued [** the status quo was its refusal to activate Dominion subscribers in accordance with terms in a contract between itself and Dominion. *Id.* Prior to this refusal, however, EchoStar had been activating Dominion subscribers regardless of the contract terms. Four days after EchoStar indicated it would no longer activate Dominion subscribers, Dominion brought an action seeking injunctive relief compelling EchoStar to [illegible] practice. *Id. at 1152*. This court rejected [illegible] ons that the status quo be confine[illegible] that preceded the filing of the motio[illegible] ive relief," *id. at 1155*, stating that the "last uncontested status between the parties was the four years in which EchoStar activated [illegible] bers." *Id.*

These [illegible] s to conclude the definition of qu[illegible] nction purposes depends very [illegible] on the [illegible] a particular case. *Valdez* and *Dominion Video* support the position that the status quo in this case s[illegible]d be viewed as the time when the plaintiffs were e[illegible]cising their religious freedoms the government enforced the CSA **[**20]** [illegible] them. As UDV asserts in its brief, the church wa[illegible]ssessing its sacrament and practicing its religion. *See* Aple. Br. at 53. Like ***Dominion Video***, it was the government's enforcement action which *changed* the status quo and became the impetus for this litigation. *See* ***Dominion Video***, *269 F.3d at 1155*. Hence, the last *uncontested* status between the parties was the plaintiffs' uninhibited exercise of their faith. It is the government's attempt to disrupt that status that UDV seeks to enjoin.

To say the enforcement of the CSA and the Convention against UDV is the status quo ignores the part played in this case by the RFRA. Having based its complaint in RFRA, UDV asserted the existence of a prima facie case, defined as a substantial burden imposed by the federal government on a sincere exercise of religion. *See* ***Kikumura***, *242 F.3d at 960*. **[*1179]** The Government has conceded UDV established its prima facie case. This concession buttresses the conclusion that the status quo here is not the need to enforce the CSA but rather UDV's religious practice free from a governmentally imposed burden.

Nor do we share the concern of the **[**21]** dissent that because of this reasoning "any party could establish the status quo by surreptitiously engaging in behavior that violated a statute until discovered by law enforcement authorities and then claiming that it is the enforcement of existing law that amounts to a change in the status quo." It is true that under our construction, a plaintiff using a CSA-listed substance or engaging in any other federally prohibited activity could claim a RFRA violation. However, a plaintiff who held insincere religious beliefs or whose practices were not, in fact, burdened by federal laws, would not pass the prima facie stage of RFRA, and, therefore, would not escape the heightened burden of proof for the four preliminary injunction factors. *See, e.g.,* ***United States v. Meyers,*** *95 F.3d 1475, 1484 (10th Cir. 1996)* (refusing to dismiss marijuana charges against defendant based on RFRA because his "beliefs more accurately espouse a philosophy and/or way of life rather than a 'religion'").

Moreover, even under the standard preliminary injunction test, a court could easily dispose of claims which, while constituting a RFRA prima facie case, had already been ruled invalid. **[**22]** For instance, even under the standard preliminary injunction test, a plaintiff seeking to use marijuana for religious purposes would likely not be able to demonstrate a substantial likelihood of success on the merits because courts have already ruled against sacramental marijuana claims. *See, e.g.,* ***United States v. Rush,*** *738 F.2d 497, 512 (1st Cir. 1984)* (concluding the Government has a compelling interest in banning the possession and distribution of marijuana notwithstanding the burden on religious practice).

Nor do we perceive a sinister quality to the plaintiffs' practicing their religion in secret. Indeed, history provides many examples in which then unpopular religious beliefs were not openly held. For example, the early Christian church conducted its services in the Roman catacombs. Secrecy, to the faithful, was an essential to self-preservation.

A. Health Risks to Uniao do Vegetal Members

The district court found the evidence on the health risks to Uniao do Vegetal members from *hoasca* use was "in equipoise." The dearth of conclusive research on the effects of *hoasca* and DMT fuels the controversy in this case. One preliminary study, **[**23]** conducted in 1993 by Dr. Charles Grob, Professor of Psychiatry at the University of California, Los Angeles, compared 15 long-term Uniao do

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Vegetal members, who drank *hoasca* for several years, with 15 control subjects who never ingested the tea. Researchers administered a series of psychiatric, neuropsychological, and physical tests and compiled life story interviews. In articles published in various scientific journals, researchers reported a positive overall assessment of the safety of *hoasca*. While acknowledging the limitations of his investigation, Dr. Grob testified:[it] did identify that in a group of randomly collected male subjects who had consumed ayahuasca for many years, entirely within the context of a very tightly organized syncretic church, there had been no injurious effects caused by their use of ayahuasca. On the contrary, our research team was consistently impressed with the very high functional status of the ayahuasca subjects.

[*1180] As the Government emphasized and the district court acknowledged, DMT's Schedule I listing represents a Congressional finding the substance "has a high potential for abuse," "no currently accepted medical use," and "a **[**24]** lack of accepted safety for use under medical supervision." *21 U.S.C. § 812(b)(1)*. Addressing the Grob study specifically, the Government highlighted methodological limitations, including the small size, male-only subjects, and selection bias. According to Dr. Alexander Walker, a Professor of Epidemiology at the Harvard School of Public Health, the selection of long-term members of Uniao do Vegetal, individuals who were able to conform to its norms over extended periods, without a similar requirement for stable, long-term, voluntary church attendance applied to the control group, ensured the *hoasca*-consuming group necessarily had a favorable psychological profile.

Testifying for the Government, Dr. Sander Genser, Chief of the Medical Consequences Unit of the Center on AIDS and Other Medical Consequences of Drug Abuse at the National Institutes of Health, testified, "existing studies have raised flags regarding potential negative physical and psychological effects" of *hoasca*. Dr. Genser cited a study in which two subjects consuming intravenously administered DMT experienced a high rise in blood pressure, and another had a recurrence of depression. Information **[**25]** about the dangerous effect of other hallucinogenic substances, according to Dr. Genser, raises concerns about *hoasca*. For instance, especially in individuals with pre-existing psychopathology, lysergic acid diethylamide (LSD), a hallucinogen substance that shares pharmacological properties with DMT, may produce prolonged psychotic reactions or posthallucinogen perceptual disorder, commonly known as "flashbacks," defined as the reemergence of some aspect of the hallucinogenic experience in the absence of the drug.

In response, UDV emphasized important differences in ceremonial use and reported effects of *hoasca*. UDV expert, Dr. David Nichols, Professor of Medical Chemistry and Molecular Pharmacology at Purdue University, declared, "orally ingested hoasca produces a less intense, more manageable, and inherently psychologically safer altered state of consciousness." Further, he testified, the "set and setting" in which an individual takes a hallucinogen are critical in determining the experience. Dr. Grob attested to the absence of evidence of flashbacks from *hoasca* use and the milder intensity and shorter duration of *hoasca*'s effects compared to those of other hallucinogens. **[**26]** He also declared the ritual setting of Uniao do Vegetal members' consumption minimizes danger and optimizes safety.

Adverse drug interactions stemming from the beta carbolines in *banisteriopsis* are a potential danger acknowledged by even UDV. Individuals who ingest *hoasca* while on certain medications may be at increased risk for developing seratonin syndrome, a condition caused by excessive serotonin levels with symptoms including euphoria, drowsiness, sustained rapid eye movement, overreaction of the reflexes, confusion, dizziness, hypomania, shivering, diarrhea, loss of consciousness, and death. Several types of antidepressants, among other drugs, contain selective serotonin reuptake inhibitors (SSRIs), which trigger the release of serotonin or prevent its reuptake. Monoamine oxidase (MAO) inhibitors, including *hoasca*, interfere with the metabolization of serotonin. The MAOs in *hoasca* may hinder the metabolization of greater levels of serotonin made available by the use of SSRIs.

Dr. Genser, for the Government, noted "irreversible" MAO inhibitors, which bind to an MAO molecule and may forever destroy its function, may harmfully interact **[*1181]** with many medicines, as well **[**27]** as with a chemical found in some common foods. Conceding a risk of adverse drug interactions, UDV noted the church has instituted a system screening members' use of medications. However, UDV maintained the danger is not so substantial as to warrant a government ban on sacramental *hoasca* use. First, *hoasca* does not contain irreversible MAO inhibitors, the kind associated with the most severe drug interactions. Rather, as UDV experts testified, the potential for adverse interaction is reduced and the effect of any reaction is shorter and much milder with *hoasca* than with irreversible MAOs. Second, Uniao do Vegetal leadership has carefully addressed the possible danger of adverse drug interactions. Dr. Grob declared, "following discussions of our concerns with physicians of the UDV, all prospective participants in ceremonial hoasca sessions have been carefully

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interviewed to rule out the presence of ancillary medication that might induce adverse interactions with hoasca." Finally, according to UDV, the risk of adverse drug interaction associated with *hoasca* falls within the normal spectrum of concerns. Government experts highlighted other dangerous aspects of *hoasca* **[**28]** , including the increased risk of psychotic episodes. Based on data collected by the medical-scientific department of the Brazilian Uniao do Vegetal, Dr. Genser testified, "pyschosis is definitely of most concern." UDV countered with expert testimony suggesting the link between psychotic disturbances and *hoasca* is coincidental, rather than causal, and that the reported very low occurrence of psychosis among church members in Brazil is equal or less than the rate in the general population.

We see no basis for disagreeing with the district court's characterization of the evidence as "in equipoise" and hold proper its determination the Government failed to satisfy its RFRA burden on the issue of health and safety risks of *hoasca*. Although studies of *hoasca* are preliminary and limited, Dr. Grob's research indicates an overall positive assessment of the health effects of the substance. Dr. Nichols, expert for the UDV, cogently highlighted the differences between the effects of *hoasca* versus intravenously injected DMT. He further stressed the importance of "set and setting" - for Uniao do Vegetal, a guided, calm ceremony - in determining the psychological impact of hallucinogens. **[**29]**

Critical to this case is that the Government's burden under RFRA was to demonstrate a ban on *hoasca* use by the Uniao do Vegetal, not a ban on hallucinogens in general, promotes a compelling interest in health and safety. The court acknowledged if it "were employing a more relaxed standard to review the application of the CSA to the UDV's use of hoasca, it would be very reluctant to question this Congressional finding concerning DMT." But RFRA provides, "government may substantially burden a person's exercise of religion only if it demonstrates that *application of the burden to the person*" furthers a compelling interest, not merely application of the law in general. *42 U.S.C. § 2000bb-1(b)* (emphasis added). "Under RFRA, a court does not consider the [law] in its general application, but rather considers whether there is a compelling govemment reason, advanced in the least restrictive means, to apply the [law] to the individual claimant." ***Kikumura**, 242 F.3d at 962.*

Thus, recitation of the criteria for listing a substance on CSA Schedule I and of the general danger of hallucinogens does not, in this record, evince a compelling **[**30]** government interest under RFRA. Moreover, "evidence which does not preponderate or is in equipoise simply fails to meet the required burden of proof." ***United States v. Kirk**, 894 F.2d 1162, 1164 (10th Cir. 1990)*. The Government "failed to build an **[*1182]** adequate record" demonstrating danger to Uniao do Vegetal members' health from sacramental *hoasca* use. ***Hardman**, 297 F.3d at 1133.*

B. Risk of Diversion to Non-Religious Use

The district court concluded the evidence of risk of diversion of *hoasca* from Uniao do Vegetal to non-ceremonial users is "virtually balanced," and, accordingly, held the Government failed to meet its "difficult burden" under RFRA. Further, in a footnote, the court noted, "the specificity of Dr. Kleiman's analysis [testifying for UDV] may even tip the scale slightly in favor of Plaintiffs' position."

The Government argued *hoasca* used by Uniao do Vegetal would be vulnerable to diversion. Testifying for the Government, Terrance Woodworth, Deputy Director of the Drug Enforcement Administration's Office of Diversion Control, identified several factors utilized to assess a controlled substance's potential for **[**31]** diversion, including the existence of an illicit market, the presence of marketing or publicity, the form of the substance, and the cost and opportunity for diversion. Focusing on patterns of drug abuse in the United States, Mr. Woodworth noted a recent substantially increased interest in hallucinogens in this country. Advertisements for *hoasca* on the internet and rising consumption of the tea in Europe evince demand for *hoasca* on the illicit market.

According to Mr. Woodworth, the low level of *hoasca* currently consumed is attributable to the lack of available native plants in this country. Were Uniao do Vegetal allowed to import the tea, the likelihood of diversion and abuse would increase. Further, the fact the tea must be shipped from Brazil, where *hoasca* is unregulated, along with the uncooperative relationship between the DEA and Uniao do Vegetal, suggest an exemption for sacramental use would result in illegal diversion.

Dr. Jasinski, Professor of Medicine at the Johns Hopkins School of Medicine, a Government witness, stated he believes the risk of abuse of *hoasca* is substantial. In his view, positive reinforcing, or "euphoric," effects - "the transient **[**32]** alterations in mood, thinking, feeling, and perceptions produced by [a] drug" - are the primary factors leading individuals to try and repeatedly use a drug of abuse. Dr. Jasinski noted research on intravenously injected DMT and preliminary studies on *hoasca* indicate these substances produce euphoric effects, although those of *hoasca* "are slower in onset, milder in intensity, and longer in duration."

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While acknowledging the negative effects of *hoasca*, nausea and vomiting, may act as a deterrent to some people, Dr. Jasinski pointed out the percentage of users who vomit is unknown, and, regardless, the negative effects may not outweigh the positive to the extent necessary to deter use. Further, he testified the pharmacological similarities between LSD, recognized to have abuse potential, and DMT support an inference *hoasca* has substantial abuse potential.

By contrast, UDV maintained *hoasca* does not carry significant potential for abuse or diversion. UDV expert, Dr. Kleiman, Professor of Policy Studies at the University of California, Los Angeles, reported the negative effects of *hoasca* and availability of pharmalogically equivalent substitutes indicate demand **[**33]** for the substance would be low. Hallucinogen users may not tolerate nausea and vomiting. Dr. Kleiman has written:hallucinogen substances, including DMT, score much lower on scales measuring reinforcement, and have much less tendency to create dependency, than opiates, such as heroin . . . a much smaller **[*1183]** proportion of hallucinogen users than of opiate users would be so strongly driven to seek out the drug experience as to neglect the presence of side-effects.

Further, the tea-like mixture ingested by Uniao do Vegetal members would not be particularly attractive to individuals seeking an oral DMT experience. Instead, "any preparation that included DMT and a sufficient quantity of any monoamine oxidase inhibitor would suffice." Plants containing DMT and harmala alkaloids are available in the United States, some of which when combined do not induce vomiting. Dr. Kleiman declared, "the widespread availability of pharmacologically equivalent substitutes, some of them with fewer unwanted side-effects and less apparent legal risk, would greatly reduce the motivation to divert the sacramental material for the purposes of drug abuse."

Dr. Kleiman also ecounted other factors he **[**34]** believes would counteract *hoasca* diversion. First, Uniao do Vegetal-United States is a very small church and would only import about 3,000 doses per year from Brazil. Second, the relatively thin potential market for *hoasca* would reduce the likelihood of diversion that might occur with widely-used drugs. An individual illegally in possession of *hoasca* would have greater trouble locating a buyer than a cocaine thief. Third, the bulky form of *hoasca* would deter diversion. Dr. Kleiman stated, "the ease of stealing goes up as the volume goes down. The larger the volume, the harder something is to steal." Finally, Uniao do Vegetal has strong incentives to keep its *hoasca* supply from being diverted, as ingestion of the tea outside the sacramental context is considered sacrilegious.

We see no clear error in the district court's characterization of the evidence on the potential for diversion as "virtually balanced." Upon de novo review, we agree with the court's legal conclusion that the Government failed to demonstrate a compelling interest. Notwithstanding the competent reports of experts Mr. Woodworth and Dr. Jasinski, speculation based on preliminary *hoasca* studies **[**35]** and generalized comparisons with other abused drugs, particularly in the face of Dr. Kleiman's powerful contradictory testimony, does not suffice to meet the Government's onerous burden of proof.

C. United Nations Convention on Psychotropic Substances

Believing the Government's strongest arguments for prohibiting Uniao do Vegetal's *hoasca* use to be health and diversion risks, the district court did not ask the parties to present evidence on the Convention at the hearing. However, in issuing a preliminary injunction, the court qualifiedly rejected the Government's assertion that the Convention requires the United States ban Uniao do Vegetal's sacramental *hoasca* use. The court concluded the treaty does not cover *hoasca*.

On appeal, the parties take opposing views of whether the Convention's proscription includes *hoasca*. At this point, we do not believe the resolution of this argument is necessary to the appeal. We therefore decline to grant what could only amount to an advisory opinion.

Although "treaties are recognized by our Constitution as the supreme law of the land," ***Breard v. Greene**, 523 U.S. 371, 376, 140 L. Ed. 2d 529, 118 S. Ct. 1352 (1998)* **[**36]** (per curiam), that rule does not decide this case. Here we are presented with a conflict between the government's obligations under the 1971 Convention and its obligations under RFRA. In such a situation, the Supreme Court has directed "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute, to the extent of conflict, **[*1184]** renders the treaty null." ***Id.*** *(quoting **Reid v. Covert**, 354 U.S. 1, 18, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957)* (plurality opinion)). *See also **Whitney v. Robertson**, 124 U.S. 190, 194, 31 L. Ed. 386, 8 S. Ct. 456 (1888)* (if treaty and statute conflict, "the one last in date will control the other").

Thus, even if the Convention does apply to *hoasca*, the United States has obligations under its laws and other international treaties to protect religious freedom. Treaties are part of the law of the land; they have no greater or lesser impact than other federal laws. ***In re Cooper**, 143 U.S. 472, 502, 36 L. Ed. 232, 12 S. Ct.*

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453 (1892). "The freedom to manifest religion . . . in worship, **[**37]** observance, practice and teaching encompasses a broad range of acts" including "ritual and ceremonial acts" and "participation in rituals." *U.N. Hum. Rts. Comm., General Comment No. 22*, at 4 (1993). Moreover, a compelling interest in abiding by certain laws, including the CSA and the Convention, does not suffice, standing alone, to carry the Government's burden under RFRA. ***Hardman**, 297 F.3d at 1125*. RFRA requires that an asserted compelling interest be narrowly tailored to the specific plaintiff whose religious conduct is impaired. ***Id.***

The Government cites the declaration of Robert E. Dalton, a State Department lawyer for the Treaty Affairs Office, opining that, "the need to avoid a violation of . . . the treaty . . . is undoubtedly a compelling interest," and that violation of the Convention would undermine the United States' leadership role in curtailing illicit drug trafficking. Yet, Mr. Dalton speaks only in the most general of terms regarding the United States' interest in complying with the 1971 Convention, and he does not provide any specifics about why such compliance, resulting in the burdening of the UDV's religious freedoms, represents **[**38]** the least restrictive means of furthering the government's compelling interests. This statement falls short of the government's burden. *See 42 U.S.C. § 2000bb-1(b)*; ***Hardman**, 297 F.3d at 1130-32* (mere speculation or a "record devoid of hard evidence indicating that the current regulations are narrowly tailored to advance the government's interests" which "does not address the possibility of other, less restrictive means of achieving" those interests is insufficient to satisfy the government's burden under RFRA). Based on the record before us, we cannot conclude the government has demonstrated that "application of the burden to the [UDV] (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." *42 U.S.C. § 2000bb-1(b)*.

D. Additional Arguments

Congress has indicated courts should look to cases predating Smith in construing and applying RFRA. *See* H.R. Rep. No. 103-88, 103d Cong., 1st Sess., at 6-7 (1993). Importantly, however, Congress' purpose in enacting RFRA was to restore the legal standard **[**39]** applied in pre-*Smith* decisions, rather than to reinstate actual outcomes. S. Rep. No. 103-111, 103d Cong., at 9, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898.

The district court correctly distinguished on two grounds cases cited by the Government denying individuals' free exercise challenges to drug laws. First, the sincerity of the Uniao do Vegetal faith and the substantial burden the CSA imposes on the practice of the religion are uncontested. By contrast, courts in other RFRA cases cited by the Government have found the plaintiff's beliefs are not religious, are not sincerely held, or are not substantially burdened by governmental action.

[*1185] For instance, in *United States v. Meyers*, involving a criminal defendant who moved under RFRA to dismiss the marijuana charges brought against him, we held in light of the secular nature of Mr. Meyers' views on the medical, therapeutic, and social benefits of marijuana, "Meyers' beliefs more accurately espouse a philosophy and/or way of life rather than a 'religion.'" *95 F.3d at 1484*. Likewise, in cases involving Rastafarianism, where marijuana is a sacrament, the Ninth Circuit concluded the religion did not **[**40]** require distribution, possession with intent to distribute, and money laundering, ***United States v. Bauer**, 84 F.3d 1549, 1559 (9th Cir. 1996)*; or the importation of marijuana, ***Guam v. Guerrero**, 290 F.3d 1210, 1223 (9th Cir. 2002)*. However, in ***Bauer***, the Ninth Circuit held the district court erred in prohibiting the defendants from using RFRA as a defense to simple possession charges. *84 F.3d at 1559*.

Second, *hoasca* and marijuana differ. Marijuana is associated with problems of abuse and control, leading courts to ascertain a particular government interest in its prohibition even for religious uses. ***United States v. Greene**, 892 F.2d 453, 456-57 (6th Cir. 1989)* ("Every federal court that has considered this issue has accepted Congress' determination that marijuana poses a real threat to individual health and social welfare and has upheld criminal penalties for possession and distribution even where such penalties may infringe to some extent on the free exercise of religion."). As the D.C. Circuit observed in acknowledging the legality of the Native American Church's use of peyote but refusing **[**41]** to grant a religious exemption to marijuana, Uniao do Vegetal's use of *hoasca* occurs in a "traditional, precisely circumscribed ritual" where the drug "itself is an object of worship" and using the sacrament outside the religious context is a sacrilege. ***Olsen v. DEA**, 878 F.2d 1458, 1464, 279 U.S. App. D.C. 1 (D.C. Cir. 1989)*.

According to the Government's reading of precedent involving marijuana and LSD, the Schedule I listing of DMT is enough, standing alone and without further proof of adverse health effects, to demonstrate a compelling interest in a ban on all *hoasca* use. In ***United States v. Rush***, for instance, the First Circuit, concluding the Government has a compelling interest in banning the possession and distribution of marijuana notwithstanding the burden on religious practice,

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found, "Congress has weighed the evidence and reached a conclusion which it is not this court's task to review *de novo*." *738 F.2d 497, 512 (1st Cir. 1984)*. The ***Rush*** court declined "to second-guess the unanimous precedent." ***Id.*** *at 512-13*.

Along with ***United States v. Oakland Cannabis Buyers' Cooperative***, *532 U.S. 483, 493, 149 L. Ed. 2d 722, 121 S. Ct. 1711 (2001)*, **[**42]** ***Rush*** affirms courts should accord great deference to Congress' classification scheme in the CSA and "be cautious not to rewrite legislation." ***Marshall v. United States***, *414 U.S. 417, 427, 38 L. Ed. 2d 618, 94 S. Ct. 700 (1974)*. As the district court in the present case acknowledged, the legislative branch's placement of materials containing DMT in Schedule I reflects a finding such substances have a high potential for abuse and no currently accepted medical use, and lack safety even if used under medical supervision. *21 U.S.C. § 812 (b)(1)*. Nevertheless, through RFRA, Congress mandated courts to consider whether the application of the burden to the claimant "is in furtherance of a compelling government interest." *42 U.S.C. § 2000bb-1(b)*. Mere recitation of Congressional findings of a general danger is insufficient to satisfy RFRA.

The Government advanced several additional compelling interests: the uniform application of the CSA, the need to avoid burdensome and constant official supervision **[*1186]** and management of Uniao do Vegetal, and the possibility of opening the door to myriad claims for religious exceptions. **[**43]** Averring these arguments were raised for the first time on appeal, UDV urged us not to consider them. ***McDonald v. Kinder Morgan, Inc.***, *287 F.3d 992, 999 (10th Cir. 2002)* n4 ("Absent extraordinary circumstances, we will not consider arguments raised for the first time on appeal. This is true whether an appellant is attempting to raise 'a bald-faced new issue' or 'a new theory on appeal that falls under the same general category as an argument presented at trial.'") (citation omitted). We do not believe the Government's additional compelling interests constitute "bald-faced new issues" or a "new theories." Rather, finding they fall into the same general category of arguments raised below regarding the interpretation of the CSA and risk of diversion, we address them.

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n4 UDV offered an alternative ground on which we can affirm the district court's result: equal protection. Because the Native American Church's use of peyote is protected, so too should Uniao do Vegetal's use of *hoasca*. The district court disagreed, and we affirm. As the court noted, our government has a special relationship with Native American tribes, rendering the Uniao do Vegetal and Native American Church disparately situated despite similarities in religious practice. ***Peyote Way Church of God v. Thornburgh***, *922 F.2d 1210, 1216 (1991)* (Fifth Circuit holding the disparate treatment of Native American peyote religion justified by the government's trust relationship with Native Americans).

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[44]**

We conclude the Government's additional alleged compelling interests are unavailing. First, we do not believe uniform application of the CSA warrants denial of an exemption for Uniao do Vegetal's sacramental *hoasca* consumption. For reasons stated above, cases involving marijuana, heroin, and LSD are distinguishable. The Government argued the existence of the 1994 amendment to the *American Indian Religious Freedom Act*, providing a statutory exemption from state prosecution of Native American Church's peyote use, indicates RFRA alone could not sustain an exemption for ceremonial peyote. Likewise, argued the Government, RFRA cannot here support a *hoasca* exemption. But, while the 1994 amendment gave the Native American Church a legislative categorical exemption, RFRA rests the outcome on the government's proof. RFRA only provides access to the courts, placing on the government the burden of justifying a ban on a religious use of a controlled substance. Federal protection of peyote existed well before RFRA; the statute protected the Native American Church only from state prosecution.

Second, the relatively unproblematic state of peyote regulation and use belies the Government's **[**45]** claimed need for constant official supervision of Uniao do Vegetal's *hoasca* consumption. The DEA does not closely monitor the Native American Church's peyote use, guard the mountains in Texas on which peyote is grown, nor monitor the distribution of peyote outside of Texas. Since its legalization for use by the Native American Church in 1966, peyote remains extremely low on the list of abused substances. While thus far the relationship between Uniao do Vegetal and the DEA has been adversarial, allowing an exemption for religious use might lead to a cooperative relationship similar to the one between the government and the Native American Church. Regardless, the Government cannot overcome RFRA by alleging an increased need for resources.

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Third, the specter of a slew of claims for religious exemptions to the CSA does not evince a compelling interest under RFRA. Our ruling in the present appeal in no way calls into question cases refusing to grant an exemption to the CSA for marijuana, LSD, heroin, or any other controlled substances. UDV's position is distinct, and as **[*1187]** RFRA requires, we have looked at the specific circumstances of Uniao do Vegetal's ceremonial *hoasca* use and assessed **[**46]** the Government's asserted compelling interests. While we need not consider the CSA in a vacuum, the bald assertion of a torrent of religious exemptions does not satisfy the Government's RFRA burden. Moreover, we leave open the possibility that future evidence of the health effects and diversion potential may allow the Government to prove a compelling interest in enforcing of the CSA against *hoasca*'s sacramental use.

III. CONCLUSION

For these reasons, at this juncture, we hold UDV has demonstrated a substantial likelihood of success on the claim for an exemption to the CSA for sacramental *hoasca* use. We find the other conditions for granting a preliminary injunction present as well. Because "a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA," ***Kikumura**, 242 F.3d at 963*, we conclude the irreparable harm requirement for a preliminary injunction is satisfied. On the balance of the harms and adversity to the public interest, we recognize the importance of enforcement of criminal laws, including the CSA. ***New Motor Vehicle Board v. Orrin W. Fox Co.**, 434 U.S. 1345, 1351, 54 L. Ed. 2d 439, 98 S. Ct. 359 (1977)* **[**47]** (in a case involving enforcement of the *California Automobile Franchise Act*, noting a state "suffers a form of irreparable injury" any time it "is enjoined by a court from effectuating statutes enacted by representatives of its people"). Nevertheless, as RFRA - a statute enacted by representatives of the people to protect religious freedom - acknowledges, harm ensues from the denial of free exercise and the public has a significant interest in unburdened legitimate religious expression. Given the critical evidence in support of the Government's alleged compelling interests was "in equipoise" and "virtually balanced," we agree with the district court that UDV has demonstrated the balance of harms and public interest tip in their favor. We **AFFIRM**.

DISSENTBY: Murphy

DISSENT: Murphy, Circuit Judge, dissenting.

The majority affirms a preliminary injunction prohibiting the United States n1 from enforcing the Controlled Substances Act ("CSA"), *21 U.S.C. § 801 et seq.*, thereby placing the United States in violation of the United Nations Convention on Psychotropic Substances, Feb. 21, 1971 (the "Convention"), *32 U.S.T. 543*. Because the majority **[**48]** utilizes the wrong standard in determining whether O Centro Espirita Beneficiente Uniao do Vegetal ("UDV") has made the necessary showing for obtaining a preliminary injunction, and because UDV has not shown that the preliminary injunction factors weigh heavily and compellingly in its favor, I respectfully dissent.

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n1 Each of the defendant-appellants in this case is an officer of the United States sued in his official capacity.

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I. Improper Standard for Preliminary Injunction

The United States asserts that the district court abused its discretion in granting UDV a preliminary injunction because it utilized an improper standard. *See SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991)* ("We will set aside a preliminary injunction if the district court applied the wrong standard when deciding to grant the preliminary injunction motion."). In particular, the United States asserts that because the preliminary injunction **[*1188]** requested by UDV alters the status quo, the district **[**49]** court should have required UDV to "show that on balance, the four [preliminary injunction] factors weigh heavily and compellingly in [its] favor." *Id. at 1099*. The majority's response to this argument is two-fold: (1) "the last *uncontested* status between the parties was the plaintiffs' uninhibited exercise of their faith," Majority Op. at 14 (alteration in original); and (2) UDV's establishment of a *prima facie* case under the *Religious Freedom Restoration Act* "buttresses the conclusions that the status quo here is not the need to enforce the CSA but rather UDV's religious practice free from a governmentally imposed burden," *id. at 14-15*. Neither of the reasons posited by the majority for concluding that the status quo favors UDV's use of *hoasca* is convincing.

The majority's conclusion that the status quo in this case is contingent on the merits of UDV's RFRA claim is clearly at odds with binding Tenth Circuit precedent. In *SCFC ILC*, the proponent of a preliminary injunction argued that the preliminary injunction entered by the district court preserved the status quo because it was entitled to the relief afforded in the preliminary injunction **[**50]** under various federal and state laws. *936 F.2d at 1099*. This court explicitly

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rejected the contention that the status quo is measured by the parties' legal rights, holding as follows:MountainWest confuses "what should be" with "what is." While [Plaintiff] may eventually succeed in convincing the district court, on the merits, to order Visa to issue the cards to it, a final decision so holding would unquestionably alter the status quo. The status quo is not defined by the parties existing *legal rights*; it is defined by the *reality* of the existing status and relationships between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties' legal rights.*Id. at 1100* (footnote omitted).

Despite the clear and unambiguous language in *SCFC ILC* defining the status quo by reference to the reality of the parties' existing status and relationship, as opposed to the parties' legal rights, the majority concludes that the status quo in this case should be measured with reference to the parties' litigation positions, i.e., whether UDV established the **[**51]** existence of a *prima facie* case under RFRA. *See* Majority Op. at 14-15. The majority, like the proponent of the preliminary injunction in *SCFC ILC*, has "confused 'what should be' with 'what is.'" *Id. at 1100*. In so doing, the majority has carved out the following special rule in RFRA cases: the status quo ante is irrelevant when the proponent of an injunction has submitted evidence establishing a *prima facie* case under RFRA. This special rule, however, is at odds with *SCFC ILC*. *See In re Smith, 10 F.3d 723, 724 (10th Cir. 1993)* (per curiam) ("We cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.").

Nor is the majority correct in asserting that the status quo in this case is UDV's use of *hoasca* because it was the government's enforcement of the CSA that was the impetus for the present litigation. Majority Op. at 14. As noted by the panel that stayed the district court's preliminary injunction pending appeal, the status quo in this case is the enforcement of the CSA and compliance with **[**52]** the Convention. *See O Centro Espirita Beneficiente Uniao de Vegetal (USA), Inc. v. Ashcroft, 314 F.3d 463, 466 (10th Cir. 2002)*. The record makes clear that both the UDV itself and the United States recognized **[*1189]** that the importation and consumption of *hoasca* violated the CSA.

The UDV has made a concerted effort to keep secret their importation and use of *hoasca*. On the relevant import forms, UDV officials in the United States generally referred to *hoasca* as an "herbal tea"; they never called it *hoasca* or ayahuasca or disclosed that it contained DMT. UDV president Jeffrey Bronfman informed customs brokers that the substance being imported was a "herbal extract" to be used by UDV members as a "health supplement." Furthermore, in an e-mail drafted by Bronfman, he emphasized the need for confidentiality regarding UDV's "sessions" involving *hoasca*: "Some people do not yet realize what confidentiality is and how careful we need to be. People should not be talking publicly anywhere about our sessions, where we have them and who attends them." Finally, when UDV attempted to grow *psychotria viridis* and *banisteriopsis caapi* in the United States, it **[**53]** imported the seeds and plants "clandestinely," in the words used by UDV, and required its members to sign confidentiality agreements to keep their attempts secret. All of these actions by plaintiff UDV demonstrate a recognition that its importation and consumption of *hoasca* violated the CSA. Likewise, when the United States realized that UDV was importing a preparation which contained DMT, it seized that shipment and additional quantities of the preparation found in a search of Bronfman's residence. Accordingly, although UDV eventually sought a preliminary injunction after the seizure of the *hoasca*, at all times leading up to that event the record reveals that the status quo was the enforcement of the CSA. n2

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n2 UDV baldly asserts in its brief on appeal that "the 'status quo' before this litigation was that the plaintiffs possessed their sacrament and practiced their religion. Defendants' conduct changed the status quo, and did not create the status quo." UDV Brief at 53-54. Under this theory, any party could establish the status quo by surreptitiously engaging in behavior that violated a statute until discovered by law enforcement authorities and then claiming that it is the enforcement of existing law that amounts to a change in the status quo. UDV's assertion might have some persuasive force if it had openly imported and consumed *hoasca* and the United States had acquiesced in those actions for a period of time before changing course and enforcing the CSA. Under the facts of this case, however, UDV's assertion is meritless. Unfortunately, the majority signs off on UDV's argument and makes it the law of this circuit. *See* Majority Op. at 14. I simply fail to see how UDV's importation and use of *hoasca* can be called "uncontested" when the government was

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not aware of the importation and consumption as a direct result of UDV's efforts to keep the matter secret.

For this reason, the majority can take no comfort in *Valdez v. Applegate, 616 F.2d 570, 573 (10th Cir. 1980)* or *Dominion Video Satellite v. EchoStar Satellite Corp., 269 F.3d 1149, 1153 (10th Cir. 2001)*. *See* Majority Op. at 13-14. In *Valdez*, the plaintiffs had been grazing their cattle in the Rio Puerco Grazing District, a 500,000 acre plot of land encompassing federal, state, and private lands. *616 F.2d at 571.* The federal government adopted a revised grazing program which reduced the plaintiffs' ability to graze their livestock. *Id.* The plaintiffs promptly sought a preliminary injunction claiming that the revised grazing program was contrary to federal law in several respects. *Id.* On these facts, it is certainly not surprising this court determined that the status quo was the grazing program in effect prior to the government's proposed revisions. The same is true in *Dominion Video*. In that case, that parties had an ongoing business relationship, wherein EchoStar had been activating Dominion customers to receive Sky Angel satellite programming over a four-year period, despite a serious question whether EchoStar was contractually obligated to do so. *269 F.3d at 1155.* When EchoStar declined to activate any further Dominion customers, Dominion immediately brought suit. *Id.* This court rejected EchoStar's contention that the four-day period in which it declined to activate further Dominion customers represented the status quo, holding as follows: "Adopting EchoStar's position would imply that any party could create a new status quo immediately preceding the litigation *merely by changing its conduct toward the adverse party*." *Id.* (emphasis added).

As noted at length above, it cannot legitimately be argued that the government "changed its conduct" toward UDV. Both the government and UDV have consistently understood that the importation and consumption of DMT violates both the Convention and the CSA. The United States did not take any previous enforcement action against UDV only because UDV was successful at hiding its illegal conduct. As soon as the government became aware of UDV's illegal activities, it seized the *hoasca* and enforced the CSA. This situation is entirely unlike the situations in *Valdez* and *Dominion Video*.

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[*1190] Because the district court did not recognize that the preliminary injunction requested by UDV would alter the status quo, it failed to require UDV to carry the onerous burden of demonstrating that the four preliminary injunction factors weigh heavily and compellingly in its favor. Accordingly, the district court abused its discretion in issuing the preliminary injunction. *SCFC ILC, 936 F.2d at 1100.* That conclusion, however, does not compel a remand to the district court. Because the record in this case is sufficiently well developed, it is appropriate for this court to determine whether UDV has satisfied its burden of demonstrating that the preliminary injunction factors weigh heavily and compellingly in its favor. *Id.*

II. Balance of Injury and Public Interest

I have serious reservations concerning the district court's and majority's conclusion that the United States did not carry its burden of demonstrating that the prohibition against importing or consuming *hoasca* furthers its compelling interests in protecting the health of UDV members and preventing diversion of *hoasca* to non-religious uses. It is unnecessary to reach those questions, **[**55]** however, because UDV did not carry its burden of demonstrating that the third and fourth preliminary injunction factors--that the threatened injury to it outweighs the injury to the United States under the preliminary injunction and that the injunction is not adverse to the public interest--weigh heavily and compellingly in its favor.

As noted by this court in staying the preliminary injunction pending appeal, the United States suffers irreparable injury when it is enjoined from enforcing its criminal laws. *O Centro Espirita, 314 F.3d at 467* (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1351, 54 L. Ed. 2d 439, 98 S. Ct. 359 (1977)* (Rehnquist, Circuit Justice)). This injury to the United States is exacerbated by the fact that any preliminary injunction issued by the district court, as illustrated by the numerous conditions and obligations imposed on the United States by the preliminary injunction actually issued by the district court, would

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require burdensome and constant official supervision and oversight of UDV's handling and use of *hoasca*. n3 *Id.* (collecting cases and examples). UDV has not carried its burden of demonstrating **[**56]** that the balancing of its injury with that of the government weighs heavily and compellingly in its favor.

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n3 Even a cursory review of the district court's eleven page, thirty-six paragraph preliminary injunction belies the majority's assertion that it preserves, rather than alters, the status quo. As noted at length above, prior to the district court's entry of the preliminary injunction, UDV was surreptitiously importing *hoasca* with the clear knowledge that it was violating the CSA in the process. The district court's preliminary injunction modifies or enjoins enforcement of a staggering number of regulations implementing the CSA, with the result being that the United States must actually set about to aid UDV in the importation of an unlimited supply of *hoasca*.

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Furthermore, Congress has specifically found that the importation and consumption of controlled substances is adverse to the public interest. *21 U.S.C. § 801(2)* **[*1191]** ("The illegal importation, manufacture, distribution, and **[**57]** possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."); *id. § 801a(1)* ("The Congress has long recognized the danger involved in the manufacture, distribution, and use of certain psychotropic substances . . ., and has provided strong and effective legislation to control illicit trafficking and to regulate legitimate uses of psychotropic substances in this country."). In fact, the district court specifically found that the evidence was in equipoise as to the risk of diversion of *hoasca* to non-religious purposes and the danger of health complications flowing from *hoasca* consumption by UDV members. Although this led the district court to conclude that the United States had not carried its burden of demonstrating that the restrictions in the CSA against the importation and consumption of *hoasca* furthered the United States' compelling interests and that, concomitantly, UDV was substantially likely to prevail on the merits of its *Religious Freedom Restoration Act* claim, the United States has no such burden at the third and fourth steps of the preliminary injunction analysis. **[**58]** At this stage, it is UDV that must demonstrate heavily and compellingly that the requested preliminary injunction is not adverse to the public interest. In light of the congressional findings noted above and the equipoised nature of the parties' evidentiary submissions, UDV has not met its burden.

III. Violation of the Convention

Finally, the United States argues convincingly that a preliminary injunction requiring it to violate the Convention could seriously impede its ability to gain the cooperation of other nations in controlling the international flow of illegal drugs. *See 21 US.C. § 801a(1)* ("Abuse of psychotropic substances has become a phenomenon common to may countries . . . and is not confined to national borders. It is, therefore, essential that the United States cooperate with other nations in establishing effective controls over international traffic in such substances."); *see also O Centro Espirita, 314 F.3d at 467* (noting that federal courts should be reluctant to second guess the executive regarding the conduct of international affairs).

The majority fails to consider this factor in determining whether UDV has **[**59]** carried its burden of establishing its entitlement to a preliminary injunction because, according to the majority, even assuming the Convention does cover *hoasca*, the government failed to demonstrate that such an interest must "be narrowly tailored to the specific plaintiff whose religious conduct is impaired." Majority Op. at 27. What the majority apparently fails to realize, however, is that the meaning of the Convention is relevant not only with regard to the first preliminary injunction factor, likelihood of success on the merits, but also with regard to the third and fourth preliminary injunction factors, the balancing of harms and the adversity of the injunction to the public interest. n4

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n4 Although it is not quite clear, the majority's opinion could be read to state the proposition that the government's interest in complying with its obligations under the Convention are not compelling because those obligations conflict with the government's obligations under RFRA. Majority Op. at 25-26. The majority further seems to assert that because RFRA was enacted after the Convention was ratified, the Convention is thereby nullified to the extent it conflicts with RFRA. *Id.*

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The majority is simply wrong in asserting that there is any kind of inherent conflict between RFRA and the Convention. Although RFRA prohibits the government from burdening a person's exercise of religion unless the burden furthers a compelling governmental interest, it does not attempt to define which interests are compelling. *42 U.S.C. § 2000bb-1* (providing that the government may not substantially burden a person's exercise of religion unless the application of the burden to that person both furthers a compelling governmental interest and does so in the least restrictive manner). What RFRA does do is set out a decisional framework within which a court is to apply the law as it existed prior to the Supreme Court's decision in *Employment Division v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990)*. Under this decisional framework, it is certainly possible that the government can advance a compelling interest in support of any action that burdens a person's exercise of religion, but that the governmental action will still need to be enjoined because it will not be the least restrictive means of advancing the compelling interest. In those circumstances, it cannot be said that the governmental interest is not compelling. The question of whether a governmental interest is compelling is wholly independent of the question whether the burden flowing from the advancement of that interest fits within the contours of RFRA. In apparently concluding that the government's interest in complying with the Convention is not compelling because it is "in conflict" with RFRA, the majority has compounded its error.

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[*1192] The district court concluded that the Convention distinguishes between a "substance" in which the psychoactive component is derived but not "separated" from the plant source, versus a "substance," which is a purified form of the psychoactive drug. Because, according to the district court, plants like *psychotria viridis* are not covered by the Convention, neither are "infusions and beverages" made from such plants, even if the infusion or beverage contains a Schedule I psychotropic chemical. In reaching his conclusion, the district court relied almost exclusively on the 1976 United Nations Commentary on the Convention on Psychotropic Substances (the "Commentary"). The district court's interpretation of the Convention and its reliance on the Commentary is fundamentally flawed.

The Convention defines a "preparation" as "any solution or mixture, *in whatever physical state*, containing one or more psychotropic substances, or [] one or more psychotropic substances in dosage form." Convention, *32 U.S.T. 543,* Art. 1(f) (emphasis added). *Hoasca* clearly fits within the plain language of this definition. It is a solution or mixture, in a liquid state, containing the **[**61]** psychotropic substance DMT. The Convention further provides that "a preparation is subject to the same measures of control as the psychotropic substance which it contains." *Id.* Art. 3(1). Accordingly, *hoasca* is subject to the same controls applicable to DMT in a pure, separated form.

The district court appears to be have been led astray by UDV's focus on Article 32 of the Convention and its assertion that Article 32 supports the proposition that plants may receive different treatment than the chemical components contained within the plants. Whether plants are covered by the Convention, however, is irrelevant. UDV does not seek to import and use plants that contain DMT; rather, it seeks to import, possess, and consume a preparation made from such a plant that can have no use other than to produce a drug-induced state, albeit in a sacramental context. In any event, UDV is simply incorrect in asserting that Article 32 supports its assertion that *hoasca* is not a preparation covered by the Convention because it is derived from a plant. Article 32 provides as follows:A State on whose territory there are plants growing wild which contain psychotropic substances from **[**62]** among those in Schedule I and which are traditionally used by certain small, clearly determined groups in magical or religious rites, may, at the time of signature, ratification or accession, make reservations concerning these plants, in respect of the provisions of article 7, except for the provisions relating to international trade. n5 **[*1193]** Convention, *32 U.S.T. 543,* Art. 32(4). Article 32 actually suggests that plants are covered by the Convention, inasmuch as the Convention requires signatories to make reservations in order to allow their use. Article 32 also makes clear that even if a signatory makes a reservation, international trafficking in such plants is still prohibited by the Convention. n6

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n5 Article 7 of the convention obligates signatory nations to prohibit all uses of Schedule I substances, with certain very

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limited exceptions not relevant here, and to prohibit the import and export of those substances. Convention, Art. 7, *32 U.S.T. 543*. It bears emphasizing, however, that Article 32, which allows signatory nations to make a reservation with regard to the use of certain plants like *psychotria viridis* in religious rites, **does not** allow signatories to opt out of the requirement that they prohibit the import or export of those plants. *Id.*, Art. 32(4).

[63]**

n6 Because the definition of "preparation" is clear and unambiguous, this court is obligated to give it its ordinary meaning absent "extraordinarily strong contrary evidence." *Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185, 72 L. Ed. 2d 765, 102 S. Ct. 2374 (1982)*. Nevertheless, the district court ignored that clear and unambiguous language in favor of language in the Commentary appearing to indicate that beverages and infusions made from plants containing hallucinogenic substances do not fall within the Convention. The Commentary notes that "neither . . . the roots of the plant Mimosa hostilis nor Psilocybe mushrooms themselves are included in Schedule I, but only their respective active principles. Commentary at 387. In two footnotes, the Commentary observes generally that "an infusion of roots is used" to consume Mimosa hostilis and that "[beverages . . . are used" to consume Psilocybe mushrooms. *Id.* at 387 nn.1227-28.

The Commentary does not constitute extraordinarily strong contrary evidence. It was drafted by a single author, published five years after the Convention was negotiated, and is, at most, ambiguous on the question whether a preparation like *hoasca*, as opposed to the plant *psychotria viridis*, is covered by the Convention. Because the Commentary was not written by the negotiators or signatories to the Convention, it is not the sort of "negotiating and drafting history" or "postratification understanding of the contracting parties" that courts have traditionally used as evidence of the signatories' intent. *See Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226, 133 L. Ed. 2d 596, 116 S. Ct. 629 (1996).* On the other hand, the interpretation of an international treaty by the United States agency charged with its negotiation and enforcement is entitled to "great weight" from the courts. *Kolovrat v. Oregon, 366 U.S. 187, 194, 6 L. Ed. 2d 218, 81 S. Ct. 922 (1961)*. The State Department has interpreted the Convention to cover preparations such as *hoasca*. The State Department's interpretation is consistent with the plain language of the Convention and this court is obliged to accord it deference.

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[64]**

The plain language of Article 7, coupled with the conforming interpretation of the Convention by the State Department, demonstrates that *hoasca* is a preparation covered by the Convention. n7 The congressional findings in *21 U.S.C. § 801a(1)* make clear that international cooperation and compliance with the Convention is essential in providing effective control over the cross-border flow of such substances. UDV has not carried its burden of demonstrating heavily and compellingly that its interest in the use of sacramental *hoasca* pending the resolution of the merits of its complaint outweighs the harm resulting to the United States from a court order mandating that it violate the Convention. Nor has it shown heavily and compellingly that such an injunction is not adverse to the public interest.

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n7 For these reasons, the district court erred in concluding that compliance with the Convention does not constitute a compelling interest. Nevertheless, because this case can be resolved based solely on UDV's failure to carry its burden under the third and fourth preliminary injunction factors, I see no need to remand the case to the district court to analyze whether the restrictions contained in the CSA are the least restrictive means of furthering the United States' compelling interest in complying with the Convention.

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[65]**

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[*1194] IV. Conclusion

For those reasons set out above, I would reverse the district court's entry of a preliminary injunction in favor of UDV. Accordingly, I respectfully dissent.

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Citation #9
311 F.3d 1220

Z.J. GIFTS D-4, L.L.C., a Colorado Limited Liability Company, doing business as Christal's, Plaintiff-Appellant, v. CITY OF LITTLETON, an Incorporated Home Rule Municipal Corporation, Defendant-Appellee.

No. 01-1220

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

311 F.3d 1220; 2002 U.S. App. LEXIS 23754

November 18, 2002, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari granted by, in part *City of Littleton v. Z.J. Gifts D-4, L.L.C., 157 L. Ed. 2d 274, 124 S. Ct. 383, 2003 U.S. LEXIS 7429* (U.S., 2003)

Motion granted by *City of Littleton v. Z.J. Gifts D-4, L.L.C., 157 L. Ed. 2d 884, 124 S. Ct. 1124, 2004 U.S. LEXIS 20* (U.S., 2004)
Motion denied by, Motion granted by *City of Littleton v. Z.J. Gifts D-4, L.L.C., 158 L. Ed. 2d 242, 124 S. Ct. 1625, 2004 U.S. LEXIS 1842* (U.S., 2004)
Reversed by CITY OF LITTLETON v. Z. J. GIFTS D-4, L. L. C., 2004 U.S. LEXIS 4026 (U.S., June 7, 2004)

PRIOR HISTORY: **[**1]** Appeal from the United States District Court for the District of Colorado. (D.C. No. 99-N-1696).

DISPOSITION: The judgment of the district court was affirmed in part and reversed in part.

COUNSEL: Michael W. Gross (Arthur M. Schwartz with him on the briefs) of Schwartz & Goldberg, P.C., Denver, Colorado for the Plaintiff-Appellant.

J. Andrew Nathan (Heidi J. Hugdahl with him on the brief) of Nathan, Bremer, Dumm & Myers, P.C., Denver, Colorado for the Defendant-Appellee.

JUDGES: Before BRISCOE, Circuit Judge, BRORBY, Senior Circuit Judge, and LUCERO, Circuit Judge.

OPINIONBY: LUCERO

OPINION: **[*1224]** **LUCERO**, Circuit Judge.

This case raises several First Amendment issues, including one in which the circuits are substantially divided: namely, the extent to which prompt judicial review must be assured in adult-business licensing cases. Plaintiff Z.J. Gifts D-4, L.L.C. ("ZJ") brought an action under *42 U.S.C. § 1983* challenging the City of Littleton's ("City's" or "Littleton's") adult business ordinance as unconstitutional, seeking declaratory and injunctive relief, attorney's fees, and damages. The district court granted summary judgment to the City. We have jurisdiction under *28 U.S.C. § 1291*, and we reverse in part **[**2]** and affirm in part.

I

In 1993, the City passed an ordinance requiring businesses that specialize in adult entertainment or merchandise to obtain licenses, and restricting those businesses to certain areas of Littleton. Before passing its ordinance, the City Council heard testimony and reviewed reports from other cities concerning deleterious effects of adult businesses on property values and on crime rates.

In the fall of 1999, ZJ opened its store, known as Christal's, on South Broadway in Littleton. Prior to the opening of Christal's, the City informed the owner of the property on which Christal's was located that adult businesses were not permitted at this South Broadway location. In late August 1999 -- shortly before Christal's opened -- ZJ filed a § 1983 suit against the City seeking monetary, declaratory, and injunctive relief. ZJ's complaint alleged that Littleton's ordinance was unconstitutional because, among other things, it infringed ZJ's First Amendment rights. ZJ also alleged that it did not intend to operate an "adult business establishment" as defined in Littleton's ordinance. (1 Appellant's App. at 11.)

On cross-motions for summary judgment, the district court **[**3]** ruled in favor of the City, concluding that ZJ was covered by Littleton's ordinance and that the ordinance was, in its entirety, constitutional. After the district court's decision in this case and during the briefing for this appeal, the City amended its ordinance, clarifying certain corporate disclosure requirements and changing an age restriction for adult businesses that do not offer live entertainment. Littleton, Colo., Ordinance 13 (2001) (codified at Littleton, Colo., City Code § 3-14-2, -5, -8, -16 (2002)).

II

Both as originally enacted and as amended, Littleton's ordinance has two primary functions: (1) it requires all adult businesses within Littleton to obtain licenses to

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operate within the City's borders, and (2) it restricts those businesses to certain sections of the City and requires that they not locate within a minimum distance of other specified sites.

Among the adult businesses covered by Littleton's ordinance, Christal's would most likely qualify as an "adult bookstore, adult novelty store, or adult video store." Littleton, Colo., City Code § 3-14-2. A commercial establishment falls into this category if, as judged by percentage of stock-in-trade, revenue, **[**4]** or advertising, it is primarily devoted to the sale of materials that are characterized by the depiction or description of "specified sexual activities" **[*1225]** or "specified anatomical areas," regardless of whether the establishment has other business purposes. Id. "Specified anatomical areas" are further defined as: "(A) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus or female breasts below a point immediately above the top of the areolae; or (B) Human male genitals in a discernibly turgid state, even if completely and opaquely covered." Id. "Specified sexual activities" are defined to include masturbation, fondling of the genitals and other specified areas, excretory functions, human genitals in a state of "sexual stimulation, arousal or tumescence," and "normal or perverted" sex acts. Id.

No adult business covered by Littleton's ordinance may operate within five-hundred feet of a church, school, child-care facility, public park, massage parlor regulated by local ordinances, or community correctional facility. Id. § 3-14-3. Adult businesses also may not operate within one-thousand feet of each other or a massage parlor regulated **[**5]** by state law. Id. In addition, multiple adult businesses may not operate within the same structure. Id.

Under Littleton's ordinance, operation of an adult business within the City requires a license. Among other things, a license application must indicate or provide: names of all owners, managers, and employees of the business; information about whether the applicant has had an adult-business license denied, revoked, or suspended by any jurisdiction; an indication whether the applicant has adult-business licenses from other jurisdictions; the address, driver's license number, and social security number of the applicant and all owners, managers, and employees; a floor plan for the proposed business; a written statement by the City's Zoning Officer that the proposed location is in compliance with the ordinance; and a statement of whether an owner, manager, or employee of the business has been convicted of specified criminal acts. n1 Id. § 3-14-5. Certain specified persons must also be fingerprinted and photographed by the Police Department. Id.

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n1 In amending its ordinance in 2001, the City added more specific corporate disclosure requirements, but did not significantly alter the key provisions. Littleton, Colo., Ordinance 13 (2001).

---------- End Footnotes ----------

[6]**

After an application has been submitted, the City Clerk has thirty days to approve or deny the license. Id. § 3-14-8. The Clerk may deny an application for one or more specified reasons, including: the applicant is under twenty-one years old; the applicant has made a false statement on the application; the applicant or any owner has had an adult-business license revoked or suspended within Colorado in the past year; the applicant has operated an adult business deemed to be a public nuisance in the past year; a corporate applicant is not in good standing or authorized to conduct business in Colorado; the applicant is overdue in any city taxes, fees, fines, or penalties assessed in relation to an adult business; the applicant has failed to obtain the required sales-tax license; or the applicant has been convicted of specified criminal acts. Id. Specified criminal acts for the purposes of the ordinance are defined as: "Sexual crimes against children, sexual abuse, rape or crimes connected with another adult business, including distribution of obscenity, prostitution, pandering or tax violation." Id. § 3-14-2.

If the clerk denies the application, the applicant then has **[**7]** twenty days to appeal the denial to the City Manager, n2 who must hold a hearing within thirty days. Id. **[*1226]** § 3-14-8. If that appeal is denied, the applicant may seek review in state court pursuant to Colorado Rule of Civil Procedure 106(a)(4). Id.

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n2 This is the time limit under the amended ordinance. Before the amendments, the ordinance gave the applicant only ten days to request a hearing before the City Manager. Littleton, Colo., Ordinance 27 (1993).

---------- End Footnotes ----------

Licenses are issued for one-year terms and may be renewed only by filing a renewal application. Id. §§ 3-14-9, -10. Licenses may be suspended for one or more

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specified grounds. Id. § 3-14-11. Suspension or revocation may only occur after a hearing before the City Manager and may be appealed to state court. Id. Finally, under the amended ordinance, all adult businesses in Littleton that do not provide live entertainment are required to restrict entrance to individuals who are eighteen or older. n3 Id. § 3-14-16.

---------- Footnotes ----------

n3 Under the original ordinance, admission to all adult businesses was limited to persons over twenty-one. Littleton, Colo., Ordinance 27 (1993).

---------- End Footnotes ----------

[8]**

III

We initially determine whether there is an Article III case or controversy before us. *Essence, Inc. v. City of Fed. Heights, 285 F.3d 1272, 1280 (10th Cir. 2002).* Standing is an essential part of the case-or-controversy requirement of Article III. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).* There are three elements to Article III standing: (1) injury-in-fact, (2) causation, and (3) redressability. *Essence, 285 F.3d at 1280.* An injury-in-fact is an "'invasion of a legally protected interest' that is (a) concrete and particularized and (b) actual or imminent, i.e., not conjectural or hypothetical." Id. (quoting *Defenders of Wildlife, 504 U.S. at 560).* Causation requires a showing that the injury is "'fairly traceable to the challenged action of the defendant,' rather than some third party not before the court." Id. (quoting *Defenders of Wildlife, 504 U.S. at 560).* Redressability means that it is "likely that a favorable court decision will redress the injury of the plaintiff." Id. "The burden to establish standing rests on the **[**9]** party invoking federal jurisdiction." Id. When the case has been resolved in the district court on summary judgment grounds, "'a plaintiff must establish that there exists no genuine issue of material fact as to justiciability,' and 'mere allegations' of injury, causation, and redressability are insufficient." Id. (quoting *Dep't of Commerce v. United States House of Representatives, 525 U.S. 316, 329, 142 L. Ed. 2d 797, 119 S. Ct. 765 (1999)).*

A

Standing usually requires that the plaintiff assert an injury to himself, rather than injuries to third parties not before the court. However, this rule is not strictly enforced in the context of facial challenges to laws as violative of the First Amendment, even though a facial challenge to the validity of a statute necessarily entails a challenge to the statute as applied to third parties besides the plaintiff:In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not **[**10]** he applied for a license.*Freedman v. Maryland, 380 U.S. 51, 56, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965);* see also *FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990)* (opinion of O'Connor, J.)("Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad."). **[*1227]** "A form of unbridled discretion is the failure to place brief, specific time limits on the decision-making process." *Nightclubs, Inc. v. City of Paducah, 202 F.3d 884, 889 (6th Cir. 2000);* see also *FW/PBS, 493 U.S. at 223-24* (opinion of O'Connor, J.)(stating that unbridled discretion includes licensing schemes that create a "'risk of delay' such that 'every application of the statute creates an impermissible risk of suppression of ideas'" (quotations omitted)).

Littleton's ordinances include within their purview sexually explicit speech, and the City does not contest that this speech is protected by the First Amendment. ZJ's **[**11]** challenge to Littleton's licensing system is based both on a claim that the City vests too much discretion in licensing officials in granting or denying a license, and that the system creates a risk of delay in granting or denying a license. Thus, ZJ has standing to bring a facial challenge to the licensing system on these two grounds.

It is true that the overbreadth doctrine discussed above "does not eliminate the need for the plaintiff to demonstrate its own cognizable injury in fact." *Nat'l Council for Improved Health v. Shalala, 122 F.3d 878, 883 (10th Cir. 1997).* But this requirement is satisfied where the plaintiff is engaged "in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution." *Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 60 L. Ed. 2d 895, 99 S. Ct. 2301 (1979).* Such a plaintiff need not wait until an actual criminal prosecution has begun. Id.

ZJ's business depends in part on its ability to sell materials that are protected by the First Amendment. ZJ has alleged in its complaint that the City views it as an adult business **[**12]** that is in violation of the

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licensing requirements of the ordinance, and it has also presented a letter from the City denying ZJ's sales-tax license application because ZJ's business "may be categorized as an adult business." (3 Appellant's App. at 450.) ZJ has thus adequately shown that, at least from the City's perspective, its business is proscribed by the ordinance.

Finally, the City has proceeded with a civil complaint in state court against ZJ for violation of the ordinance based on ZJ's failure to apply for an adult-business license and ZJ's operation of an adult business without a license. n4 While ZJ's sales-tax license application was denied and a civil complaint was brought in state court only after ZJ's federal complaint was filed, these events nonetheless are evidence that when ZJ filed its lawsuit there was "a credible threat of prosecution" under Littleton's ordinance and that the threat of prosecution continues. *Babbitt, 442 U.S. at 298;* see also *id. at 302* (indicating that standing exists "when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative"). ZJ has satisfied the injury-in-fact **[**13]** requirement because the City has taken steps to enforce the ordinance against ZJ. n5

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n4 In supplemental briefing the City explicitly waived the applicability of abstention under *Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)*. A state may voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention. See *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 626, 91 L. Ed. 2d 512, 106 S. Ct. 2718 (1986)* (citing cases in which Younger abstention was waived).

n5 While ZJ has never applied for an adult-business license, this is not a requirement for standing to mount a facial challenge against an ordinance. See *ACORN v. Municipality of Golden, 744 F.2d 739, 744 (10th Cir. 1984)* ("Applying for and being denied a license or an exemption is not a condition precedent to bringing a facial challenge to an unconstitutional law.").

ZJ, the City argues, has no standing to challenge the licensing requirements of the ordinance because -- even if such a challenge were successful -- ZJ would nonetheless be in violation of the location requirements of the ordinance. However, ZJ challenges both sets of requirements, and if both challenges are successful, then ZJ will obtain its desired relief. See *N. Ave. Novelties, Inc. v. City of Chicago, 88 F.3d 441, 443-44 (7th Cir. 1996)*. In addition, the parties' supplemental briefs reveal that the City is charging ZJ with separately violating both the licensing and location requirements. Thus, even if ZJ only succeeds in its challenge to the licensing provisions, it will nonetheless obtain some relief against prosecution by the City.

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[14]**

[*1228] B

ZJ also has standing to challenge the location requirements in Littleton's ordinance. Both parties agree that ZJ's business is located on a site in which adult businesses are not permitted under the ordinance. Based on the location of ZJ's business, the City has refused to grant ZJ a sales-tax license, and the City's complaint in state court is based in part on the location of ZJ's business. This is sufficient evidence for ZJ to meet the injury-in-fact requirement. By enacting and enforcing its ordinance, the City brought about ZJ's injury, and injunctive and declaratory relief, if granted by this court, would redress ZJ's injury.

C

ZJ has challenged the provisions in Littleton's ordinance that require the City to reject adult-business license applications when the applicant has been convicted of specified past criminal acts. ZJ has never alleged that these restrictions would apply to any of the owners or operators of ZJ's business. ZJ therefore has not even argued that it might be affected by these provisions in Littleton's ordinance, and accordingly it does not have standing to challenge these provisions. See *FW/PBS, 493 U.S. at 234* (stating that **[**15]** for a party to have standing to challenge a similar provision in a Dallas ordinance, "the individual must show both (1) a conviction of one or more of the enumerated crimes, and (2) that the conviction or release from confinement occurred recently enough to disable the applicant under the ordinance").

ZJ also attacks the ordinance's license revocation and suspension provisions. ZJ, however, has never obtained a license from the City, nor has it indicated that it plans to obtain a license. Instead, ZJ stated in its complaint that it "does not intend to operate an adult entertainment establishment in a B-2 zone." (1

Appellant's App. at 11.) ZJ has neither alleged nor provided any evidence that the licensing suspension or revocation proceedings will apply to it. As it is "pure conjecture," *Essence, 285 F.3d at 1281,* whether ZJ will be forced to comply with these provisions of the ordinance, ZJ likewise does not have standing to challenge these provisions. Cf. id. (holding that an adult business did not have standing to challenge a city's provisions for the granting of a license because the business already had a license and had not alleged any facts indicating that **[**16]** it would need to reapply for a license).

D

ZJ decries as overly vague the ordinance's definition of an "adult bookstore, adult novelty store, or adult video store" as a business that "devotes a significant or substantial portion" of its floor space, inventory, or advertising to adult materials, or that obtains "a significant or substantial portion" of its revenue from those materials. Littleton, Colo. City Code § 3-14-2.

[*1229] In the First Amendment context, the Supreme Court has determined that a plaintiff may have standing to challenge a statute as overly vague with respect to third parties even if the suspect statute is "unquestionably applicable" to the plaintiff. *Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 59-60, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976)* ("On several occasions we have determined that a defendant whose own speech was unprotected had standing to challenge the constitutionality of a statute which purported to prohibit protected speech, or even speech arguably protected."). This "exception from traditional rules of standing" reflects the Supreme Court's judgment that "the very existence of some statutes may cause persons not before the **[**17]** Court to refrain from engaging in constitutionally protected speech or expression." *427 U.S. at 59-60.* n6

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n6 Having reviewed the evidence provided by the parties in the present case, including the videotape of the interior of ZJ's business, we conclude that the ordinance is "unquestionably applicable" to ZJ -- i.e., a "significant or substantial" portion of ZJ's stock-in-trade, interior floor space, or revenue is devoted to material that is "characterized by the depiction or description" of the defined "specified sexual activities" or "specified anatomical areas."

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Nevertheless, as the Court in Young explained, "if the statute's deterrent effect on legitimate expression is not both 'real and substantial,' and if the statute is 'readily subject to a narrowing construction by the state courts,' the litigant is not permitted to assert the rights of third parties." *Id. at 60* (citation omitted, quoting *Erznoznik v. City of Jacksonville, 422 U.S. 205, 216, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975)).* **[**18]**

In Young, the Court concluded that the ordinance in question did not have a "real and substantial" deterrent effect on legitimate expression because "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." *427 U.S. at 61.* The same rationale applies equally to the present case. Adult businesses covered by Littleton's ordinance are, by definition, likely to carry materials that border on pornography. Stated simply, in light of Young, Littleton's ordinance does not have a "real and substantial" deterrent effect upon "legitimate expression."

As to the second issue raised by Young -- whether the ordinance is readily subject to a narrowing construction -- we note that language similar to the "significant or substantial" language used in this ordinance has been interpreted previously by state courts in a sufficiently narrow manner to avoid constitutional problems. A common method of narrowing construction has been to develop a percentage that will act as a guide as to what constitutes "significant or substantial. **[**19]** " See, e.g., *Dandy Co. v. Civil City of South Bend, 401 N.E.2d 1380, 1385-86 (Ind. Ct. App. 1980)* (holding that a conviction under a similar ordinance was sustainable where there was evidence that "50 to 80% of the inventory was adult in nature"); *St. Louis County v. B.A.P., Inc., 25 S.W.3d 629, 630-31 (Mo. Ct. App. 2000)* (noting that a local adult-business ordinance established a rebuttable presumption that a business carries "a substantial portion" of adult-oriented items where more than twenty-five percent of the retail value of the inventory consists of such items); *City of New York v. Les Hommes, 94 N.Y.2d 267, 724 N.E.2d 368, 370, 702 N.Y.S.2d 576 (N.Y. 1999)* (noting that the City of New York had clarified that a "substantial portion" for purposes of its adult-business ordinance meant at least **[*1230]** forty percent). We conclude that "the limited amount of uncertainty in the ordinance[] is easily susceptible of a narrowing construction." *Young, 427 U.S. at 61.*

In short, we agree with the district court that ZJ "does not have standing to challenge the constitutionality of [Littleton's ordinance] under the void **[**20]** for vagueness doctrine." (3 Appellant's App. at 561.)

E

Finally, Littleton's ordinance as originally enacted prohibited individuals under twenty-one years of age from being licensees, owners, managers, employees, or customers of an adult business. ZJ argues that it is unconstitutional to restrict individuals between the ages of eighteen and twenty-one from entering or working in its business. We need not address ZJ's challenge to the age restrictions, however, because the City has amended its ordinance to provide that anyone over eighteen years of age may enter an adult business that does not offer live entertainment. n7 Thus, ZJ's challenge to the age restrictions on customers and employees of its business is now moot, and we will not address it.

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n7 To the extent that other provisions of Littleton's ordinance conflict with this amendment, they have been repealed. Littleton, Colo., Ordinance 13, § 9 (2001).

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IV

We now address ZJ's claims that Littleton's licensing scheme grants excessive discretion **[**21]** to licensing officials.

Because this case was decided on summary judgment, we review the district court's decision de novo, applying the same legal standard as the district court. *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1326 (10th Cir. 1999).* Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)* para. 4. "When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the non-moving party." *Simms, 165 F.3d at 1326.* "If there is no genuine issue of material fact in dispute, we determine whether the district court correctly applied the substantive law." Id. In the First Amendment context, "our review of the record is more rigorous," and we are "obligated to make an independent examination of the record in its entirety." *Essence, 285 F.3d at 1283* (quotation omitted).

Littleton's **[**22]** ordinance requires all adult businesses to obtain a license prior to opening for business. "Adult businesses," as defined by the ordinance, include adult bookstores and adult video stores, see Littleton, Colo., City Code § 3-14-2, that sell materials presumptively protected by the First Amendment. n8 A very similar licensing scheme was analyzed as a "prior restraint" on speech by six of the Justices of the Supreme Court in *FW/PBS. 493 U.S. at 225-30* (opinion of O'Connor, J.); *493 U.S. at 238* (Brennan, J., concurring). Following FW/PBS, we **[*1231]** have concluded that "licensing of adult entertainment establishments" must be analyzed as a prior restraint. *Essence, 285 F.3d at 1289-90.*

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n8 In the instant case, the City does not argue that the materials sold by "adult businesses" are obscene and therefore unprotected by the First Amendment. The City has therefore effectively made the same concession that the City of Dallas made in FW/PBS: i.e., that the ordinance applies to businesses that purvey speech protected by the First Amendment. See *FW/PBS, 493 U.S. at 224* (noting that the Dallas ordinance largely targeted businesses that purvey sexually explicit speech and no claim was made that such materials were unprotected by the First Amendment).

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[23]**

Ordinarily, a duly enacted law is presumed to be constitutional. When a law infringes on First Amendment rights, however, the proponent of the law bears the burden of establishing its constitutionality. *Wilson v. Stocker, 819 F.2d 943, 949 (10th Cir. 1987).* Whether or not Littleton's ordinance is content-neutral is not relevant to the burden of proof, because any "system of prior restraint" comes to this court "bearing a heavy presumption against its constitutional validity." *FW/PBS, 493 U.S. at 225* (quotation omitted). In the present case, therefore, the City bears the burden of establishing that Littleton's ordinance is constitutional.

A

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Standards for analysis of a prior restraint of speech were initially developed in the context of censorship schemes in Freedman, where the Supreme Court held that (1) a censorship scheme must assure the exhibitor, "by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film"; (2) the censorship scheme must "assure a prompt final judicial decision" following a refusal to license; and (3) "the **[**24]** burden of proving that the film is unprotected expression must rest on the censor." *380 U.S. at 58-59.*

In FW/PBS, a divided Supreme Court considered whether Freedman's procedural requirements applied to adult-business licensing schemes as well. Two Justices joined Justice O'Connor in announcing the judgment of the Court that the Dallas licensing scheme at issue was unconstitutional. *FW/PBS, 493 U.S. at 229.* Three other Justices concurred but would have gone further in applying the Freedman requirements. *Id. at 238-39* (Brennan, J., concurring). Justice O'Connor's opinion characterizes Freedman as mandating that any prior restraint "that fails to place limits on the time within which the decisionmaker must issue the license is impermissible," *FW/PBS, 493 U.S. at 226,* because a "scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech," *FW/PBS, 493 U.S. at 227.* The Court in FW/PBS determined that the Dallas ordinance failed to meet this general requirement because a license could not be approved without inspection **[**25]** and approval by the fire department, the health department, and the building official as being in compliance with relevant laws and ordinances. Id. Even though a completed license application had to be approved or disapproved within thirty days after submission, there was nonetheless a risk that the city could endlessly delay those inspections and approvals in order to postpone consideration of a license application because there was no time limit for the inspections and approvals. Id. Concluded the Court: "Thus, the city's regulatory scheme allows indefinite postponement of the issuance of a license." Id.

Justice O'Connor then reiterated the Freedman procedural requirements:The following three procedural safeguards were necessary to ensure expeditious decisionmaking by the motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. **[*1232]** *Id. at 227.* **[**26]** Concluding that the "first two safeguards are essential" to preventing undue delay in the licensing process, *id. at 228,* and that the Dallas licensing scheme "fails to provide an avenue for prompt judicial review" of a license denial, *id. at 229,* Justice O'Connor's opinion held that Freedman's third requirement -- that the censor bear the burden of obtaining judicial action and of proof -- need not be applied in the context of adult-business licensing schemes. *Id. at 230.*

The remainder of the Court was sharply divided. Justice Brennan, joined by two other Justices, agreed that the Dallas ordinance was an unconstitutional prior restraint, but would have applied all three of the Freedman procedural requirements. *Id. at 238-39* (Brennan, J., concurring). Justice White, joined by the Chief Justice, concluded that the Dallas ordinance was constitutional and that none of the Freedman procedural requirements applied because the ordinance was not a prior restraint. *Id. at 245* (White, J., concurring and dissenting). Justice Scalia concurred in part and dissented in part on other grounds. *Id. at 250* **[**27]** (Scalia, J., concurring and dissenting).

Faced with the fractured decision in FW/PBS, our sibling courts of appeals have struggled to determine which of Freedman's requirements apply to licensing schemes. Joined by several other circuits, we have concluded that the first two Freedman requirements -- maintenance of the status quo and expeditious judicial review -- are applicable to the licensing context. See *Essence, 285 F.3d at 1290;* see also, e.g., *Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097, 1100-01 (9th Cir. 1998);* 11126 *Baltimore Boulevard, Inc. v. Prince George's County, 58 F.3d 988, 996 & n.12 (4th Cir. 1995); TK's Video, Inc. v. Denton County, 24 F.3d 705, 707-08 (5th Cir. 1994).* With respect to Freedman's third requirement -- that the censor must bear the burden of going to court and of proof -- our circuit has not yet decided whether it is applicable to adult-business licensing schemes. See *Essence, 285 F.3d at 1290 n.17.* Other circuits, however, have held that the third requirement of Freedman does not apply to licensing schemes that do not directly regulate **[**28]** content. See *MacDonald v. City of Chicago, 243 F.3d 1021, 1035-36 (7th Cir. 2001); Ward v. County of Orange, 217 F.3d 1350, 1355 (11th Cir. 2000); Steakhouse, Inc. v. City of Raleigh, 166 F.3d 634, 640-41 (4th Cir. 1999).* Because ZJ does not argue that the Littleton ordinance fails to satisfy the third Freedman requirement, we limit our analysis here to the two procedural safeguards clearly adopted in FW/PBS.

B

Our first inquiry is whether Littleton's ordinance satisfies the requirement that "any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained." *FW/PBS, 493 U.S. at 227.* Although the ordinance specifies that a license application must be approved within thirty days, Littleton, Colo., City Code § 3-14-8, ZJ stresses that, before an application is accepted, (1) applicants are required to obtain a written statement from the City's Zoning Official stating that the proposed location is in compliance with the location requirements of the ordinance, (2) specified persons named on the application must be fingerprinted and photographed **[**29]** by the Police Department, n9 and (3) the applicant must **[*1233]** obtain a sales-tax license. ZJ argues that these provisions present the possibility of indefinite postponement of a license. Id.

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n9 Littleton's original ordinance required all principal owners, managers and employees to be photographed and fingerprinted. Littleton, Colo., Ordinance 27 (1993). In 2001, the City eliminated the requirement with respect to employees, but specified that managers, general partners and (in the case of a corporation) the president of the corporation must be photographed and fingerprinted. Littleton, Colo., Ordinance 13 (2001). No time limit for the fingerprinting and photography was specified either in the original ordinance or in the amended ordinance.

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Justice O'Connor's opinion in FW/PBS, which announced the judgment of the Court, held that the Dallas ordinance in question allowed for indefinite postponement of a license because the premises had to be approved in advance by "the health department, fire department and the **[**30]** building official." *493 U.S. at 227.* Although the prerequisites required by Littleton's ordinance are arguably less onerous than those in FW/PBS, Littleton's ordinance similarly does not specify a time limit within which the City must complete them. We therefore consider whether they render Littleton's ordinance unconstitutional for failure to satisfy the first requirement of Freedman and FW/PBS.

Every retail business in Colorado must obtain a sales-tax license.*Colo. Rev. Stat. § 39-26-103.* Because this requirement is not specific to adult businesses, it is irrelevant to the constitutionality of the licensing ordinance at issue in the present case. The City does not argue, however, that the other two requirements are similarly applicable to all businesses, and we therefore presume that they are specific to adult businesses. Littleton's ordinance provides no assurance that the City will promptly act on a pre-application request for a certification of zoning compliance or for fingerprinting or photography.

During oral argument of the present case, counsel for the City offered to make a "judicial admission" on behalf of the City that "if the Zoning Official **[**31]** doesn't act, the application can be complete without his statement." Littleton's ordinance, however, explicitly states that the "City Clerk shall not accept any application that is not complete in every detail." Littleton, Colo., City Code § 3-14-5. Such details presumably include the provision of the Zoning Official's letter as well as the requirements of photography and fingerprinting by the Police Department. By interpreting the ordinance as allowing for the submission of an incomplete application in the event of delay by the Zoning Official, appellee's counsel is stating a legal conclusion, and courts are reluctant to treat opinions and legal conclusions as judicial admissions. See *MacDonald v. General Motors Corp., 110 F.3d 337, 341 (6th Cir. 1997); Glick v. White Motor Co., 458 F.2d 1287, 1291 (3d Cir. 1972); New Amsterdam Cas. Co. v. Waller, 323 F.2d 20, 24 (4th Cir. 1963).* "A matter as important as the constitutionality of a state statute should not be decided on the basis of an advocate's concession during oral argument." *Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 398, 98 L. Ed. 2d 782, 108 S. Ct. 636 (1988)* **[**32]** (Stevens, J., concurring in part and dissenting in part).

Moreover, Freedman requires that either a "statute or authoritative judicial construction" must specify the time limit within which the license must be issued or denied, *380 U.S. 51-59,* and there is nothing in Justice O'Connor's opinion suggesting that this requirement was changed in FW/PBS. Federal courts "lack jurisdiction authoritatively to construe state legislation." *United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 369, 28 L. Ed. 2d 822, 91 S. Ct. 1400 (1971).* Only if a state law is "readily susceptible" of an interpretation may the federal courts subject it to a **[*1234]** narrowing construction, and "we will not rewrite a state law to conform it to constitutional requirements." *Am. Booksellers Ass'n, 484 U.S. at 397* (majority opinion). Because Littleton's ordinance is not "readily susceptible" to the interpretation offered by the City -- to the contrary, it is readily susceptible to the opposite interpretation --

much as we are tempted, we cannot decide this case on the basis of Littleton counsel's oral argument offer.

Although the Colorado Supreme Court upheld **[**33]** a similar requirement that a zoning permit must accompany the application for a sexually-oriented-business license in *City of Colo. Springs v. 2354, Inc., 896 P.2d 272, 281-82 (Colo. 1995)*, a separate Zoning Ordinance in that case required that a zoning administrator "approve or deny a zoning permit application within ten working days of the submittal." *Id. at 282.* Counsel for the City implicitly conceded at oral argument that no such time limit is present in this case. Because no time limit is specified in the ordinance or by authoritative judicial construction, we hold that the subject ordinance's requirement that a letter from the Zoning Official accompany the application, along with the fingerprinting and photography requirements, are unconstitutional for failure to specify a time limit within which the City must act. n10 See *FW/PBS, 493 U.S. at 227.* To the extent that the City's motion for summary judgment on this point was granted and ZJ's motion for partial summary judgment was denied, the order of the district court is reversed.

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n10 As noted above, this defect in Littleton's ordinance cannot be cured by "judicial admission," as the City's counsel suggests. Appropriate procedures under Colorado law for the amendment of a city ordinance must be followed. It is not our role to sit as a party to negotiations concerning the implementation of the City's code. Littleton's ordinance can easily be amended to state that an application may be submitted without zoning approval, fingerprinting, or photography if a good faith request is not acted on by the Zoning Official or the Police Department within a specified brief time period.

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[34]**

C

Having held that Littleton's ordinance fails to meet the first test of FW/PBS, we must decide whether the unconstitutional provisions are severable. Under Colorado law, a section of a legislative enactment is severable if the remaining portion of the statute is autonomous and the legislature's will in passing the entire statute is not thwarted by the excision. *City of Lakewood v. Colfax Unlimited Ass'n, 634 P.2d 52, 70 (Colo. 1981)* (en banc). Utilization of a severability clause creates a presumption that the legislature would have been satisfied with the remaining portions of the enactment. Id. A provision will not be held severable, however, if the remaining enactment is "so incomplete or riddled with omissions" that it lacks coherence. Id.

At issue in the present case is an ordinance that contains a severability clause, both in its original version and in the amended version. Littleton, Colo., Ordinance 13, § 8 (2001); Littleton, Colo., Ordinance 27, § 8 (1993). More importantly, other requirements of the ordinance do not depend upon the constitutionally suspect pre-application requirements for coherence or consistency, and the purpose of **[**35]** the ordinance is not thwarted by their excision. As a result, we conclude that the pre-application licensing provisions of the ordinance are severable.

D

Because other provisions of Littleton's ordinance, if constitutional, may be enforced without the pre-application requirements, we must decide whether the **[*1235]** remainder of the ordinance is constitutional. Thus we consider the "prompt judicial review" requirement adopted by the Supreme Court in *FW/PBS, 493 U.S. at 228.* ZJ argues that "prompt judicial review" requires the City to provide a "prompt decision" from the courts as to whether a license should have been granted or denied. (Appellant's Br. at 23.) According to the City, however, "prompt judicial review" means only that there must be "'the possibility' or 'an avenue' for prompt judicial review," and there need not be a "judicial determination" within a short period of time. (Appellee's Am. Resp. Br. at 47.)

The circuits are divided over this question. Some have held that "prompt judicial review," at least with regard to licensing decisions, requires only that the government provide prompt access to the courts. See, e.g., *Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251, 1256-57 (11th Cir. 1999)* **[**36]** (concluding that "access to prompt judicial review is sufficient for licensing decisions"); *TK's Video v. Denton County, 24 F.3d 705, 709 (5th Cir. 1994)* (same); see also *Graff v. City of Chicago, 9 F.3d 1309, 1324-25 (7th Cir. 1993)* (en banc) (opinion of Manion, J.) (noting the availability of the common-law writ of certiorari and finding this procedure sufficient under FW/PBS); *Jews for Jesus v. Mass. Bay Trans. Auth., 984 F.2d 1319, 1327 (1st. Cir. 1993)*(implying that access is sufficient). Others have concluded that "prompt judicial review" requires a prompt judicial resolution of license denials. See *Nightclubs, Inc. v. City of Paducah, 202 F.3d 884, 892-93 (6th Cir. 2000); Baby Tam & Co. v. City of Las Vegas, 154 F.3d*

1097, 1101-02 (9th Cir. 1998); 11126 *Baltimore Boulevard, Inc. v. Prince George's County, 58 F.3d 988, 1000-01 (4th Cir. 1995).*

Access to prompt judicial review was selected as the appropriate standard by the Eleventh Circuit in Boss Capital , *187 F.3d at 1255-57.* That case enunciates two principal bases in support of its **[**37]** holding that mere access is sufficient in adult-business licensing cases. First, Boss Capital holds that Justice O'Connor modified the second Freedman requirement relating to judicial review in the adult-business licensing context. *Id. at 1255-56.* Second, Boss Capital reasons that this interpretation of FW/PBS is appropriate given the difference between censorship cases and licensing cases. *Id. at 1256-57.*

Focusing on Justice O'Connor's language, the Eleventh Circuit points out that Justice O'Connor uses different terminology than Justice Brennan in describing Freedman's second requirement. *Id. at 1255* (citing *FW/PBS, 493 U.S. at 228-29).* Justice O'Connor's opinion holds that there must be "the possibility of prompt judicial review" in the event a license is denied, *FW/PBS, 493 U.S. at 228* (opinion of O'Connor, J.) (emphasis added), and states that the Dallas ordinance failed to provide an "avenue for prompt judicial review," *id. at 229* (emphasis added). Later, the requirement is characterized by Justice O'Connor as "the availability of prompt judicial **[**38]** review." *Id. at 230* (emphasis added). In contrast, Justice Brennan's concurrence states that a "prompt judicial determination must be available." *Id. at 239* (Brennan, J., concurring) (emphasis added).

Justice O'Connor's language could arguably mean that the FW/PBS Court modified the second Freedman requirement in the context of licensing cases. See *Boss Capital, 187 F.3d at 1255-56* (relying partially on the difference of language to distinguish Freedman from FW/PBS). n11 It **[*1236]** is by no means clear, however, that Justice O'Connor intended to change the meaning of the "prompt judicial review" requirement. First, when Justice O'Connor refers to "prompt judicial review," she cites to Freedman, which unequivocally stated that the procedure must "assure a prompt final judicial determination." *380 U.S. at 59;* see also 11126 *Baltimore Boulevard, 58 F.3d at 999* (discussing this point). Other decisions following Freedman have used the phrase "prompt judicial review" to indicate a prompt judicial determination, albeit in a censorship context. See 11126 *Baltimore Boulevard, 58 F.3d at 1000* **[**39]** (listing several Supreme Court cases). Moreover, elsewhere in her opinion in FW/PBS, Justice O'Connor states that the "first two safeguards" provided for by Freedman are "essential." *FW/PBS, 493 U.S. at 228.* Although Justice O'Connor inevitably qualifies the prompt judicial review requirement by referring to the "possibility," "availability," or "avenue" of such review, such qualification most likely amounts to an acknowledgment that it is up to the plaintiff to decide whether or not to seek judicial review. This language does not necessarily indicate any intent to weaken the second Freedman requirement.

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n11 If the O'Connor opinion did modify Freedman's "prompt judicial review" requirement for the licensing context, then it arguably struck down the ordinance at issue in FW/PBS on a narrower ground (failure to provide prompt access to judicial review) than the Brennan concurrence would have (failure to provide the prompt judicial determination required by Freedman). If that is the case, then the O'Connor restatement of the "prompt judicial review" requirement might well state the law, at least in the context of adult business licensing. See *Marks v. United States, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977)*("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (quotation omitted)). Whether this would constitute the narrowest ground for decision is debatable, however. See 11126 *Baltimore Boulevard, 58 F.3d at 999 & n.15* (arguing that, if Justice O'Connor modified the Freedman requirement, this was not the narrowest ground for decision). Because we conclude that Justice O'Connor did not modify the second Freedman requirement in the licensing context, we need not decide which ground for decision in FW/PBS was the narrowest.

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[40]**

Parties always have access to the courts. See *FW/PBS, 493 U.S. at 248* (White, J., dissenting)("No one suggests that licensing decisions are not subject to immediate appeal to the courts."); *Baby Tam, 154 F.3d at 1101* ("[A] person always has a judicial forum when

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his speech is allegedly infringed." (quoting *Graff, 9 F.3d at 1324)).* Judicial review is available regardless of whether an applicable state court procedure is expressly mentioned in the ordinance. In order to have "prompt judicial review," however, a party necessarily must be able to obtain a decision, for "without a decision, the most exhaustive review is worthless." n12 *Baby Tam, 154 F.3d at 1101-02.* Thus, Justice O'Connor's "avenue for prompt judicial review" requirement in a First Amendment context makes far more sense if it is understood to mean a prompt final judicial determination.

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n12 Baby Tam draws an analogy to baseball. Judicial review without a decision "would be like throwing a pitch and not getting a call. As legendary major league umpire Bill Klem once said to an inquisitive catcher: 'It ain't nothin' till I call it.' This is also true of judicial review. Until the judicial officer makes the call, it ain't nothin'.'" *154 F.3d at 1102.*

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[41]**

The Eleventh Circuit further points out in Boss Capital that Freedman and the line of cases following it can be distinguished from adult-business licensing cases on the grounds that they involved **[*1237]** censorship rather than licensing. Justice O'Connor held in FW/PBS that licensing schemes do not involve "the grave 'dangers of a censorship system,'" and therefore "the full procedural protections set forth in Freedman are not required." *493 U.S. at 228* (citation omitted). As the Eleventh Circuit notes, adult-business licensing schemes primarily involve "mundane and ministerial factors," such as the general qualifications of each applicant. n13 *Boss Capital, 187 F.3d at 1256.* In contrast, censorship cases involve a highly subjective judgment about the nature of the suspect material.

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n13 Littleton's ordinance, for example, lists eight specific reasons to deny a license -- although the ordinance does not explicitly state that this list is exclusive -- and these reasons do not involve discretion on the part of the licensing official. Littleton, Colo., City Code § 3-14-8.

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[42]**

In addition, the Eleventh Circuit notes, "unlike movie distributors who might show a given film in hundreds of theaters around the country," applicants for adult-business licenses arguably have a greater incentive "to stick it out and see litigation through to its end." *187 F.3d at 1256.* Freedman's rationale therefore arguably makes less sense in the licensing context, and Boss Capital concludes that the need for a prompt judicial decision is therefore "less compelling." n14 See *Boss Capital, 187 F.3d at 1256-57* (arguing that access to prompt judicial review is sufficient for licensing cases). Because the ordinance in dispute contained an explicit judicial review provision, the Eleventh Circuit held it constitutional. *Id. at 1255, 1257.*

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n14 Analyzing the constitutionality of a permit requirement for a public forum, the Supreme Court has recently held that an ordinance that gives no discretion to the licensing official does not threaten to stifle free expression. See *Thomas v. Chi. Park Dist., 534 U.S. 316, 122 S. Ct. 775, 780-81, 151 L. Ed. 2d 783 (2002).* However, Thomas distinguishes FW/PBS on the grounds that "it involved a licensing scheme that targeted businesses purveying sexually explicit speech," *122 S. Ct. at 780 n.2* (quotation omitted), and the Court did not overrule its earlier decision that the first two Freedman requirements must be applied in adult-business licensing cases.

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[43]**

Boss Capital draws a rational distinction between licensing cases and censorship cases. The purpose of Justice O'Connor's language distinguishing between these two categories, however, is most logically understood as an attempt at explaining why Freedman's third safeguard -- that the burden of going to court and the burden of proof must be on the censor -- is not appropriate to the licensing context. See *FW/PBS, 493 U.S. at 229-30* (concluding that the third Freedman requirement does not apply to licensing cases). If Justice O'Connor had intended to adopt a different judicial review requirement for licensing cases, she could have done so explicitly, just as she explicitly rejected the burden-shifting requirement.

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Other circuits have held that the judicial review requirement of Freedman was not altered by FW/PBS. As the Sixth Circuit notes, Justice O'Connor "gave no indication that she was modifying the second requirement of prompt judicial review" in the licensing context. *Nightclubs, 202 F.3d at 893.* According to the Ninth Circuit, the FW/PBS plurality "took issue only with Freedman's requirement that the censor bear the **[**44]** cost of going to court to obtain judicial review; otherwise, FW/PBS offered nothing different from Freedman's concept of what 'judicial review' meant." *Baby Tam, 154 F.3d at 1102;* see also 11126 *Baltimore Boulevard, 58 F.3d at 999* (reaching the same conclusion). If the Court adopted the Freedman requirement without modification in FW/PBS, then the distinction between licensing and censorship is not relevant here.

[*1238] Even if the rationale behind Freedman is specific to censorship cases, there is an equally valid rationale for requiring prompt judicial review in adult-business licensing cases. Although adult-business licensing ordinances are technically considered "content-neutral," Z. J. Gifts D-2, *L.L.C. v. City of Aurora, 136 F.3d 683, 686-88 (10th Cir. 1998),* they are distinguishable from other content-neutral time, place, and manner restrictions insofar as they target "businesses purveying sexually explicit speech." *Thomas v. Chi. Park Dist., 122 S. Ct. at 780 n.2 (2002)* (quoting *FW/PBS, 493 U.S. at 224).* A licensing official may have little or no discretion in reviewing **[**45]** an application, but he or she may be tempted nonetheless to overs tep the bounds of the ordinance.

Adult businesses are controversial, and the possibility exists that licensing officials might allow their personal views on the morality of sexually explicit entertainment to sway a decision on an application. Given the strong feelings that adult businesses can engender, there must be a prompt judicial determination to ensure that licensing officials do not exceed their authority under the ordinance in their zeal to protect the local community. ZJ sells sexually explicit magazines and videocassette tapes, which are presumptively protected by the First Amendment, see *FW/PBS, 493 U.S. at 224,* and the danger that an ordinance like Littleton's may be improperly used as a subterfuge for censorship is too great to overlook the necessity for a prompt judicial determination.

In short, we are not persuaded by those circuits that have concluded that mere "access" to judicial review is sufficient in licensing cases. Following the Fourth, Sixth and Ninth Circuits, we hold that, in the event that an adult-business license is denied, FW/PBS requires a prompt final judicial **[**46]** decision regarding the validity of the denial. "[A] theoretical possibility of expeditious judicial review is not constitutionally sufficient." *Nightclubs, 202 F.3d at 892.* "While we trust state courts to exercise due diligence, we cannot be sure that a state judge . . . toiling under a busy docket, will conduct a hearing and render a decision in a prompt manner." Id. Prompt judicial review, including a prompt final decision, must be assured in all First Amendment licensing cases in order for the second requirement of Freedman and FW/PBS to be satisfied. What constitutes a prompt judicial determination in the adult-business licensing context is to be determined by reference to the Supreme Court's jurisprudence following Freedman. See, e.g., *Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 561-62, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975)*(holding that a judicial review process lasting more than five months was not prompt).

Littleton's ordinance allows a party whose license has been denied to appeal to the Colorado district court under Colorado Rule of Civil Procedure 106(a)(4). This Rule allows an adverse decision regarding **[**47]** the license to be given expedited review in the trial court's discretion. 2354 Inc., 896 P.2d at 284 (citing Colo. R. Civ. P. 106(a)(4)(VIII)). Because this Rule does not assure that license decisions will be given expedited review, however, it does not save Littleton's ordinance. Accordingly, the order of the district court granting summary judgment for the City is reversed to the extent that it held the judicial review procedure to be constitutionally sufficient.

V

Finally, ZJ attacks the location restrictions in Littleton's ordinance as unconstitutional because they do not provide reasonable alternatives of communication, as required by *City of Renton v. Playtime* **[*1239]** *Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).* n15 It is the City's burden to demonstrate that its ordinance meets this requirement. See Z. J. *Gifts, 136 F.3d at 688.*

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n15 In its reply and supplemental briefing, ZJ argued that the location restrictions in Littleton's ordinance should be viewed as "content-based" restrictions on speech subject to strict scrutiny. In particular, ZJ argues that the recent Supreme Court decision in *Thomas, 534 U.S. 316, 151 L. Ed. 2d 783, 122 S. Ct. 775 (2002),* and Justice Kennedy's opinion in *City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 122 S. Ct. 1728, 1739, 152 L. Ed. 2d 670 (2002)*(Kennedy, J., concurring in the

judgment), support this claim. This court, however, has previously held that a nearly identical ordinance should be reviewed as a "content-neutral" regulation subject to intermediate scrutiny. See Z. J. *Gifts, 136 F.3d at 686-88*. We see nothing in either Thomas or Alameda Books that requires reconsideration of our conclusion as to the applicable standard of review.

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[48]**

Renton considered a local ordinance that restricted the location of adult businesses. *475 U.S. at 44*. Content-neutral zoning ordinances, the Court held, are permissible so long as "reasonable alternative avenues of communication" are left open, *id. at 53,* a question that is answered through an analysis of how much land is available in which adult businesses may be located under the zoning system, *id. at 53-54*. In undertaking that analysis, the courts must examine what land is actually available, but also must keep in mind that adult businesses must "fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees." *Id. at 54*.

How much land is sufficient to constitute "reasonable alternative avenues of communication" is a question that the Renton Court left open. In Renton, the ordinance left "520 acres, or more than five percent of the entire land area of" the city, open for adult businesses, with the land "in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and **[**49]** roads." *Id. at 53* (quotation omitted). The Renton Court determined that the ordinance "easily meets" the requirement of providing a "reasonable opportunity to open and operate an adult theater within the city." *Id. at 54*.

Under Littleton's ordinance, there are approximately one-hundred acres of land that are within industrial zones and outside the minimum distance from nearby schools, day care centers, and correctional facilities. n16 This land constitutes between 1.2 and 1.3% of the total acreage of the City of Littleton. At least one other court of appeals has found this proportion of land to be sufficient under Renton. See *Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1260 (5th Cir. 1992)*.

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n16 ZJ argues that some of these parcels are unavailable because portions of the parcels are within five-hundred feet of schools, day care centers, and correctional facilities. However, as the record shows, the majority of these parcels are outside the distance limits. Under Littleton's ordinance, the distance limits are only violated if the exterior wall of the structure in which the adult business is located is within the minimum distance from the neighboring use. Thus, these parcels are available for use by an adult business as long as the business locates in the portions of the parcels where such uses are permitted.

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ZJ argues that portions of this land are unavailable because specific parcels are (1) currently occupied by large-scale manufacturing uses, see *Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1531-32 (9th Cir. 1993),* or (2) currently owned by governmental entities, see *Centerfold Club, Inc. v. City of St. Petersburg, 969 F. Supp. 1288, 1305 (M.D. Fla. 1997)*.

[*1240] First, we disagree with the notion that warehouses and other large-scale manufacturing uses must be excluded per se from any calculation of whether there is sufficient land for adult business uses. In Renton itself the Supreme Court noted the diversity of property that was available for adult business use under the ordinance -- "industrial, warehouse, office, and shopping space," *Renton, 475 U.S. at 53* (emphasis added) -- in concluding that there was sufficient land available. Similarly, Littleton's ordinance leaves a diversity of different types of properties available for use by an adult business, including large-scale manufacturing and warehouse uses. Under Renton, there is no need to exclude those uses from our analysis. n17 While it may indeed be **[**51]** more difficult and more expensive for an adult-business owner to acquire and convert these types of properties, there is no requirement that those businessmen must "be able to obtain sites at bargain prices." *Id. at 54*.

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n17 We add that we do not address a situation where all or nearly all properties consist of large-scale manufacturing and warehouse uses, such that the diversity of land uses described in Renton does not exist. In such a situation, the municipality

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may be "effectively denying" adult businesses "a reasonable opportunity to open and operate." *Renton, 475 U.S. at 54.*

---------- End Footnotes ----------

As for inclusion of the government-owned properties, we need not decide whether that is permissible under the Renton analysis. Even excluding those parcels that are government-owned according to evidence introduced by ZJ, there is sufficient property zoned for adult business uses to meet the requirements of Renton. ZJ submitted evidence identifying only one specific property -- the Littleton **[**52]** City Shops between Belleview Avenue and Prentice Avenue, constituting twelve acres -- as being owned by the government. Other properties mentioned by ZJ in its brief -- a fire training center, a nature area, and the Arapahoe County Government Center -- are not identified by parcel, nor does ZJ provide any information as to their total acreage. However, even giving ZJ the benefit of the doubt as to these additional properties, based on the information we can glean from the record, removing these properties would only reduce the total available area by approximately ten acres. n18 Thus, the total area available excluding government properties would be about seventy-eight acres, or just under one percent of the total area of the City.

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n18 In reaching this conclusion, we draw the following inferences in ZJ's favor: Littleton's fire protection center and the abandoned city property are located in an industrial zone that comprises approximately eight acres near the intersection of Chenango and Vallejo Streets. We assume that all of those properties were used by both the fire protection center and the abandoned city property, and we remove them from our analysis. As for the Arapahoe Government Center, ZJ relies on the City's maps in the record as evidence regarding its location on "South Crestline Avenue." We can find only an ambiguous reference for a parcel south of West Crestline Avenue, which appears to occupy about two acres of the industrial zones. ZJ has provided us with absolutely no information from which an inference can be drawn regarding the specific location or acreage of Littleton's nature area.

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[53]**

Moreover, excluding both the government properties to which ZJ objects as well as those properties that are implicated by the minimum distance requirements of the ordinance, the City has listed over twenty sites within the industrial districts that its real estate expert stated would be available for adult businesses. Given the small population of Littleton (forty-thousand people), and the fact that ZJ is the only adult business that is currently located in Littleton, this is a sufficient number of available sites. See *Diamond v. City of Taft, 215 F.3d 1052, 1058 (9th Cir. 2000)* (holding seven available sites sufficient **[*1241]** where only one business sought to locate within the municipality), cert. denied, *531 U.S. 1072, 148 L. Ed. 2d 665, 121 S. Ct. 763 (2001);* n19 see also *Boss Capital, 187 F.3d at 1254* (listing factors to be considered in analyzing whether there are sufficient sites for adult businesses, including geographical size of the locality, location of sites, number of adult businesses currently operating or seeking permission to operate, and population). We conclude that the ordinance meets the requirements of Renton, n20 **[**54]** and the section of the district court order dealing with the location requirements of Littleton's ordinance is affirmed.

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n19 Where an adult-business zoning regulation prohibits the location of one adult business within a minimum distance of another one -- as Littleton's ordinance does -- some courts have required the analysis of the minimum number of sites to take into account those spacing requirements, dramatically reducing the potential number of sites. See, e.g., *Young v. City of Simi Valley, 216 F.3d 807, 821 n.13 (9th Cir. 2000).* ZJ has never argued that we should incorporate the spacing requirements into our analysis, and given that ZJ is the only adult business currently operating or seeking to operate in Littleton, such an adjustment would be inappropriate in the first place. See *Diamond, 215 F.3d at 1057-58.*

n20 ZJ urges us to hold that the Colorado Constitution provides broader protections than the United States Constitution in this context. None of the cases cited by ZJ in support of this proposition, however, involves a challenge to adult-business

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licensing ordinances. See *Bock v. Westminister Mall Co., 819 P.2d 55, 56 (Colo. 1991)* (discussing plaintiffs' right to distribute political leaflets in a shopping mall); *People v. Ford, 773 P.2d 1059, 1061 (Colo. 1989)* (addressing the constitutionality of the Colorado obscenity statute); *People v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348, 353 (Colo. 1985)* (same). In analyzing a local ordinance regulating nude dancing, the Colorado Supreme Court relied almost exclusively on federal cases in determining that the ordinance did not violate the free speech protections of either the federal or state constitutions. See 7250 *Corp. v. Bd. of County Comm'rs, 799 P.2d 917, 924-28 (Colo. 1990)* (en banc). We have found no evidence that in this particular field of free speech jurisprudence the Colorado courts have interpreted the state constitution to provide greater protection than the federal Constitution.

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VI

In sum, we conclude that ZJ has standing to challenge the pre-application and location requirements of the ordinance and the judicial review procedure. ZJ lacks standing, however, to challenge the ordinance as vague, attack the ordinance's license revocation and suspension provisions, or challenge the age and criminal history restrictions in the ordinance. As to the merits of ZJ's challenge, we hold that the judicial review procedure and pre-application requirements of Littleton's ordinance are unconstitutional, but that the location requirements of the ordinance are constitutional.

The judgment of the district court is **AFFIRMED** in part and **REVERSED** in part. n21

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n21 We grant the City's motions to file additional supplemental appendices.

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Citation #10
285 F.3d 1272

ESSENCE, INC., doing business as The Bare Essence, a Colorado corporation; DEVONA RICHELLE LOPEZ and LISA EASTON, Plaintiffs-Appellees/Cross-Appellants, v. THE CITY OF FEDERAL HEIGHTS, Defendant-Appellant/Cross-Appellee.

Nos. 00-1271 and 00-1286

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

285 F.3d 1272; 2002 U.S. App. LEXIS 6471

April 8, 2002, Filed

SUBSEQUENT HISTORY: [**1] Writ of certiorari denied: *City of Fed. Heights v. Essence, Inc., 2002 U.S. LEXIS 7600* (U.S. Oct. 15, 2002).

PRIOR HISTORY: Appeal from the United States District Court for the District of Colorado. (D.C. No. 98-M-71). D.C. Judge Richard P. Matsch.

DISPOSITION: Affirmed in part, reversed in part, vacated in part and remanded for further proceedings.

COUNSEL: Bradley J. Reich, (Arthur M. Schwartz, Michael W. Gross, on the briefs), Arthur M. Schwartz, P.C., Denver, Colorado, for Plaintiffs-Appellees/Cross-Appellants.

Steven J. Dawes, (Brian S. Popp, with him on the briefs), Griffiths, Tanoue & Light, Denver, Colorado, for Defendant-Appellant/Cross-Appellee.

JUDGES: Before TACHA, ANDERSON, and MURPHY, Circuit Judges.

OPINIONBY: MURPHY

OPINION: [*1276] **MURPHY**, Circuit Judge.

I. INTRODUCTION

During the middle to late 1990s, the defendant, City of Federal Heights, Colorado, enacted a series of ordinances governing the licensing and operation of adult entertainment businesses. Plaintiffs are Essence, Inc., a corporation that operates a nude dancing establishment, and Devona Richelle Lopez and Lisa Easton, two women denied employment as dancers by Essence, Inc. because they were younger than twenty-one at the time they sought employment. Plaintiffs present First Amendment facial challenges to multiple provisions of the Federal Heights municipal code. The district court, with a few exceptions, rejected the challenges and granted Federal Heights' [**2] summary judgment motion. This court has jurisdiction under *28 U.S.C. § 1291* and **affirms in part, reverses in part**, and **remands**.

II. BACKGROUND

At least as early as 1994, Federal Heights sought to regulate the location and operation of "adult entertainment establishments." n1 A series of ordinances [*1277] followed throughout the 1990s. The result was a comprehensive licensing and regulatory scheme governing adult entertainment establishments codified in Federal Heights Municipal Code chapter XII, article XII. It requires those seeking to do business as adult entertainment establishments to apply for a license from the City of Federal Heights. *See* Federal Heights Mun. Code ch. XII, art. XII, §§ 12-12-4 to -6. The code was amended in 1997 to require employees and managers of adult entertainment establishments to obtain licenses before they would be allowed to work. *See* Federal Heights Ordinance 97-15, § 6, *codified at* Federal Heights Mun. Code ch. XII, art. XII, § 12-12-10. n2

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n1 As used throughout this opinion, the phrase "adult entertainment establishment" shall have the meaning given it by Federal Heights Ordinance 96-12, sec. 1(A) (June 17, 1996), *codified at* Federal Heights Mun. Code ch. XII, art. XII, § 12-12-2(A): "An adult arcade, adult bookstore, adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, sexual encounter establishment, all as defined herein, or other similar businesses . . . ." Relevant to this case is the definition of "adult cabaret": "A nightclub, bar, restaurant or similar business which regularly features . . . Persons who appear in a state of nudity . . . ." Federal Heights Mun. Code ch. XII, art. XII, § 12-12-2(A)(3).

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n2 In this opinion, licenses issued under section 12-12-6 to businesses will be called "business licenses." Licenses issued under section 12-12-10 to employees or managers will be called "employee licenses."

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Plaintiff Essence n3 applied for a business license in November 1996. It was informed by the Federal Heights City Administrator, Roger Tinklenberg, that it had met "all the preliminary requirements for issuance" of a license, but that a license would not issue until permits from the Building and Fire Departments were issued for remodeling of Bare Essence. It is not clear whether Federal Heights ever issued the license. Following the death of the registered agent of Essence, Federal Heights required Essence to reapply for a license. Essence applied for another business license on October 28, 1997. Plaintiffs claim that before Federal Heights would issue the license it required substantial remodeling to ensure that dancers would be kept a minimum distance away from patrons and that there was adequate lighting inside and outside the premises. In addition, Federal Heights required Essence to **[**4]** comply with section 12-12-11(B) of the municipal code, which prohibited individuals under 21 from entering nude dancing establishments. As a result, because they were younger than twenty-one, plaintiffs Lopez and Easton were refused employment. n4 Essence was issued a business license on November 4, 1997.

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n3 Essence, Inc. was called Sanclub Corporation throughout the proceedings before the district court. Some time prior to this appeal its name changed. At all times it did business in Federal Heights as "The Bare Essence." This opinion will refer to the plaintiff corporation as "Essence" and its establishment as "Bare Essence."

n4 Lopez and Easton have since turned twenty-one, and their claims for injunctive relief are moot. Lopez and Easton, however, also present damage claims which are dependent on their constitutional challenge to the Federal Heights ordinances. They thus retain a concrete interest in the outcome of this matter, rendering their challenge viable and not moot. *See Univ. of Texas v. Camenisch, 451 U.S. 390, 393-94, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981).*

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[5]**

In the meantime, the Federal Heights City Council introduced Ordinance 97-15. The Ordinance amended portions of chapter XII, article XII of the municipal code. Among other provisions, it amended section 12-12-10 to require employees and mangers to obtain licenses from the city before they would be allowed to work. Ordinance 97-15 was adopted on December 2, 1997, nearly a month after Federal Heights issued a business license to Essence. **[*1278]** That same day, the City Council passed Resolution 97-36, which set the application fees for an employee license.

On January 14, 1998, plaintiffs filed a lawsuit challenging the entirety of the Federal Height's adult entertainment regulatory scheme. The plaintiffs mounted a facial attack on numerous provisions of article XII, asking for declaratory and injunctive relief. Essence also claimed that enforcement of the provisions prior to the issuance of its business license caused Essence economic damages. Plaintiffs Lopez and Easton claimed monetary damages stemming from their inability to work as nude dancers at the Bare Essence.

Federal Heights moved for summary judgment, and plaintiffs filed a cross-motion for partial summary judgment. The issues **[**6]** contested were a subset of the claims asserted by plaintiffs. The plaintiffs challenged: (1) the age restriction contained in section 12-12-11(B) n5; (2) the provision dealing with the denial of business licenses, section 12-12-6 n6; (3) section 12-12-9, which contained the procedures for suspending or revoking a business license n7; (4) section 12-12-10, the employee licensing provision n8; (5) the fees imposed **[*1279]** on employee license applicants by Resolution 97-36; (6) requirements contained in section 12-12-4 that owners of an adult entertainment business disclose their ownership share in the business; and (7) sections 12-12-13, -14, and -15, which required certain stage configurations, lighting, and a minimum distance between dancers and patrons.

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n5 "It shall be unlawful for any person under twenty-one (21) years of age to be upon the premises of any adult entertainment establishment which offers

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live nude dancing." Federal Heights Mun. Code ch. XII, art. XII, § 12-12-11(B).

n6 Section 12-12-3 makes it unlawful for a business to engage in business as an adult entertainment establishment without a license. Section 12-12-4 requires applicants for an adult entertainment license to file an application with the City Clerk; the section also specifies what information must be included in the application.

Section 12-12-6 sets out the procedure once the application is submitted. After the City Clerk receives the application, the Police Department, the Building Inspector, and the Fire Chief investigate the applicant and its premises "for compliance with the applicable provisions of the municipal code." Those agencies turn the result of their investigations over to the City Administrator. Within 30 days of the Clerk's receipt of the application, the City Administrator must decide to grant a license or, if there is probable cause to believe that there are grounds for denial, notify the applicant and refer the application to the City Council. A hearing before the Council will be held within 20 days of the notice to the applicant. Review of the Council's decision may be pursued according to Colorado law.

Section 12-12-6 also specifies grounds under which the City Council may deny an application. Among these grounds are a failure by the applicant to provide information reasonably necessary for the issuance of a license, the premise's noncompliance with applicable provisions of the municipal code, or when an applicant, partner, officer, director, or stockholder of more than 10% of the outstanding shares of the applicant business was either convicted of a crime listed in section 12-12-4(F)(1) or had an adult entertainment license denied, suspended, revoked, or non-renewed *and* as a consequence the issuance of a Federal Heights license would result in "serious criminal conduct."

[**7]

n7 Section 12-12-9 provides the grounds for suspension and revocation of an adult entertainment business license. Under section 12-12-9(A), the City Council shall suspend a license, and may revoke it, if the licensee or its employees have violated any provision of article XII or have knowingly permitted an "unlawful act" upon the licensed premises. Section 12-12-9(B) provides that a license shall be revoked if the license has been suspended within a year, and the licensee or an employee knowingly allowed possession or sale of drugs, prostitution, the licensee operated the business while the license was suspended, or the licensee or employee allowed a sexual act on the premises. Section 12-12-9(E) requires that the City Council hold a public hearing on suspension or revocation within 20 days of notice to the licensee. The decision shall issue within 10 days of the hearing, and the decision may be appealed according to Colorado law.

n8 Section 12-12-10 (as amended by Ordinance 97-15) requires all managers and employees of a licensed establishment to apply for an employee's license. All applications will be investigated by the Police Department; the investigations shall be completed within 14 days. After the investigation, the license shall issue unless the City Administrator finds grounds for denial of the license. There is no specific time limit on the City Administrator's decision. The grounds for denial include making false or misleading statements on the application, failing to provide the information required in section 12-12-10, failing to pay an annual license fee, being convicted of one of the criminal offenses listed in section 12-12-4(F)(1), or having an employee license revoked by Federal Heights or other governmental entity within the 5 years preceding the date of application.

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[**8]

The district court granted defendant's motion in part and plaintiffs' motion in part. On the issue of the age restriction, the court held section 12-12-11(B) invalid as it applied to dancers, but valid as it applied to anyone else. The court recognized that the age restriction was a content neutral regulation and could thus be upheld if it was narrowly tailored to further a

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substantial governmental interest. It ruled, however, that Federal Heights had "made no showing that restricting the employment of performers to those over 21 has any relationship to the community's interest in avoidance or mitigation of the secondary effects from the operation of adult entertainment establishments." Dist. Ct. Op. at 6-7. As to patrons under the age of twenty-one, the court ruled that their First Amendment rights were "qualitatively different" from the rights of the performers, that dancers' rights to express themselves through nude dancing "did not include a right to perform for a particular audience," and that the age restriction was "only an incidental burden on [Essence's] freedom." *Id.* at 7.

The district court ruled that sections 12-12-6, 12-12-9, and 12-12-10, the provisions dealing **[**9]** with the denial, suspension, and revocation of business and employee licenses, contained all the requisite procedural safeguards. The court ruled that the fourteen day limit on the decision whether to grant an employee license under section 12-12-10 was not so long as to run afoul of the procedural safeguards of *Freedman v. Maryland, 380 U.S. 51, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965). See* Dist. Ct. Op. at 8. The court did not address whether section 12-12-10 was invalid because it did not require the city to go to court to justify a denial of an employee license, nor did it consider whether 12-12-10 was invalid because it did not contain an adequate judicial review procedure. The court ruled that the judicial review following a denial of an application for a business license under section 12-12-6, or following a suspension or revocation of a business license under section 12-12-9, was adequate, even though the judicial review procedure did not guarantee a swift judicial decision. *Id.* at 8-10.

The district court also ruled that sections 12-12-6 and 12-12-9, for the most part, did not grant to the officials of Federal Heights impermissible discretion in deciding **[**10]** whether to grant, suspend, or revoke business licenses. The court accepted the city's narrowing construction of several phrases in the ordinance that otherwise seemed to give the City Administrator and City Council wide discretion to deny, suspend, or revoke a business license. *See id.* at 11. The district court, however, declared invalid the portion of section 12-12-6 allowing the City Council to deny an application for a business license if issuance of the license would result in "serious criminal conduct." *See id.* at 12.

[*1280] The district court upheld portions of sections 12-12-6 and 12-12-10, which allowed denial of applications for business and employee licenses if a principal (in the case of a business license) or employee has been convicted of certain crimes specified in section 12-12-4(F). The court analyzed the disqualification provisions as content neutral restrictions on speech and concluded that they furthered the substantial governmental interest in mitigating the secondary effects of adult businesses. *Id.* at 13-15.

The district court upheld the licensing fees imposed on applicants for employee licenses, observing that the fees were correlated to the costs of administering **[**11]** the licensing scheme. *Id.* at 16-17. Since plaintiffs did not prove the fees were excessive, the court declared them valid. *Id.* at 17. The district court also ruled on other provisions of the Municipal Code, including the requirements that principals of businesses seeking business licenses disclose their share of the business, that dancers maintain a certain distance from the stage, and that adequate lighting be installed both inside and outside the premises. The court declared invalid the portion of the Code requiring principals to disclose their exact share of an applicant for a business license, but upheld the premises configuration requirements. These rulings were not appealed.

III. STANDING

Before reaching the merits of the appeal, this court must satisfy itself that the parties have standing to invoke the power of the federal courts. *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998).* Neither the parties nor the district court addressed the question of plaintiffs' standing. Nevertheless, it is the responsibility of this court to raise the issue on its own to ensure that it has and the district **[**12]** court had before it an Article III case or controversy. *See Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986).* There are three requirements of Article III standing. First, the plaintiff must suffer an injury in fact. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).* An injury in fact is an "invasion of a legally protected interest" that is (a) concrete and particularized and (b) actual or imminent, i.e., not conjectural or hypothetical. *Id.* (quotations omitted). Second, the injury must be "fairly traceable to the challenged action of the defendant," rather than some third party not before the court. *Id.* (quotation omitted). Third, it must be likely that a favorable court decision will redress the injury of the plaintiff. *Id. at 561.* The burden to establish standing rests on the party invoking federal jurisdiction, and the evidence needed to carry that burden depends on the stage of litigation. *Id.*; *Loving v. Boren, 133 F.3d 771, 772 (10th Cir. 1998).* When the procedural posture of the case is a **[**13]**

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Federal Rule of Civil Procedure 56 motion for summary judgment and plaintiffs' standing is at issue, to prevail on such a motion "a plaintiff must establish that there exists no genuine issue of material fact as to justiciability," and "mere allegations" of injury, causation, and redressability are insufficient. *Dept. of Commerce v. United States House of Representatives, 525 U.S. 316, 329, 142 L. Ed. 2d 797, 119 S. Ct. 765 (1999).*

We conclude that plaintiffs do not have Article III standing to challenge the portion of section 12-12-6 allowing the City of Federal Heights to deny a business license based on the previous criminal convictions of a principal or the portion of section 12-12-10 allowing the city to deny an employee license based on a previous criminal conviction of the applicant. Plaintiffs have neither demonstrated that no **[*1281]** genuine issue of fact exists as to injury in fact, nor alleged facts necessary to show injury-in-fact. *See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990)* ("Petitioners . . . must allege . . . facts essential to show jurisdiction. If [they] fail to make the necessary allegations, [they **[**14]** have] no standing." (quotation omitted)).

Injury-in-fact must be concrete and imminent. Hypothetical or conjectural harm is not sufficient. When a law does not apply to a party, that party has suffered no invasion of a legally protected interest and may not question the law's constitutionality. *See Warth v. Seldin, 422 U.S. 490, 504, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975)* (holding plaintiffs challenging zoning ordinance lacked standing because, among other reasons, "none is himself subject to the ordinance's strictures"). The portions of sections 12-12-6 and 12-12-10 that provide grounds for denial of licenses based on previous criminal convictions are remarkably similar to a provision challenged in *FW/PBS*. A "civil disability provision" prohibited the City of Dallas from issuing an adult entertainment license to an individual who had been convicted of one or more enumerated crimes. *FW/PBS, 493 U.S. at 232.* The Supreme Court held that no party before it had standing to challenge the disability provision because none could show that they had been convicted of a crime disabling them from receiving a license. *Id. at 233-34;* **[**15]** *see also East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220, 227 (6th Cir. 1995)* (same).

Similarly, 12-12-6 and 12-12-10's disability provisions do not apply to Essence or the individual plaintiffs. There is no allegation that Essence is owned or controlled by any individuals subject to the disability provision or that Essence has ever been owned by such individuals. Additionally, plaintiffs have not alleged that Essence employs such individuals or has had to deny employment to those convicted of crimes, nor is there an allegation that the individual plaintiffs have been convicted of crimes. Merely because Essence is prospectively inhibited from such ownership and employment arrangements is, in this case, a hypothetical injury and not a concrete injury. As a consequence, the plaintiffs do not have standing, and the district court should have dismissed their challenge to the disability portions of section 12-12-6 and 12-12-10.

Essence has not alleged facts demonstrating injury-in-fact to support its challenge to the other portions of section 12-12-6. Section 12-12-6 allows the denial of an application for a business license on one of several grounds. Once an application **[**16]** is denied, the applicant may appeal the decision to the Colorado state courts pursuant to Colorado Rule of Civil Procedure 106(a)(4). Plaintiffs contend that the grounds for denial vest too much discretion in the licensing authority and that the judicial review procedure is inadequate. Essence, of course, has already been granted a license, and the allegedly overbroad discretion and lack of judicial review attendant to the application process do not apply to Essence. *See Clark v. City of Lakewood, 259 F.3d 996, 1008 (9th Cir. 2001)* (finding no injury in fact when cabaret owner who had license challenged licensing requirement); *DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 413 (6th Cir. 1997)* (same). While section 12-12-5(C) requires a new application if there is any change in ownership of an adult entertainment establishment, Essence has not alleged that it will change ownership or is likely to do so. It is thus pure conjecture to say that Essence will again have to apply for a business license.

Essence has also failed to allege facts demonstrating that it has standing to **[*1282]** challenge section 12-12-9. It asserts that section 12-12-9 gives too much **[**17]** discretion to the city to revoke or suspend a business license. Essence also asserts section 12-12-9 fails to provide a stay of a suspension or revocation pending judicial review and fails to guarantee timely judicial review of the city's suspension and revocation decisions. Essence currently holds a business license. Thus, there is the *possibility* that the city will suspend or revoke the license through exercise of its allegedly overbroad discretion, unchecked by adequate procedural safeguards. An Article III injury, however, must be more than a possibility. *See Whitmore v. Arkansas, 495 U.S. 149, 158, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990)* ("Allegations of *possible* future injury do not satisfy the requirements of Art. III." (emphasis added)). Essence must show that it "has sustained or is *immediately in danger of sustaining some direct injury.*" *City of Los Angeles v. Lyons, 461 U.S. 95,*

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101-02, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983) (emphasis added). The "threat of injury must be both real and immediate." *Id. at 102* (quotation omitted). Of course, Essence need not "await the consummation of threatened injury," but **[**18]** the injury must be "certainly impending." *Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 60 L. Ed. 2d 895, 99 S. Ct. 2301 (1979)* (quotation omitted). Essence has not alleged that Federal Heights has sought to suspend or revoke its business license or has threatened to do so. Nor has it alleged any fact indicating that suspension or revocation may be imminent or that it has altered its behavior as a result of the provision. It has thus not carried its burden of demonstrating standing. n9

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n9 There are cases that hold a possibility of license suspension or revocation confers standing. In *Deja Vu of Nashville, Inc. v. Metropolitan Government*, the Sixth Circuit held that the possibility that a licensor will suspend or revoke a license without adequate procedural safeguards constitutes a threat to the licenseholders' First Amendment interests and is itself a legally cognizable injury. *See 274 F.3d 377, 399 (6th Cir. 2001).* In *Deja Vu*, as in this case, the plaintiffs did not allege that the licensor threatened to suspend or revoke their business license. *Id.* In holding that the plaintiffs had standing to challenge the municipal ordinance's alleged lack of adequate judicial review procedures, the Sixth Circuit relied on Supreme Court precedent establishing that a license *applicant* need not apply for and be denied a license before challenging a licensing requirement. *Id.* (quoting *Freedman v. Maryland, 380 U.S. 51, 57, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965)).*

The analogy between an applicant and a licenseholder is not persuasive. The applicant has standing to bring a facial challenge to a licensing scheme vesting unbridled discretion in the licensor because of the likelihood of self-censorship: the applicant may be cowed into censoring its speech for fear of alienating the licensor and receiving an unfavorable decision on its application. *City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988).* After the license has already been granted, however, circumstances change. First, self-censorship is spurred by apprehension of viewpoint hostility. *See id. at 757-58.* The approval of the license eliminates some concern that the licensor harbors covert hostility to the content of the licenseholder's speech. Second, self-censorship may be presumed in the application context because the licensor has the leverage of the pending application decision. After the license has been granted, however, the licensor lacks this ready means for influencing the licenseholder. We recognize that a threat of suspension or revocation would be one method of coercing the licenseholder to self-censor, and, as we have recognized, such a threat would provide standing. The precedent relied upon by the *Deja Vu* court also recognized standing when a licenseholder was actually threatened with revocation. *See G & V Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1074 (6th Cir. 1994); see also Deja Vu, 274 F.3d at 404* (Wellford, J., concurring in part and dissenting in part). Without some indication that Essence may lose its license to speak or is being pressured into not speaking, it cannot demonstrate injury.

---------- End Footnotes ----------

[19]**

[*1283] On remand, the district court should vacate the portion of its opinion and order upholding the disqualification provisions of sections 12-12-6 and 12-12-10, the portion of its opinion and order relating to plaintiffs' other challenges to section 12-12-6, and the portion of its opinion and order relating to plaintiffs' challenges to section 12-12-9. The district court should then dismiss the portions of plaintiffs' complaint challenging those provisions.

IV. STANDARD OF REVIEW

This court reviews a summary judgement *de novo* and applies the same legal standard used by the district court under Rule 56. *Sigmon v. CommunityCare HMO, Inc., 234 F.3d 1121, 1124 (10th Cir. 2000).* When determining whether there exist issues of material fact and whether the movant is entitled to a judgment as a matter of law, a court looks at the record and the reasonable inferences from the record in the light most favorable to the non-movant. *Kaul v.*

Stephan, 83 F.3d 1208, 1212 (10th Cir. 1996). Our review of the record is more rigorous in a First Amendment context. *Revo v. Disciplinary Bd. of the Supreme Court, 106 F.3d 929, 932 (10th Cir. 1997).* **[**20]** Accordingly, this court is "obligated to make an independent examination of the record in its entirety." *Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683, 685 (10th Cir. 1998).*

V. AGE RESTRICTION

Both parties contest the district court's handling of plaintiffs' challenge to section 12-12-11(B), the section prohibiting anyone under the age of twenty-one from being on the premises of a business offering live nude dancing. The district court ruled that section 12-12-11(B) was valid as applied to patrons of nude dancing establishments, but invalid as applied to dancers.

Nude dancing is expressive conduct protected by the First Amendment. *Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66, 68 L. Ed. 2d 671, 101 S. Ct. 2176 (1981).* Such dancing is not "core" First Amendment speech, but rather "falls only within the outer ambit" of free speech protection. *City of Erie v. Pap's A.M., 529 U.S. 277, 289, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000)* (plurality opinion). As with any symbolic speech mixing elements of speech and conduct, the first question to be answered is whether section 12-12-11(B) is content based or content **[**21]** neutral. *Texas v. Johnson, 491 U.S. 397, 407, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).* Content based regulations are subject to strict scrutiny, while content neutral regulations need only satisfy the more relaxed scrutiny specified in *United States v. O'Brien, 391 U.S. 367, 377, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). Id.* Because we conclude, however, that section 12-12-11(B) does not survive intermediate scrutiny under *O'Brien*, we need not decide whether it is content neutral or content based.

The *O'Brien* test has four factors. First, this court must assess whether Federal Heights possesses the constitutional power to enact the ordinance. Second, the regulation must further an important or substantial government interest. Third, the government interest must be unrelated to the suppression of free expression. Fourth, the restriction must be no greater than is essential to the furtherance of the government interest. *See O'Brien, 391 U.S. at 377.* It is the burden of Federal Heights to prove satisfaction of each of these elements. *See United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 816, 146 L. Ed. 2d 865, 120 S. Ct. 1878 (2000)* **[**22]** ("When the Government restricts speech, the Government bears the burden **[*1284]** of proving the constitutionality of its actions."); *Z.J. Gifts, 136 F.3d at 688.* The city has not met its burden with respect to the second *O'Brien* requirement. We do not address the other factors.

A. The City's Interest in Limiting the Harmful Secondary Effects Associated with Nude Dancing.

The city asserts it has an interest in combating the harmful secondary effects flowing from nude dancing, including a decrease in property values, an increase in crime, and sexually transmitted diseases. n10 The city's interest is undeniably important. *Pap's A.M., 529 U.S. at 296* (plurality opinion). The city must demonstrate, however, that the harms it seeks to circumscribe are real. *See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994).* The city has presented undisputed evidence establishing the existence of harmful secondary effects of nude dancing establishments and, accordingly, that it has a substantial or important interest in limiting those effects.

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n10 Federal Heights seems to argue in portions of its brief that it passed the age restriction because it determined that individuals aged eighteen to twenty are at a greater risk than the general population from the secondary effects of nude dancing establishments. Federal Heights has not, however, demonstrated that its interest in protecting those younger than twenty-one is substantial. Federal Heights must demonstrate that the harms it seeks to redress actually exist. *See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994).* Federal Heights offered evidence that general harmful secondary effects do indeed flow from adult entertainment establishments. *See infra*. The city did not, however, present any evidence that those younger than twenty-one are any more susceptible to those harmful effects. Indeed, there is no indication in the record that those aged eighteen to twenty are even affected by the harmful secondary effects of nude dancing. Without presenting such evidence, the city cannot establish that its interest in protecting those younger than twenty-one is substantial.

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[23]**

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A municipality only has a substantial or important governmental interest in combating the harmful secondary effects of nude dancing if those secondary effects are real. *Phillips v. Borough of Keyport, 107 F.3d 164, 175 (3d Cir. 1997)* (en banc). n11 The Supreme Court held in *Renton* that a city enacting an ordinance aimed at secondary effects can rely on evidence "reasonably believed to be relevant to the problem the city addresses." *475 U.S. at 51-52, 89 L. Ed. 2d 29, 106 S. Ct. 925.* The city need not "conduct new studies or produce" independent evidence of the secondary effects, but may rely on the experience of other cities. *Id. at 51.* In order to prove a substantial interest in limiting the secondary effects of sexually oriented businesses, the governmental body must point to evidence of secondary effects at the time of enactment or evidence of current secondary effects. *See Barnes v. Glen Theatre,* **[*1285]** *Inc., 501 U.S. 560, 582, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991)* (Souter, J., concurring in the judgment) ("Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a **[**24]** *current governmental interest . . . .*" (emphasis added)). n12 Thus, evidence of secondary effects occurring even years after the enactment of a statute may form the basis of a government's substantial interest in limiting those secondary effects. *See DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 410-11 (6th Cir. 1997)* (rejecting the argument that evidence of secondary effects developed after enactment of adult entertainment regulation is irrelevant); *see also J & B Entm't, Inc. v. City of Jackson, 152 F.3d 362, 371-72 (5th Cir. 1998).*

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n11 There is some support for the position that since the Supreme Court has repeatedly accepted evidentiary showings that secondary effects do in fact result from the presence of adult entertainment establishments, a city may presume their reality. *See City of Erie v. Pap's A.M., 529 U.S. 277, 297, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000)* (plurality opinion); *see also FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 244, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990)* (opinion of White, J.) ("*Renton* and *Young* also make clear that there *is* a substantial governmental interest in regulating sexually oriented businesses because of their likely deleterious effect on the areas surrounding them . . . .") (emphasis added). *But see Pap's A.M., 529 U.S. at 313* (opinion of Souter, J.) (requiring "a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity"). Because this court holds that Federal Heights has actually demonstrated that the secondary effects of nude dancing are real, we need not consider whether it may presume their reality.

[25]**

n12 Numerous courts have concluded that Justice Souter's opinion should be read as the holding of the *Barnes* court. *See Tunick v. Safir, 209 F.3d 67, 83 (2d Cir. 2000)* (separate opinion of Calabresi, J.) (noting that Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have read Justice Souter's opinion as the holding of *Barnes*).

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Other courts have required a substantial evidentiary showing of secondary effects before a city's interest in combating them will be deemed substantial or important. The Fifth Circuit requires a showing based on "testimony of individuals, local studies, or the experiences of other cities." *SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1274 (5th Cir. 1988).* Merely stating the words "secondary effects" in a preamble is insufficient. *J & B Entm't, 152 F.3d at 373-74.* The Third Circuit requires the regulating governmental body to identify the secondary effects "with some particularity" and put forth "some record support for the existence of those effects." *Phillips, 107 F.3d at 175.*

This circuit **[**26]** has declared that a city's stated purpose to limit the impact of secondary effects must be credited and "accorded high respect." *Z.J. Gifts, 136 F.3d at 688* (quotation omitted). A city "may control a perceived risk" of secondary effects through regulation and need not wait until the secondary effects actually exist. *Id.*

Federal Heights' evidentiary showing is substantial. The preamble to Ordinance 94-16, which enacted the predecessor of section 12-12-11(B), recited several harmful secondary effects that the city found were caused by "adult entertainment establishments." There is no preamble to Ordinance 95-11, which enacted section 12-12-11(B), but section 12 of the ordinance provided that the ordinance "is deemed necessary for the protection of the health, welfare, and safety of the community." Ordinance 96-15 amended the zoning laws of Federal Heights to prohibit adult entertainment

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establishments from locating within 500 feet of a church, school, other adult entertainment establishment, or a residential zone. The preamble recites that the city consulted land use studies from other cities demonstrating adverse secondary impacts from adult businesses, but the **[**27]** cities, the authors, and details of the studies are not included.

Ordinance 97-15 amended other provisions of the adult business regulations and created, among other things, an employee licensing scheme. The preamble to 97-15 cites *Renton* for the proposition that it may rely on the experience of other cities with harmful secondary effects from adult businesses and need not "await the impact of such effects." The preamble also states that the City Council and administrators have reviewed many land use studies concerning secondary effects. The location and dates of fourteen studies are listed, but no details are given. From these studies, the City Council concluded that secondary effects result from adult businesses. **[*1286]** These effects include increased rates of certain crimes, the spread of sexually transmitted diseases, and harmful effects on surrounding residences and businesses including decreased property values and parking and traffic problems.

The affidavit of Sharon Richardson, Mayor Pro Tem of Federal Heights, states that "residents shared concerns with me about the nature of the effects of Adult Entertainment Establishments on the community." Section 12-12-11(b) was supported **[**28]** by "studies and information received subsequent to the 1995 ordinance." The City Council's deliberations on Zoning Ordinance 96-15, she testifies, took into account "secondary impact studies both locally and nationally." Crime statistics relating to adult businesses were presented to the Council, as was an informal survey of other Colorado communities regarding their experiences with the secondary effects of adult businesses. Ms. Richardson also testified that Federal Heights had a topless dancer club from 1975 to 1979 and that there were "numerous problems . . . including one murder on the premises."

In this case, Federal Heights has offered undisputed evidence that secondary effects have resulted and will result from nude dancing clubs and other forms of adult entertainment. As noted above, there are numerous statements in the preambles of various Federal Heights ordinances that the presence of adult entertainment establishments would result in harmful secondary effects. These preambles are not "mere incantations" of secondary effects. *See J & B Entm't, 152 F.3d at 373-74.* Rather, they are a detailed list of the harmful effects the City Council expected to flow **[**29]** from adult entertainment establishments. Detailed as they are, and, given the testimony of Mayor Pro Tem Richardson, supported by studies and information received by the Council, these preambles are strong evidence of secondary effects. *See id. at 374* (preamble statements properly explained are evidence of substantial governmental interest in limiting secondary effects). Additionally, the City Council was in close communication with its constituents who made clear that there were concerns about the effect of adult establishments on the community. The subsequent pronouncements of the City Council that it felt the need to deal with the imminent secondary effects of adult establishments should be interpreted as experienced, "particularized, expert judgments" entitled to significant weight. *See Pap's A.M., 529 U.S. at 297-98* (plurality opinion). Moreover, Federal Heights consulted several studies from other jurisdictions and relied on court decisions detailing the secondary effects flowing from such establishments. Ms. Richardson's affidavit also reveals that Federal Heights and the City Council had some experience with a topless dancing club and its attendant **[**30]** problems. *See DLS, Inc., 107 F.3d at 410* (noting that city's experience with crime-ridden adult cabaret fifteen years before enactment of adult entertainment ordinance was evidence that secondary effects result from adult cabarets).

When there is evidence of secondary effects in the form of supported preamble statements, studies and court decisions relied upon by the governing body, and localized experience with crime or other secondary effects associated with nude dancing, the city is entitled to summary judgment on the existence of a substantial governmental interest unless the challenger presents conflicting evidence giving rise to an issue of fact. *See Jones v. Denver Post Corp., 203 F.3d 748, 751 (10th Cir. 2000)* (party opposing summary judgment motion must "identify sufficient evidence which would require submission of the case to the jury" (quotations omitted)). Plaintiffs have not referenced any evidence **[*1287]** casting doubt on the existence of secondary effects. Accordingly, Federal Heights has demonstrated as a matter of law that it has a substantial interest in combating the secondary effects associated with nude dancing.

B. Requirement [31] that the Age Restriction Furthers the City's Interest.**

The *O'Brien* test is not satisfied, however, merely by the existence of a substantial governmental interest in regulating secondary effects. The city must also prove that its chosen weapon against these secondary effects will further its mission. The city has chosen to combat the general secondary effects associated with nude

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dancing not by banning nude dancing outright, but by banning those under twenty-one from nude dancing establishments. The district court ruled that Federal Heights failed to present evidence that its age restriction on dancers would further its interest in combating secondary effects. Dist. Ct. Op. at 6-7. It therefore denied Federal Heights motion for summary judgment in part and granted plaintiffs' in part. n13

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n13 The district court upheld the age restriction as it applied to patrons, because it believed there is a "qualitative difference" between the rights of dancers and observers. We do not decide whether those who receive protected expression have a lesser right than those who send such expression. We note that observers or recipients of expression do have some First Amendment rights. *See U.S. West, Inc. v. FCC, 182 F.3d 1224, 1232 (10th Cir. 1999)* ("Effective speech has two components: a speaker and an audience. A restriction on either of these components is a restriction on speech."); *see also Kleindienst v. Mandel, 408 U.S. 753, 762, 33 L. Ed. 2d 683, 92 S. Ct. 2576 (1972)* ("It is now well established that the Constitution protects the right to receive information and ideas." (quotations omitted)).

Moreover, Essence may assert those rights. Although federal courts generally have prevented parties from asserting the rights of others, the traditional rule prohibiting the assertion of the rights of others is prudential rather than jurisdictional in the Article III sense. *See United Food & Commercial Workers Union v. Brown Group, 517 U.S. 544, 557, 134 L. Ed. 2d 758, 116 S. Ct. 1529 (1996).* Because this case presents a facial challenge on First Amendment grounds, the prudential standing rules are relaxed. *See Virginia v. American Booksellers Assoc., 484 U.S. 383, 392-93, 98 L. Ed. 2d 782, 108 S. Ct. 636 (1988).* A well-established exception to the bar against third-party standing is when the exercise of rights by the third party is intertwined with the litigant's activities. As the Supreme Court explained:when . . . enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has legal entitlement (typically a constitutional entitlement), third-party standing has been held to exist.*United States Dept. of Labor v. Triplett, 494 U.S. 715, 720, 108 L. Ed. 2d 701, 110 S. Ct. 1428 (1990); see also Craig v. Boren, 429 U.S. 190, 195, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976)* (allowing beer vendor to assert the rights of males under twenty-one in an equal protection challenge to an Oklahoma liquor law and observing that vendors have been "uniformly permitted" to challenge restrictions "by acting as advocates of the rights of third parties who seek access to their market or function"). The right of eighteen to twenty year-olds to watch nude dancing depends upon whether nude dancing establishments, such as the Bare Essence, are allowed to show nude dancing. In such a case, a restriction on a nude dancing establishment can result in an indirect violation of the rights of audiencemembers.

Because patrons of nude dancing establishments do have some First Amendment interest in observing nude dancing, and because Essence may assert that interest, the district court erred in bifurcating its analysis Instead, it should have evaluated the age restriction as a whole under *O'Brien.*

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[32]**

A ban on nude dancing would necessarily further the city's interest in minimizing secondary effects. *Pap's A.M., 529 U.S. at 300-01* (plurality opinion); *Barnes, 501 U.S. at 584* **[*1288]** (Souter, J., concurring in the judgment). Federal Heights' more limited ban on the presence of those under twenty-one complicates the analysis. Compliance with the ordinance does not require further clothing of the dancers. Federal Heights must thus establish that banning persons under twenty-one while maintaining nude dancing would combat the secondary effects associated with nude dancing.

The city attempted to demonstrate that the age restriction furthers its interest in combating secondary effects by offering the affidavit of Mayor Pro Tem Richardson and the affidavit of Jennifer Weaver, a former dancer at Bare Essence. The city did not offer the Weaver affidavit until the day of oral argument on

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the cross-motions for summary judgment, almost six months after it filed its summary judgment motion. Weaver was a dancer at the Bare Essence and testified to observing numerous illegal activities and conduct at the club violating the Federal Heights ordinance. Specifically, Weaver **[**33]** testified to seeing dancers under the age of twenty-one drinking alcohol, being told in an employee meeting that it was acceptable for dancers to drink alcohol, and observing customers bring alcohol into the club for employees. Weaver's affidavit tends to prove that underage drinking occurs at nude dancing establishments and that the age restriction would be effective in reducing the crime of underage drinking.

The district court denied Federal Heights' motion to supplement its reply brief with the affidavit. Our review of that decision, like review of other evidentiary rulings, is for abuse of discretion. *See Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 894 (10th Cir. 1997)* ("We review a district court's decision to exclude evidence at the summary judgment stage for abuse of discretion."). Plaintiffs objected to the affidavit as untimely and irrelevant. The transcript indicates that the district court initially thought the affidavit probative only as to the standing of plaintiffs and, hence, irrelevant to consideration of the cross-motions. The court, however, subsequently recognized that the city offered the affidavit to establish the **[**34]** city's need for the age restriction. Thus, the only ground upon which the district court could have denied the motion was timeliness.

A district court may, in its discretion, consider an untimely affidavit for "cause shown" if the failure to timely file the affidavit "was the result of excusable neglect." *Fed. R. Civ. P. 6(b)(2)*. n14 Federal Heights contends that the district court abused its discretion by concluding there was no evidence that the age restriction would further the city's interest in preventing secondary effects "and yet the Court did not consider or allow the presentation of evidence which directly addressed the adverse secondary effects." The city's position is essentially that an abuse of discretion arises whenever a district court refuses to consider evidence necessary to one party's case. This court, however, will not overturn the district court's evidentiary decision unless we are firmly convinced that it made a clear error of judgment. *United States v. Magleby, 241 F.3d 1306, 1315 (10th Cir. 2001)*. The district court's **[*1289]** exclusion of the late affidavit was not such an error. *Cf. United States v. Diaz, 189 F.3d 1239, 1247 (10th Cir. 1999)* **[**35]** (holding district court has wide discretion to exclude expert testimony for which notice is untimely); *see also United States v. Adams, 271 F.3d 1236, 1244 (10th Cir. 2001)* (holding district court justifiably excluded psychologist testimony on timeliness grounds alone).

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n14 Rule 6(d) requires that affidavits supporting a motion be served with the motion. *Fed. R. Civ. P. 6(d)*. Rule 6(b)(2) allows a district court, in its discretion, to admit an untimely filing upon motion if the failure to timely act was the result of excusable neglect. *Fed. R. Civ. P. 6(b)(2)*. Rule 6(b) applies to motions for summary judgment. *See id.* (excluding various motions from Rule 6(b)'s time extension procedures but not listing summary judgment motions); *Buchanan v. Sherrill, 51 F.3d 227, 228 (10th Cir. 1995)* (per curiam) (reviewing a district court's decision to extend time to file summary judgment response under Rule 6(b)(1)).

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The only other materials offered by Federal Heights was Mayor Pro Tem **[**36]** Richardson's affidavit. Richardson testified that the City Council determined that "the minimum age requirement of Code § 12-12-11 would assist Federal Heights in reducing the negative effects of sexually oriented businesses." Richardson also testified that the City Council determined again in 1995 that the age restriction on nude dancing would reduce secondary effects. She further testified that the Council's determination is "supported by the studies and information received" after passage of the restriction. The studies referenced by the affidavit are not in the record.

Federal Heights bears the burden at trial of proving that the age restriction furthers its interest in preventing the secondary effects of nude dancing even though nude dancing may still occur. To successfully resist plaintiffs' motion for summary judgment, Federal Heights, as the non-movant who bears the burden of proof at trial, may not rest on its pleadings but must come forth with specific facts showing there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. Richardson's affidavit does not demonstrate **[**37]** that there is a genuine issue for trial on whether the age restriction furthers the city's interest. Mayor Pro Tem Richardson merely opines in a conclusory fashion that the age restriction furthers the city's interest. The affidavit does not provide a factual basis for Richardson's conclusion. This court

has held that such an affidavit does not create a genuine issue of material fact. *Murray v. City of Sapulpa, 45 F.3d 1417, 1422 (10th Cir. 1995)* (conclusory affidavits not providing factual bases for their conclusions not sufficient to create fact question); *Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991)* (conclusory, self-serving affidavit does not create fact question). Thus, plaintiffs' summary judgment motion should have been granted, n15 and section 12-12-11(B) should be stricken.

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n15 Accordingly, Federal Heights' summary judgment motion should have been denied as to the age restriction. Because the Richardson affidavit does not create a genuine issue of fact, it is not evidence upon which a reasonable jury could return a verdict for Federal Heights. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* It was the only evidence offered by Federal Heights, and accepted by the district court, to show that the age restriction furthered its interest in preventing secondary effects. Thus, there was no evidence that would support a jury verdict for Federal Heights. The city, which had the burden of proof at trial, was therefore not entitled to summary judgment. *See Jeffries v. Kansas, 147 F.3d 1220, 1228 (10th Cir. 1998)* (noting that summary judgment proper when "evidence is so one-sided that one party must prevail as a matter of law" (quotation omitted)).

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[38]**

VI. LICENSING PROVISIONS

In addition to restricting the age of those on the premises, Federal Heights' sexually-oriented business ordinances establish a licensing scheme for such businesses and their employees. In particular, section 12-12-10 requires all employees and managers of adult entertainment establishments to apply for an "employee's license." n16 The Supreme Court has allowed licensing of adult entertainment **[*1290]** establishments so long as two classic evils of prior restraints are not present. *FW/PBS, 493 U.S. at 225-26.* First, the licensing scheme may not vest unbridled discretion in the government officials charged with the responsibility of granting or denying the license. *Id.* Second, the licensing scheme may not allow the decisionmaker unlimited time to decide on matters affecting the license; otherwise, there is the "risk of indefinitely suppressing speech." *Id. at 226.* To ensure that the decision time is limited, certain procedural safeguards are required. *See id. at 227; Freedman, 380 U.S. at 58-60.*

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n16 It appears from the record that neither the plaintiff dancers nor any of Essence's employees applied for or were denied an employee license. Nevertheless, plaintiffs have standing to bring a facial challenge to section 12-12-10. "Applying for and being denied a license . . . is not a condition precedent to bringing a facial challenge to an unconstitutional law." *Assoc. of Cmty. Orgs. for Reform Now v. Municipality of Golden, 744 F.2d 739, 744 (10th Cir. 1984); see also City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755-56, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988)* ("Our cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official . . ., one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license."); *Freedman v. Maryland, 380 U.S. 51, 55-56, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965)* (plaintiff who did not seek censor's approval had standing to mount facial attack on censorship scheme that had inadequate procedural safeguards).

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[39]**

In the adult business licensing context, at least two procedural safeguards are essential: (1) the licensor must make the decision whether to issue the license within a specified and reasonable time period, (2) there must be opportunity for prompt judicial review of the denial of a license. *See FW/PBS, 493 U.S. at 228; Freedman, 380 U.S. at 58-60.* n17 Plaintiffs contend that section 12-12-10 does not contain these protections. n18 Because section 12-12-10 does not provide for any judicial review following an employee license denial, this court need not address the promptness of administrative and judicial procedures.

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n17 It is unclear whether a third procedural safeguard, requiring that the censor bear the burden of going to court to justify a license denial, must also be present in adult business licensing schemes. The Supreme Court split sharply over the issue in *FW/PBS. See 493 U.S. at 229-30* (plurality opinion); *id. at 239-42* (Brennan, J., concurring in the judgment); *id. at 244-49* (White J., concurring in part and dissenting in part); *see also Ward v. County of Orange, 217 F.3d 1350, 1355 (11th Cir. 2000)* (recognizing that a majority of the Supreme Court has not recognized the distinction between adult business licensing schemes and censorship schemes); 11126 *Baltimore Blvd., Inc. v. Prince George's County, 58 F.3d 988, 996 n.12 (4th Cir. 1995)* (en banc) ("The splintered opinion of the *FW/PBS* Court leaves the continued application of the third *Freedman* factor subject to some speculation."). We do not reach the issue.

[40]**

n18 Plaintiffs also contend, in a single sentence, that section 12-12-10 vests the City Council with overbroad discretion. "Such perfunctory complaints fail to frame and develop an issue sufficient to invoke appellate review." *Murrell v. Shalala, 43 F.3d 1388, 1389 n.2 (10th Cir. 1994).* We will thus not consider the argument.

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Section 12-12-10 provides that an employee license shall issue unless the City Administrator finds one of several grounds of denial. *See supra* note 8. Unlike sections 12-12-6 and 12-12-9, the sections dealing with denial, suspension, and revocation of business licenses, section 12-12-10 lacks any mechanism for review of the City Administrator's decision. There is no provision for a public hearing before the City Council following a license denial. *Compare* Federal Heights Mun. Code ch. XII, art. XII, §§ 12-12-6, -9. n19 In addition, **[*1291]** there is no authorization to appeal the City Administrator's decision to a Colorado court. Section 12-12-10 thus fails to provide any opportunity for judicial review and is facially invalid. n20

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n19 These provisions are summarized in footnotes 6 and 7.

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n20 Plaintiffs also contend that the fees charged for issuance of an employee license constitute an unconstitutional tax on free expression. Because we conclude that the employee licensing requirement is invalid on its face, we need not decide the issue.

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VII. SEVERABILITY

Sections 12-12-10 and 12-12-11(B) are facially unconstitutional. Under Colorado law, a section of a legislative enactment is severable if the remaining portion is autonomous and the legislature's will in passing the entire statute is not thwarted by excision. *See City of Lakewood v. Colfax Unlimited Assoc., 634 P.2d 52, 70 (Colo. 1981)* (en banc). A severability clause creates a presumption that the legislature would have been satisfied with the remaining portions of the enactment. *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348, 371 (Colo. 1985)* (en banc). If the remaining enactment, however, is so "incomplete or riddled with omissions" that it lacks coherence, the entire enactment should be stricken. *Colfax Unlimited, 634 P.2d at 70.* **[**42]**

Sections 12-12-10 and 12-12-11(B) were made part of the municipal code by Ordinances 97-15 and 95-11 respectively. Both ordinances contain a severability clause. n21 Striking sections 12-12-10 and 12-12-11(B) does not render Ordinances 97-15 and 95-11 incoherent since each code amendment made by the ordinances is autonomous. Nor will striking either section render contradictory or incoherent any other provision of the municipal code. We therefore conclude that only section 6 of Ordinance 97-15, the provision enacting the present form of section 12-12-10, and that portion of section 5 of Ordinance 95-11 enacting the present form of section 12-12-11(B) should be stricken.

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n21 Section 8 of Ordinance 95-11 and section 10 of Ordinance 97-15 both read:If any article, section, paragraph, sentence, clause or phrase of this ordinance is held to be unconstitutional or invalid for any reason, such decision shall not affect the

validity or constitutionality of the remaining portions of this ordinance. The city council hereby declares that it would have passed this ordinance and each part or parts hereof irrespective of the fact that any one part or parts be declared unconstitutional or invalid.

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VIII. CONCLUSION

We **affirm** the district court's exclusion of the Weaver affidavit. We **affirm in part and reverse in part** the district court's decision with regard to the age restriction. Section 12-12-11(B) is stricken in its entirety. The district court's decision on the constitutionality of section 12-12-10 is **reversed**. The section is stricken in its entirety. The portions of the district court's opinion and order dealing with the plaintiffs' challenge to the disability provisions of sections 12-12-10 and 12-12-6, plaintiffs' other challenges to section 12-12-6, and plaintiffs' challenges to section 12-12-9 should be **vacated** on remand. The district court should then dismiss the portion of plaintiffs' complaint relating to the disability provisions and sections 12-12-6 and 12-12-9.

2-245244

Citation #11
894 F.2d 1210

DENNIS O'CONNOR and UNITED THEATERS INCORPORATED, d/b/a Empress Theater, 111 South Broadway, Inc., d/b/a After Dark and Matties Theatre, Plaintiffs-Appellants, v. THE CITY AND COUNTY OF DENVER, an incorporated municipality; L. BELLIO; DEAN JONES; DALE WALLIS; STEVE ROSENGREN; MARK LEONE, and TERRY BALL, Defendants-Appellees

No. 87-2434

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

894 F.2d 1210; 1990 U.S. App. LEXIS 1004

January 29, 1990

PRIOR HISTORY: [**1]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, D.C. No. 85-F-1967.

COUNSEL: Michael W. Gross of Arthur M. Schwartz, P.C., Denver, Colorado, for Plaintiff-Appellants.

Stan M. Sharoff, Assistant City Attorney (Stephen H. Kaplan, City Attorney, with him on the brief), Denver, Colorado, for Defendants-Appellees.

JUDGES: Baldock, Circuit Judge, Eugene A. Wright, Senior Circuit Judge, * and Brorby, Circuit Judge.

> * The Honorable Eugene A. Wright, Senior Judge, United States Court of Appeals, Ninth Circuit, sitting by designation.

OPINIONBY: BRORBY

OPINION: [*1212] BRORBY, Circuit Judge.

Pursuant to *42 U.S.C. §§ 1983* and 1988 (1982) Dennis O'Connor (O'Connor); United Theaters Incorporated, d/b/a Empress Theater (the Empress); and 111 South Broadway, Inc., d/b/a After Dark and Matties Theatre (the After Dark) (the Empress and the After Dark are referred to jointly as the Theatres) sought declaratory and injunctive relief against the enforcement of Denver Municipal Code §§ 7-11 through 7-40 (the Code) pertaining to licensing of "entertainments". The plaintiffs claimed that the Code stood in violation of their rights under [**2] the First and Fourteenth Amendments to the United States Constitution. In addition, the Theatres sought damages for the closure of their businesses under the Code. O'Connor sought damages resulting from his arrest and detention for operating without a license in violation of the Code. After a trial to the court, n1 the court ordered entry of judgment for the defendants, the City and County of Denver and various law enforcement officers in their official capacities, and against the plaintiffs. The trial court concluded that the plaintiffs were not entitled to nominal damages or attorney fees. O'Connor and the Theatres appeal the judgment entered on the trial court's opinion. We AFFIRM.

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n1 O'Connor and the Theatres did not call any witnesses at trial, but rested their case upon the stipulation and exhibits of the parties. Without explanation, O'Connor failed to appear for trial. O'Connor and the Theatres did cross-examine the City's two witnesses.

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I. FACTS

111 South Broadway, Inc. is a Colorado corporation [**3] that owns and operates the After Dark and Matties Theatres in Denver, Colorado. United Theatres, Inc. is a Colorado corporation that owns and operates the Empress Theater, also in Denver. Both the Empress and the After Dark exhibit sexually explicit motion picture films. Each of the theatres held amusement licenses from the Department of Excise and Licenses of the City and County of Denver (the Department). At the time of the incidents giving rise to the action below, O'Connor was a cashier at the Empress.

Pursuant to an order to show cause issued by the Director of Excise and Licenses (the Director), Martin J. Baker, holder of the license for the Empress, was summoned to appear before the Department for a hearing to suspend or revoke its [*1213] amusement license. The order to show cause why the Department should not suspend the license stemmed from allegations that patrons of the theater were engaging in public sex acts in violation of Denver's public

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indecency ordinances. After a hearing on July 25, 1984, the Department's hearing officer found that Martin Baker provided dimly lit areas where indecent acts took place and provided no supervision of these areas. n2 The hearing **[**4]** examiner recommended suspension or revocation of the Empress' license based on the owner's failure to prevent indecent acts from being committed in his establishment. The Director subsequently adopted the hearing officer's findings and set a penalty hearing, which was not held until April 15, 1985. At the penalty hearing, the City Attorney presented 126 Denver Police Department Vice and Drug Control Bureau case summary sheets documenting the same number of citations for acts of public indecency committed by Empress patrons between January 5, 1983, and February 15, 1985. On May 20, 1985, pursuant to § 7-39 of the Code, the Director issued a written order revoking the Empress' amusement license.

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n2 In a conversation with an investigating officer, Mr. Baker admitted that he knew sex acts were occurring frequently at the Empress but stated that he was "providing a public service so that these individuals didn't go into K-Mart and King Soopers and perform these acts."

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Contending the entire licensing scheme was **[**5]** unconstitutional, the Empress elected to remain open. When O'Connor reported to work on July 23, 1985, he was arrested and jailed for operating without an amusement license in violation of § 7-26 of the Code. On August 2, 1985, the Empress and O'Connor commenced an action in the District Court in and for the City and County of Denver, Colorado, seeking injunctive and declaratory relief and damages. On August 21, 1985, the Empress and O'Connor filed a Petition for Removal to the United States District Court for the District of Colorado.

Meanwhile, on July 10, 1985, the Director summarily suspended the amusement license of the After Dark, which was held by 111 S. Broadway, Inc. The order was entered as a result of a complaint filed with the Director by the city attorney's office, which included sixty-five case summary sheets representing a like number of criminal citations for public indecency issued to patrons of the After Dark. The citations were issued for a wide variety of public sex acts including masturbation, fellatio and sexual intercourse. A hearing was held July 23-24, at which four Denver police officers testified as to various acts they had witnessed. One officer also **[**6]** testified about a group of five booths in a row with so-called "glory holes" cut in the shared walls at waist level. The booths were completely dark and were the site of sexual acts between unknown partners. The trial court found and the parties do not challenge the fact that it was impossible to view films shown in the theater from inside the booths.

Based upon the evidence presented at the hearing, the Director revoked the After Dark's license. The After Dark immediately filed the complaint in the instant action seeking declaratory and injunctive relief against the enforcement of Denver's allegedly unconstitutional licensing scheme. The district court consolidated the After Dark's action with that of the Empress and O'Connor. While state and federal actions were pending, the Director granted the issuance of the After Dark's new amusement license. n3 Furthermore, during the pendency of the federal lawsuit, the City repealed §§ 7-26, 7-39 and 7-40, and replaced these sections with revised § 7-26.

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n3 Various state court proceedings were conducted as a result of the administrative action and the issuance of citations to employees of the theatre. We need not discuss those proceedings in order to resolve the issues in this appeal.

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II. STANDING AND MOOTNESS

The district court concluded that O'Connor and the Theatres had standing to assert the unconstitutionality of the repealed Denver Municipal Code sections, but lacked standing to assert the unconstitutionality of the revised version of the Code due to the fact they had abandoned their claim. **[*1214]** O'Connor, the Empress and the After Dark argue the court erred in so ruling. They assert they have standing to challenge the constitutionality of the revised ordinance because it remains substantially similar to the one which the City repealed. Appellants' Brief at 12-15. We do not agree. We hold that because O'Connor and the Theatres abandoned their claim at trial, they lack standing to assert the unconstitutionality of the revised version of the Code.

"'Standing doctrine is designed to determine who may institute the asserted claim for relief.'" *ACORN v. City of Tulsa, Okla., 835 F.2d 735, 738 (10th Cir. 1987)* (emphasis omitted) (quoting *Action Alliance of Senior Citizens v. Heckler, 252 U.S. App. D.C. 249, 789 F.2d 931, 940 (D.C.Cir. 1986))*. In order to avoid futile proceedings, we determine whether the matter **[**8]** involves injury (actual or threatened) and whether judicial action is likely to redress the injury.The constitutional dimension of standing derives from article III, which limits the judicial power of the United States to "cases" and "controversies." In order to satisfy the article III restrictions on standing, a party must show at least that he or she has suffered an actual or threatened injury caused by the defendant and that a favorable judicial decision is likely to redress the injury.

Id. at 738 (citing *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982))*. Absent this showing, a court need not entertain the parties' contentions.

Within the First Amendment context, courts properly apply an expanded notion of standing to determine who may institute the asserted claim for relief. "When a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license. **[**9]** " *City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, , 108 S. Ct. 2138, 2143, 100 L. Ed. 2d 771 (1988)*. Parties "who have not actually engaged in protected activity are allowed to challenge a statute that inhibits others from engaging in protected speech or expression." *ACORN v. City of Tulsa, 835 F.2d at 738* (citing *Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 956-57, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984)); see Association of Community Orgs. for Reform Now, ("ACORN") v. Municipality of Golden, Colo., 744 F.2d 739, 745 n. 3 (10th Cir. 1984)*. Under these principles, O'Connor and the Theatres argue they have standing to challenge the constitutionality of the revised portions of the Code.

This expanded notion of standing, however, has no application in the instant case. Standing to raise an issue does not preserve for appeal a claim abandoned at trial. Stated differently, the standing doctrine does not undo the parties' trial strategy or their decisions regarding how to fashion their case. We do not consider on appeal issues not raised in the district court. *Gillihan v. Shillinger, 872 F.2d 935, 938 (10th Cir. 1989)*. **[**10]** Similarly, we will not consider claims abandoned in the district court.

At trial, O'Connor and the Theatres limited their case to the constitutionality of the repealed Code. Although the trial court's Supplemental Pre-Trial Order, indicates that O'Connor and the Theatres challenged the constitutionality of the Code in both its former and amended versions, at trial plaintiffs abandoned their claim as to the amended version and proceeded with only their claim that the former version of the Code was unconstitutional. In addressing the trial court, counsel for plaintiffs stated:

And they eventually did [amend the amusement licensing ordinance]. Whether they corrected the problem remains to be seen. We contend that they didn't. But that issue will probably be resolved another day.

But, again, to capsulize, 7-39 overly broad discretion and no procedural safeguards. And 7-26 equal protection, vagueness and overly broad discretion. **[*1215]** It would seem again based upon all of the cases cited by the Plaintiffs there is no doubt that this ordinance is unconstitutional, and it's not even a borderline case.

The trial court concluded the unconstitutionality of the revised **[**11]** Denver Municipal Code sections was not at issue and addressed the plaintiffs' claims only as to the constitutionality of the Code prior to the amendments.

We agree with the trial court that O'Connor and the Theatres abandoned their claim as to the revised Code and did not seek a determination from the trial court that the revised Code was unconstitutional. Consequently, the only issue of standing before us is whether O'Connor and the Theatres have standing to challenge the Code as it read before the effective date of the revisions. Because O'Connor and the Theatres suffered injury when the Director revoked their licenses and they received citations for operating without them, we hold they have standing to challenge the validity of the Code as it read at the time of the official actions that gave rise to their comp laint.

The City argues that amending the Code mooted n4 all of O'Connor's and the Theatres' claims for relief. O'Connor and the Theatres admitted in their pleadings that their claims for injunctive and declaratory relief were moot for the reason that the City amended and repealed the pertinent sections of the Code. At trial, plaintiffs withdrew their claims for damages **[**12]** except nominal damages. Consequently, we need consider only whether the lonely claim for nominal damages is moot.

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n4 In this appeal, both parties play fast and loose with the issue of mootness. The court perceives mootness here as one battleground over attorney fees under *42 U.S.C. § 1983.* Resolution of the fee dispute, however, depends upon our review of the trial court's determination that plaintiffs were not "prevailing parties."

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Citing *Memphis Community School Dist. v. Stachura, 477 U.S. 299, 91 L. Ed. 2d 249, 106 S. Ct. 2537 (1986),* the City argues that plaintiffs' withdrawal of all claims for damages combined with the failure of plaintiffs to prove injury at trial mooted all claims for monetary relief, even nominal damages. Appellees' Brief at 15-16. In *Stachura*, the plaintiff filed a § 1983 action seeking both compensatory and punitive damages. The district court instructed the jury on the standard elements of compensatory and punitive damages and also **[**13]** charged the jury that additional compensatory damages could be awarded based on the value or importance of the constitutional rights that were violated. The Sixth Circuit affirmed, but the Supreme Court reversed, holding "damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages in such cases." *477 U.S. at 310.* The Court in *Stachura* clearly distinguished nominal damages from the damages at issue. The Court wrote:

Nominal damages, and not damages based on some undefinable "value" of infringed rights, are the appropriate means of "vindicating" rights whose deprivation has not caused actual, provable injury: ". . . By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights."

Id., 477 U.S. at 308-309 n. 11 **[**14]** (quoting *Carey v. Piphus, 435 U.S. 247, 266, 55 L. Ed. 2d 252, 98 S. Ct. 1042 (1978)).* Thus, *Stachura* indicates that nominal damages are recoverable without proof of actual injury, and therefore does not support the City's argument.

Plaintiffs' withdrawal of claims coupled with the failure of their proof did not moot their claim for nominal damages. In *Taxpayers for Animas-La Plata Referendum* **[*1216]** *v. Animas-La Plata Water Conservancy Dist., 739 F.2d 1472, 1479 (10th Cir. 1984),* we stated: "Indeed, by definition claims for past damages cannot be deemed moot." There is no question that the nominal damages sought in this case were past damages not affected by any changes in the Code. We hold that repeal and amendment of the Code did not moot plaintiffs' claim for nominal damages.

III. FIRST AMENDMENT

O'Connor and the Theatres argue that because their activities of providing entertainment are protected by the First Amendment to the United States Constitution, all issues in this appeal are First Amendment issues. They challenge the facial validity of the Code, asserting the licensing requirement itself imposes a prior restraint on First **[**15]** Amendment activity and the challenged ordinance provides unconstitutionally broad discretion to licensing officials and law enforcement officials. They further argue the Code is unconstitutionally vague in light of heightened First Amendment inquiry.

The trial court found no constitutional infirmity in the Code. Relying on *Arcara v. Cloud Books, Inc., 478 U.S. 697, 92 L. Ed. 2d 568, 106 S. Ct. 3172 (1986),* the trial court determined this case deals with an action by the City in response to public nuisances occurring on the Theatres' premises and therefore does not implicate or trigger First Amendment protections. We agree with the trial court. Further, because O'Connor and the Theatres have not demonstrated any infringement of their First Amendment rights by the licensing scheme, the City does not bear the burden of showing the constitutionality of the licensing scheme. *See Association of Community Orgs. for Reform Now, ("ACORN") v. Municipality of Golden, Colo., 744 F.2d 739, 746 (10th Cir. 1984).*

A. *Arcara* applied

Citing *Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65, 68 L. Ed. 2d 671, 101 S. Ct. 2176 (1981),* O'Connor **[**16]** and the Theatres state: "Since the Denver amusement licensing scheme regulates 'entertainment,' there can be no dispute the ordinance must fulfill the strict requirements for regulation of First Amendment expression." Appellants' Brief at 16. *Schad*, however, does not apply to the instant case. In *Schad*, the challenged code provision prohibited "all uses not expressly permitted," which included all live entertainment and nude dancing, a protected form of First Amendment expression. In declaring the law overbroad, the Court held the Borough failed to justify the exclusion of live entertainment from the broad range of commercial uses permitted in the Borough. *See Schad, 452 U.S. at 65-66, 72-77.* We perceive a

meaningful difference between prohibiting all live entertainment in *Schad* and closing business establishments because of the repeated and sanctioned criminal conduct in the instant case. n5 Unlike *Schad*, the ordinance now before the court was not designed or used to prohibit entertainment or regulate the content thereof. n6 Although under the City's scheme one must obtain an amusement license before presenting "entertainment" (as defined by the ordinance) **[**17]** to the public, the Code arguably applies to all entertainment businesses. O'Connor and the Theatres base their entire argument on a faulty premise that the Code infringes their First Amendment rights.

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n5 According to the hearing officer in *In re Martin J. Baker, d/b/a Empress Theatre*, Nos. 85-F-1967 and 85-F-1968, Martin Baker testified that he knew gay sexual aids were sold on the premises and he had never had any employee stationed in the back of the theatre even though he was aware of arrests made on the premises and at one time had sealed off the private booths.

n6 In affidavits supporting their motion for summary judgment, the sole shareholder of the After Dark and the attorney representing the Empress individually conceded the issuance of an amusement license was contingent solely upon payment of the application fee and passing inspection by the Zoning, Building and Fire Departments.

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In our view, the trial court correctly applied *Arcara v. Cloud Books, Inc., 478 U.S. 697, 92 L. Ed. 2d 568, 106 S. Ct. 3172 (1986)*, **[**18]** and determined that First Amendment protections **[*1217]** are not at issue. In *Arcara*, a criminal investigation revealed that an "adult" bookstore was also the site of solicitation of prostitution, public acts of masturbation, fondling, and fellatio, all within the observation of the proprietor. The district attorney filed a civil complaint seeking closure of the premises under a statute which authorized closure of a building found to be a public health nuisance because it was being used as a place for prostitution and lewdness. The bookstore claimed First Amendment protections. In the Court's view, the statute was directed at unlawful conduct having nothing to do with books or other expressive activity. We conclude the First Amendment is not imp licated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books." *Id. at 707.* In *Arcara*, the Supreme Court declined to apply the First Amendment least restrictive means test to the statute under which the bookstore was closed.

Similarly, the Theatres were closed under an ordinance that was directed at unlawful conduct having **[**19]** nothing to do with movies or other expressive conduct. At trial, the Director testified that he revoked the licenses of the Theatres because of a significant number of acts of public indecency. Further, the investigating officer testified that the film fare at the Theatres was unrelated to his investigation of reported criminal activity on the premises. The trial court wrote:This case involves first amendment considerations only incidentally, if at all.

[Note 4] The issue is whether plaintiffs may avoid the requirements of complying with public safety standards merely because they show films which are protected by the first amendment. The fact that a commercial enterprise deals in material protected by the first amendment does not immunize it from police power regulations. *Chulchian v. City of Indianapolis, 633 F.2d 27, 31 (7th Cir. 1980).*

In our view, this case evidences legitimate police power regulation very similar to the regulation in *Arcara*. In *Arcara* the Court wrote:

It is true that the closure order in this case would require respondents to move their bookselling business to another location. Yet we have not traditionally **[**20]** subjected every criminal and civil sanction imposed through legal process to "least restrictive means" scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *[United States v.] O'Brien, [391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968)]* or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in *Minneapolis Star [& Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 75 L. Ed. 2d 295, 103 S. Ct. 1365 (1983)].* This case involves neither situation, and we conclude the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books.

Arcara, 478 U.S. at 706-07. Under the reasoning of *Arcara*, the enforcement of the criminal code and the

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closure of the Theatres in this [**21] case do not implicate First Amendment protections.

We reach our conclusion with an appreciation of the fact that determining whether First Amendment protections are at issue is not a mechanical task. In *City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, , 108 S. Ct. 2138, 2152, 100 L. Ed. 2d 771 (1988)*, the Court held, in part, that a statute giving the mayor unbridled discretion whether to permit newsracks was unconstitutional. In so holding, the Court reiterated the focus of the First Amendment inquiry:The danger giving rise to the First Amendment inquiry is that the government is silencing or restraining a channel of speech; we ask whether some interest [*1218] unrelated to speech justifies this silence. To put it another way, the question is whether "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."

108 S. Ct. at 2147 (quoting *Grayned v. Rockford, 408 U.S. 104, 116, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972))*. We are not persuaded that the government was silencing or restraining a channel of speech. The act of closing [**22] the premises does not present the same constitutional issue as the act of prohibiting movies. The Theatres were entitled to open elsewhere upon showing that they met with Zoning, Building and Fire Department regulations and they paid the license fee. Although O'Connor and the Theatres argue that the City used the Code to suppress protected activity, the evidence convinces us to the contrary. n7 The argument that failed in *Arcara* fails here as well.

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n7 The parties agree the content of the films shown at the Theatres was sexually explicit and protected by the First Amendment. Stipulation in Pre-Trial Order. The uncontroverted evidence at trial was that the content of the films had no bearing on the decision to revoke the licenses. Testimony of Manual Martinez, Director of Excise and Licenses. Neither O'Connor nor the Theatres claimed that the stated reasons for closing were pretextual.

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Further, under the *Lakewood* analysis, the instant case does not even raise an issue regarding suppression of constitutionally [**23] protected expression. In *Lakewood* the Court wrote: "In determining whether expressive conduct is at issue in a censorship case, we do not look solely to the time, place, or manner of expression, but rather to whether the activity in question is commonly associated with expression." *108 S. Ct. at 2150.* "The actual 'activity' at issue here is the circulation of newspapers, which is constitutionally protected. . . . So here, the First Amendment is certainly implicated by the City's circulation restriction; the question we must resolve is whether the First Amendment is abridged." *Id.* at 2149-50.

While the placing of newsracks may be "commonly associated with expression," participation in public sex acts is not commonly associated with any constitutionally protected expression. *Cf. Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986)* (no fundamental constitutional right to engage privately in consensual acts of sodomy between homosexuals). *Lakewood* does not cloak the paper boy with First Amendment protection should he choose to engage in public sex acts while delivering the newspaper. The case presented by O'Connor and [**24] the Theatres does not raise a First Amendment issue.

Furthermore, we are not persuaded that the Code affects First Amendment protections even incidentally. The notion of "incidental burden" on protected expression was addressed in *United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968)*, where speech and nonspeech elements were combined in the same course of conduct, the burning of a draft card. *Id. at 376.* The statute at issue imposed criminal sanctions for alteration of a draft card. In upholding the constitutionality of the statute, the Court held, in part, that when speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify *incidental* limitations of First Amendment freedoms. Hence, questions of "incidental burden" arise only after a court has determined the case presents a First Amendment issue.

The notion of "incidental burden" should not be used to elevate non-First Amendment conduct to the level of First Amendment expression solely because it occurs at the location of or simultaneous with protected expression. [**25] *See Arcara, 478 U.S. at 703.* In *Arcara*, the Court drew an important distinction between the *O'Brien* analysis and the analysis properly made in a case such as ours. The Court wrote:

The New York Court of Appeals held that the *O'Brien* test for permissible governmental regulation was applicable to this case because the closure order [*1219] sought by petitioner would also impose an incidental burden upon respondents' bookselling activities. That court ignored a crucial distinction between the circumstances presented in *O'Brien* and

the circumstances of this case: unlike the symbolic draft card burning in *O'Brien*, the sexual activity carried on in this case manifests absolutely no element of protected expression. In *Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973),* we underscored the fallacy of seeking to use the First Amendment as a cloak for obviously unlawful public sexual conduct by the diaphanous device of attributing protected expressive attributes to that conduct. First Amendment values may not be invoked by merely linking the words "sex" and "books."

Arcara, 478 U.S. at 704-05. **[**26]** Thus, the Court made clear that the "incidental burden" analysis does not apply to the closure of a business engaged in protected activity as a result of criminal conduct occurring on the premises. In the same way that closure of the bookstore in *Arcara* was not an "incidental burden" on First Amendment activities, closure of the Theatres due to public sex acts on the premises does not place an "incidental burden" on activities protected by the First Amendment.

Similarly, the disproportionate burden inquiry referred to in *Arcara* does not operate to apply First Amendment scrutiny herein. In *Arcara* the Court acknowledged it has "also applied First Amendment scrutiny to some statutes which, although directed at activity with no expressive component, impose a disproportionate burden upon those engaged in protected First Amendment activities." *Arcara, 478 U.S. at 703-04.* The Court also noted that in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 75 L. Ed. 2d 295, 103 S. Ct. 1365 (1983),* the Courtstruck down a tax imposed on the sale of large quantities of newsprint and ink because the tax had the effect **[**27]** of singling out newspapers to shoulder its burden. We imposed a greater burden of justification on the State even though the tax was imposed upon a nonexpressive activity, since the burden of the tax inevitably fell disproportionately -- in fact, almost exclusively -- upon the shoulders of newspapers exercising the constitutionally protected freedom of the press.

Arcara, 478 U.S. at 704. While acknowledging this precedent, the Court did not apply the "disproportionate burden" analysis to the facts in *Arcara*. Similarly, we see no application of the analysis herein.

Further, we see a distinction between the so-called "open booth" cases and the instant case. In the "open booth" cases, courts have considered the constitutionality of ordinances designed to curtail anonymous sexual activities in commercial establishments. In *Berg v. Health & Hosp. Corp., 865 F.2d 797 (7th Cir. 1989),* and other "open booth" cases, the private booths were places where films were viewed. *See Wall Distribs., Inc. v. City of Newport News, 782 F.2d 1165 (4th Cir. 1986); Ellwest Stereo Theatres, Inc. v. Wenner, 681 F.2d 1243 (9th Cir. 1982);* **[**28]** *Doe v. City of Minneapolis, 693 F. Supp. 774 (D.Minn. 1988); Broadway Books, Inc. v. Roberts, 642 F. Supp. 486 (E.D.Tenn. 1986).* In *Berg*, the Seventh Circuit upheld the ordinance as a valid time, place and manner restriction on film dissemination protected by the First Amendment. n8 *865 F.2d at 805.* In the **[*1220]** instant case, however, the films presented at the After Dark could not be seen from the booths erected in the theatre. Furthermore, in the instant case, the licensing scheme in question was created simply to generate revenue and insure public health and safety, whereas the ordinances in the open booth cases focused on preventing sexual contact. The fact that the theatre just happened to have booths does not change the issues before us regarding the licensing scheme or the revocation thereof.

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n8 Other courts have resolved challenges to regulation of closed booths on theatre premises in the same way. In *FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1304 (5th Cir. 1988), aff'd in part & vacated in part on other grounds, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990),* the Fifth Circuit upheld an "open booth" ordinance as a reasonable time, place and manner restriction under the analysis set forth in *City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986),* a zoning case. In *Wall Distribs., Inc., 782 F.2d at 1168,* the Fourth Circuit relied on the tests set forth in *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984),* and *United States v. O'Brien, 391 U.S. 367, 376, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968),* and determined that the regulation must be analyzed under a manner restriction test, "for the regulation does not regulate speech on the basis of content, but instead, restricts primarily noncommunicative aspects of [plaintiff's] right to disseminate the content of the films and thereby imposes only an incidental burden on that right." *782 F.2d at 1168* (footnote omitted).

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We believe the trial court in this case properly applied *Arcara* and removed the case from the First Amendment focus. The issues before us are whether and to what extent the City may regulate illegal conduct on the Theatres premises, and *Arcara* addresses those questions. Contrary to O'Connor's and the Theatres' contentions, the application of *Arcara* does not depend on the character of the governmental action, i.e., nuisance versus revocation. Rather, *Arcara* applies to any regulation of nonprotected conduct on the premises of a business engaged in protected expression. The fact that a business engages in protected expression does not cloak all activities on the premises, from the sale of concessions to the commission of crime, with First Amendment protection. Under the facts of this case, we hold the First Amendment is not implicated by the closure of the Theatres.

B. Prior Restraint

O'Connor and the Theatres contend that § 7-26 of the Code, n9 which requires a party to obtain a license prior to exhibiting films is "the very essence of a prior restraint of free expression." Appellants' Brief at 18. n10 They argue that because no license is required "when such [**30] entertainment is . . . for patriotic, philanthropic, social service, health, welfare, benevolent, educational, fraternal or religious purposes, or by a nonprofit organization," the determination of whether an amusement license is required under § 7-26 "rests completely in the discretion of licensing officials." Appellants' Brief at 18. We do not agree with O'Connor and the Theatres.

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n9 Section 7-26 reads:

> It shall be unlawful for any person, in any capacity whatsoever, to give, conduct, produce, present, or offer any entertainment mentioned in section 7-12, without first having applied for and obtained a license so to do; provided, however, that no license shall be required when such entertainment is to be given, conducted, produced, presented, or offered in facilities rented or leased from the city for that purpose, or when such entertainment is given, conducted, produced, presented or offered for patriotic, philanthropic, social service, health, welfare, benevolent, educational, fraternal or religious purposes, or by a nonprofit organization.

n10 Under the City's ordinances, businesses providing nearly every conceivable form of entertainment must obtain licenses prior to opening their doors.

---------- End Footnotes ----------

[**31]

First, the requirement of an amusement license under the Code does not constitute a prior restraint. Prior restraint arises where the content of the expression is subject to censorship. *See Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713, 75 L. Ed. 1357, 51 S. Ct. 625 (1931).* "'Governmental action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated.'" *Berg, 865 F.2d at 801* (quoting *United States v. Kaun, 827 F.2d 1144, 1150 (7th Cir. 1987),* and *In re G. & A. Books, Inc., 770 F.2d 288, 296 (2d Cir. 1985), cert. denied sub nom. M.J.M. Exhibitors, Inc. v. Stern, 475 U.S. 1015, 89 L. Ed. 2d 310, 106 S. Ct. 1195 (1986)).* The Supreme Court has struck down regulations as unconstitutional prior restraints on speech where they gave "public officials the power to deny use of a forum in advance of actual expression." *Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975).* In the instant case, the Code did not ban the presentation of any forms of entertainment or [**32] grant officials the discretion to suppress any speech based upon its content. The license requirement applied to all forms of entertainment when [*1221] offered "for gain." Furthermore, the health and safety requirements applied to all entertainment as defined in the Code. "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning *and other licensing requirements* is not a sufficient reason for invalidating these ordinances." *Young v. American Mini Theatres, 427 U.S. 50, 62, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976)* (emphasis added). In our view prior restraint is not an issue in this case.

Second, the fact that the Code exempted from the licensing requirement entertainment offered or presented under circumstances described unambiguously in § 7-26 does not vest the Director with "unbridled discretion," which could result in censorship. Under the Code, a license was granted to an applicant on a showing that he complied with basic health and safety regulations. The discretion of the licensing official was discretion to determine who paid

for a license and who did not pay for a license. The Director had **[**33]** no discretion to deny a license if the required inspections and approvals were obtained. Appellees' Brief at 11 (citing § 32-11 of the Code).

In our view, a facial challenge to the Code in this case is unsupportable. In *City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, , 108 S. Ct. 2138, 2145, 100 L. Ed. 2d 771 (1988),* the Court wrote: "[A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." The Court further observed: "In the area of free expression a licensing statute placing unbridled discretion in the hands of a governmental official or agency constitutes a prior restraint and may result in censorship." *Id.* at 2143. The instant case, however, presents a completely different licensing scheme than did *Lakewood*, where the ordinance gave the mayor authority to grant or deny applications for annual permits to place newsracks on public property. The licensing scheme at issue here does not place "unbridled" discretion in the hands of the Director. To the contrary, the record **[**34]** is clear that the license must be issued once compliance with the public health and safety codes is demonstrated. *See* Appellees' Brief at 11.

Further, the provision in the Code providing for revocation or suspension of a license does not create a prior restraint. In *Arcara*, the Court distinguished prior restraint from the closure order in the case before the Court:The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials, since respondents are free to carry on their bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited -- indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.

478 U.S. at 705-06 n. 2. Similarly, the closure order in the instant case did not prevent the dissemination of particular materials because the Theatres immediately obtained licenses, and the order was not **[**35]** based upon any determination concerning the content of the films. Under the *Arcara* standard, the provision for license revocation does not convert the scheme into a prior restraint.

C. Vagueness

O'Connor and the Theatres argue that the exemptions contained in § 7-26 render the Code unconstitutionally vague. Appellants' Brief at 32. Citing *Erznoznik v. City of Jacksonville, 422 U.S. 205, 217-18, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975),* they argue: "It is fundamental that, 'where First Amendment freedoms are at stake, we have repeatedly emphasized that precision of drafting and clarity of purpose are' priority considerations." Appellants' Brief at 30. They then argue that because we observed in a footnote that the ordinance in *ACORN* was unconstitutionally vague, *Association of Community Orgs.* **[*1222]** *for Reform Now, ("ACORN") v. Municipality of Golden, Colo., 744 F.2d 739, 748 n. 5 (10th Cir. 1984),* the same words in § 7-26 render the ordinance vague as well. We are not persuaded by this argument. As previously noted, the instant case is not a First Amendment case. Consequently, we do not scrutinize the challenged ordinance from **[**36]** the perspective urged by O'Connor and the Theatres. Rather, we review the ordinance to determine whether it "is so vague that [individuals] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co., 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126 (1926).* Under this standard, the challenged language is not unconstitutionally vague.

O'Connor and the Theatres argue that *ACORN* is dispositive. We disagree. In *ACORN*, we held that an ordinance which prohibited door-to-door canvassing unless an exemption was obtained from the city council violated the First and Fourteenth Amendments "[by] empower[ing] the city council to grant exemptions in its discretion so as to control the exercise of First Amendment rights. Moreover the ordinances [could not] be justified as time, place, and manner regulations because they are not content neutral." *744 F.2d at 750.* ACORN's goal was to assist persons of low and moderate income to organize their neighborhoods so that they might petition authorities on issues of concern to them. ACORN's staff went door-to-door informing residents of the **[**37]** program and seeking donations. The ordinance at issue prohibited solicitation *unless* the city manager issued an exemption. *Id. at 741.* Exemptions could be obtained if the solicitation were for "charitable, religious, patriotic or philanthropic purpose or otherwise provide[d] a service or product so necessary for the general welfare of the residents of the city that such activity does not constitute a nuisance." *Id.*

O'Connor and the Theatres argue that since a similar exemption appeared in the Code, although it did not apply to them, the Code was unconstitutionally vague and gave "licensing officials, police officers, judges and juries . . . unbridled discretion to determine which

individuals are permitted to exercise First Amendment rights." Appellants' Brief at 23. *ACORN*, however, does not apply. In *ACORN*, speech itself was prohibited unless it fell within the exempted categories. Such is not true in the instant case. The Code provided for the grant of an amusement license unless the applicant failed to comply with the enumerated health and safety requirements. The mere fact that similar language existed in both the Code and the Golden ordinance **[**38]** does not render the Code violative of O'Connor's and the Theatres' constitutional rights. In distinguishing *ACORN*, the trial court wrote:Significantly, under Section 726, there is no restriction of first amendment activity. The only limitation imposed on theaters is the requirement of obtaining an amusement license prior to showing films. The evidence showed that Section 726 only prevented nonprofit organizations from paying a license fee. However, both nonprofit and commercial organizations had to comply with the safety codes, etc. Further, plaintiffs have not argued that the exemptions apply to them, and have not shown how the exemptions in any way affected the loss of their amusement licenses. In fact, the plaintiff-theaters obtained licenses from the City.

Thus, *ACORN* was not dispositive in the trial court's analysis. We agree with the trial court, and hold the challenged Code is not unconstitutionally vague.

IV. DUE PROCESS

Citing *Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975),* and *Freedman v. Maryland, 380 U.S. 51, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965),* **[**39]** O'Connor and the Theatres argue that the challenged ordinance violates Fourteenth Amendment due process requirements by failing to provide for speedy hearing and appeal of licensing decisions. Appellants' Brief at 37. Because *Southeastern Promotions* and *Freedman* involved prior restraints, they **[*1223]** do not apply to the case now before the court. In *Freedman*, the appellant sought to challenge the constitutionality of a motion picture censorship statute. The Court held that a noncriminal process requiring the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. "First, the burden of proving that the film is unprotected expression must rest on the censor. . . . Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *380 U.S. at 58-59.* The *Freedman* requirements, however, are limited to prior restraints on protected expression. Because this case does not involve a prior restraint, **[**40]** there is no need to comply with the stricter *Freedman* due process procedures.

In *Southeastern Promotions*, a promoter of theatrical productions applied to a municipal board to present the musical production, "Hair," at a theater. The board concluded that the production was not "in the best interest of the community," and rejected the application. The promoter sought a preliminary injunction, then a permanent injunction permitting it to use the auditorium. After a three-day hearing on the content of the musical, the district court concluded that the production contained obscene conduct not entitled to First Amendment protection and denied relief. The Sixth Circuit affirmed, but the Supreme Court reversed, holding that when members of the board rejected the application to use a public forum, they accomplished a prior restraint under a system lacking in constitutionally required minimal procedural safeguards. *420 U.S. at 552.* The Court applied the *Freedman* standards only after characterizing the action as a prior restraint. "We held in *Freedman*, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards. **[**41]** . . ." *420 U.S. at 560.* Because the instant case does not involve an issue of prior restraint, neither *Freedman* nor *Southeastern Promotions* applies herein.

O'Connor and the Theatres mistakenly argue that the hearing and appeal mechanisms of the Code are inadequate because they fail to protect their First Amendment rights. Section 7-39 of the Code provides the following due process protections: (1) notice; (2) the right to a full evidentiary hearing with the right to present testimony and cross-examine adverse witnesses; (3) written findings of fact and conclusions of law by the trier of fact; and (4) the opportunity to present evidence in mitigation if a violation is found. The section also provides for summary suspension procedures. These provisions are similar to those provided in *Barry v. Barchi, 443 U.S. 55, 64-65, 61 L. Ed. 2d 365, 99 S. Ct. 2642 (1979).* In the context of this case, these protections provide the process due O'Connor and the Theatres.

V. EQUAL PROTECTION

O'Connor and the Theatres claim that § 726 of the Code denies them equal protection of the law. Citing *Association of Community Orgs. for Reform Now, ("ACORN") v. Municipality of Golden, Colo., 744 F.2d 739, 749-750 (10th Cir. 1984),* **[**42]** they contend that the challenged ordinance creates a classification distinguishing between groups or individuals providing entertainment for "patriotic, philanthropic, social service, health, welfare, benevolent, educational,

fraternal, or religious purposes" and those providing entertainment for any other purpose. Appellants' Brief at 36. They argue the classifications created by § 7-26 inherently require a judgment of the content of the entertainment by the Director to determine if a license is required. Appellants' Brief at 36. Citing *Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 90 L. Ed. 2d 899, 106 S. Ct. 2317 (1986),* and *San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973),* they further argue that, because the Code infringes a fundamental right (here, freedom of speech), the strict scrutiny analysis **[*1224]** applies and the government bears the burden of establishing that the provision is necessarily related to the government interest. Appellants' Brief at 34. We reject their argument.

We have already concluded that § 7-26 does not create content-based classifications that infringe **[**43]** upon the fundamental right of free speech. Thus, a strict scrutiny analysis is inapplicable here. In order to succeed with an equal protection challenge based on some other classification, O'Connor and the Theatres must show that they were treated differently than similarly situated licensees and that this different treatment lacked a rational basis. *See Rodriguez, 411 U.S. at 17; Landmark Land Co. of Oklahoma, Inc. v. Buchanan, 874 F.2d 717, 722 (10th Cir. 1989). See generally Lyng v. Castillo, 477 U.S. 635, 638-39, 91 L. Ed. 2d 527, 106 S. Ct. 2727 (1986)* (the classification must be sustained if it is rationally related to a legitimate government interest). The trial court found that § 7-26 excepted only nonprofit organizations from the requirement of paying a license fee, and that both nonprofit and commercial organizations had to comply with the health and safety provisions. Further, the court noted that O'Connor and the Theatres did not argue that the exemptions applied to them and did not show how the exemptions were in any way related to the loss of their amusement licenses. O'Connor and the Theatres failed to demonstrate **[**44]** that they were treated differently than similarly situated licensees or that this treatment, if different, lacked a rational basis. Consequently, their equal protection claim fails.

VI. O'CONNOR'S CLAIMS

O'Connor raises three contentions of error. First, he and the Empress claim that, based upon the doctrine of res judicata, they are entitled to judgment. Second, he contends he is entitled to nominal damages and reasonable attorney fees based upon his arrest for allegedly violating an unconstitutional ordinance. Third, he claims the trial court erred in "setting aside the stipulations of the parties" concerning his arrest and in holding that he abandoned his claims. *See* Appellants' Brief at 44-47. We address each contention individually.

First, we consider the effect, if any, of the doctrine of res judicata in O'Connor's case. O'Connor contends that he and the City litigated the constitutionality of §§ 7-11 to 7-40 in the criminal action before the Honorable Brian Campbell, Judge of the Denver County Court. The record indicates that in a hearing on a motion to dismiss case No. GV-141717, City and County of Denver v. James Riley, the county court judge apparently reviewed **[**45]** n11 the subject licensing scheme and granted the defendant's motion. In so doing, the judge stated:Well, as I've indicated on other occasions, I feel a certain amount of frustration because I'm sure that what ever decision is made will ultimately be appealed, and even if not appealed, actions pending in the District Court, Federal District Court, State District Court, to a certain extent or under any action taken by me, *it's advisory at best*, perhaps in reality totally moot. But I do think a good point was made by Mr. Gross the last time we were here and that is that defendants are -- should not be required to have hang over them the threat of suit or the pending litigation, if it appears that the city's not going to prevail in its -- its assertions. And on this basis I will go ahead and grant the . . . defendant's motion to dismiss, for the reasons previously stated. Principally, because, while licensing may be appropriate under a certain situation, I have a hard time finding that this licensing scheme does not violate equal protection arguments. Thank you, gentlemen.

(Emphasis added.) In his brief, O'Connor states: "Judge Campbell held that the ordinance **[**46]** challenged herein violated equal protection rights as guaranteed by the Fourteenth **[*1225]** Amendment. . . ." Appellants' Brief at 44. O'Connor contends that Judge Campbell's decisionbecame a final judgment for purposes of applying the doctrine of res judicata. . . . O'Connor is thus entitled to an award of nominal damages and reasonable attorney fees on this basis. Additionally, O'Connor's employer, Plaintiff Empress Theater, is without question a privy in interest to that proceeding, and as such, is also entitled to that same relief.
Appellants' Brief at 44-45. We are not persuaded by this argument.

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n11 The brief of the City explains that the case involved employees of the After Dark. The transcript does not identify Mr. Riley or explain the circumstances of his arrest or the charge against him.

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---------- End Footnotes----------

Under proper circumstances, federal courts accord preclusive effect to issues decided by state courts. Res judicata and collateral estoppel not only reduce unnecessary litigation and foster **[**47]** reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system. *Allen v. McCurry, 449 U.S. 90, 95-96, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980).* In the instant case, however, the very nature of the judge's remarks removes them from any res judicata consideration. The judge himself characterized the comments as "advisory at best." Second, the parties in the actions were neither the same nor did they stand in privity to one another. *See generally* J. Moore, J. Lucas & T. Currier, 1B *Moore's Federal Practice*, P0.411 (2d ed. 1988). By citing no authority and by arguing the comments of the state judge have res judicata effect in this matter, O'Connor and the Theatres are grasping at straws.

Similarly, we find no merit to O'Connor's second contention. Because we hold the trial court did not err in determining the challenged ordinance did not violate O'Connor's constitutional rights, we necessarily hold the trial court did not err in determining that O'Connor was not entitled to nominal damages and attorney fees as a prevailing party.

Finally, O'Connor argues the trial judge "erred **[**48]** in setting aside the stipulations of the parties concerning the arrest of plaintiff O'Connor and in holding that O'Connor abandoned his claims." Appellants' Brief at 47. O'Connor misreads the record. In the Opinion issued by the trial court, the court noted that the parties stipulated in the pretrial order that Dennis O'Connor, an employee of the Empress Theater, was arrested and incarcerated overnight for violating the repealed § 7-26. At trial, his attorneys asserted that O'Connor sought only nominal damages and attorney fees under *42 U.S.C. § 1988* (1981). O'Connor was not present at the trial. He presented no testimony. The only evidence regarding O'Connor was the stipulation in the pretrial order. The trial court found that O'Connor failed to meet his burden of proof. "His unexplained absence at the trial connotes an abandonment of his claims." Relying on *Platt v. United States, 163 F.2d 165, 168 (10th Cir. 1947),* the trial court concluded: "In the absence of the plaintiff at the trial, the stipulations of O'Connor's attorney are insufficient to establish any wrongdoing by the defendant." The trial judge did not err in determining that **[**49]** the stipulations of O'Connor's attorney are insufficient to establish any wrongdoing by the City.

Citing *United States v. Northern Colo. Water Conservancy Dist., 608 F.2d 422, 431 (10th Cir. 1979),* O'Connor seems to argue the court was bound by the facts in the stipulations, and the stipulations set forth facts sufficient to prove a cause of action. Appellants' Brief at 47-48. He argues he was entitled to judgment based upon the unconstitutionality of the scheme and the facts in the stipulations. Appellants' Brief at 48. O'Connor's argument is flawed in two respects. First, although the parties are bound by their stipulations, *Mills v. State Farm Mut. Auto Ins. Co., 827 F.2d 1418, 1422 (10th Cir. 1987),* the stipulations do not lock the court into entering judgment one way or another. As we stated in *Platt*:

Parties may not stipulate the findings of fact upon which conclusions of law and the judgment of the court are to be based. Parties may by stipulation establish evidentiary facts to obviate the necessity of offering proof, but based thereon the court must itself find the **[*1226]** ultimate facts upon which the conclusions of law **[**50]** and the judgment are based. *163 F.2d at 168* (footnote omitted). Even if we accept O'Connor's argument that the trial court disregarded the stipulation of the parties, in some cases such action is not erroneous. We agree with the Seventh Circuit that a "party may not compel a court to decide a constitutional argument, especially one of some difficulty, by stipulation." *National Advertising Co. v. City of Rolling Meadows, 789 F.2d 571, 574 (7th Cir. 1986).* n12 We know of no authority that compels a trial judge to entertain the purported case of a party who fails to appear for trial. The trial court did not err in determining that the stipulations of O'Connor's attorney are insufficient to establish any wrongdoing by the City.

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n12 We distinguish *Rolling Meadows* from our circuit precedent in *L.P.S. v. Lamm, 708 F.2d 537 (10th Cir. 1983),* wherein we stated: "'We cannot overlook or disregard stipulations which are absolute and unequivocal. Stipulations of attorneys may not be disregarded or set aside at will.'" *Id. at 539* (quoting *Northern Colorado Water Conservancy Dist., 608 F.2d at 431).* Even though a court may not overlook stipulations as a matter of course, no rule of law requires a court to base the resolution of the case on stipulations of the parties. The court determines the effect, if any, of the stipulations.

---------- End Footnotes- - - - - - - -

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[51]**

VII. PREVAILING PARTIES

During the trial, the Director of the Department testified that the City amended the Code as a direct result of the lawsuit. Consequently, O'Connor and the Theatres argue they are "prevailing parties" under *42 U.S.C. §§ 1983* and 1988 because their actions caused the City to take remedial action subsequent to the commencement of the lawsuit. They assert they are entitled to nominal damages and reasonable attorney fees in accordance with the "catalytic effect doctrine" referred to in *J & J Anderson, Inc. v. Town of Erie, 767 F.2d 1469, 1475 (10th Cir. 1985),* and outlined in *Helms v. Hewitt, 780 F.2d 367, 371 (3rd Cir. 1986), rev'd, 482 U.S. 755, 96 L. Ed. 2d 654, 107 S. Ct. 2672 (1987),* and *Dawson v. Pastrick, 600 F.2d 70, 79 (7th Cir. 1979).* Appellants' Brief at 42-43. We are not persuaded by their argument.

In *Luethje v. Peavine School Dist., 872 F.2d 352 (10th Cir. 1989),* we reiterated the two-prong test for fee eligibility as a prevailing party under *42 U.S.C. § 1988:*A civil rights plaintiff who does not **[**52]** receive a judicial determination on the merits but who obtains relief from a defendant qualifies as a "prevailing party" if she shows "(1) that [her] lawsuit is causally linked to securing the relief obtained and (2) that the *defendant's conduct in response to the lawsuit was required by law.*"

Id. at 354 (emphasis added) (quoting *J & J Anderson, Inc., 767 F.2d at 1473, 1475). See also Foremaster v. City of St. George, 882 F.2d 1485, 1488 (10th Cir. 1989).* In finding that O'Connor and the Theatres were not prevailing parties, the trial court stated: "Even though the City amended the [Code], we made no findings as to the constitutionality of the repealed ordinance. Further, we found the [City's] actions in revoking the plaintiffs' licenses were proper means of enforcing the public nuisance ordinance." We agree with the analysis of the trial court that O'Connor and the Theatres have the burden and fail to demonstrate the unconstitutionality of the Code. Because they fail to demonstrate that the revisions were required by law, they are not "prevailing parties" under *42 U.S.C. § 1988.* **[**53]**

CONCLUSION

We AFFIRM the judgment of the district court. O'Connor and the Theatres have standing to challenge the Code as it existed at the time the City took action against them. Under *Arcara*, this case does not trigger First Amendment analysis and protections. Resolution of the issues does not turn on prior restraint or heightened scrutiny under the vagueness, due process, or equal protection challenges. Further, we find no merit to O'Connor's additional contentions. Finally, we affirm the trial court's judgment that the Department's revocation of the licenses was a proper means of enforcing the public nuisance ordinance and O'Connor and the Theatres are **[*1227]** not prevailing parties for purposes of obtaining attorney's fees.

AFFIRMED.

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Citation #12
136 F.3d 683

Z.J. GIFTS D-2, L.L.C., doing business as CHRISTIE'S, an Oklahoma limited partnership, Plaintiff-Counter-Defendant-Appellee, v. CITY OF AURORA, an Incorporated Municipality, Defendant-Counter-Claimant-Appellant.

No. 96-1483

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

136 F.3d 683; 1998 U.S. App. LEXIS 1831; 1998 Colo. J. C.A.R. 1041

February 10, 1998, Filed

SUBSEQUENT HISTORY: [**1] Certiorari Denied October 5, 1998, Reported at: *1998 U.S. LEXIS 5593.* Writ of certiorari denied *Z.J. Gifts D-2, L.L.C. v. City of Aurora, 525 U.S. 868, 142 L. Ed. 2d 133, 119 S. Ct. 162, 1998 U.S. LEXIS 5593 (1998)*

Related proceeding at *Z.J. Gifts D-2, L.L.C. v. City of Aurora, 2001 Colo. App. LEXIS 730* (Colo. Ct. App., Apr. 26, 2001)

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO. (D.C. No. 93-M-2310). *Z.J. Gifts D-2, L.L.C. v. City of Aurora, 932 F. Supp. 1256, 1996 U.S. Dist. LEXIS 10717* (D. Colo., 1996)

DISPOSITION: District court's judgment REVERSED. REMANDED, the district court shall vacate its judgment and conduct further proceedings consistent with this opinion.

COUNSEL: Charles H. Richardson (Teresa Kinney of the Office of the Aurora City Attorney, Aurora, Colorado, and Barry Arrington of the Law Offices of Barry K. Arrington, P.C., Denver, Colorado, with him on the briefs), Office of the Aurora City Attorney, Aurora, Colorado, for Defendant-Counter-Claimant-Appellant.

Michael Gross (Arthur M. Schwartz with him on the briefs), Arthur M. Schwartz, P.C., Denver, Colorado, for Plaintiff-Counter-Defendant-Appellee.

JUDGES: Before ANDERSON, KELLY, and HENRY, Circuit Judges.

OPINIONBY: KELLY

OPINION: [*685] KELLY, Circuit Judge.

Defendant/Counterclaimant-appellant, the City of Aurora, appeals from the district court's grant of summary judgment in favor of Plaintiff/Counterdefendant-appellee Z.J. Gifts. The district court invalidated a city zoning regulation requiring sexually oriented businesses to locate in industrially-zoned areas and enjoined its enforcement against Z.J. Gifts. Interpreting federal constitutional [**2] law, the district court held that the regulation was a content-based restriction of speech as applied to Z.J. Gifts' retail business which sold and leased adult videos and magazines for off-site viewing only. See *Z.J. Gifts v. City of Aurora, 932 F. Supp. 1256, 1257-60 (D. Colo. 1996).* We exercise jurisdiction pursuant to *28 U.S.C. §§ 1291* and 1292(a)(1), reverse, and remand for proceedings consistent with this opinion.

Background

In early 1993, Aurora city officials became concerned that the city lacked regulatory and enforcement mechanisms to minimize negative effects resulting from sexually-oriented businesses locating within city limits. In response, the city attorney's office presented a draft ordinance regulating the operation and location of sexually- oriented businesses to the city council in September 1993.

In October 1993, Z.J. Gifts, a limited partnership, leased space in the Granada Park Shopping Center, located in a commercially-zoned area, and prepared the space for retail sales of adult novelties, magazines, and videos. After applying for sales tax and business licenses, the shop, named "Christie's," opened for business on October 30, 1994, and has since been [**3] in continual operation. Unlike other adult uses, such as adult theaters, peep shows, and nude dance clubs, Christie's provides no on-site adult entertainment. The shop instead sells and rents adult materials to customers for viewing off premises. After review of a thorough legislative record, deliberation and public hearings, the Aurora City Council enacted an ordinance regulating all sexually-oriented businesses, including adult bookstores, novelty shops and video stores, on December 13, 1994. The ordinance established comprehensive licensing, operating, and inspection requirements for sexually oriented businesses located within city limits. The ordinance further required sexually oriented businesses to locate in industrially-zoned areas, and prohibited

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them from locating within 1500 feet of churches, schools, residential districts or dwellings, public parks, and other sexually oriented businesses. See Aurora Mun. Code § 32.5-52; I Aplt. App. at 43-44.

Z.J. Gifts filed suit against the city, challenging the constitutionality of several provisions of the ordinance, including the zoning requirements. The city counterclaimed to enjoin Z.J. Gifts from operating Christie's in violation **[**4]** of the ordinance. The city also sought a declaration that Christie's operates in violation of the zoning provision of the ordinance and requested a permanent injunction barring Christie's from operating in that location. The parties filed cross-motions for summary judgment, and the district court granted Z.J. Gifts' motion. The district court held that as applied, the zoning provision requiring Christie's to locate within an industrially zoned area unconstitutionally infringed Z.J. Gifts' free speech interests. Z.J. Gifts' remaining claims for relief were dismissed as moot. The city appealed.

Discussion

Where First Amendment interests are implicated, this court is obligated to make an independent examination of the record in its entirety to ensure the challenged regulation does not improperly limit expressive interests. See *Revo v. Disciplinary Bd. of the Supreme Court, 106 F.3d 929, 932* (10th Cir.), cert. denied, *138 L. Ed. 2d 1017, 117 S. Ct. 2515 (1997).* Thus, we review constitutional facts and conclusions of law de novo. See id. Similarly, we review a district court's grant of summary judgment de novo, using the standard provided in *Fed. R. Civ. P. 56(c).* See **[**5]** *Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir. 1996).* Just as we may affirm a grant of summary judgment on any ground adequately supported by the record, we may direct that judgment be entered in favor of any moving party if the record adequately supports it. **[*686]** See *Dickeson v. Quarberg, 844 F.2d 1435, 1444-45 n.8 (10th Cir. 1988).*

We recognize that governmental limitations which limit expressive interests strike "at the heart of the First Amendment." *Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994).* We are also aware that First Amendment doctrine must be informed by the complex tangle of social, political, and cultural interests in limiting speech as well as protecting it, for the tension between individual rights and community needs is at the core of every First Amendment issue. This tension is most pronounced in cases like this one, where the speech regulated is unpopular and the community's interest in regulating it significant. We undertake review of the Aurora zoning provision against this backdrop of competing community and individual interests.

As an initial matter, the district court reviewed Aurora's ordinance **[**6]** as a content-based regulation of speech. See *Z.J. Gifts, 932 F. Supp. at 1260.* Recognizing that most ordinances regulating sexually oriented businesses are considered content-neutral, the court rejected that conclusion because it believed "none of the material relied on by the city council shows that the business of Christie's bears any relationship to [harmful secondary] effects." *Id. at 1258.* Though we recognize that "deciding whether a . . . regulation is content-based or content-neutral is not always a simple task," *Turner, 512 U.S. at 642,* the district court's emphasis on the relationship between the materials used to justify the ordinance and the nature of Z.J Gifts' retail business is misplaced.

Content-based restrictions on speech, those which "suppress, disadvantage, or impose differential burdens upon speech because of its content," id., are subject to "the most exacting scrutiny." Id. Conversely, content-neutral regulations "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue" because they are unrelated to the content of speech. Id. Content-neutral regulations are accordingly subject to intermediate scrutiny. **[**7]** See *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984).* In determining whether a regulation is content- neutral, "the government's purpose [in enacting the regulation] is the controlling consideration." *Ward v. Rock Against Racism, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989).* If the regulation "serves purposes unrelated to the content of expression" it is considered neutral, "even if it has an incidental effect on some speakers or messages but not others." See id. (citing *City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986)).*

The Supreme Court has long held that city zoning ordinances which place limits on the location of adult uses are valid exercises of the city's police power. See *Young v. American Mini Theatres, Inc., 427 U.S. 50, 62-63, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976).* Though such regulations treat adult uses differently from other uses based on their sexually explicit nature, they are "designed to prevent crime, . . . maintain property values, . . . and preserve . . . the quality of urban life." *Renton, 475 U.S. at 48* (quotation marks omitted). Because ordinances **[**8]** zoning adult uses are intended to curb the secondary effects of those uses on surrounding communities and burden free speech interests only incidentally, they are generally reviewed as content-neutral regulations subject to a less stringent standard of review. See *id. at 48-50.*

The record clearly establishes Aurora's purpose in enacting the ordinance: to regulate the harmful

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secondary effects of sexually oriented businesses. The preamble to the ordinance indicated the City's intent to "protect[] [its] citizens from increased crime; preserve[] the quality of life, property values, and character of neighborhoods and businesses; deter[] the spread of urban blight; and protect[] against the spread of sexually transmitted diseases . . . ." I Aplt. App. at 126; see *Renton, 475 U.S. at 49*. Further, even if Z.J. Gifts could support its allegation that "members of the Aurora City Council[] openly avowed . . . that the ordinance was enacted for the express purpose of closing Plaintiff's business[,]" **[*687]** Aplee. Br. at 4, "'alleged illicit . . . motives'" hidden in legislators' comments will not support a determination that a restriction is content-based. *Renton, 475* **[**9]** *U.S. at 48* (quoting *United States v. O'Brien, 391 U.S. 367, 383-84, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968))*.

Most importantly, we disagree that the ordinance's content-neutrality is affected by the city's reliance on studies utilizing slightly dissimilar businesses. As the Eighth Circuit noted in a case remarkably similar to this one, examining the similarity of the businesses utilized in the studies relied on to the businesses regulated in determining an ordinance's content-neutrality "confuses distinct aspects of the City of Renton test." *ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413, 1416* (8th Cir.), cert. denied, *513 U.S. 1017, 130 L. Ed. 2d 493, 115 S. Ct. 578 (1994)*. The district court's inquiry may well be relevant in determining whether the ordinance is "narrowly tailored to regulate only those adult uses shown to have caused adverse secondary effects" under Renton. *Id. 25 F.3d at 1417*. But where, as here, the studies relied upon adequately support the city's purpose in enacting the ordinance-- regulating the harmful secondary effects associated with sexually oriented businesses--the government's regulation of such businesses is "justified **[**10]** without reference to the content of the regulated speech." *Rock Against Racism, 491 U.S. at 791* (emphasis in original). Thus, we are satisfied that differences in the mode of delivery of sexually oriented materials are constitutionally insignificant for purposes of determining an ordinance's content-neutrality. See *Renton, 475 U.S. at 49* ("With respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are . . . 'content-neutral.'") (emphasis added). The city need only rely upon "evidence . . . reasonably believed to be relevant to the problem that the city addresses." *Id. at 51-52* (emphasis added). If the city can show that the ordinance affects "that category of [businesses] shown to produce the unwanted secondary effects," *id. at 52*, the ordinance will stand. So long as cities do not use "the power to zone as a pretext for suppressing expression," *id. at 54* (citing *Young, 427 U.S. at 84* (Powell, J. concurring)), attempts to regulate the adverse effects associated with sexually oriented businesses are properly classified as content-neutral.

Given the uncontroverted **[**11]** sexual nature of Z.J. Gifts' business, we are convinced the city has met its burden. The record indicates several of the studies examine the effects of adult businesses or sexually oriented businesses generally. Significantly, at least three of these studies examine the effects of adult bookstores on surrounding communities. n1 Although Z.J. Gifts argues and attempts to prove that all other adult bookstores provide some form of on-premises viewing of sexually explicit materials, see Aplee. Br. at 13, 16, 22, II Aplt. App. at 344 (Jackson aff.), we think the record fully supports the city's regulation of sexually oriented businesses providing both on- and off-site viewing of sexually explicit materials.

---------- Footnotes ----------

n1 See I Aplt. App. at 158 (summary of Garden Grove, California land use study reviewing impact of adult businesses); id. at 161 (summary of Austin, Texas land use study reviewing crime rates, property values, and trade area characteristics for areas surrounding adult bookstore, theater, and topless bar); id. at 162 (summary of Oklahoma City, Oklahoma study examining effect of adult bookstore on property values and crime); id. at 163 (summary of Indianapolis, Indiana study examining the effects of sexually oriented businesses on crime rates and property values in surrounding areas; report concludes that "even relatively . . . passive uses such as . . . adult bookstores . . . have a serious negative effect on their immediate environs."); id. at 166 (summary of Minneapolis, Minnesota land use report concluding "concentrations of sexually oriented businesses have [a] significant relationship to higher crime and lower property values."); id. at 168 (summary of Whittier, California study of effects of sexually oriented businesses, including two adult bookstores, on surrounding residential and commercial areas); id. at 169 (summary of Amarillo, Texas study of adult businesses, including "bookstores . . . with publications featuring nudity and explicit sexual activities,"

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concluding that such businesses lead to increases in street crime).

---------- End Footnotes----------

[12]**

[*688] Properly analyzed as a content-neutral regulation, Aurora's zoning ordinance survives constitutional scrutiny, and the city is entitled to relief, if the city can establish the ordinance is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication. See *Renton, 475 U.S. at 45; Rock Against Racism, 491 U.S. at 791; Clark, 468 U.S. at 293.* The district court, however, analyzed the ordinance under the test set out in *O'Brien. 391 U.S. at 377.* O'Brien provides that content-neutral regulations having an incidental impact on expressive conduct are constitutional if they further an important or substantial governmental interest and restrict First Amendment freedoms no greater than essential to further the interest. See id. We need not choose between the two tests, however, because the O'Brien analysis "is, in the last analysis, . . . little, if any, different from the standard applied to time, place or manner restrictions." *Clark, 468 U.S. at 298.* Review of the record and the legal principles which govern the city's claims indicates that the city prevails under either standard.

Z.J. Gifts does **[**13]** not in any real sense question the substantiality of Aurora's interests in preventing crime and disease, protecting property values, and preserving the quality of life of the city's residents. Indeed, the district court recognized that the city had demonstrated "the legitimacy of its concern" regarding adult uses which provide on-site adult entertainment, but not to those which provide adult materials for off-site consumption. See *Z.J. Gifts, 932 F. Supp. at 1257-58.* As noted earlier, this distinction is constitutionally irrelevant in determining whether Aurora's interests are important or substantial, particularly in light of the Court's strong statements regarding the government's interest in regulating such businesses in Young and Renton. Our analysis of Aurora's interest in regulating sexually oriented businesses thus remains unaffected by the district court's distinction between off-site and on-site viewing of sexually explicit materials.

To the extent Z.J. Gifts argues that the city has not "demonstrated that the recited harms are real, not merely conjectural," *Turner, 512 U.S. at 664,* we disagree. Aurora need not wait for sexually oriented businesses to locate **[**14]** within its boundaries, depress property values, increase crime, and spread sexually transmitted diseases before it regulates those businesses. It may rely on the experience of other cities to determine whether the harms presented by sexually oriented businesses are real and should be regulated. See *Renton, 475 U.S. at 51-52.* In other words, the city may control a perceived risk through regulation. The Court has long held, and we agree, that Aurora's stated governmental interests in circumscribing the adverse secondary effects of sexually oriented businesses "must be accorded high respect." *Renton, 475 U.S. at 50* (quoting *Young, 427 U.S. at 71); ILQ Investments, 25 F.3d at 1416.*

Similarly, Z.J. Gifts cannot dispute that Aurora's ordinance allows for reasonable alternative avenues of communication. Sexually oriented businesses may locate within the city's industrial zones, which comprise approximately 10.9 percent of the city's area. See I Aplt. App. at 120. Approximately 3,200 acres of this land--fully 3.6 percent of the city's total area--are located near existing water and sewer services. See id. Thus, Z.J. Gifts is left with more land on which to relocate **[**15]** than was found to be adequate in Renton and its progeny. See, e.g., *Renton, 475 U.S. at 53* (five percent of city's land "in all stages of development from raw land to developed, industrial, warehouse, office and shopping space" available); *S&G News, Inc. v. City of Southgate, 638 F. Supp. 1060, 1066 (E.D. Mich. 1986),* aff'd *819 F.2d 1142 (6th Cir. 1987)* (2.3 percent of city's land available); *Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1260, 1262-63 (5th Cir. 1992)* (majority opinion and Politz, C.J., dissenting), cert. denied *507 U.S. 1030, 123 L. Ed. 2d 469, 113 S. Ct. 1845 (1993)* (1.2 percent of city's land available).

[*689] Z.J. Gifts' only remaining argument is that Aurora's zoning provision is not narrowly tailored to further the interests asserted. See *Renton, 475 U.S. at 52-53; O'Brien, 391 U.S. at 377.* The district court held that Aurora had "far less restrictive means of achieving [its] purpose with respect to a business like Christie's [which provides only off-site viewing of adult materials] than [a] zoning provision that would require it to relocate . . ." *Z.J. Gifts, 932 F. Supp. at 1260.* We believe the district **[**16]** court construed the narrow tailoring inquiry too narrowly, and held Aurora to a far more stringent standard than required by Renton and O'Brien.

The district court derived its "least restrictive means" language from O'Brien, which stated that an incidental restriction on free speech should be "no greater than is essential to the furtherance of [the] interest." *O'Brien, 391 U.S. at 377.* In recent cases, however, the Court elaborated on O'Brien, explicitly holding that time, place or manner regulations on protected speech must be narrowly tailored, but "need not be the least

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restrictive or least intrusive means of doing so." *Rock Against Racism, 491 U.S. at 798.* Instead, "so long as the means chosen are not substantially broader than necessary," an ordinance is narrowly tailored if the regulation "promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *Id. at 799, 800;* see *ILQ Investments, 25 F.3d at 1417-18.*

This reading of O'Brien's narrow tailoring inquiry harmonizes with that crafted by the Court in Renton. In regulating the harmful effects of sexually oriented businesses, the city need **[**17]** not address all the potential problems created by adult businesses at once. See *Renton, 475 U.S. at 52-53.* Nor is it limited to one method of regulation over another in attempting to curb harmful secondary effects. See *id. at 53* ("Cities may regulate adult theaters by dispersing them . . . or by effectively concentrating them."). Instead, Renton's constitutional framework grants the city broad discretion to choose the means and scope of its regulation of sexually oriented businesses.

The Court's interpretation of the narrow tailoring prong in time, place and manner analyses recognizes the judiciary's limited role in reviewing content-neutral limitations on speech. "It is not [the court's] function to appraise the wisdom of [the city's] decision[.]" *Renton, 475 U.S. at 53* (citing *Young, 427 U.S. at 71).* Instead, because legislative bodies are entitled to "reasonable inferences" suggested by the legislative record before them, see *Turner, 512 U.S. at 666,* the court simply determines whether the ordinance, as promulgated, "affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects" the city seeks **[**18]** to regulate. *ILQ Investments, 25 F.3d at 1418.* If so, the court's review is complete, and it may not substitute its own judgment for that of the legislature, usurping the legislative body's policy-making function. Where the legislative record validates the legislature's judgment, our obligation to exercise independent judgment "is not a license to . . . replace [legislative] factual predictions with our own." *Turner, 512 U.S. at 666.* Courts must allow cities like Aurora "reasonable opportunity to experiment with solutions to admittedly serious problems." *Young, 427 U.S. at 71* (emphasis added).

In invalidating Aurora's reasonable legislative choices, the district court exceeded the limits imposed by Renton and O'Brien. Unlike other zoning provisions held unconstitutional, Aurora's ordinance does not attempt to regulate businesses which have a minimal or nonexistent connection to sexually oriented entertainment. See, e.g., *Schad v. Borough of Mount Ephraim, 452 U.S. 61, 74-77, 68 L. Ed. 2d 671, 101 S. Ct. 2176 (1981)* (invalidating ordinance prohibiting all live entertainment within city's limits); *Faraone v. City of East Providence, 935 F. Supp. 82, 88-89* **[**19]** *(D.R.I. 1996)* (granting preliminary injunction against enforcement of ordinance prohibiting rental of "adult oriented x-rated" videotapes on holidays and Sundays by businesses having only ten percent x-rated or **[*690]** adult oriented videos in total video rental inventory); *World Wide Video v. City of Tukwila, 117 Wash. 2d 382, 816 P.2d 18, 21 (Wash. 1991)* (en banc), cert. denied, *503 U.S. 986, 118 L. Ed. 2d 391, 112 S. Ct. 1672 (1992)* (invalidating ordinance regulating sexually oriented businesses, defined to include businesses with ten percent or more of their stock in trade consisting of sexually oriented merchandise). Nor does the city seek to justify its actions with a completely barren legislative record. See, e.g., *Discotheque, Inc. v. City Council of Augusta, 264 Ga. 623, 449 S.E.2d 608, 609-10 (Ga. 1994)* (summary judgment improper in favor of City where City produced no probative evidence of experience of other municipalities regarding negative secondary effects of sexually oriented businesses); *Quetgles v. City of Columbus, 264 Ga. 708, 450 S.E.2d 677, 678 (Ga. 1994),* cert. denied, *514 U.S. 1083, 131 L. Ed. 2d 722, 115 S. Ct. 1794 (1995)* (same). **[**20]** Instead, Christie's, and businesses like it, are indisputably sexually oriented businesses--specifically, "adult bookstores" as defined by the ordinance. See Aurora Mun. Code § 32.5-2 (adult bookstore means "a commercial establishment which devotes a significant or substantial portion of its stock-in-trade . . . to the sale, rental or viewing . . . of books, magazines, periodicals, . . . films, motion pictures, video cassettes, . . . or other visual representations . . . of 'specified sexual activities' or 'specified anatomical areas.'"); I Aplt. App. at 263-75 (Inventory list for Christie's); id. at 119 (Anderson aff.). The legislative record before the city fully supported the city's concerns regarding the negative secondary effects caused by sexually oriented businesses, such as decreased property values and increased crime, which were precisely the problems Aurora sought to regulate by enacting the ordinance. See I Aplt. App. 124-26 (Preamble to Aurora Mun. Code § 32.5). In short, even if, as Z.J. Gifts claims, Christie's is "a new type of adult business, it may not avoid time, place and manner regulation that has been justified by studies of the secondary effects **[**21]** of reasonably similar businesses." *ILQ Investments, 25 F.3d at 1418* (footnote omitted).

On this record, Aurora's ordinance satisfies Renton and O'Brien, as it promotes the city's well-established interest in regulating harmful secondary effects caused by sexually oriented businesses reasonably similar to

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those studied by other municipalities without unnecessarily regulating dissimilar businesses. We accordingly REVERSE the district court's judgment. On REMAND, the district court shall vacate its judgment and conduct further proceedings consistent with this opinion.

Citation #13
98 F.3d 1262

DODGER'S BAR & GRILL, INC., a corporation, d/b/a Bonita Flats Saloon, RHONDI DAVIS, SHEILA KING, ELIZABETH LUCAS, RHONDA WHEELER, SERENA PARKER, MELISSA JONES, MELISSA FINNEY, CHERI DAVIDSON, TAMMY SCHEUMEISTER, ANITA BOWER, MARLEY WESTON, SUZY KELLY, RACHAL WORKMAN, BROOKE UTZ, DEBRA MANESS, GENA LILLY, LAURIE BOYER, SHELLY STEWART, VICKI SMITH, JESSICA ALLEN, DEANNA HURST, BRENDA SHOOK, CYNDI SCHMIDT, SUSAN PRINCE, KRISTI MARTIN, ANGELA THOMAS, DESIREE EDWARDS, ORISSA HANSON, JACKIE ARNETT, ROBIN PACKARD, NICOLE HESTAND, JANA SULLINS, NANCY SESLER, HESTER RAMEY, LEWANA DUNCAN, SANDY WATSON, CHRISSIE MALLOY, TINA L. SMITH, Plaintiffs-Appellants, v. JOHNSON COUNTY BOARD OF COUNTY COMMISSIONERS, JOHNNA (NMI) LINGLE, Chair, Johnson County Commissioner, SUE E. WELTNER, Johnson County Commissioner, BRUCE R. CRAIG, Johnson County Commissioner, MURRAY L. NOLTE, Johnson County Commissioner, DAN (NMI) HOSFIELD, Johnson County Commissioner, FRED ALLENBRAND, Johnson County Sheriff, PAUL (NMI) MORRISON, Johnson County District Attorney, Defendants-Appellees.

No. 95-3187

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

98 F.3d 1262; 1996 U.S. App. LEXIS 30214

October 29, 1996, Filed

PRIOR HISTORY: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS. (D.C. No. 92-2289-EEO). D.C. Judge O'CONNOR.

DISPOSITION: Judgment affirmed.

COUNSEL: Brock R. Snyder, Topeka, Kansas, for Plaintiffs-Appellants.

LeeAnne Hayes Gillaspie, Johnson County Legal Department, Olathe, Kansas, for Defendants-Appellees Board of County Commissioners, and Lawrence L. Ferree, III, and Ronald C. Rundberg of Ferree, Bunn & Byrum, Overland Park, Kansas, for Defendant-Appellee Fred Allenbrand, Johnson County Sheriff.

JUDGES: Before Anderson, McWilliams and Engel *, Circuit Judges.

* Honorable Albert J. Engel, Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

McWILLIAMS, Senior Circuit Judge.

OPINION: [*1263] This case originally was set for oral argument before this panel on May 13, 1996. On May 1, 1996, the parties filed with this court a stipulation for submission of the case on the briefs. On May 7, 1996, this panel, after examining the briefs and the appellate record, determined that oral argument would not materially assist the decisional process. Accordingly, we construed the stipulation as a motion to strike the case from the oral argument calendar and to submit the case [**2] on the briefs. We then granted such motion and ordered the case to be submitted on the briefs. See *Fed. R. App. P. 34(f)*; *10*th Cir. R. 34.1.2.

Dodger's Bar & Grill, Inc., d/b/a Bonita Flats Saloon ("Bonita Flats"), and thirty-eight of its "entertainers," brought a civil rights action under *42 U.S.C. § 1983* in the United States District Court for the District of Kansas against the Board of County Commissioners of Johnson County, Kansas, and certain Johnson County officials. The plaintiffs sought a declaration by the district court that certain resolutions of the Board of County Commissioners enacting regulations for business establishments which serve alcohol or cereal malt beverages for consumption on the premises were unconstitutional. The [*1264] plaintiffs also sought an injunction prohibiting the county officials from enforcing the resolutions here in question. Specifically, in their complaint the plaintiffs challenged the constitutionality of Resolutions 67-92 and 68-92. The defendants filed an answer to the complaint in which they alleged that the resolutions under attack were constitutional.

The case was tried to the district court, which upheld the constitutionality of Resolution [**3] 67-92, but did not rule on the plaintiffs' challenge to Resolution 68-92. *Dodger's Bar & Grill, Inc., v. Johnson County Bd. of County Comm'rs, 815 F. Supp. 399 (D. Kan. 1993).*

On appeal, we upheld the district court's holding that Resolution 67-92 was constitutional and affirmed the district court's entry of judgment for the defendants on plaintiffs' claims for injunctive relief and declaratory

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judgment. However, we remanded the case to the district court with directions that it rule on the constitutionality of Resolution 68-92. *Dodger's Bar & Grill, Inc., v. Johnson County Bd. of County Comm'rs, 32 F.3d 1436 (10th Cir. 1994).*

On remand, after the parties filed supplemental briefs, the district court, taking into consideration the evidence adduced at the first trial of this matter, upheld the constitutionality of Resolution 68-92 and entered judgment for the defendants on plaintiffs' claims for injunctive relief and declaratory judgment. *Dodger's Bar & Grill, Inc., v. Johnson County Bd. of County Comm'rs, 889 F. Supp. 1431 (D. Kan. 1995).* Plaintiffs appeal that judgment. We affirm.

We are in general accord with the district court's holding that Resolution 68-92 is constitutional **[**4]** and we affirm its judgment denying the plaintiffs both declaratory and injunctive relief. Such being the case, we do not propose a prolix opinion in the present appeal. There are already three published opinions concerning Bonita Flats' dispute with Johnson County, two by the district court and one by this court. Therefore, the background facts have already been fully set forth and will not be unnecessarily repeated here.

As indicated, in 1992, the Board of County Commissioners of Johnson County decided to regulate the "entertainment" to be permitted or allowed on premises where alcoholic beverages or cereal malt beverages were served. Resolution 68-92 has an "applicability" provision, which read as follows:

This Chapter shall apply from and after its effective date to all persons and all property located within the unincorporated area of Johnson County, Kansas and shall be applicable to any business establishment, whether licensed or not, now located or hereafter locating within or upon any property located in the unincorporated area of Johnson County, Kansas, which serves alcoholic beverages or cereal malt beverages for consumption on the premises, and to any operator of any such **[**5]** establishment.

In *Dodger, 32 F.3d 1436 (10th Cir. 1994),* we upheld the constitutionality of Resolution 67-92 on the basis of the Twenty-First Amendment, rejecting the plaintiffs' suggestion that the controversy involved the First Amendment. n1 The particular provisions of Resolution 67-92 there under attack were the following:

SECTION 1. Nudity and Sexual Conduct Prohibited.

A. No person shall, on licensed premises, perform acts of or acts which constitute or simulate:

(1) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law; or

(2) The touching, caressing or fondling of the breast, buttocks, anus, or genitals; or

(3) The displaying of post-pubertal human genitals, buttocks, or pubic area, or the female breast below the top of the nipple.

[*1265] B. No person shall, on licensed premises, use artificial devices or inanimate objects to perform, simulate or depict any of the prohibited conduct or activities described in paragraph A of this Section.

C. It shall be unlawful for any person to show, display or exhibit, on licensed premises, any film, video, still picture, electronic reproduction **[**6]** or any other visual reproduction or image of any act or conduct described in paragraphs A and B of this Section.

SECTION 2. Allowing Persons to Engage in Prohibited Acts.

A. No operator shall allow or permit to remain in or about the licensed premises any person who performs acts of or acts which constitute or simulate:

(1) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law; or

(2) The touching, caressing or fondling of the breast, buttocks, anus or genitals; or

(3) The displaying of post-pubertal human genitals, buttocks, or pubic area, or the female breast below the top of the nipple.

As indicated, in *Dodger, 32 F.3d 1436 (10th Cir. 1994),* we upheld the constitutionality of Resolution 67-92 and remanded the case to the district court with directions that it rule on the constitutionality of Resolution 68-92. That resolution, in pertinent part, provides as follows:

SECTION 5. SEPARATE PREMISES. No operator shall allow or permit any door, window, or other entrance or opening leading directly to or through an enclosed area from an establishment serving alcoholic **[**7]** beverages for consumption on the premises to another room, building, premises or place wherein or whereon acts prohibited by Chapter 1 of this Code can or do occur; nor shall any person allow or permit such acts prohibited by Chapter 1 to occur in any room, building, premises or place within 1,000 feet of a

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licensed premises or other business premises covered by this Chapter; nor shall an operator allow or permit such acts prohibited by Chapter 1 to occur in any room, building, premises or place operated in conjunction with a licensed or other business premises covered by this Chapter (emphasis added).

As we understand it, the plaintiffs do not challenge the first or third clauses in the paragraph of the above set forth statute, but confine their challenge solely to the second clause thereof, which has been underlined.

We agree with the district court that "the focal point of Resolution 68-92, [and we note, parenthetically, of Resolution 67-92] is the premises on which the alcohol is served." *Dodger, 889 F. Supp. at 1435.* The first clause in Section 5 of Resolution 68-92 provides that an operator shall not allow or permit any door, window or other entrance leading to an **[**8]** enclosed area from an establishment serving alcohol beverages to another room or building wherein acts prohibited by Chapter One of the Adult Entertainment Code occur. Plaintiffs do not challenge that particular provision, nor do they challenge the third clause in Section 5. They only take aim at the second clause in Section 5 which provides as follows:

nor shall any person allow or permit such acts prohibited by Chapter 1 to occur in any room, building, premises or place within 1,000 feet of a licensed premises or other business premises covered by this Chapter;

The obvious purpose of the foregoing provision is to prohibit bar owners, entertainers or patrons from setting up a nearby trailer, recreational vehicle or other separate structure and to therein engage in conduct which is prohibited inside the licensed premises. We agree with the district court that there is a "reasonable relationship" between the area immediately adjacent to the licensed premises and the licensed premises and that Resolution 68-92 is within the ambit of the Twenty-First Amendment and the police power of the State of Kansas.

---------- Footnotes ----------

n1 In so doing, we relied on *New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 69 L. Ed. 2d 357, 101 S. Ct. 2599 (1981)* and *California v. LaRue, 409 U.S. 109, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972).*

---------- End Footnotes ----------

[9]**

ARTICLE IV. PROHIBITED CONDUCT

The plaintiffs' remaining arguments that Resolution 68-92 is overbroad, vague, and violative of equal protection are unavailing under the general rationale of our prior **[*1266]** opinion. *Dodger's Bar & Grill v. Johnson County Bd. of County Comm'rs, 32 F.3d 1436 (10th Cir. 1994).* We agree with the district court that the "any person" language appearing in the second clause of Resolution 68-92 "can be read as limited to 'operators,' 'entertainers,' or 'patrons' of the regulated establishment." *Dodger, 889 F. Supp. at 1437* (footnotes omitted). We further agree with the district court that, after considering both resolutions, the Johnson County Adult Entertainment Code "is clearly directed at regulating the conduct of operators, entertainers, and patrons of establishments which sell liquor for on-premises consumption." n2 *Dodger, 889 F. Supp. at 1437.*

---------- Footnotes ----------

n2 In its Memorandum and Order the district court did declare the "other business premises" language in the second clause of Section 5 to be "unconstitutionally vague." However, under the severability clause in Resolution 68-92, providing that if particular language in the resolution is declared unconstitutional such would not affect the balance of the resolution, the district court severed those three words. That holding of the district court has not been appealed, or cross-appealed.

---------- End Footnotes ----------

[10]**

Finally, in connection with plaintiffs' suggestion that the 1,000 foot restriction is "too much," it should be remembered that we are not here concerned with a densely populated urban area. In their brief, plaintiffs described the location of Bonita Flats as follows:

Bonita Flats is located in a rural area next to a grain mill, railroad tracks and three homes across from the railroad tracks. The remaining area is surrounded by pasture with the nearest neighbor approximately a mile away.

Aplt's Br. at 4.

Judgment affirmed.

2-270269

Citation #14
154 F.3d 281

Connection Distributing Co., Plaintiff-Appellant, v. The Honorable Janet Reno, Defendant-Appellee.

No. 97-3092

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

154 F.3d 281; 1998 U.S. App. LEXIS 18686; 1998 FED App. 0249P (6th Cir.); 26 Media L. Rep. 2121

February 6, 1998, Argued
August 13, 1998, Decided
August 13, 1998, Filed

SUBSEQUENT HISTORY: [**1] Rehearing Denied October 22, 1998, Reported at: *1998 U.S. App. LEXIS 29657.*

Certiorari Denied April 26, 1999, Reported at: *1999 U.S. LEXIS 2860.*

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 95-01993. John M. Manos, District Judge.

DISPOSITION: AFFIRMED the district court's denial of the preliminary injunction and VACATED the stay pending appeal.

COUNSEL: ARGUED: J. Michael Murray, BERKMAN, GORDON, MURRAY, PALDA & DeVAN, Cleveland, Ohio, for Appellant.

ARGUED: Anne M. Lobell, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for Appellee.

ON BRIEF: J. Michael Murray, Lorraine R. Baumgardner, BERKMAN, GORDON, MURRAY, PALDA & DeVAN, Cleveland, Ohio, for Appellant.

ON BRIEF: Anne M. Lobell, Jacob M. Lewis, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for Appellee.

JUDGES: Before: NORRIS and CLAY, Circuit Judges; BORMAN, District Judge. *

* The Honorable Paul D. Borman, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINIONBY: CLAY

OPINION: [***2]

[*284] OPINION [**2]

CLAY, Circuit Judge. Plaintiff-Appellant Connection Distributing Company appeals the denial of its motion for preliminary injunction against the enforcement of *18 U.S.C. § 2257* and 28 C.F.R. § 75, *et seq.*, on the ground that the statute and its implementing regulations violate the First Amendment as applied to Appellant. For the reasons set forth below, we AFFIRM the district court's denial of the preliminary injunction.

I. BACKGROUND

A. Nature of the Case

Plaintiff-Appellant Connection Distributing Company ("Connection") filed this action on September 13, 1995, seeking a judgment declaring *18 U.S.C. § 2257* (1994) and 28 C.F.R. § 75 (1997), et seq., unconstitutional as applied to Connection and its readers and seeking injunctive relief against the Honorable Janet Reno in her official capacity as Attorney General of the United States. [***3] [*285] Connection publishes and distributes approximately a dozen so-called "swingers" magazines. Connection defines the philosophy of "swinging" as: "an alternative social and sexual lifestyle comprised mostly of mature adults who believe in sexual freedom and do [**3] not believe in sexual monogamy." (J.A. at 44.) Connection's magazines contain, in addition to editorials and feature stories, messages placed by persons whose beliefs and philosophies embrace the "swinging" lifestyle. These individuals and couples place and respond to messages in Connection's various magazines. The messages often contain detailed descriptions of the subscribers' bodies and sexual tastes and frequently are accompanied by sexually explicit photographs of the subscribers. Some messages include photographs with persons simply nude or in street clothes, but many feature individuals or couples engaged in sexually explicit conduct. Although some of the magazines allow the subscriber to place his or her address directly beneath the message, the majority of the people submitting messages identify themselves

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through a code that appears at the beginning of the text of each message. Readers respond by writing to Connection, which charges a fee to forward the response to the message placer. n1 Connection also offers 900 number voice mailboxes for individuals who wish to respond by telephone, as well as an Internet service.

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n1 The terms "subscribers," "advertisers," and "readers" will be used interchangeably to describe those who place messages in Connection's magazines.

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[4]**

Connection asserts that the labeling and record-keeping provisions of *18 U.S.C. § 2257* and its accompanying regulations violate the First Amendment by unconstitutionally suppressing the free speech rights of Connection and its subscribers, by serving as an unlawful prior restraint, and by violating the free association rights of Connection's subscribers. The challenged record-keeping and labeling provisions require anyone appearing in a sexually explicit visual depiction to produce photographic identification and require anyone publishing such a visual depiction to maintain **[***4]** identification records and label the publication as to the location of those records. See *18 U.S.C. § 2257* and 28 C.F.R. § 75 et seq. Connection contends that, because anonymity is important to "swingers," these provisions stand as a barrier to those who wish to exercise their free speech rights to place messages and their free association rights to communicate with other "swingers" in Connection's magazines. Likewise, Connection asserts that its right to publish constitutionally protected expression is diminished because of the effect of the provisions **[**5]** on its subscribers and on Connection itself.

B. Legal Framework

Following challenges to the constitutionality of the Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4485, Congress amended the statute through the passage of the Child Protection Restoration and Penalties Enhancement Act of 1990, *18 U.S.C. § 2257* (1994) (the "Act" or "Section 2257"). n2 Section 2257 is a record-keeping statute that requires all producers of matter containing visual depictions of "actual sexually explicit conduct" to create and maintain records of the names and date of birth of the performers portrayed in the depictions. *18 U.S.C. § 2257*(a), (b) (1994). The Act requires that the records be maintained at the producer's business premises, or as elsewhere permitted by regulations, and that the records be made available "to the Attorney General for inspection at all reasonable times." *18 U.S.C. § 2257*(c) (1994). In addition, the Act mandates that the producers affix to each copy of material covered by its provisions a statement detailing where the depicted person's age verification records **[**6]** may be located. *18 U.S.C. § 2257*(e)(1) (1994).

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n2 Congress amended the record-keeping provisions of the 1988 version of the statute during the pendency of an appeal to the District of Columbia Circuit of a case challenging these provisions brought by a group of librarians and book, magazine, and video publishers, editors, and distributors. *See American Library Ass'n v. Barr, 294 U.S. App. D.C. 57, 956 F.2d 1178, 1181 (D.C. Cir. 1992).*

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[*5]**

As defined by the Act, the term "produces" means to "produce, manufacture, or publish," and includes "duplication, reproduction, or **[*286]** reissuing," but does not include "mere distribution or any other activity which does not involve hiring, contracting for managing, or otherwise arranging for the participation of the performers depicted." *18 U.S.C. § 2257*(h)(3) (1994). A "performer" is defined as "any person portrayed in a visual depiction engaging in, or assisting another person to engage in, **[**7]** actual sexually explicit conduct." *18 U.S.C. § 2257*(h)(4)(1994). The Act applies only to depictions of "actual sexually explicit conduct," which is defined as: (1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal sex; (2) bestiality; (3) masturbation; and (4) sadistic or masochistic abuse. *See 18 U.S.C. § 2257* (h)(1) (1994) (incorporating definitions of § 2256(2)(A)-(D)).

The Act also provides that no information or evidence obtained from the records shall be used "directly or indirectly" as evidence against any person with respect to any violation of law except for the record-keeping provisions themselves. *18 U.S.C. § 2257*(d) (1994). Persons violating the Act are subject to fines and imprisonment of up to two years for the first offense, and up to five years (but not less than two) for succeeding convictions. *18 U.S.C. § 2257*(i) (1994).

The regulations propounded by the Attorney General as required by *18 U.S.C. § 2257*(b)(3) further define the Act's requirements. The regulations divide producers into two categories, **[**8]** "primary" and "secondary." *28 C.F.R. § 75.1(c)* (1997). A primary producer is one who "actually films, videotapes, or photographs a visual depiction of actual sexually explicit conduct," id. § 75.1(c)(1), while a secondary producer "produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues" materials containing such depictions that are "intended for commercial distribution." Id. § 75.1(c)(2).

The regulations require that all producers maintain records that contain "the legal name and date of birth of each **[***6]** performer, obtained by the producer's examination of an identification document." Id. § 75.2(a)(1). Those records must include a "legible copy of the identification document examined," id., as well as "any name, other than each performer's legal name, ever used by the performer, including the performer's maiden name, alias, nickname, stage name, or professional name." *Id.* § 75.1(c)(3). A secondary producer is permitted to "maintain records by accepting from the primary producer . . . copies of the records" as long as the secondary producer keeps the "name and address of the primary producer." Id. § 75.2(b). n3

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n3 In *Sundance Associates, Inc. v. Reno, 139 F.3d 804, 1998 WL 127112,* at *2-3 (10th Cir. 1998), the Tenth Circuit struck down part of *28 C.F.R. § 75.1(c)(4)(iii)* to the extent it requires record-keeping by producers who do not hire, manage, or arrange for the participation of the persons depicted. The court concluded that the regulations were impermissible because they were broader in scope than authorized by the Act. *Id.* We need not reach this issue in the instant case, however, because both parties acknowledge that Connection has made no such contention in this suit.

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[9]**

C. Prior Proceeding

In its Complaint of September 13, 1995, Connection sought a declaratory judgment that the Act and its implementing regulations were unconstitutional under the First Amendment, as well as a temporary restraining order n4 and a preliminary and permanent injunction against the enforcement of the Act against Connection.

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n4 On October 24, 1995, the district court denied Connection's request, filed by separate motion, for a temporary restraining order against the enforcement of the Act. (J.A. at 32.)

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On April 8 and 9, 1996, the district court convened an evidentiary hearing on Connection's motion for preliminary injunction. At the hearing, Connection presented the testimony of Patricia Prementine, the editor for the past twelve years of the magazines published by Connection. Prementine testified that people who believe in the **[***7]** philosophy known as "swinging" are engaged in an alternative social and sexual lifestyle and "believe in sexual freedom and do not believe in sexual monogamy. **[**10]** " (J.A. at 44.) Prementine testified that most "swingers" are married or couples, have been together for a number of years, and are thirty to fifty years old. (J.A. at 49.)

[*287] Prementine estimated that approximately eighty-five to ninety percent of the persons who place ads in Connection's magazines request that their faces be blocked out. (J.A. at 71.) According to Prementine, and based on her personal experiences and contacts with "swingers," privacy and confidentiality are fundamental to the "swinging" lifestyle because the participants fear that their employers, communities, and families will reject them upon learning of their controversial lifestyle. (J.A. at 50-51.) Prementine asserted that, because of these privacy concerns, Connection's publications serve a critical and unique role to those choosing this alternative lifestyle by presenting information about social activities and functions and allowing a means for connecting with others who share their beliefs. (J.A. at 52-53.) Connection also presented the testimony of Robert McGinley as an "expert" on the "swinging" lifestyle. n5 McGinley likewise testified that privacy and confidentiality are very important to **[**11]** "swingers." (J.A. at 179-80.)

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n5 McGinley has a doctorate in counseling psychology and has co-authored a book on

"swinging," written numerous articles, appeared on television and radio programs, operated businesses that have sponsored conventions, social events, tours and directories to assist those interested in learning about or engaging in the "swinging" lifestyle, conducted surveys and studies of "swingers," and had personal contact with thousands of "swingers" over the past twenty years. (J.A. at 171-76.)

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Prementine stated that prior to the passage of the Act, Connection required anyone wishing to place a message in its magazines to sign a release form assuring Connection that he or she was at least twenty-one years of age. (J.A. at 57.) Prementine personally reviewed all the submissions and, if a question arose regarding an individual's age or name, the **[***8]** submission would be returned and necessary verification required. (J.A. at 58-59.) Prementine further testified that when Connection began **[**12]** to make efforts in January 1995 to notify its readers of the new disclosure requirements imposed by the Act and send out its revised advertisement forms, the reader response was low, and there was a significant decline in the number of submissions Connection was receiving. (J.A. at 66-68.) Based solely upon her personal experience and her position as Connection's editor, Prementine opined that the decline in messages was attributable to the passage of the Act. (J.A. at 68.)

The government presented the testimony of Dr. Francis Michael Anthony Biro, the Director of Clinical Affairs in the Division of Adolescent Medicine at Children's Hospital Medical Center in Cincinnati, Ohio. Dr. Biro reviewed several issues of Connection's magazines to attempt to find photographs depicting minors by using a rating system of various stages of pubertal development used in adolescent medicine. (J.A. at 124-25.) Dr. Biro testified that the vast majority of the photographs he examined depicted persons in their thirties, forties, and fifties and did not require photographic identification to establish that they were older than the age of majority. (J.A. at 155.) Although Dr. Biro did identify three photographs **[**13]** that he believed depicted persons under the age of eighteen, this testimony conflicted with his earlier deposition testimony, in which he stated that none of the photographs he examined depicted minors. (J.A. at 127, 156-57.)

On January 16, 1997, approximately nine months after the date of the hearing, the district court denied Connection's motion for preliminary injunction. Although the district court's ruling primarily relied on its finding that Connection had not demonstrated a substantial likelihood of success on the merits, the court also found that the other factors for analyzing a request for a preliminary injunction did not weigh in favor of granting one. (J.A. at 27-30.)

Nonetheless, the district court granted Connection's motion for an injunction pending this appeal of the denial of the **[***9]** preliminary injunction. The district court concluded that, even though there was not a strong likelihood of success on the merits of the appeal, a stay of its order denying the preliminary injunction was warranted both because of the substantial legal questions involved in the case and because Connection would be irreparably harmed, in the form of its potential demise, if it were **[**14]** forced to **[*288]** comply with the statute during the pendency of the appeal. (J.A. at 37-38.) Accordingly, the district court issued an injunction barring the enforcement of the Act against Connection prior to the resolution of this appeal.

II. STANDARD OF REVIEW

In determining whether or not to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest. *Golden v. Kelsey-Hayes Co., 73 F.3d 648, 653* (6th Cir.), cert. denied, *136 L. Ed. 2d 13, 117 S. Ct. 49 (1996)*. "None of these factors, standing alone, is a prerequisite to relief; rather, the court should balance them." Id. (citations omitted).

An appeals court reviews a challenge to a district court's ruling on a preliminary injunction for abuse of discretion. *Blue Cross & Blue Shield Mutual of Ohio v. Blue Cross and Blue Shield Ass'n, 110 F.3d 318, 322 (6th Cir. 1997)*. "The district court's **[**15]** determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Id.*

When a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor. With regard to the factor of irreparable injury, for example, it is well-settled that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976)* **[***10]** (plurality); *see*

also Newsom v. Norris, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*). Thus, to the extent that Connection can establish a substantial likelihood of success on the merits of its First Amendment claim, it also has established the possibility of irreparable harm as a result of the deprivation of **[**16]** the claimed free speech rights. *See Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1490 (6th Cir. 1995).*

Likewise, the determination of where the public interest lies also is dependent on a determination of the likelihood of success on the merits of the First Amendment challenge because "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir. 1994); see also Dayton Area, 70 F.3d at 1490* ("the public as a whole has a significant interest in . . . protection of First Amendment liberties"). Furthermore, although the government presumably would be substantially harmed if enforcement of a *constitutional* law aimed at fighting child pornography were enjoined, this determination, too, first requires a review of the merits of the claim.

Accordingly, because the questions of harm to the parties and the public interest generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation, the crucial inquiry often is, and **[**17]** will be in this case, whether the statute at issue is likely to be found constitutional. *Cf. Congregation Lubavitch v. requiring placement of menorah in public square, that because harm could be suffered by either party, and the public interest lies in the correct application of First Amendment principles, "our decision must turn on the likelihood of success on the merits").* **[***11]**

III. CONSTITUTIONALITY OF SECTION 2257 AS APPLIED TO CONNECTION AND ITS READERS

A. Suppression of Free Speech

As a publisher of magazines containing sexually explicit visual depictions, Connection asserts that its First Amendment rights to publish and distribute constitutionally **[*289]** *protected expression, as well as the rights of its advertisers to communicate with each other, n6 have been unconstitutionally suppressed as a result of the record-keeping and disclosure provisions of the Act. The protected nature of the expression involved in this case was not challenged before the district court and thus is not at issue. There is the possibility that the sexually explicit photographs published by Connection could be found constitutional because it is well-settled* **[**18]** *that "sexual expression which is indecent but not obscene is protected by the First Amendment," and hence subject to constitutional strictures. n7 Sable Communications of Cal., Inc.* **[***12]** *v. FCC, 492 U.S. 115, 126, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989).* Furthermore, the Supreme Court specifically has held that "non-obscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment." *United States v. X-Citement Video, Inc., 513 U.S. 64, 72, 130 L. Ed. 2d 372, 115 S. Ct. 464 (1994).* Therefore, the photographs published by Connection are protected expression to the extent they feature adults engaged in non-obscene, sexually explicit conduct. n8

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n6 Connection brings this action on behalf of itself and its advertisers. A litigant may raise a claim on behalf of a third party if the litigant can demonstrate that it has suffered a concrete, redressable injury, that it has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests. *Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 629, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991).* For the reasons explained in Part III.C, we conclude that Connection may properly assert the free speech and free association rights of its readers. *See* discussion *infra* Part III.C.

[19]**

n7 The standard for determining whether materials are obscene remains the same today as that set forth by the Supreme Court in *Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973):*"(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id., at 24, 93 S. Ct. at 2615* (internal quotation marks and citations omitted).*Reno v. American Civil Liberties Union, U.S. , 117 S. Ct.*

2329, 2345, 138 L. Ed. 2d 874 (1997). Based upon the record and factual scenario before us, we need not decide, and have not decided, specifically whether any of the materials at issue are obscene. However, we will assume, but solely for the purpose of analyzing the record-keeping provisions at issue, that the materials are not obscene.

n8 This does not mean that use or distribution of these materials would be protected in all contexts. The government presumably could, for example, prohibit the distribution of these materials, even though not obscene, to minors. *See Ginsberg v. New York, 390 U.S. 629, 636-37, 20 L. Ed. 2d 195, 88 S. Ct. 1274 (1968).* Additionally, the First Amendment also would not protect the right to engage in the depicted sexual conduct publicly under the theory that the sexual act itself constitutes protected expression. *See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973).* What is relevant for purposes of this case, however, is that the materials published by Connection are protected expression in the context of the record-keeping provisions at issue.

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Photographs featuring children engaged in sexually explicit conduct, however, would not constitute protected expression. In *New York v. Ferber, 458 U.S. 747, 764, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982),* the Supreme Court held that, as long as the activity to be prohibited is adequately defined and limited by applicable state law, child pornography--defined generally as works that visually depict sexual conduct by children below a specified age--is not entitled to First Amendment protection. In upholding a statute prohibiting the distribution of child pornography, the Court in *Ferber* noted that States are entitled to greater leeway in the regulation of child pornography because of the State's interest in preventing the sexual exploitation of children and in closing down the distribution network that generates the market for child pornography, which in turn leads to the abuse of children involved in the production of the materials. *Id. at 757-59.* The Court also **[***13]** has upheld a State's right to prohibit even the possession of child pornography. *See Osborne v. Ohio, 495 U.S. 103, 111, 109 L. Ed. 2d 98, 110 S. Ct. 1691 (1990)* **[**21]** ("given the gravity of the State's interests . . . we find that Ohio may constitutionally proscribe the possession and viewing of child pornography").

[*290] The goal of preventing the sexual exploitation of children undoubtedly is a compelling and important one, which the government not only is permitted but perhaps obliged to pursue. *See Ferber, 458 U.S. at 757* (finding prevention of the sexual exploitation and abuse of children to be a government objective of "surpassing importance"). Recently, Congress has further attempted to fight child pornography through the passage of the Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26 (codified at *18 U.S.C. § 2252A* (Supp. II 1996)). This new statute, aimed at curbing the effects of computer technology upon the child pornography industry, broadens the scope of child pornography laws by making it illegal to possess or distribute, electronically or otherwise, child pornography and defining "child pornography" to include visual depictions, however generated or created, that feature minors, have been created or modified to appear to feature minors, or are marketed **[**22]** as featuring minors engaged in sexually explicit conduct. *See 18 U.S.C. § 2252A* (Supp. II 1996) (incorporating definition of "child pornography" contained in *18 U.S.C. § 2256*(8)(Supp. II 1996)). n9 **[***14]**

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n9 Recently, this statute has been subjected to constitutional challenge, particularly on the basis that because the statute prohibits sexually explicit visual depictions of persons who only *appear* to be minors, it prohibits constitutionally protected expression. *See United States v. Hilton, 999 F. Supp. 131, 1998 WL 167255* at * 3-4 (D. Me. 1998) (finding prohibition on pornography with child-like depictions to be content-neutral but striking the definition of "child pornography" on the basis of vagueness); *Free Speech Coalition v. Reno, 1997 U.S. Dist. LEXIS 12212,* No. C 97-0281 VSC, 1997 WL 487758 at * 4, 6 (N.D. Cal. Aug. 12, 1997) (finding prohibition on child-like depictions content-neutral and sufficiently defined to withstand vagueness challenge).

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[23]**

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However, even in the pursuit of the most worthy of goals, the government may not unduly burden free speech. In determining whether the Act inappropriately hinders the exercise of the protected speech at issue, it is necessary first to determine whether the Act is content-based or content-neutral because that determination will decide the level of scrutiny.

The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.*Ward v. Rock Against Racism, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989)* (citations and internal quotations omitted).

The stated purpose of the original Child Protection and Obscenity Enforcement Act of 1988, which § 2257 amended, **[**24]** was to alleviate the difficulty for law enforcement officers in ascertaining whether an individual in a film or other visual depiction is a minor for the purpose of combating child pornography. *See* 1 Attorney General's Commission on Pornography, *Final Report* 618-20 (July 1986) ("Final Report"). The Attorney General's Commission on Pornography reasoned that, because some pornographers deliberately use youthful-looking adult models, there needed to be a statute requiring producers of sexually explicit material to maintain records of age verification. *Id.* at 618. The Commission also concluded that minors deserve special protection from the risks inherent in the production of pornographic materials and, therefore, individuals should be prohibited from employing, using, persuading, inducing, or coercing any minor to engage in sexually explicit conduct for **[***15]** the purpose of producing any visual depiction of such conduct. *Id.* at 618-19.

The government's goal of preventing child pornography through the record-keeping provisions of the Act clearly is not an attempt to regulate the speech of Connection and its advertisers because of disagreement with the messages they **[**25]** convey. Although the Act does require that the content of speech be examined to determine its applicability, the Act is not directed at the protected speech but rather unprotected conduct--namely, child pornography--that may be **[*291]** identified by the speech. Therefore, the fact that publishers or producers of sexually explicit visual depictions are, to some extent, treated differently from other types of producers of visual depictions does not make the Act content-based. *Cf. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986)* (finding that zoning ordinance restricting the placement of adult theaters was aimed at the secondary effects of such theaters on the surrounding community and thus was a content-neutral regulation despite the differing treatment received by adult theater owners as compared to other theater owners); *see also R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 389, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992)* (noting that a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated **[**26]** with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech'") (citations omitted). Thus, although the Act may not be content-neutral in a technical sense, because it is directed at curbing the secondary effects of the speech and not the speech itself, it is proper to deem it content-neutral for First Amendment purposes. *See Richland Bookmart, Inc. v. Nichols, 137 F.3d 435, 440 (6th Cir. 1998)* (noting that regulations of sexually explicit speech which are aimed at its secondary effects are, in fact, content-based but merely are to be treated as content-neutral). The reason for this difference in treatment is that the Supreme Court has held that although sexually explicit expression is protected by the First Amendment, "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude" **[***16]** than the societal interest in other forms of expression, such as political debate. *Young v. American Mini Theatres, Inc., 427 U.S. 50, 70, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976)* (plurality). Accordingly, because § 2257 is a regulation **[**27]** aimed at the secondary effects of sexually explicit speech, it is properly analyzed as a content-neutral regulation.

The intermediate level of scrutiny applies to content-neutral regulations that impose an incidental burden on speech. *Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 662, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994)*. Under this standard, a government regulation is constitutional if the obligations it imposes are "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Ward, 491 U.S. at 791* (citation and internal quotations omitted).

With regard to the requirement of narrow tailoring, Connection argues that the Act burdens substantially more speech than is necessary to achieve its professed goal of combating child pornography. Although Connection acknowledges that the protection of children is a legitimate and substantial government interest, it claims that the Act's record-keeping

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provisions unnecessarily diminish the First Amendment rights of adults because the Act's goal is not furthered by the record-keeping provisions as applied **[**28]** to Connection and its readers.

It is true that the interest of protecting children may not always justify limitations on the First Amendment rights of adults, and the government is not excused from the tailoring requirement merely because the interests of children are involved. In *Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 130-31, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989),* the Supreme Court struck down a total ban on indecent commercial telephone communications as not sufficiently justified by the government interest in preventing minors from being exposed to those messages. In balancing the interests at stake, the Court found that the statute's complete denial of adult access to telephone messages which are indecent but not obscene far exceeded that which was necessary to limit the access of minors to such **[***17]** messages. *Id. at 131.* Similarly, in *Reno v. American Civil Liberties Union, U.S. , 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997),* the Court invalidated provisions of an act designed to protect minors from harmful material on the Internet because the statute unnecessarily suppressed a **[**29]** broad amount of adult speech. *Id. 117 S. Ct. at 2346-48.* Therefore, courts must weigh **[*292]** the interests at stake in determining whether a statute impermissibly burdens free speech.

It is alleged by Connection that the vast majority of its advertisers are well over the age of majority. Nonetheless, a universal requirement of age disclosure, regardless of the apparent age of an individual in a visual depiction, is critical to the government's interest in ensuring that no minors are depicted in actual sexual conduct. Although standards based on "obvious" maturity would lead to accurate determinations in many cases, they also would attach an ineffectual subjectivity to the age determination, which was the target of the Act in the first place. *See Final Report* at 620 ("By viewing a visual depiction, how does one decide if the performer is fourteen or eighteen, seventeen or twenty-one?").

Furthermore, to satisfy the narrow tailoring requirement of the intermediate scrutiny test, a regulation need not be the least speech-restrictive means of achieving the government's interests. *Turner Broadcasting, 512 U.S. at 662.* All that is required **[**30]** for narrow tailoring is that the regulation does not burden substantially more speech than is necessary to further the government's legitimate interest. *Id.* If the government wishes to prevent the sexual exploitation of children through the production of child pornography, application of the record-keeping provisions to all producers of sexually explicit materials is necessary and not unduly burdensome.

In *City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986),* the Supreme Court analyzed a zoning ordinance that prohibited adult motion pictures from locating within 1,000 feet of any residential zone. After noting that the ordinance did not ban adult theaters altogether, but merely put restrictions on their location, the Court upheld the ordinance under the intermediate scrutiny test. *Id. at 52-54.* The Court **[***18]** found that the ordinance represented a valid governmental response to the "admittedly serious problems" created by adult theaters and was not used as a "pretext for suppressing expression" but rather was an attempt to make some areas available for adult theaters and their patrons, while at **[**31]** the same time preserving the quality of life in the community at large. *Id. at 54* (citations omitted).

The Act, like the ordinance at issue in *City of Renton,* also is a reasonable attempt to balance the free speech interests of Connection and its readers against the interest of the government in fighting child pornography. Child pornography is an "admittedly serious" problem, and the record-keeping provisions of the Act clearly are not a "pretext for suppressing expression." *See City of Renton, 475 U.S. at 54.* The provisions are a reasonable attempt to prevent the use of minors in pornographic materials. By requiring that age verification records be submitted and maintained, the provisions do not prohibit the sexually explicit speech at issue or unduly burden the opportunity of Connection and its readers to engage in the expression. Because the Act supports the government's interest in fighting pornography, while allowing Connection and its readers to exercise their free speech rights, it satisfies the requirement of narrow tailoring. *See Turner Broadcasting, 512 U.S. at 662.*

Similarly, the Act is not impermissibly overbroad. **[**32]** A statute is overbroad when it includes within its prohibitions activities that are constitutionally protected. *See Grayned v. City of Rockford, 408 U.S. 104, 114, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972).* Although the majority of Connection's readership may not be the object of the Act's focus, the allowance of exceptions to the disclosure requirements--presumably based on a subjective determination by Connection as to a subscriber's age--would not promote the Act's goal of eliminating the use of minors in pornography.

Connection also argues that the Act unconstitutionally chills protected speech. A statute may be stricken as unconstitutional under the First Amendment if it has a substantial chilling effect upon protected speech. *See, e.g.,* **[***19]** *Reno, 117 S. Ct. at 2345* (explaining that

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the vagueness of the Communications Decency Act and the severity of its criminal sanctions "may **[*293]** well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images"). Connection contends, based primarily on anecdotal evidence and supposition, that the potential of their identifying information being disclosed **[**33]** to the government will chill its advertisers from exercising their right to publish sexually explicit photographs and will result in the self-censorship of their speech.

The Supreme Court "consistently has refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities." *Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 767, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986)* (striking down reporting requirements of Pennsylvania abortion law where records would be available to public), *overruled on other grounds by Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992)*. In this case, however, the provisions at issue do not require the disclosure of any information about the subscribers to the public. The Act does not constitute an impermissible "chill" on the exercise of free speech rights because it clearly does not contemplate public release of the information or "raise the specter of public exposure and harassment" of "swingers" who choose to express themselves through Connection's publications. **[**34]** *Thornburgh, 476 U.S. at 767; cf. Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 79-81, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976)* (upholding constitutionality of mandatory abortion records that were accessible only to public health officers).

All of the preceding relates to the requirement that a content-neutral regulation of speech be "narrowly tailored." This requirement is satisfied "'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward, 491 U.S. at 799 (1989)* (quoting *United States v. Albertini, 472 U.S. 675, 689, 86 L. Ed. 2d 536, 105 S. Ct. 2897 (1985))*. The Act complies with this requirement and is neither overbroad nor an impermissible **[***20]** chill on free expression because, as explained above, the government's interest in eliminating child pornography would be less effectively promoted without the record-keeping and disclosure requirements.

Connection also argues that the Act does not comply with the part of the intermediate scrutiny test which requires that a regulation of protected expression **[**35]** leave open "ample alternative channels" for the communication. Related to this argument is the contention that the regulation interferes with the rights of Connection's readers to express themselves anonymously. Connection contends that a person wishing to publish a sexually explicit message without submitting identification documents that may be made available to the government no longer has a forum where he or she can publish that message anonymously.

Connection is correct that the Supreme Court has recognized that the right to communicate anonymously is encompassed within the First Amendment. In *McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 131 L. Ed. 2d 426, 115 S. Ct. 1511 (1995)*, the Court struck down an ordinance prohibiting the anonymous distribution of political leaflets. The Court noted that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id. at 342.* Nonetheless, Connection's and its readers' First Amendment rights have not been violated.

First, Connection has defined the relevant **[**36]** channel of communication too narrowly. Connection claims that what is destroyed by the Act is a channel for anonymous, sexually explicit visual expression that does not require the submission of identification documents. However, the requirement that ample alternative channels be left available does not mean that there must be a channel where Connection and its readers can express themselves in precisely the same manner as before the regulation. *Cf. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647, 100 S. Ct. 2559,* **[*294]** *69 L. Ed. 2d 298 (1981)* (noting that "the First Amendment does not guarantee the right to **[***21]** communicate ones were an identical channel available for the communication, there likely would be no constitutional challenge.

If the relevant channel instead is defined merely as a forum for anonymous, sexually explicit visual expression, alternative channels clearly remain available. People who wish to submit sexually explicit photographs to Connection's magazines still may do so. These persons also may have their photographs *published* anonymously. All that has been restricted is their ability to *submit* their **[**37]** photographs without identification but not their right to express themselves, via their advertisements, anonymously. In point of fact, Connection's subscribers already were required to identify themselves and verify their ages to the magazines' editor. All that has changed is that documentation of age is required, and this information must be made available to the government if requested. Public disclosure of this information is neither required

nor suggested by the terms of the Act. This condition of entry to this forum for anonymous, sexually explicit speech does not destroy the forum. Even assuming *arguendo* that Connection's readers will be less likely to engage in this form of expression because of the fear of disclosure, this unsubstantiated fear, and not the Act, is what is diminishing the forum. *See Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 60, 103 L. Ed. 2d 34, 109 S. Ct. 916 (1989)* ("mere assertion of some possible self-censorship resulting from a statute is not enough to render . . . [a] law unconstitutional").

In addition, this fear of disclosure argument is weakened by the fact that Connection's readers already have placed themselves at risk **[**38]** of losing the anonymity of their speech by submitting sexually explicit photographs of themselves to be published and distributed in Connection's magazines. Even if the majority of Connection's advertisers do ask to have their faces blocked out of the advertisements and identify themselves only through the code at the beginning of each message, they still are subjecting themselves to potential disclosure because anyone may respond to the advertisement **[***22]** and then discover the advertisers' identities. Likewise, advertisers already have been disclosing their identities to Connection, which could also subject them to at least some risk of public disclosure.

Furthermore, defining the forum even more broadly indicates that there are numerous "reasonable alternative avenues of communication" available for sexually explicit expression. *See City of Renton, 475 U.S. at 53* (finding zoning ordinance which prohibited adult motion pictures from locating near residential zones left ample land available for theaters in other areas). Undocumented sexually explicit expression is permitted if the acts of sexual conduct are simulated or do not otherwise fall within the proscriptions **[**39]** of the Act. Obviously, documentation also is not required for photographs of subscribers who are merely nude, fully clothed, or submit text-only messages. Connection's subscribers also may make use of its voice mailboxes for "swingers" and its service on the Internet. Therefore, subscribers who wish to engage in sexually explicit expression, without submitting documentation, still have alternative channels of communication available. Because the regulation at issue does not restrict the quantity or content of the expression, in the absence of any showing that the remaining channels of communication are inadequate, the requirement for alternative channels has been met. *See Ward, 491 U.S. at 802.* Therefore, as applied in this case, the Act does not impermissibly burden Connection's or its subscribers' free speech rights.

B. Prior Restraint

Connection argues that the Act operates as a prior restraint because advertisers must comply with the record-keeping provisions before they can publish their expression. Typically, "the term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of **[**40]** the time that such communications are to occur." *Alexander v. United States, 509 U.S. 544, 550, 113 S. Ct. 2766,* **[*295]** *125 L. Ed. 2d 441 (1993)* (citation and internal quotations omitted). Unlike this case, a prior restraint usually is alleged **[***23]** where a public official has been given discretionary power to deny use of a forum in advance of actual expression. *See Ward, 491 U.S. at 795 n.5* (noting that most prior restraint cases have public officials with the power of pre-approval in common). Connection and its subscribers are not being forbidden from engaging in expressive activity in the future, but rather they potentially are being subjected to sanctions *following* their expressive activity--but only if they subsequently are found guilty of violating the record-keeping provisions. Because there is a "well-established distinction between prior restraints and subsequent criminal punishments," *Alexander, 509 U.S. at 548,* the Act does not constitute a prior restraint. In addition, for the reasons discussed above, the Act does not constitute a prior restraint because of any alleged self-censorship or "chilling effect" **[**41]** that it may have on Connection's readers.

C. Freedom of Association

Connection argues that the Act violates the free association rights of its members by inhibiting their right to publish sexually explicit messages seeking to associate with others of like beliefs without coming forward and identifying themselves.

The first issue to address is whether Connection has *jus tertii*, or right of a third party, standing to assert this right of freedom of association on behalf of its readers. Although generally a party may not assert rights or interests of third parties, there are exceptions to this rule. *See Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 629, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991).* A litigant may raise a claim on behalf of a third party if the litigant can demonstrate that it has suffered a concrete, redressable injury, that it has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests. *Id.* Because Connection's own free speech rights are implicated, and it is directly subject to the strictures of the Act, Connection may challenge the Act **[**42]** on behalf of its readers, who are

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affected by the regulation of Connection's activities. *See Craig v. Boren, 429 U.S. 190, 195, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976)* ("vendors and those in like **[***24]** positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function"); *accord Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati, 822 F.2d 1390, 1394 (6th Cir. 1987).*

Furthermore, even if Connection were attempting solely to assert its readers' rights and not its own, *jus tertii* standing would be appropriate under the facts of this case. When determining whether a party may assert the constitutional rights of others, a court must consider: (1) whether the relationship of the litigant to the third party is such that the rights of the third party; and (2) whether the third party is hindered in its ability to assert its own rights. *Singleton v. Wulff, 428 U.S. 106, 114-16, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976); Planned Parenthood Ass'n of Cincinnati, Inc., 822 F.2d at 1394.* **[**43]** In the present case, Connection properly may assert the First Amendment rights of its readers to remain anonymous in their speech and to freely associate with one another. Because a right to anonymity is at issue, "to require that [the right] be claimed by the [readers] themselves would result in nullification of the right at the very moment of its assertion." *NAACP v. Alabama, 357 U.S. 449, 459, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958)* (finding that NAACP could assert the right of its rank-and-file members not to be identified). Accordingly, Connection may assert the rights of its readers.

Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of freedom of speech. *NAACP, 357 U.S. at 460.* This freedom may be threatened if there is forced disclosure of an individual's membership in an organization. In *NAACP v. Alabama*, the Supreme Court held that the NAACP could not be forced to disclose its membership lists to the State of Alabama because disclosure would adversely affect the ability of its members **[*296]** to collectively advocate and associate due to the fear of reprisals resulting from this **[**44]** disclosure. *Id. at 462-63.* The position of Connection's readership, however, is not analogous to that of the NAACP members. In NAACP, the Court noted the fact that the organization had made an **[***25]** uncontroverted showing that reprisals had occurred in the past when identity of the members had been disclosed. *Id. at 462.* Although Connection presented testimony that "swingers" have suffered reprisals when their lifestyles have been discovered by their communities, there has been no evidence offered that they will suffer reprisals from this information being disclosed only to the government.

Perhaps more importantly, Connection's readers' freedom to associate by means of its magazines is not significantly hindered by the Act. The readers still may associate freely and anonymously by submitting numerous types of messages and pictures for publication without providing documentation of name or age. Clearly, the right of the readers to freely associate with like-minded persons is not infringed by the presence of a record-keeping provision that applies only to a highly specific form of expression and requires potential disclosure only to the government. **[**45]** Accordingly, the free association rights of Connection's readers have not been violated.

IV. CONCLUSION

Accordingly, it is clear that Connection has not demonstrated a substantial likelihood of success on the merits of its claim that the Act and its implementing regulations violate the First Amendment rights of Connection and its readers. n10 In addition, the other factors relevant to the granting of a preliminary injunction weigh against Connection's motion. The public has a strong interest in the enforcement of a law designed to fight child pornography, and the granting of an injunction against the enforcement of a likely constitutional statute would harm the government. Furthermore, Connection has not demonstrated that it will be **[***26]** irreparably injured absent the granting of an injunction. Accordingly, the district court did not abuse its discretion, and we hereby AFFIRM the district court's denial of the preliminary injunction and **VACATE** the stay pending appeal.

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n10 In analyzing the Act under a similar constitutional attack, the District of Columbia Circuit likewise has concluded that the aspect of the record-keeping provisions at issue in this case does not violate the First Amendment. *See American Library Ass'n v. Reno, 308 U.S. App. D.C. 233, 33 F.3d 78 (D.C. Cir. 1994).*

---------- End Footnotes ----------

[46]**

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Citation #15
139 F.3d 804

SUNDANCE ASSOCIATES, INC., a Colorado corporation, Plaintiff-Appellee, v. JANET RENO, Attorney General of the United States, in her official capacity only; UNITED STATES DEPARTMENT OF JUSTICE, Defendants-Appellants.

No. 96-1501

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

139 F.3d 804; 1998 U.S. App. LEXIS 5720; 26 Media L. Rep. 1564; 1998 Colo. J. C.A.R. 1415

March 23, 1998, Filed

PRIOR HISTORY: **[**1]** Appeal from the United States District Court for the District of Colorado. (D.C. No. 95-N-2592). D.C. Judge EDWARD W. NOTTINGHAM.

DISPOSITION: District court's decision AFFIRMED; remanded to the district court.

COUNSEL: Arthur M. Schwartz (Michael W. Gross, Cindy D. Schwartz, and Gary M. Kramer, with him on the brief) of Arthur M. Schwartz, P.C., Denver, Colorado, for Plaintiff-Appellee.

Anne M. Lobell (Jacob M. Lewis with her on the briefs), United States Department of Justice, Washington, D.C., for Defendants-Appellants.

JUDGES: Before BALDOCK and BRORBY, Circuit Judges, and BROWN, * District Judge.

* The Honorable Wesley E. Brown, Senior District Judge, District of Kansas, sitting by designation.

OPINIONBY: BRORBY

OPINION: **[*805]** **BRORBY**, Circuit Judge.

The Attorney General and the United States Department of Justice ("the government") appeal the United States District Court for the District of Colorado's award of summary judgment for Sundance Associates ("Sundance"), holding *28 C.F.R. § 75.1(c)(4)(iii)* is an invalid implementation of *18 U.S.C. § 2257*. This court assumes jurisdiction pursuant to *28 U.S.C. § 1291* and affirms.

Concerned about the exploitation of children by pornographers, Congress enacted the **[**2]** Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, Title VII, § 7513(a), 102 Stat. 4187, 4485-4503 (significantly amended by the Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, Title III, §§ 301(b), 311, 104 Stat. 4808, 4816-17) to require producers of sexually explicit matter to maintain certain records concerning the performers n1 that might help law enforcement agencies monitor the industry. *See 18 U.S.C. § 2257*. Violations of these record keeping requirements are criminal offenses punishable by imprisonment for up to two **[*806]** years for first-time offenders and up to five years for repeat offenders. n2 *See 18 U.S.C. § 2257*(i).

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n1 The statute requires the producers of such matter to "ascertain, by examination of an identification document containing such information, the performer's name and date of birth," to "ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name," and to record this information. *18 U.S.C. § 2257*(b).

[3]**

n2 With the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2(a), 92 Stat. 7 (1978), Congress had already criminalized the production and distribution of materials visually depicting minors engaged in sexually explicit conduct. *See 18 U.S.C. §§ 2251,* 2252.

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The record keeping requirements apply to "whoever *produces*" the material in question. *18 U.S.C. § 2257*(a) (emphasis added). The statute defines "produces" asto produce, manufacture, or publish any book, magazine, periodical, film, video tape or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but does not include mere distribution or any other activity which does not involve hiring, contracting for[,]

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managing, or otherwise arranging for the participation of the performers depicted.*18 U.S.C. § 2257*(h)(3).

Pursuant to her authority to issue regulations to carry out the statutory requirements, *see 18 U.S.C. § 2257*(g), the Attorney General issued regulations implementing the statute on April 24, 1992. n3 *See 57 Fed. Reg.* **[**4]** *15017-022 (1992);* 28 C.F.R. § 75.

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n3 In addition to the record keeping requirements specifically discussed in § 2257, the Attorney General's regulations require the persons to whom it applies to retain copies of the performers' identification documents, to cross-index the records by "all names(s) of each performer, including any alias, maiden name, nickname, stage name or professional name of the performer; and according to the title, number, or other similar identifier of each book, magazine, periodical, film, videotape, or other matter," and to maintain the records for as long as the producer is in business, plus five years. *28 C.F.R. §§ 75.2(a)(1), 75.3, 75.4.*

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The extent to which the record keeping requirements apply to various persons and businesses is one area the regulations attempt to define. Under the regulatory language, the requirements apply to "any *producer* of any book, magazine, periodical, film, videotape, or other matter that contains one or more visual depictions of actual sexually explicit **[**5]** conduct made after November 1, 1990." *28 C.F.R. § 75.2(a)* (emphasis added). The regulation defines "producer" as:[A] person, including any individual, corporation, or other organization, who is a *primary producer* or a *secondary producer.*

(1) A *primary producer* is any person who actually films, videotapes, or photographs a visual depiction of actual sexually explicit conduct.

(2) A *secondary producer* is any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues a book, magazine, periodical, film, videotape, or other matter intended for commercial distribution that contains a visual depiction of actual sexually explicit conduct.

(3) The same person may be both a primary and a secondary producer.

(4) *Producer* does not include persons whose activities relating to the visual depiction of actual sexually explicit conduct are limited to the following:

(i) Photo processing;

(ii) Distribution; or

(iii) Any activity, other than those activities identified in paragraphs (c)(1) and (2) of this section, that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation **[**6]** of the depicted performers.

28 C.F.R. § 75.1(c) (emphasis in original). The ultimate question in this case is whether this definition of "producer" clashes impermissibly with the statutory definition of "produces."

Sundance publishes five magazines: *Odyssey*, *Odyssey Express*, *Connexion*, *Looking Glass*, and *UnReal People*. These magazines print personal or commercial announcements by individuals seeking to contact others with similar sexual interests. The announcements are typically accompanied by pictures, most of which are sexually explicit. The pictures are submitted voluntarily to Sundance by the individuals advertising in the magazines. Sundance, therefore, does not participate in the production of the photographs it publishes in its various magazines.

[*807] Facing possible criminal liability as a "secondary producer" under the regulation, Sundance filed a complaint seeking declaratory relief in the district court. The parties filed cross-motions for summary judgment in the district court.

The court ruled for Sundance, finding *28 C.F.R. § 75.1(c)(4)(iii)* to be an invalid implementation of *18 U.S.C. § 2257.* n4 Applying *Chevron, U.S.A., Inc. v. Natural* **[**7]** *Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984),* the district court found the intent of Congress to be clear from the language of the statute and, consequently, did not inquire into the legislative history of the Act. Finding "the plain meaning of this section of the Restoration Act clearly exempts persons whose activities '... include mere distribution or any other activity which does not involve hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted,'" the court determined the scope of the regulation's coverage to be impermissibly broader than that intended by the statute.

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n4 The district court also ruled that Sundance had standing to challenge the validity of *28 C.F.R. § 75.1(c)* but lacked standing to challenge the validity of any other aspects of the regulation or statute because it could not demonstrate "a realistic danger of sustaining a direct injury" once the court declared § 75.1(c)(4)(iii) invalid. Neither of these issues was raised on appeal.

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[8]**

The government raises one issue on appeal: whether the district court erred in finding *28 C.F.R. § 75.1(c)(4)(iii)* to be an invalid implementation of *18 U.S.C. § 2257.* n5

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n5 This is not the only Circuit to have addressed the validity of 28 C.F.R. § 75. Although it did not face the precise question raised in this case, the United States Court of Appeals for the District of Columbia invalidated the regulation's requirement that producers keep records as long as they remain in business, and the regulation's record keeping requirement as applied to printers, film processors, duplicators, and similar persons who simply perform services and return the product to the producer. *American Library Ass'n v. Reno, 308 U.S. App. D.C. 233, 33 F.3d 78, 91, 93 (D.C. Cir. 1994)* (upholding the constitutionality of the record keeping requirements as applied to the appellants in that case). To the extent any of those persons may be considered "secondary producers" (for instance, as assemblers or manufacturers), this ruling supports Sundance's argument that the statute was not meant to apply to everyone who could be considered "to produce, manufacture, or publish" or "duplicate, reproduce, or re issue."

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[9]**

This court reviews the grant of a motion for summary judgment de novo, applying the same legal standard used by the district court. *See Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir. 1996).* Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c).* "When applying this standard, we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. If there is no genuine issue of material fact in dispute, then we next determine if the substantive law was correctly applied by the district court." *Kaul, 83 F.3d at 1212* (quoting *Wolf v. Prudential Ins. Co., 50 F.3d 793, 796 (10th Cir. 1995)).*

The facts in this case are not in dispute. The only question is whether the district court was correct in its legal analysis of the statute and regulation. We review de novo a district court's interpretation of a statute. *See United States v. Diaz, 989 F.2d 391, 392 (10th* **[**10]** *Cir. 1993).*

When faced with a challenge to the validity of a regulation, we apply the analytical framework provided by the United States Supreme Court in *Chevron.* As an initial matter, we decide "whether Congress has directly spoken to the precise question at issue." *Chevron, 467 U.S. at 842.* "'If the statute is clear and unambiguous "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." ... The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.'" *K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291, 100 L. Ed. 2d 313, 108 S. Ct. 1811 (1988)* (quoting *Board of Governors of Fed. Reserv. Sys. v. Dimension Fin. Corp., 474 U.S. 361, 368, 88 L. Ed. 2d 691, 106 S. Ct. 681 (1986)* **[*808]** (quoting *Chevron, 467 U.S. at 842-43)).* If, however, the statute does not speak directly to the question at issue or is ambiguous, the court, giving considerable weight to the agency's interpretation, must decide if the agency's answer is "a permissible construction of the statute." *Chevron, 467 U.S. at 843-44.*

In this case, we need **[**11]** go no further than the initial analysis. "The text and reasonable inferences from it give a dear answer against the Government, and that ... is 'the end of the matter.'" *Brown v. Gardner, 513 U.S. 115, 120, 130 L. Ed. 2d 462, 115 S. Ct. 552 (1994)* (quoting *Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409, 124 L. Ed. 2d 368, 113 S. Ct. 2151 (1993)* (quoting *Chevron, 467 U.S. at 842)).* We agree with the district court that "the plain meaning of [§ 2257((h)(3)] clearly exempts persons

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whose activities '... include mere distribution or any other activity which does not involve hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted.'"

Under the statutory scheme, the requirements apply to persons or organizations who "produce, manufacture, or publish" any of the identified matter, including those involved in "duplication, reproduction, or reissuing" of the matter, but not including those who merely distribute or whose activity "does not involve hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted." *18 U.S.C. § 2257*(h)(3). The plain language of the statute **[**12]** establishes a group possibly subject to its requirements (including those who "produce, manufacture, or publish" and those involved in "duplication, reproduction, or reissuing") and then excludes from that group those who basically have had no contact with the performers (mere distributors and others not involved in the "hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted"). n6 *Id.*

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n6 Without deciding the issue, another Circuit appeared to read the final clause in § 2257(h)(3) in a similar manner. *American Library Ass'n v. Barr, 294 U.S. App. D.C. 57, 956 F.2d 1178, 1186 n.5 (D.C. Cir. 1992).* In that case, the court stated the 1990 amendment to the statute, which added the clause in issue, "clarified the definition of 'produces' to exclude 'mere distribution or any other activity which does not involve hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted.'" *Id.*

---------- End Footnotes ----------

The Attorney General's **[**13]** regulatory definition of producer follows the statute in establishing a class of individuals and organizations possibly subject to the record keeping requirements, but it fails to exclude persons from the class that the statute requires. The regulation conditions its exclusion of those "not involve[d in] the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers" to persons who are not a primary or secondary producer. *28 C.F.R. § 75.1(c)(4)(iii)*. The statute makes no such condition. This is not a minor matter, because, as will be explained in detail below, the practical effect of the regulatory scheme is that the exclusion cannot be applied to anyone. "An agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecomm. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 234, 129 L. Ed. 2d 182, 114 S. Ct. 2223 (1994).* An agency's rulemaking power is not "the power to make law," it is only the "'power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Mabry v. State Bd. of Community Colleges & Occupational Educ.,* **[**14]** *813 F.2d 311, 315* (10th Cir.) (quoting *Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14, 47 L. Ed. 2d 668, 96 S. Ct. 1375 (1976)* (further quotation marks and citations omitted), *cert. denied, 484 U.S. 849 (1987).*

Attempting to justify its regulation, the government urges upon this court a tortured reading of the statute. The government contends the second part of § 2257(h)(3), beginning with "does not include mere distribution," was actually intended to broaden the scope of the statute. The government's approach leads us down a path toward Alice's Wonderland, where up is down and down is up and words mean anything. The words "but *does not include* ... any other activity which does not involve **[*809]** hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted," the argument goes, were not intended to "not include" anyone listed above, but were actually intended by implication only to include more activities in the definition. This is too much of a stretch. In reviewing statutes, courts do not assume the language is imprecise, as the government would have us do. *See United States v. LaBonte, 520 U.S. 751, 117 S. Ct. 1673,* **[**15]** *1677, 137 L. Ed. 2d 1001 (1997).* Rather, we assume that in drafting legislation, Congress says what it means. *Id.* This is not a case of verbal ambiguity presenting accepted alternative meanings; it is one of an agency twisting words to reach a result it prefers. Although § 2257(h)(3) was poorly drafted and should never be used as a model of the English language, its intent is clear to this court.

One wonders, looking at the regulation, why the government did not follow the logic of its own argument when implementing the regulation. n7 If the second clause of the statute actually was intended to broaden the definition of produces to include activities that "involve hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted," it seems odd that none of those activities are included in the regulatory definition of producer. The regulation defines a producer as a person who is a primary or secondary producer, yet the definitions of primary and secondary producer do not address hiring, contracting for, managing, or otherwise arranging for participation, as they should according to

the government's arguments. *See 28 C.F.R. § 75.1(c)(1)*-(3).

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n7 Without explanation, the government asserts "the regulations make clear that the statute applies to all activities which 'involve hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted[,]'regardless of whether or not the entity is a producer by virtue of being engaged in activities listed in the first clause." The regulation does not do this. The regulation defines a producer as a primary or secondary producer. The definitions of primary and secondary producers do not include activities that involve hiring, contracting for, managing, or otherwise arranging for the participation of the performers. *See 28 C.F.R. § 75.1(c)*.

---------- End Footnotes ----------

[16]**

Explaining its position, the government states "the structure of the statute, which identifies 'mere distribution' as the activity specifically excluded from the definition of 'produces,' suggests that Congress did not intend to exempt actual producers from the definition, but only those whose involvement in production is wholly tangential." The problem with this position is the statute does not identify "mere distribution" as the only activity specifically excluded, but also "any other activity" basically not involving contact with the performers. *18 U.S.C. § 2257*(h)(3). The government's explanation simply ignores the obvious import of the final clause of the statute.

The government also argues the Attorney General properly rejected the district court's reading of the statute because if "Section 2257(h)(3) is interpreted that way, the clause 'including the duplication, reproduction, or reissuing of any such matter' would be read out of the statute, because such activities would not necessarily involve the hiring, contracting for, or managing of performers." This is wrong. The clause would not be read out of the statute because it is easy to imagine persons duplicating, reproducing, **[**17]** or reissuing material they originally created who would have had the requisite contact with the performers, and as a result such persons would be subject to the requirements of the statute. Just because the exclusionary clause would make the statute inapplicable to some duplicators, reproducers, and reissuers is no reason to justify reading it out of the statute -- narrowing the field is the very nature of exclusions.

The government further argues its comprehensive regulatory scheme is necessary because of the difficulties involved in enforcing the record keeping requirements only on those producers who hire, contract for, manage, or otherwise make arrangements for the participation of sexual performers. n8 "Such **[*810]** considerations address themselves to Congress, not to the courts." *MCI Telecommunications, 512 U.S. at 234* (quoting *Armour Packing Co. v. United States, 209 U.S. 56, 82, 52 L. Ed. 681, 28 S. Ct. 428 (1908))*. Of course, this court is sympathetic to the purported n9 goals of this legislation -- preventing the sexual exploitation of children. And although it seems the Attorney General has identified a problem with its effective enforcement -- that it is drawn in such **[**18]** a way as to make it narrow in application n10 -- neither the court nor the Attorney General has the authority to rewrite a poor piece of legislation (if, indeed, that is what it is). That responsibility lies solely with Congress.

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n8 This clause may not narrow application of the statute as significantly as the government suggests. "Arranging for the participation of the performers depicted," may well encompass a broad range of activities, although that will be for later courts to decide.

n9 Because the statute expressly forbids the use of the mandated records, directly or indirectly, "as evidence against any person with respect to any violation of law," other than the failure to maintain the records in the first place, it might only be of limited use in aiding enforcement of child pornography laws. *18 U.S.C. § 2257*(d)(1); *see American Library Ass'n v. Reno, 310 U.S. App. D.C. 341, 47 F.3d 1215, 1216 (D.C. Cir. 1995)* (Tatel, J., dissenting from denial of suggestion for rehearing in banc).

n10 One might question whether the statute is narrowly drawn by mistake or if it was narrowly drawn on purpose, because of a considered congressional determination that it could be subject to constitutional attack, as an earlier version had been. *See American Library Ass'n v.*

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Barr, 956 F.2d at 1186-87; American Library Ass'n v. Thornburgh, 713 F. Supp. 469 (D.D.C. 1989).

---------- End Footnotes ----------

[19]**

Even if we assumed for purposes of this analysis that the statutory language was unclear, and proceeded to the second stage of *Chevron* analysis, we would have to find the Attorney General's regulation to be an impermissible construction of the statute. The regulation makes the final part of § 2257(h)(3), beginning with "or any other activity" superfluous. Although we afford deference to the Attorney General's interpretation of a statute under her purview, we cannot overlook an interpretation that flies in the face of the statutory language. *See Bridger Coal Co./Pacific Minerals, Inc. v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor, 927 F.2d 1150, 1153 (10th Cir. 1991)* ("We will not construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous.").

The regulation defines "*producer* as any "individual, corporation, or other organization, who is a *primary producer* or *secondary producer*." *28 C.F.R. § 75.1(c)* (emphasis in original). Obviously then, if individuals, corporations, or other organizations are not primary or secondary producers, they are not producers for purposes of the regulation. That means, **[**20]** by definition, producers *must* engage in the activities listed in either *28 C.F.R. § 75.1(c)(1)* or (2). *See 28 C.F.R. § 75.1(c)*. For the exception to apply, however, one cannot be engaged in the activities listed in *28 C.F.R. § 75.1(c)(1)* or (2). *See 28 C.F.R. § 75.1(c)(4)(iii)*. Therefore, the exception is meaningless; it excepts those persons and organizations to which the regulation does not apply in the first place and it does not except any of the persons and organizations to which the regulation does apply. n11

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n11 This raises a question about the Attorney General's specific exclusion for photo processing. *28 C.F.R. § 75.1(c)(4)(i)*. Unlike the other specific exclusion, distribution, photo processing is not mentioned in the statute. If photo processing is one of the activities listed in the definition of secondary producer, for example producing or manufacturing (it clearly does not fall into the category of primary producer), what makes it different than many other similar activities for which there is no exclusion? If it does not fall into the category of secondary producer, then no exclusion is necessary in the first place. Obviously, even the Attorney General recognized Congress did not intend for everyone falling into the categories of production, manufacture, publication, duplication, reproduction, and reissuing to be subject to the record keeping requirements, or the regulation would not have included a specific exclusion for photo processing.

---------- End Footnotes ----------

[21]**

We have to assume Congress intended its words "but does not include ... any other activity which does not involve hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted" to have some meaning and effect. *See Reiter v. Sonotone Corp., 442 U.S. 330, 339, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)* ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). Because the government's construction makes these words mere surplusage, it cannot stand.

[*811] The government correctly notes the district court should not have held all of *28 C.F.R. § 75.1(c)(4)(iii)* invalid. The flaw in the subsection of the regulation arises from the clause "other than those activities identified in paragraphs (c)(1) and (2) of this section." *28 C.F.R. § 75.1(c)(4)(iii)* Our decision, therefore, necessitates only that clause be stricken from § 75.1(c)(4)(iii).

For the foregoing reasons, the district court's decision is **AFFIRMED** ; however, we remand to the district court so it may issue a judgment striking from § 75.1(c)(4)(iii) only the clause **[**22]** identified above.

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Citation #16
25 F.3d 1413

ILQ Investments, Inc., a Minnesota corporation; Excalibur Group, Inc., a Minnesota corporation, Plaintiffs - Appellees, v. City of Rochester, a municipal corporation, Defendant - Appellant.

No. 93-1925

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

25 F.3d 1413; 1994 U.S. App. LEXIS 14680

December 15, 1993, Submitted
June 15, 1994, Filed

SUBSEQUENT HISTORY: **[**1]** Certiorari Denied November 28, 1994, Reported at: *1994 U.S. LEXIS 8368.*

PRIOR HISTORY: Appeal from the United States District Court for the District of Minnesota. District No. CIV 3-92-751. Honorable Richard H. Kyle, District Judge.

DISPOSITION: Reversed

COUNSEL: Counsel who presented argument on behalf of the appellant was James J. Thomson of Minneapolis, MN.

Counsel who presented argument on behalf of the appellee was Randall D.B. Tigue of Minneapolis, MN.

JUDGES: Before LOKEN, Circuit Judge, HEANEY, Senior Circuit Judge, and HANSEN, Circuit Judge.

OPINIONBY: LOKEN

OPINION: **[*1414]** LOKEN, Circuit Judge.

Rochester is a city of 75,000 people in southern Minnesota. In April 1988, Rochester enacted Ordinance No. 2590, a zoning ordinance that defines and restricts the location of "adult establishment uses." In this case, the district court has preliminarily enjoined enforcement of Ordinance No. 2590 against a newly-opened adult bookstore in **[*1415]** downtown Rochester. See *ILQ Invs., Inc. v. City of Rochester, 816 F. Supp. 516 (D. Minn. 1993).* Concluding that Ordinance No. 2590 will almost certainly survive constitutional challenge under *City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986),* we reverse.

I.

In the summer of 1992, appellees ILQ Investments, Inc., and Excalibur Group, Inc. (collectively "ILQ"), opened Downtown Book and Video on the main floor of a commercial building in premises previously occupied by a retail china shop. Downtown Book and Video segregates **[**2]** forty per cent of its floor space into an adults-only area selling sexually explicit books, magazines, and novelty items that account for fifty per cent of the store's total sales. The store has no facilities for on-premises viewing of these sexually explicit materials.

On August 7, 1992, the Zoning Administrator issued two Notices of Violation. The first advised ILQ that it violated § 61.111 by changing the use of the property without a zoning certificate. n1 The second Notice frames the issues for this appeal. It informed ILQ that Downtown Book and Video was violating Ordinance No. 2590 because the store is an "adult bookstore" n2 and an "adult establishment" n3 that is located within 750 feet of a "youth facility," n4 the Rochester Public Library. Both Notices ordered the violations discontinued but gave ILQ ten days to appeal the Zoning Administrator's decisions.

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n1 Rochester requires a zoning certificate "before . . . an existing use is changed or modified so as to alter the character of its occupancy." Rochester Code of Ordinances § 61.111.

n2 An "adult bookstore" is a "business engaging in the . . . sale of items consisting of printed matter [etc.] . . . if a substantial or significant portion of such items are distinguished or characterized by an emphasis on the depiction or description of 'specified sexual activities' or 'specified anatomical areas.'" Rochester Code of Ordinances § 60.4012. The ordinances include detailed definitions of the terms "specified sexual activities" and "specified anatomical areas." See Rochester Code of Ordinances §§ 60.4642, 60.4643.

[3]**

n3 An "adult establishment" includes an "adult bookstore" and is also generally

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defined as "any . . . business which offers its patrons services or entertainment characterized by an emphasis on matter depicting, exposing, describing, discussing or relating to specified sexual activities or specified anatomical areas." Rochester Code of Ordinances § 60.4015.

n4 A "youth facility" is a "public playground, public swimming pool, public library, or licensed day care facility." Rochester Code of Ordinances § 60.4795. "All adult establishment uses shall be located not less than 750 feet from any residential district boundary, from any church, from any school, or from any youth facility. In addition, no adult establishment use may be located within 750 feet of another adult establishment use." Rochester Code of Ordinances § 65.720.

---------- End Footnotes----------

ILQ appealed to the Zoning Board of Appeals and then to the Rochester Common Council. Both held public hearings, made detailed findings of fact and conclusions of law, and upheld the Zoning Administrator's decisions. Foregoing judicial review in state court, ILQ commenced **[**4]** this *42 U.S.C. § 1983* action, seeking declaratory and injunctive relief on the ground that Ordinance No. 2590 violates ILQ's First Amendment and due process rights.

The district court granted a preliminary injunction, enjoining the City "from taking any action, civil or criminal, to enforce the provisions of Ordinance No. 2950 against [ILQ]." The court concluded that ILQ is likely to succeed on the merits of its constitutional challenge because the definition of "adult bookstore" is impermissibly vague, and because Rochester was unreasonable in relying on other cities' studies to justify both the breadth of Ordinance No. 2590 and its application to Downtown Book and Video. ILQ is irreparably harmed by this chilling of its First Amendment rights, the court reasoned, and the balance of harms and public interest support preliminary injunctive relief. See *Dataphase Systems v. C.L. Systems, Inc., 640 F.2d 109 (8th Cir. 1981)* (en banc).

Rochester appeals this preliminary injunction, challenging only one prong of the district court's preliminary injunction analysis -- whether ILQ is likely to succeed on the **[*1416]** merits of its **[**5]** constitutional claims. We have jurisdiction to review the grant of a preliminary injunction. See *28 U.S.C. § 1292*(a)(1). We review for a clearly erroneous factual determination, an error of law, or an abuse of discretion. See *West Pub. Co. v. Mead Data Central, Inc., 799 F.2d 1219, 1222-23 (8th Cir. 1986),* cert. denied, *479 U.S. 1070, 93 L. Ed. 2d 1010, 107 S. Ct. 962 (1987).*

II.

ILQ does not allege that Ordinance No. 2590 effectively bans adult entertainment uses from Rochester. Therefore, this zoning ordinance is "properly analyzed as a form of time, place, and manner regulation." *City of Renton, 475 U.S. at 46.* Time, place, and manner regulations are acceptable if they are "content-neutral," and if they are "designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id. at 47.* Applying this test, we have recently upheld similar ordinances enacted by the cities **[**6]** of Little Rock, Arkansas, see *Ambassador Books & Video, Inc. v. City of Little Rock, 20 F.3d 858, 1994 WL 106467 (8th Cir. 1994);* Ramsey, Minnesota, see *Holmberg v. City of Ramsey, 12 F.3d 140 (8th Cir. 1993);* Minneapolis, Minnesota, see *Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991);* and St. Louis, Missouri, see *Thames Ent., Inc. v. City of St. Louis, 851 F.2d 199 (8th Cir. 1988).* See also *SDJ, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir. 1988),* cert. denied, *489 U.S. 1052 (1989).*

In applying the City of Renton test, the first task is to determine whether the ordinance is "content-neutral." This is a term of art. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989).* Thus, even if a time, place, and manner ordinance regulates **[**7]** only businesses selling sexually explicit materials, the ordinance is content-neutral if its purpose is to lessen undesirable secondary effects attributable to those businesses, such as increased crime, lower property values, or deteriorating residential neighborhoods. See *Holmberg, 12 F.3d at 143; Doe v. City of Minneapolis, 898 F.2d 612, 617 (8th Cir. 1990).*

ILQ argues that Ordinance No. 2590 is not content-neutral because Rochester has failed to prove that the City's adult businesses cause adverse secondary effects. That argument impermissibly confuses distinct aspects of the City of Renton test. Content neutrality focuses on the City's purposes in enacting the ordinance. *Ward, 491 U.S. at 791.* Here, it is clear that the Common Council targeted not the content of Downtown Book and Video's materials, but the anticipated impact of adult businesses on their

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surrounding communities. On this record, Ordinance No. 2590 is indisputably content-neutral.

To survive First Amendment scrutiny, a content-neutral regulation must be "designed to serve a substantial governmental **[**8]** interest." *City of Renton, 475 U.S. at 47.* Regulations reasonably designed to curb unwanted secondary effects of sexually oriented businesses serve a substantial governmental interest. See *id. at 50; Holmberg, 12 F.3d at 143.* In identifying and measuring such secondary effects, a city may rely upon studies or evidence generated by other cities "so long as [that] evidence . . . is reasonably believed to be relevant to the problem that the city addresses." *City of Renton, 475 U.S. at 51-52;* see also *Ambassador Books & Video, 20 F.3d 858, 1994 U.S. App. LEXIS 6040,* *12, *1994 WL 106467,* at * 4. The legislative history of Ordinance No. 2590 demonstrates that the City has satisfied this element of the City of Renton standard.

In February 1987, the Common Council became concerned about two adult bookstores located across from each other in downtown Rochester and directed the Planning Commission to study the effects of adult entertainment uses. On March 2, 1988, the Planning Department published the results of its **[**9]** study in a report entitled "Adult Entertainment: Land Use and Legal Perspectives." This report discussed the relevant legal issues and precedents and summarized **[*1417]** studies of the adverse secondary effects of adult entertainment businesses conducted by other cities, including Minneapolis and St. Paul. The study concluded:a) A considerable number of communities throughout the nation have studied the impacts which adult entertainments have on the areas surrounding them.b) These studies have concluded that adult entertainment uses have an adverse impact on the surrounding neighborhoods.c) Residential neighborhoods in proximity to adult uses suffer adverse effects including increased crime rates, lowered property values, and increased transiency.d) Values of both commercial and residential properties are diminished when located in proximity to adult entertainment businesses.e) The adverse impact on commercial areas is increased by the presence of more than one adult entertainment use in close proximity to another adult entertainment use.f) The impact which an adult entertainment use has on the surrounding area appears to lessen as the distance **[**10]** from the adult entertainment use increases.g) Reasonable "time, place and manner" restrictions which address the "secondary" impacts of adult entertainment uses are constitutionally permissible.

After conducting a public hearing, the Planning Commission adopted detailed findings and conclusions, including:6. The concerns which have prompted public hearings in this city are similar to the concerns which motivated the communities of Indianapolis, Indiana; St. Paul, Minnesota; Phoenix, Arizona; and Seattle, Washington to undertake their studies of adult entertainment uses; consequently, the results of those studies are relevant to the existing or foreseeable impacts which such uses can have on the areas surrounding them in this city.7. The concentration of adult entertainment uses in commercial areas or the location of adult entertainment uses in close proximity to residential uses, churches, parks and schools will result in devaluation of property values and decreases in commercial business sales, thereby reducing tax revenues to the City and adversely impacting the economic well-being of the citizens of this City.8. Location of adult entertainment uses **[**11]** in proximity to residential uses, churches, parks, schools, bars, and other adult entertainment uses very likely would lead to increased levels of criminal activities, including prostitution, rape, assaults, and other sex-related crimes in the vicinity of such adult entertainment uses.At its April 18, 1988, meeting, the Common Council took up the Commission's recommendation that the City amend its zoning code to restrict the location of adult establishment uses. The Council reviewed the Planning Department study and heard testimony by the Planning Department, Planning Commission, and local residents. After finding that other cities' studies "are relevant to the existing or forseeable impacts which such uses can have on the areas surrounding them in this city," the Council adopted Ordinance No. 2590.

Despite this thorough legislative process, the district court concluded that the City was unreasonable in relying upon the other cities' studies because they did not specifically address businesses similar to Downtown Book and Video, that is, adult bookstores "that offer both sexually explicit and non-sexually explicit materials and allow only off-premises consumption of those materials." **[**12]** ILQ urges us to uphold this ruling, asserting that, for this reason, Ordinance No. 2590 is not "narrowly tailored to regulate only those adult uses shown to have caused adverse secondary effects."

The legislative history of Ordinance No. 2590 does not support the district court's conclusion. The studies the Common Council found relevant to Rochester's problems identified and measured adverse secondary effects linked to adult businesses generally -- higher crime, neighborhood deterioration, lower property values, and an increase in transients -- as well as adverse secondary effects **[*1418]** specifically attributable to adult bookstores:

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. The Indianapolis study included a national survey of real estate appraisers. Of the 507 responding appraisers, 80% opined that an adult bookstore would reduce the value of residential properties within one block of the site, and 72% opined that an adult bookstore would reduce the value of commercial properties within one block. "This negative impact dissipates markedly as the distance from the site increases."

. The St. Paul study included one neighborhood in which 20% of the City's adult entertainment establishments, including the only **[**13]** adult bookstore, were located. The documented secondary effects included "discarded pornographic literature allegedly found in the streets, sidewalks, bushes and alleys near adult businesses. Such literature is sexually very explicit, even on the cover, and . . . becomes available to minors even though its sale to minors is prohibited.". The St. Paul study concluded that a concentration of adult businesses in one area causes the greatest neighborhood problems. "In many cities, adult bookstores and movie theatres are associated with the most serious land use problems. This pattern persists in Saint Paul as well."

ILQ argues that Rochester was constitutionally required to disregard these studies because none evaluated the secondary effects of a bookstore offering non-adult as well as adult materials and having no facilities for on-premises consumption. That is simply not the law. "The requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward, 491 U.S. at 799,* quoting *United States v. Albertini, 472 U.S. 675, 689, 86 L. Ed. 2d 536, 105 S. Ct. 2897 (1985).* **[**14]** Under City of Renton, Rochester need not prove that Downtown Book and Video would likely have the exact same adverse effects on its surroundings as the adult businesses studied by Indianapolis, St. Paul, and Phoenix. So long as Ordinance No. 2590 affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects, Rochester "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young v. American Mini Theatres, Inc., 427 U.S. 50, 71, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976)* (plurality opinion).

Rochester relied upon studies that identified specific adverse secondary effects attributable to adult bookstores. The City reasonably believed that evidence was relevant to the problems addressed by Ordinance No. 2590. Even if Downtown Book and Video is a new type of adult business, n5 it may not avoid time, place, and manner regulation that has been justified by studies of the secondary effects of reasonably similar businesses. See *Holmberg, 12 F.3d at 143-44.*

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n5 An affidavit by ILQ's president recites that "on-premises viewing booths, otherwise known as 'peep shows' . . . . are an absolute essential component" of the 70 adult bookstores in 25 States that he has personally visited.

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[15]**

ILQ does not argue that Ordinance No. 2590 unreasonably limits alternative avenues of communication, the third prong of the City of Renton test. Accordingly, on the preliminary injunction record before us, we conclude that this ordinance may validly be applied to Downtown Book and Video under City of Renton.

III.

The district court also concluded that ILQ will likely prevail on the merits of two other constitutional claims: first, that Ordinance No. 2590 is impermissibly vague because it classifies a business as an adult bookstore if a "substantial or significant portion" of its merchandise is sexually explicit; and second, that Ordinance No. 2590 is impermissibly broad because the term "adult establishment" includes a business that offers any entertainment "characterized by an emphasis" on sexually explicit activity.

Rochester argues that ILQ lacks standing to raise these claims because Downtown Book and Video is unquestionably an "adult **[*1419]** bookstore" and an "adult establishment" within the meaning of Ordinance No. 2590. See *American Mini Theatres, 427 U.S. at 58-59; Parker v. Levy, 417 U.S. 733, 756, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974)* **[**16]** ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). ILQ replies that the impact of this ordinance on Downtown Book and Video is nonetheless uncertain because Rochester zoning officials refuse to clarify what amount of sexually explicit material will violate this criminal statute. n6 Compare *Kolender v. Lawson, 461 U.S. 352, 357-58, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983).*

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n6 A violation of these Rochester zoning ordinances is a misdemeanor punishable

by up to a $ 700 fine and 90 days in prison for each day of violation.

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On this record, we find ILQ's argument unpersuasive. ILQ's First Amendment interest is relatively weak -- "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." *American Mini Theatres, 427 U.S. at 61.* **[**17]** ILQ is not primarily concerned with its right of free expression, or it would have located Downtown Book and Video in an unrestricted part of the City. ILQ is also not primarily concerned with the risk of criminal prosecution, or it would have applied for a change-of-use certificate rather than confronting the City with an up-and-running adult bookstore in the downtown area. Given the City's properly substantiated interest in these zoning regulations, we see no reason why ILQ should not be subject to the same tensions and uncertainties that zoning regulations typically impose upon other legitimate enterprises.

Moreover, the portions of this detailed ordinance that ILQ attacks are not devoid of meaningful legislative standards. The limiting term, "characterized by an emphasis" on the sexually explicit, which ILQ characterizes as overly broad, has been widely construed since it was discussed and upheld in the Supreme Court's 1976 decision in American Mini Theatres. The limiting term, "substantial portion" of a bookstore's merchandise, which ILQ characterizes as impermissibly vague, appears frequently in the United States Code. See, e.g., *42 U.S.C. § 2000a* **[**18]** (c) ("The operations of an establishment affect commerce if a substantial portion of the food which it serves . . . has moved in commerce"). In these circumstances, we conclude that ILQ's vagueness and overbreadth arguments are not likely to succeed. As the Supreme Court said in *American Mini Theatres, 427 U.S. at 61:*The only vagueness in the ordinances relates to the amount of sexually explicit activity that may be portrayed before the material can be said to be "characterized by an emphasis" on such matter. For most films the question will be readily answerable; to the extent that an area of doubt exists, we see no reason why the ordinances are not "readily subject to a narrowing construction by the state courts."

ILQ intentionally declined to present its vagueness and overbreadth claims to the state courts, choosing instead to bring these claims, in the form of largely hypothetical enforcement issues, in federal court. We think the district court erred in concluding that these claims are likely to prevail.

IV.

We conclude that the preliminary injunction should not have been granted. ILQ is unlikely to prevail **[**19]** on the merits of its First Amendment and due process claims and therefore has failed to prove that substantial First Amendment interests are being irreparably injured by Rochester's time, place, and manner regulation of Downtown Book and Video. The public interest is not served by premature federal court intervention in regulatory matters of strong local interest. Accordingly, the district court's order of February 22, 1993, is reversed.

CONCURBY: HEANEY

CONCUR: HEANEY, Senior Circuit Judge, concurs in the result.

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Citation #17
368 F.3d 1186

WORLD WIDE VIDEO OF WASHINGTON, INC., Plaintiff-Appellant, v. CITY OF SPOKANE, Defendant-Appellee.

No. 02-35936

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

368 F.3d 1186; 2004 U.S. App. LEXIS 10443

January 7, 2004, Argued and Submitted, Seattle, Washington
May 27, 2004, Filed

SUBSEQUENT HISTORY: Amended by *World Wide Video of Wash., Inc. v. City of Spokane, 2004 U.S. App. LEXIS 14381 (9th Cir. Wash., May 27, 2004)*

Amended by, Rehearing denied by, Rehearing, en banc, denied by *World Wide Video of Wash., Inc. v. City of Spokane, 2004 U.S. App. LEXIS 18927 (9th Cir. Wash., July 12, 2004)*

PRIOR HISTORY: **[**1]** Appeal from the United States District Court for the Eastern District of Washington. D.C. No. CV-02-00074-AAM. Alan A. McDonald, District Judge, Presiding. *World Wide Video of Wash., Inc. v. City of Spokane, 227 F. Supp. 2d 1143, 2002 U.S. Dist. LEXIS 22749 (E.D. Wash., 2002)*

DISPOSITION: Affirmed.

COUNSEL: Gilbert H. Levy, Seattle, Washington, on behalf of the plaintiff-appellant.

Stephen A. Smith, Preston Gates & Ellis, LLP, Seattle, Washington, on behalf of the defendant-appellee.

JUDGES: Before: Susan P. Graber, Richard C. Tallman, and Richard R. Clifton, Circuit Judges. Opinion by Judge Tallman.

OPINIONBY: Tallman

OPINION: **[*1188]** TALLMAN, Circuit Judge:

This appeal raises two questions. First, whether the City of Spokane's ordinances regulating the location of adult-oriented retail businesses ("adult stores") are constitutional. Second, whether an amortization period is required in this context and, if so, whether a reasonable amount of time was allotted for World Wide Video of Washington, Inc. ("World Wide"), to either relocate its stores or change the nature of its retail operations. Because the record reveals no **[**2]** genuine issue of material fact regarding either of these issues, we affirm the district court's summary judgment for Spokane.

I

In the late 1990s, city leaders in Spokane grew concerned with the opening of several adult stores in residential areas. To develop a legislative response to this situation, the City compiled information -- specifically, studies from other municipalities, relevant court decisions, and police records -- documenting the adverse secondary effects of adult stores.

On November 29, 2000, Spokane's Plan Commission held a public hearing to consider amending the Municipal Code to combat these documented secondary effects. At this hearing, the City Attorney's office presented the legislative record and gave the Commission an overview of the effect of adult stores on the community. Although a number of citizens testified in favor of amending the Code, World Wide presented no evidence, testimonial or otherwise, at this hearing.

On December 13, 2000, after considering public comments and the legislative record, the Plan Commission voted unanimously to recommend that the City Council amend the Code. Before the vote at this meeting, two individuals testified against **[**3]** the proposed amendment. Once again, however, World Wide did not participate.

On January 29, 2001, the Spokane City Council heeded the Plan Commission's recommendation and unanimously passed Ordinance C-32778. n1 Under Ordinance C-32778, adult stores are subject to Spokane's set-back requirements, which prevent **[*1189]** them from opening in close proximity to certain land use categories. n2 Ordinance C-32778 also amended the Code to provide adult stores with an amortization period of one year either to relocate or change the nature of their operations. *See* SMC § 11.19.395. A procedure was included whereby the owner of a business could seek an extension of this deadline. *See id.*

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n1 The Code as amended by Ordinance C-32778 reads:A. An "adult retail use establishment" is an enclosed building, or any portion thereof which, for money or any other form of consideration, devotes a significant or substantial portion of stock in trade, to the sale, exchange, rental, loan, trade, transfer, or viewing of "adult oriented merchandise".

B. Adult oriented merchandise means any goods, products, commodities, or other ware, including but not limited to, videos, CD Roms, DVDs, computer disks or other storage devices, magazines, books, pamphlets, posters, cards, periodicals or non-clothing novelties which depict, describe or simulate specified anatomical area, as defined in Section 11.19.0355, or specified sexual activities, as defined in Section 11.19.0356.Spokane Mun. Code ("SMC") § 11.19.03023.

[4]**

n2 Specifically, the Spokane Municipal Code provides:1. An adult retail use establishment [or] an adult entertainment establishment may not be located or maintained within seven hundred fifty feet, measured from the nearest building of the adult retail use establishment or of the adult entertainment establishment to the nearest building of any of the following pre-existing uses:

a. public library,

b. public playground or park,

c. public or private school and its grounds, from kindergarten to twelfth grade,

d. nursery school, mini-day care center, or day care center,

e. church, convent, monastery, synagogue, or other place of religious worship,

f. another adult retail use establishment or an adult entertainment establishment, subject to the provisions of this section.

2. An adult retail use establishment or an adult entertainment establishment may not be located within seven hundred fifty feet of any of the following zones:

a. agricultural,

b. country residential,

c. residential suburban,

d. one-family residence,

e. two-family residence,

f. multifamily residence (R3 and R4),

g. residence-office.

SMC § 11.19.143(D).

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[5]**

Subsequently, Spokane determined that it needed to establish more sites for the relocation of adult stores. Following four Plan Commission meetings on the issue, on March 18, 2002, Spokane enacted Ordinance C-33001, which increased the number of land use categories permitted to accommodate the operation of adult stores.

Because Ordinance C-32778 became effective on March 10, 2001, all non-conforming uses were required to terminate by March 10, 2002. World Wide applied to Spokane's Planning Director for an extension of the amortization period and was granted an additional six months. World Wide appealed this decision to the city's Hearing Examiner, arguing that a six-month extension was insufficient. The Hearing Examiner affirmed the extension, but held that it would run from the date of his May 15, 2002, decision. World Wide was therefore required to close or change the nature of its businesses by November 15, 2002. n3 Although we were informed at oral argument that the configuration of World Wide's retail services has changed somewhat, the businesses remain open in their original locations.

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n3 World Wide appealed the Hearing Examiner's ruling to Spokane County Superior Court under Washington's Land Use Petition Act, *RCW 36.70C.005, et seq.*

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[6]**

On February 27, 2002, World Wide filed a *§ 1983* civil rights action in the United States District Court for the Eastern District of Washington alleging, *inter alia*, that Ordinances C 32778 and G33001 (hereinafter, "the Ordinances") violate the **[*1190]** *First Amendment*. At

the close of discovery, Spokane moved for summary judgment. In support of its motion, the City tendered(1) more than 1,500 pages of legislative record related to the Ordinances, including studies from other municipalities concerning the adverse secondary effects associated with adult businesses, n4 police reports, relevant court decisions, and evidence submitted by Spokane residents;

(2) the minutes of the Plan Commission and City Council meetings concerning the Ordinances;

(3) a report from a real estate appraiser stating that hundreds of parcels of land zoned for adult retail remained available; n5 and

(4) the declarations of several citizens detailing the secondary effects of the existing adult stores. n6

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n4 Spokane relied on studies from New York City (1994); Garden Grove, California (1991); a coalition of several municipalities in Minnesota (1989); St. Paul, Minnesota (1987); Austin, Texas (1986); Indianapolis, Indiana (1984); Amarillo, Texas (1977); and Los Angeles (1977).

[7]**

n5 When Ordinance C-32778 went into effect, there were a total of seven affected adult stores, six of which were required to relocate. By the time Spokane moved for summary judgment, one affected business had already reopened at a new site. Spokane's appraiser found that 326 properties were available for relocation of adult stores; that 161 of the 326 were best suited for commercial uses; and that 63 of the 161 were actively listed for sale or lease. Applying the set-back requirements of the Ordinances, Spokane determined that 32 of these 63 sites were particularly well-suited to accommodate adult stores.

n6 Specifically, these declarants stated that they had witnessed various criminal acts in and around World Wide's stores, including prostitution, drug transactions, public lewdness, harassment of citizens by World Wide's clientele, and pervasive litter, including used condoms, empty liquor bottles, and video packaging featuring graphic depictions of sexual acts.

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In opposition to Spokane's motion for summary judgment, World Wide offered(1) the declaration of land use planner **[**8]** Bruce McLaughlin, who opined that the studies relied on by Spokane provided no valid basis for the Ordinances because none dealt exclusively with secondary effects produced by retail-only uses and concluded that adult stores in Spokane neither contributed to the depreciation of property values nor resulted in increased calls for police service;

(2) police reports and call summaries intended to corroborate McLaughlin's conclusion;

(3) the report of a private investigator containing interviews of citizens who claimed that there were no problems related to the adult stores in their neighborhoods; n7

(4) the declaration of a real estate broker stating that there were only 26 available properties and only one was a plausible relocation site for an adult store; n8 and

[*1191] (5) evidence that two of World Wide's stores were subject to long-term leases that their landlord was unwilling to dissolve.Additionally, World Wide suggested in its statement of facts that the citizens who provided declarations in support of Spokane's motion were motivated by their disagreement with the content of World Wide's speech rather than by a desire to combat secondary effects. **[**9]**

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n7 We note that World Wide's investigator indicated in his deposition that he was instructed not to include information in his report that was unhelpful to his client's legal position.

n8 Spokane tendered a supplemental declaration from its appraiser with its summary judgment reply, asserting that World Wide's broker ignored 92 qualifying parcels, which were sufficient to allow simultaneous operation of 18 adult stores, and that, even accepting the data contained in World Wide's broker's report, there were sufficient locations to operate 14 adult stores.

Moreover, although World Wide hired a second land use expert, it declined to

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submit his opinion to the court. World Wide's second expert concluded that there were more than enough possible relocation sites (*i.e.*, 60) for the six stores that needed to move.

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On September 11, 2002, the district court granted Spokane's motion for summary judgment. World Wide timely appealed.

II

We review de novo the district court's grant of summary judgment. **[**10]** *See Coszalter v. City of Salem, 320 F.3d 968, 973 (9th Cir. 2003)*. Viewing the evidence in the light most favorable to World Wide, we must decide whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See id.*

A

To determine whether Spokane's Ordinances violate the *First Amendment*, we must first answer the threshold question of whether they are content based, thus meriting strict scrutiny, or content neutral, thus meriting intermediate scrutiny. Under *City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986)*, laws aimed at controlling the secondary effects of adult businesses are deemed content neutral. *See id. at 48-49*. n9

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n9 It merits noting that in the Supreme Court's most recent foray into the law of the *First Amendment* and secondary effects, *City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 152 L. Ed. 2d 670, 122 S. Ct. 1728 (2002)*, Justice Kennedy assailed this categorization as a "fiction," asserting that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Id. at 448* (Kennedy, J., concurring). Nevertheless, Justice Kennedy ultimately agreed that a "zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny," reasoning that "the zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional." *Id. at 448-49*; *accord G.M. Enters., Inc. v. Town of St. Joseph, 350 F.3d 631, 637 (7th Cir. 2003)* ("In light of [*Alameda Books*], we need not decide whether the ordinances are content based or content neutral, so long as we first conclude that they target not 'the activity, but . . . its side effects,' and then apply intermediate scrutiny.'") (citation omitted).

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[11]**

The district court found that Spokane's purpose in enacting its Ordinances was to regulate the harmful secondary effects associated with sexually oriented businesses. *World Wide Video of Wash., Inc. v. City of Spokane, 227 F. Supp. 2d 1143, 1150-51 (E.D. Wash. 2002)*. The factual findings underlying a district court's grant of summary judgment are reviewed for clear error. *See, e.g., Carrillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002)*. Here, there is adequate support in the record for the district court's finding concerning the purpose of the Ordinances. *See* Ordinance C-33001, Preamble/Findings, (4)(k) ("It is not the intent of the proposed zoning provisions to suppress any speech activities protected by the *First Amendment* . . ., but to propose content neutral legislation which addresses the negative secondary impacts of adult retail use and entertainment establishments[.]"). Accordingly, we apply intermediate scrutiny. *See Renton, 475 U.S. at 49*.

[*1192] B

An ordinance aimed at combating the secondary effects of a particular type of speech survives intermediate **[**12]** scrutiny "if it is designed to serve a substantial government interest, is narrowly tailored to serve that interest, and does not unreasonably limit alternative avenues of communication." *Center for Fair Pub. Policy v. Maricopa County, 336 F.3d 1153, 1166 (9th Cir. 2003)* (citing *Renton, 475 U.S. at 50* and *Colacurcio v. City of Kent, 163 F.3d 545, 551 (9th Cir. 1998))*, *cert. denied, 158 L. Ed. 2d 468, 124 S. Ct. 1879 (2004)*. World Wide does not appeal the district court's determination that the Ordinances leave open adequate alternative avenues of communication. The issue before us is thus limited to whether the Ordinances are narrowly tailored to serve a substantial government interest.

In *Alameda Books*, the Supreme Court "clarified the [*Renton*] standard for determining whether an [adult-use] ordinance serves a substantial government interest." *535 U.S. at 433* (plurality opinion). Thus, the

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proper starting point for evaluating World Wide's appeal is close consideration of *Renton* and *Alameda Books*. Our analysis is also informed by *Maricopa County*, this **[**13]** court's sole interpretation and application of the *Renton/Alameda Books* standard to date.

1

The challenged ordinance in *Renton* prohibited adult movie theaters from locating within 1,000 feet of various zones, such as those intended for schools and churches. An adult theater owner sued, arguing, *inter alia*, that because the City of Renton improperly relied on another city's experiences with the secondary effects of adult theaters rather than undertaking its own study, the city had failed to establish that its ordinance served a substantial government interest. *Renton, 475 U.S. at 50.*

We agreed and held in favor of the theater owner, but the Supreme Court reversed. Noting that "a city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect," the Court concluded that we had imposed "an unnecessarily rigid burden of proof." *Id.* (internal quotation marks omitted). The Court held that "the *First Amendment* does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, **[**14]** so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses." *Id. at 51-52.*

2

Like *Renton*, *Alameda Books* originated in this circuit. In 1977, the City of Los Angeles conducted a study to assess the secondary effects of adult land uses. *See Alameda Books, 535 U.S. at 430.* Because that study discovered increased crime in areas with high concentrations of adult businesses, Los Angeles enacted an ordinance regulating their locations. *See id.*

It soon came to light, however, that there was a loophole in the law: multiple adult businesses could congregate in a single building. *See id. at 431.* Accordingly, Los Angeles amended its ordinance to prohibit more than one adult business from operating under the same roof. *See id.* Two book-stores sued, alleging that the ordinance violated the *First Amendment. See id. at 432.*

The district court granted summary judgment in favor of the stores. *See id. at 433.* We affirmed, concluding that Los Angeles "failed **[**15]** to present **[*1193]** evidence upon which it could reasonably rely to demonstrate that its regulation of multiple-use establishments [was] designed to serve the city's substantial interest in reducing crime." *Id.* (internal quotation marks omitted).

In the Supreme Court, *Alameda Books* produced four opinions: a plurality opinion by Justice O'Connor (joined by the Chief Justice, Justice Scalia, and Justice Thomas), a brief concurring statement by Justice Scalia, a concurrence in the judgment by Justice Kennedy, and a dissent by Justice Souter (joined by Justices Stevens and Ginsburg and joined in part by Justice Breyer). A five justice majority -- the plurality plus Justice Kennedy -- reversed our decision.

Given the fractured nature of the Court's disposition, it is difficult to glean a precise holding from *Alameda Books.* However, under *Marks v. United States, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977)*, since Justice Kennedy's concurrence was the narrowest opinion joining the Court's judgment, it controls. *See Maricopa County, 336 F.3d at 1161*; *see also Fly Fish, Inc.v. City of Cocoa Beach, 337 F.3d 1301, 1310 n.19 (11th Cir. 2003)* **[**16]** ; *Ben's Bar, Inc. v. Vill. of Somerset, 316 F.3d 702, 722 (7th Cir. 2003).* Thus, we are bound by the plurality opinion, but only insofar as its conclusions do not expand beyond Justice Kennedy's concurrence.

All five Justices in the *Alameda Books* majority affirmed *Renton*'s core principle that local governments are not required to conduct their own studies in order to justify an ordinance designed to combat the secondary effects of adult businesses. *See Alameda Books, 535 U.S. at 438* (plurality opinion); *id. at 451* (Kennedy, J., concurring). Further, the majority of the Court stressed the paramount role of local experimentation in developing legislative responses to secondary effects, given local governments' superior understanding of their own problems. *See id. at 440* (plurality opinion) ("We must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems."); *id. at 451-52* (Kennedy, J., concurring) ("The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that **[**17]** knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion.") (citations omitted).

Most importantly, Justice Kennedy did not disagree with the key innovation announced by the *Alameda Books* plurality. To wit:The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets

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the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.*Id. at 438-39* (plurality opinion). Announcement of this burden shifting approach fulfilled the *Alameda Books* Court's stated intention in granting certiorari: it "clarified the standard for determining whether an ordinance serves a substantial government interest." *Id. at 433* **[**18]** .

At its heart, the limiting principle that Justice Kennedy's concurrence imposes on the plurality opinion concerns the importance of determining and evaluating a **[*1194]** city's "rationale" behind a particular ordinance. While Justice Kennedy did not dispute the plurality's burden-shifting gloss on *Renton*, he stressed that a city's rationale for passing an ordinance aimed at controlling the secondary effects of adult stores "cannot be that when [the ordinance] requires businesses to disperse (or to concentrate), it will force the closure of a number of those businesses, thereby reducing the quantity of protected speech." *Maricopa County, 336 F.3d at 1163*. Justice Kennedy thus concurred with the *Alameda Books* plurality with the following cautionary caveat: "It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech." *535 U.S. at 450* (Kennedy, J., concurring). A secondary-effects ordinance must be designed to leave "the quantity of speech . . . substantially undiminished, and [the] total secondary effects . . . significantly reduced." *Id. at 451* **[**19]** .

3

Our recent decision in *Maricopa County* differs slightly from the case before us in that it concerned the constitutionality of a "time" rather than a "place" restriction on adult businesses. *See 336 F.3d at 1159.* In *Maricopa County*, operators of a variety of adult businesses, including "sellers of sexually-related magazines and paraphernalia," *id. at 1158*, challenged an Arizona statute that prohibited them from operating in the early morning hours. The district court upheld the statute and the businesses appealed. Applying *Alameda Books* -- which we described as "reaffirming the *Renton* framework," *id. at 1159* -- a divided panel of this court affirmed. n10

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n10 In dissent, Judge Canby opined that Arizona's statute could not survive Justice Kennedy's requirement that the quantity of speech remain undiminished because it required adult businesses to close down during certain parts of the day -- *i.e.*, it *stopped* speech -- unlike a "dispersal" regulation, which merely *moves* speech. *Maricopa County, 336 F.3d at 1172* (Canby, J., dissenting). Spokane's Ordinances are dispersal ordinances; consequently, Judge Canby's concern does not arise here.

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[20]**

As in the instant case, the legislative record in *Maricopa County* included both documentary and testimonial evidence. *See id. at 1157.* For example, the Arizona legislature heard testimony describing problems with pornographic litter and prostitution related to the operation of adult businesses adjacent to a residential area. *Id. at 1157-58.* The *Maricopa County* legislative record also included letters discussing reports detailing similar problems in Denver and Minnesota. *Id. at 1158.* We concluded that the state provided a sufficient basis for the challenged statute, noting that the evidence was "hardly overwhelming, but it does not have to be." *Id. at 1168.* Because the Arizona legislature relied on evidence "reasonably believed to be relevant" to the targeted problem, we determined that the statute was presumptively constitutional. *Id.*

Having made this determination, we continued: "Under *Alameda Books*, the burden now shifts to [the businesses] to cast direct doubt on [the state's] rationale, either by demonstrating that the [state's] evidence does not support its rationale or **[**21]** by furnishing evidence that disputes the [state's] factual findings." *Id.* (internal quotation marks omitted; first alteration added). Essentially, the *Maricopa County* businesses argued that "the evidence before the Arizona legislature consisted of 'irrelevant anecdotes' and 'isolated' incidents, and that testimonial evidence is not 'real' evidence." *Id.* Rejecting this contention as explicitly foreclosed by *Alameda Books*, we concluded that the businesses had "failed to cast doubt on the state's **[*1195]** theory, or on the evidence the state relied on in support of that theory," and affirmed the district court's decision upholding the statute. *Id.*

C

Like the statute challenged in *Maricopa County*, Spokane's Ordinances satisfy the *Renton* standard as clarified in *Alameda Books.* We hold that the Ordinances are narrowly tailored to serve Spokane's

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substantial interest in reducing the undesirable secondary effects of adult stores.

1

Turning first to the substantial interest issue, per Justice Kennedy's *Alameda Books* concurrence, the initial question is "how speech will **[**22]** fare" under the Ordinances. *535 U.S. at 450* (Kennedy, J., concurring); *see also R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402, 408 (7th Cir. 2004)* (noting that under Justice Kennedy's *Alameda Books* concurrence "it is essential . . . to consider the impact or effect that the ordinance will have on speech"). Conceptually, this question dovetails with the requirement that an ordinance must leave open adequate alternative avenues of communication. Again, World Wide does not appeal the district court's conclusion that the Ordinances left open sufficient relocation sites. Given that each of the six remaining affected stores has the opportunity to relocate, it is likely that the Ordinances will reduce secondary effects -- by moving the stores from sensitive areas -- without substantially reducing speech by forcing stores to close. *See Alameda Books, 535 U.S. at 450* (Kennedy, J., concurring).

The next step is to determine whether the Ordinances survive the burden-shifting regime announced by the *Alameda Books* plurality. They do. World Wide does not contend that Spokane failed to satisfy its initial burden of producing **[**23]** evidence that "fairly supports" the Ordinances. Rather, World Wide argues that when it provided contrary evidence the burden shifted back to Spokane, and the City failed to supplement the record.

However, in order to shift the burden back to Spokane, World Wide was required to *succeed* in "casting direct doubt" on the rationale behind the Ordinances, either by showing that the City's evidence does not support it or by supplying its own contrary "*actual and convincing* evidence." *Id. at 438-39* (plurality opinion) (emphasis added). Like the businesses in *Maricopa County*, World Wide failed to satisfy this requirement. World Wide's arguments and evidence against the Ordinances were insufficient to trigger the burden shifting contemplated in *Alameda Books*.

We reach this conclusion primarily because World Wide did not effectively controvert much of Spokane's evidence through McLaughlin's report or otherwise. In holding that the Ordinances promoted a substantial governmental interest, the district court stressed that Spokane only needed "'some' evidence to support its Ordinances," and correctly concluded that the "elimination of **[**24]** pornographic litter, by itself, represents a substantial governmental interest, especially as concerns protection of minors." *World Wide Video, 227 F. Supp. 2d at 1157-58*. The citizen testimony concerning pornographic litter and public lewdness, standing alone, was sufficient to satisfy the "very little" evidence standard of *Alameda Books, 535 U.S. at 451* (Kennedy, J., concurring) (citing *Renton, 475 U.S. at 51-52*). *Accord Maricopa County, 336 F.3d at 1168*; *cf. Stringfellow's of N.Y., Ltd. v. City of New York, 694 N.E.2d 407, 417, 91 N.Y. 2d 382, 400, 671 N.Y.S.2d 406 (N.Y. 1998)* ("Anecdotal evidence and reported experience can be as telling as statistical **[*1196]** data and can serve as a legitimate basis for finding negative secondary effects . . . ."). n11

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n11 In *Tollis Inc. v. San Bernardino County, 827 F.2d 1329 (9th Cir. 1987)*, San Bernardino County determined that a single showing of an adult movie was sufficient to subject a theater to regulation under an adult-use zoning ordinance. *Id. at 1331*. Because the County "presented *no* evidence that a single showing of an adult movie would have any harmful secondary effects on the community," *id. at 1333* (emphasis added), we affirmed an injunction against enforcement of the ordinance. Although *Tollis* predates *Alameda Books*, the decisions are consistent; the principle remains that a local government must reasonably rely on at least *some* evidence. Here, Spokane clearly satisfied this requirement.

Likewise, in *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251 (11th Cir. 2003), cert. denied, 72 USLW 3488* (U.S. Apr. 19, 2004) (No. 03-1011), a case relied on by World Wide, the Eleventh Circuit reversed summary judgment because Manatee County "failed to rely on *any evidence whatsoever* that might support the conclusion that the ordinance was narrowly tailored to serve the County's interest in combating secondary effects." *Id. at 1266* (emphasis added). As Spokane adduced voluminous evidence in support of the Ordinances, this case is clearly distinguishable.

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[25]**

The relevant question is "whether the municipality can demonstrate a connection between the speech

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regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." *Alameda Books, 535 U.S. at 441* (plurality opinion). Here, the protected speech and the secondary effects described in the citizen testimony are inexorably intertwined: the sexual images in the magazines and on the packaging of the videos sold by adult stores may be protected, but if the stores' products are consistently discarded on public ground, municipal regulation may be -- and, in this case, is -- justified.

Our conclusion concerning the nature of the post-*Alameda Books* evidentiary burden is in line with the weight of federal authority. For example, in *SOB, Inc. v. County of Benton, 317 F.3d 856 (8th Cir.), cert. denied, 157 L. Ed. 2d 38, 124 S. Ct. 104 (2003)*, the Eighth Circuit noted that the adult business's evidence in opposition to Benton County's zoning regulationsaddressed only two adverse secondary effects, property values and crime in the vicinity of an adult entertainment establishment. . . . [The challenged **[**26]** ordinance], on the other hand, may address other adverse secondary effects, such as the likelihood that an establishment whose dancers and customers routinely violate long-established standards of public decency will foster illegal activity such as drug use, prostitution, tax evasion, and fraud.*Id. at 863*. Just so here. Granted, the evidence tendered by World Wide in opposition to Spokane's motion for summary judgment purported to contradict some of the City's secondary effects evidence. Again, however, World Wide failed to present an effective rebuttal to an entire category of evidence: the public testimony. World Wide attempted to counter the citizens' stories by charging bias. However, this tactic is insufficient to defeat summary judgment. *See Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co., 701 F.2d 95, 97 (9th Cir. 1983)*. This failure to cast doubt on Spokane's justification for the Ordinances dooms World Wide's challenge.

2

We also conclude that the Ordinances are narrowly tailored. A law is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." **[*1197]** **[**27]** *United States v. Albertini, 472 U.S. 675, 689, 86 L. Ed. 2d 536, 105 S. Ct. 2897 (1985); accord Ward v. Rock Against Racism, 491 U.S. 781, 799, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989)*. Here, as in *Maricopa County*, it is self-evident that Spokane's asserted interest would be achieved less effectively absent the Ordinances. *See 336 F.3d at 1169.*

The crux of World Wide's argument is that, because Spokane's studies do not deal exclusively with retail-only stores, the City impermissibly relied on "shoddy data [and] reasoning" to justify the Ordinances. *Alameda Books, 535 U.S. at 438* (plurality opinion). World Wide relies principally on *Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288 (5th Cir.)* (per curiam), *cert. denied, 157 L. Ed. 2d 372, 124 S. Ct. 466 (2003)*, to support its argument. The *Encore Videos* court, noting that "[a] time, place, and manner regulation meets the narrow tailoring standard if it 'targets and eliminates no more than the exact source of the evil it seeks to remedy,'" *id. at 293* (quoting *Frisby v. Schultz, 487 U.S. 474, 485, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988))* **[**28]** , found San Antonio's re-zoning of adult stores unconstitutional because the studies on which the city relied "either entirely excluded establishments that provide only take-home videos and books . . . or included them but [did] not differentiate the data collected from such businesses from evidence collected from enterprises that provide on-site adult entertainment," *id. at 294-95*. n12 Hoping to repeat Encore Videos' success, World Wide presented the district court with an extensive study concluding that problems with increased crime rates and decreased property value were limited to the neighborhood around a store that has preview booths for on-site viewing.

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n12 The Fifth Circuit recently clarified its *Encore Videos* opinion, stating that "the ordinance at issue was found not to be narrowly tailored because of both its failure to make an on-site/off-site distinction *and* its low 20 inventory requirement [*i.e.*, the fact that it covered all stores with at least 20 'adult' merchandise]." *Encore Videos, Inc. v. City of San Antonio, 352 F.3d 938, 939 (5th Cir. 2003)* (emphasis added).

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[29]**

Notwithstanding its proffer, World Wide's reliance on *Encore Videos* is misplaced. In *Encore Videos*, San Antonio apparently relied *only* on other cities' studies to justify its ordinance. *See id. at 295*. Here, Spokane relied on a wide variety of evidence, including studies, police records, and citizen testimony. Further, in this case we can assume, but need not decide, that the distinction between retail-only stores and stores with preview booths is constitutionally relevant. The Ordinances still survive World Wide's challenge because much of the citizen testimony concerned retail-only stores. To take just one example, a pedodontist working in a building less than a block

away from a retail-only store complained of pornographic litter, harassment of female employees, vandalism, and decreased business, all resulting from his proximity to the retail-only store. As *Maricopa County* teaches, World Wide's claim that citizen complaints such as these are biased and unscientific is insufficient to cast direct doubt on the Spokane's testimonial evidence. *Maricopa County, 336 F.3d at 1168* (rejecting the plaintiffs argument "that testimonial **[**30]** evidence is not 'real' evidence").

Among the secondary effects that Spokane sought to curb by enacting the Ordinances are the "economic and aesthetic impacts upon neighboring properties and the community as a whole." Ordinance C-33001, pmbl. at 3. Through testimonial evidence, Spokane has shown that retail-only stores generate these secondary effects and therefore that its interests in enacting **[*1198]** the Ordinances "would be achieved less effectively absent the regulation." *Albertini, 472 U.S. at 689*. World Wide has offered no evidence that meaningfully challenges that conclusion. We thus conclude that the Ordinances are narrowly tailored.

D

In sum, *Alameda Books* "does not affect [a municipality's] ability to rely on secondary effects studies and certainly does not mandate a trial in every case where a municipality does so." *Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery County, 256 F. Supp. 2d 385, 393-94 (D. Md. 2003)*. The evidence relied on by Spokane "is both reasonable and relevant," *Maricopa County, 336 F.3d at 1168*, and the City's regulatory regime "is likely to cause a significant decrease in secondary **[**31]** effects" at the cost of "a trivial decrease in the quantity of speech," *Alameda Books, 535 U.S. at 445* (Kennedy, J., concurring). Therefore, we hold that Spokane's reliance on this evidence was proper and that the Ordinances are narrowly tailored to address the City's legitimate concerns.

III

We must next decide whether the amended Code -- specifically, the language added by Ordinance C-32778 -- is overbroad. n13 Because "the *First Amendment* needs breathing space . . . [,] statutes attempting to restrict or burden the exercise of *First Amendment* rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma, 413 U.S. 601, 611-12, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973)*. Nonetheless, the Supreme Court has "repeatedly emphasized that where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate **[**32]** sweep." *Osborne v. Ohio, 495 U.S. 103, 112, 109 L. Ed. 2d 98, 110 S. Ct. 1691 (1990)* (internal quotation marks omitted); *see also United States v. Adams, 343 F.3d 1024, 1034 (9th Cir. 2003), petition for cert. filed*, U.S.L.W. (U.S. Feb. 17, 2004) (No. 03-9072).

---------- Footnotes ----------

n13 World Wide waived its claim that Ordinance C-32778's definition of "adult retail establishment" is unconstitutionally vague by failing to present it to the district court. *See United States v. Flores-Payon, 942 F.2d 556, 558 (9th Cir. 1991)*. This is not a purely legal issue. Had World Wide raised it below, Spokane could have presented evidence in support of its position that the definition is sufficiently precise. *Cf. id.* (noting that an argument not presented to the district court can still be raised on appeal under certain limited circumstances, including when "the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court") (internal quotation marks omitted).

---------- End Footnotes ----------

[33]**

Spokane defines an "adult retail establishment" asan enclosed building, or any portion thereof which, for money or any other form of consideration, devotes a significant or substantial portion of its stock in trade, to the sale, exchange, rental, loan, trade, transfer, or viewing of "adult oriented merchandise".SMC § 11.19.03023(A). World Wide claims that this definition is unconstitutional on its face. We disagree.

Cases directly addressing the phrase "significant or substantial" in this context have upheld its validity. *See, e.g., Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 53 n.5, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976)*; *Alameda Books, 535 U.S. at 431*. Moreover, this phrase is readily **[*1199]** susceptible to a narrowing construction. "Language similar to the 'significant or substantial' language used in this ordinance has been interpreted previously by state courts in a sufficiently narrow manner to avoid constitutional problems." *Z.J. Gifts D-4, L.L.C. v. City of Littleton, 311 F.3d 1220, 1229 (10th Cir. 2002)* (collecting cases), *cert. granted*

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in part, 157 L. Ed. 2d 274, 124 S. Ct. 383 (2003) **[**34]** . We agree and hold that the inclusion of this phrase in Ordinance C-32778 does not render it unconstitutionally overbroad.

World Wide also takes issue with Spokane's "any portion thereof" wording, arguing that as a result of its inclusion the ordinance covers any store with a "portion" that is "significantly" or "substantially" comprised of adult materials. For example, under World Wide's interpretation, a store with a rack of postcards comprising 1% of its stock, 5% of which qualifies as adult material, would fall under the purview of Ordinance C-32778. We read this ordinance differently. The "any portion thereof" clause plainly means that the ordinance is intended to cover stores that occupy only a portion of an enclosed building -- *e.g.*, one store in a shopping mall -- as distinct from the entire building. This language has nothing to do with the determination whether adult material constitutes a "significant or substantial" portion of a store's stock. n14

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n14 World Wide relies on *Executive Arts Studio, Inc. v. City of Grand Rapids, 227 F. Supp. 2d 731 (W.D. Mich. 2002)*, where the court found overbroad an ordinance that encompassed stores with a "section or segment" of sexually-explicit magazines. *See id. at 748*. However, that holding was based on a state court's refusal to adopt a limiting construction. *See id.* No Washington state court has so construed Ordinance C-32778.

---------- End Footnotes ----------

[35]**

Accordingly, mindful that the facial overbreadth doctrine is "strong medicine" that should be employed "sparingly and only as a last resort," *Broadrick, 413 U.S. at 613*, we affirm the district court's rejection of World Wide's claim that Ordinance C-32778 is overbroad.

IV

The final issue before us is the adequacy of the amortization provision. This provision reads, in pertinent part: "Any adult retail use establishment located within the City of Spokane on the date this provision becomes effective, which is made a nonconforming use by this provision, shall be terminated within twelve (12) months of the date this provision becomes effective." SMC § 11.19.395. The Ordinance allows for the extension of a business's termination date "upon the approval of a written application filed with the Planning Director no later than [one] (1) month prior to the end of such twelve (12) month amortization period." *Id.*

Although World Wide applied for and was granted a six-month extension, and received an extra two months via administrative grace, it claims that we should remand for trial because there remains a question of fact whether its hardship outweighs the benefit **[**36]** to the public to be gained from termination of the non-conforming use. *See Ebel v. City of Corona, 767 F.2d 635, 639 (9th Cir. 1985)* (per curiam) (adopting the balancing test set out in *Northend Cinema, Inc. v. City of Seattle, 90 Wn.2d 709, 585 P.2d 1153, 1159-60 (Wash. 1978))*. Given the length of its leases and various other alleged impediments to relocation -- *e.g.*, restrictive covenants, the unwillingness of landlords to rent or sell to an adult store, and the prohibitive cost -- World Wide claims that it can prevail under *Ebel*'s balancing test.

We are not convinced. Nothing in the Constitution forbids municipalities from requiring non-conforming uses to close, change their business, or relocate **[*1200]** within a reasonable time period. Here, as in *Baby Tam & Co. v. City of Las Vegas, 247 F.3d 1003 (9th Cir. 2001)*, World Wide "furnishes no authority for the proposition that a zoning ordinance may not prohibit a use in existence before its enactment," *id. at 1006*. As a general matter, an amortization period is insufficient only if it puts a business in an impossible position due to a shortage of **[**37]** relocation sites. This issue is conceptually indistinguishable from the *First Amendment* requirement of alternative avenues of communication. *See Jake's, Ltd. v. City of Coates, 284 F.3d 884, 889 (8th Cir.)* (holding that application of an amortization provision is constitutional as long as it complies with *Renton*), *cert. denied, 537 U.S. 948, 154 L. Ed. 2d 292, 123 S. Ct. 413 (2002)*. Because the district court held that there are sufficient relocation sites in Spokane and World Wide does not appeal that factual determination, we hold that the amortization provision is not unconstitutional.

Finally, in attempting to extend its right to operate at its present locations, World Wide was afforded -- and has availed itself of -- the full panoply of due process rights. World Wide requested an extension and received eight months; it appealed this decision to Spokane's Hearing Examiner, claiming the extension was too short, and lost. World Wide then filed a land use action in Spokane County Superior Court challenging the denial of its amortization appeal. We

conclude that World Wide received all the process it was due. **[**38]**

V

As conceded by World Wide, municipalities are allowed to "keep the pig out of the parlor" by devising regulations that target the adverse secondary effects of sexually-oriented adult businesses. This is precisely what Spokane did when it enacted the Ordinances. The district court properly entered summary judgment upholding them.

AFFIRMED.

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Citation #18
256 F. Supp. 2d 385

BIGG WOLF DISCOUNT VIDEO MOVIE SALES, INC. v. MONTGOMERY COUNTY, MARYLAND

Civil Action No. DKC 2001-3386

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

256 F. Supp. 2d 385; 2003 U.S. Dist. LEXIS 6105

March 28, 2003, Decided

PRIOR HISTORY: *Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery County, 184 F. Supp. 2d 445, 2002 U.S. Dist. LEXIS 1896* (D. Md., 2002)

DISPOSITION: [**1] Plaintiff's motions to consolidate and strike denied. Defendant's motion for summary judgment on declaratory judgment granted, but its counterclaim for injunctive relief dismissed.

COUNSEL: For Bigg Wolf Discount Video Movie Sales, Inc., Plaintiff: Jonathan Lawrence Katz, Marks and Katz LLC, Silver Spring, MD, LEAD ATTORNEY.

For Montgomery County, Maryland, Defendant: Clifford L. Royalty, Office of the County Attorney for Montgomery County MD, Rockville, MD, LEAD ATTORNEY.

For Mid-Atlantic Management Corporation, Movant: Barry Nelson Covert, Lipsitz Green Fahringer Roll Salisbury and Cambria LLP, Buffalo, NY, LEAD ATTORNEY. Gina Marie Smith, Meyers Rodbell and Rosenbaum PA, Riverdale, MD, LEAD ATTORNEY. Joseph B Chazen, Meyers Rodbell and Rosenbaum PA, Riverdale, MD, LEAD ATTORNEY. Paul J Cambria, Jr, Lipsitz Green Fahringer Roll Salisbury and Cambria LLP, Buffalo, NY, LEAD ATTORNEY.

For Montgomery County, Maryland, Counter Claimant: Clifford L. Royalty, Office of the County Attorney for Montgomery County MD, Rockville, MD, LEAD ATTORNEY.

For Bigg Wolf Discount Video Movie Sales, Inc., Counter Defendant: Jonathan Lawrence Katz, Marks and Katz LLC, Silver Spring, MD, LEAD [**2] ATTORNEY.

JUDGES: DEBORAH K. CHASANOW, United States District Judge.

OPINIONBY: DEBORAH K. CHASANOW

OPINION: [*387] MEMORANDUM OPINION

Presently pending and ready for resolution in this case raising a constitutional challenge to a Montgomery County zoning ordinance restricting "adult entertainment businesses" are the following motions: (1) the motion of Plaintiff Bigg Wolf Discount Video Movie Sales, Inc. ("Plaintiff" or "Bigg Wolf") to join and consolidate with the case of Mid-Atlantic Management Corporation ("Mid-Atlantic"); (2) the motion of Bigg Wolf to strike material provided by Defendant Montgomery County ("Defendant" or "the County") after the discovery deadline had passed; and (3) the motion of Defendant for summary judgment and its counterclaim for injunctive relief. The issues have been fully briefed and no hearing is deemed necessary. Local Rule 105.6. For reasons that follow, Plaintiff's motions to consolidate and strike will be denied. Defendant's motion for summary judgment will be granted in part, but its counterclaim for injunctive relief will be dismissed without prejudice.

I. Background

Unless otherwise noted, the following facts are undisputed. Plaintiff Bigg Wolf [**3] is the owner and operator of a retail store at 9421 Georgia Avenue, Silver Spring, Maryland. The store's primary merchandise is comprised of prerecorded videocassettes and DVDs for purchase and rental. A majority of these are sexually explicit. The store also sells sexually-oriented merchandise such as condoms, sex toys and sexual lubricants. Paper no. 5, Ex. 1.

Bigg Wolf limits the availability of sexually explicit merchandise in its store to consenting adults aged 21 or older. Such merchandise is confined to a separate rear area of the store that is set apart from the rest of the store and which is not visible from the rest of the store or the street. Paper no. 1, at PP 17, 18. The rear area comprises over 50% of the store's space that is open to customers, though Plaintiff's owner states that sexually explicit merchandise comprises approximately 85-90% of the store's sales. Testimony of Richard Biggs, Preliminary Injunction Hearing, January 29, 2002; Paper no. 5, Ex. 1, at P 6. There are no booths for

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viewing tapes or DVDs at the store. Paper no. 1, at P 17; Paper no. 5, Ex. 1.

On April 11, 2000, the Montgomery County Council enacted Ordinance No. 14-19 ("the Ordinance"), which **[**4]** amended certain zoning provisions directed towards "adult entertainment businesses." Montg. County Zoning Code §§ 59-A-2.1, 59-A-6.16. Prior to the enactment of these amendments, Bigg Wolf had been lawfully located at its present address since 1998. The amendments contained in Ordinance No. 14-19 became effective on May 1, 2000. Paper no. 31, Ex. 1. Under the amended zoning provisions, all "adult entertainment businesses" in Montgomery County must be located in the county's C-2, I-1 or I-2 zoning districts. Montg. County Zoning Code §§ 59-C-4.2(d), 59-C-5.21(d). The zoning provisions, § 59-A-2.1, define "adult entertainment business" as follows:An establishment that: (1) sells, rents, exhibits, or displays adult entertainment materials using a floor area that is more **[*388]** than 10 percent of the total floor area for selling, renting, exhibiting, or displaying all materials; (2) features nude persons or adult entertainment performances; or (3) otherwise requires a County license as an adult entertainment business.

The same section defines "adult entertainment material" as:Material that is a book, magazine, periodical, or other printed matter; photograph, film, motion **[**5]** picture, video cassette, slide or other visual representation; sculpture or 3-dimensional representation; or sexual paraphernalia that depicts or describes, or a live performance that depicts, sadomasochistic abuse, sexual conduct, or sexual excitement as defined in State law (*Section 416A of Article 27 of the Annotated Code of Maryland*).

The referenced provisions of *MD. CODE ANN. art. 27, § 416A* n1 define the foregoing terms as follows, in pertinent part:(c) "Sadomasochistic abuse" means flagellation or torture by or upon a human who is nude or clad in undergarments, or in a revealing or bizarre costume, or the condition of one who is nude or so clothed as being fettered, bound, or otherwise physically restrained;

(d) "Sexual conduct" means human masturbation, sexual intercourse, or any touching of or contact with genitals, pubic areas, or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex, or between human and animals;

(e) "Sexual excitement" means the condition of human male or female genitals, or the breasts of the female when in a state of sexual stimulation, or the sensual experience **[**6]** of humans engaging in or witnessing sexual conduct or nudity.

---------- Footnotes ----------

n1 Effective October 1, 2002, *MD. CODE ANN. art. 27, § 416A* was replaced by *MD. CODE ANN., CRIM. LAW § 11-101* without any substantive change. *See MD. CODE ANN., CRIM. LAW § 11-101* Revisor's Note.

---------- End Footnotes ----------

In addition to confining them to the aforementioned zoning districts, the zoning provisions, § 59-A-6.16, place the following restrictions on the location and practices of adult entertainment businesses, in pertinent part:(a) An adult entertainment business is permitted in certain zones, subject to the following restrictions and regulations:

(1) The adult entertainment materials must not be visible from outside the establishment . . .

(3) The adult entertainment business must be located at least 750 feet from any property: (A) located in a residential zone, or (B) on which a school, library, park, playground, recreational facility, day care center, place of worship, or other adult business is located as a principal use. The **[**7]** distance must be measured in a straight line from the nearest property line of the property used for the adult entertainment business to the nearest boundary line of any property located in a residential zone, or on which a school, library, park, playground, recreational facility, day care center, place of worship or other adult entertainment business is located . . .

(5) An adult entertainment business may operate only between the hours of 9:00 a.m. and 11:00 p.m.

The zoning provisions allowed existing non-conforming adult entertainment businesses to continue to operate for eighteen months following the effective date of the amendment. At the expiration of this **[*389]** amortization period, in October 2001, the Code requires compliance with the requirements of the amended zoning ordinance. Paper no. 31, Ex. 1, 2.

Plaintiff filed a six-count complaint on November 14, 2001, challenging the constitutionality of the zoning provisions regulating adult entertainment businesses. Specifically, Plaintiff seeks a declaration that the relevant portions of the zoning ordinance violate the

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United States Constitution and the Maryland Declaration of Rights and an injunction prohibiting the County [**8] from enforcing the zoning provisions against Plaintiff or any other adult entertainment business located in Montgomery County. Plaintiff also seeks unspecified money damages under *42 U.S.C. § 1983*. In response to the complaint, Defendant filed an answer and counterclaim seeking to enjoin Plaintiff from continuing to violate the zoning ordinance.

Before the County filed its answer, Plaintiff moved for a preliminary injunction pending the outcome of this case, and the County then filed an opposition and motion to dismiss. Plaintiff's motion was based largely on the assertion that the provisions at issue are not a constitutional time, place, and manner ("TPM") restriction on speech protected by the *First Amendment*. Plaintiff claimed that the County did not satisfy the standard for such zoning restrictions set forth in *City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986)*, because it did not actually rely on appropriate studies of adverse secondary effects to justify the zoning, narrowly tailor the zoning to combat those secondary effects, and provide reasonable alternative means of communication. Plaintiff [**9] also asserted that the Ordinance is unconstitutionally vague and overbroad, constitutes a prior restraint on protected speech, and violates equal protection. The court held an evidentiary hearing on January 28, 2002 and issued a memorandum opinion on February 6, 2002 denying Plaintiff's motion for a preliminary injunction and Defendant's motion to dismiss. Defendant now moves for summary judgment on Plaintiff's challenge to the constitutionality of Ordinance No. 14-19 and also seeks injunctive relief on its counterclaim against Plaintiff.

II. Analysis

A. Plaintiff's Motion to Join and Consolidate

Plaintiff Bigg Wolf has moved to join together with the plaintiff in *Mid-Atlantic Management Corporation v. Montgomery County*, DKC-01-CV-2822, and to consolidate their civil actions because both seek to declare unconstitutional various adult use provisions of the County's zoning laws. n2 Plaintiff contends that there will be little prejudice from such consolidation and that any such prejudice would be outweighed by judicial economy. The County opposes consolidation, noting that there are already separate scheduling orders in place in the two cases and that there are [**10] substantive issues that the two cases do not share in common. Mid-Atlantic filed a response noting the separate scheduling orders and divergent issues, but declining to take a position on Plaintiff's motion for consolidation.

---------- Footnotes ----------

n2 Although Plaintiff cites *FED. R. CIV. P. 20* in its motion, it appears that *FED. R. CIV. P. 42*, which governs consolidation of actions sharing questions of common law or fact, is more applicable to the relief Plaintiff seeks.

---------- End Footnotes ----------

Since Plaintiff filed the motion to consolidate on or about April 10, 2002, there have been delays in the *Mid-Atlantic* case, unlike Plaintiff's case, due in part to efforts to reach a settlement. As such, it would be inappropriate to consolidate the [*390] two cases at this time. Accordingly, Plaintiff Bigg Wolf's motion to consolidate its case with the *Mid-Atlantic* case will be denied without prejudice.

B. Plaintiff's Motion to Strike

Plaintiff Bigg Wolf moves to strike several exhibits attached to Defendant County's motion for summary judgment which it [**11] claims were "not provided to Plaintiff" before the discovery deadline. Specifically, Plaintiff seeks to strike Exhibits 12a through 12s, which are photographs of Plaintiff's store, and Exhibits 13 and 18, which are the affidavits of Reginald T. Jetter and Mark Moran, respectively. Plaintiff also moves to strike Exhibit 5 to Defendant's motion for summary judgment, a copy of a study of the secondary effects of adult entertainment establishments in Los Angeles, because it is missing many pages. Plaintiff's motion to strike is entirely without merit.

Defendant has proffered evidence that it offered Plaintiff the opportunity to inspect the photographs of Plaintiff's store, pursuant to Plaintiff's document production request, *prior* to the discovery deadline. *See* Paper no. 35, Ex. 1. Defendant has, therefore, provided evidence that it complied with the appropriate discovery rules with respect to the photographs, and there is no basis for striking the photographs. *See FED. R. CIV. P. 34*. n3 Plaintiff's request to strike the affidavits of Reginald T. Jetter and Mark Moran because they were not provided to Plaintiff during discovery is similarly without merit. In its motion to [**12] strike, Plaintiff does not identify the discovery request in which it actually sought the affidavits. Moreover, the affidavits appear to have been prepared in support of Defendant's motion for summary judgment and are, therefore, not even subject to the

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discovery deadline. Accordingly, Plaintiff has identified no colorable basis for striking these exhibits. There is also no basis for Plaintiff's motion to strike Defendant's excerpted copy of the Los Angeles study of secondary effects. Plaintiff does not argue that it was denied access to the study during discovery, nor that the study is inaccurate as excerpted. The entire study apparently is even available as part of the legislative record accompanying the Ordinance at issue. Because all of Plaintiff's discovery claims lack merit, the motion to strike will be denied in its entirety.

---------- Footnotes ----------

n3 Defendant apparently even offered to Plaintiff that it would copy the photographs to floppy disks, *see* Paper no. 35, Ex. 2, and, in fact, did so once Plaintiff's counsel finally provided the disks on July 24, 2002, to which Defendant could copy the photographs. *See id.*, Ex. 3. Defendant returned the disks one week later. *See id.*, Ex. 4.

---------- End Footnotes ----------

[13]**

C. Defendant's Motion for Summary Judgment

1. Standard of Review

It is well established that a motion for summary judgment will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *FED. R. CIV. P. 56(c)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. In other words, if there clearly exist factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary judgment is inappropriate. *Anderson, 477 U.S. at 250*; *see also Pulliam Inv. Co. v. Cameo Properties, 810 F.2d 1282, 1286 (4th Cir. 1987)*; *Morrison v. Nissan Motor Co., 601 F.2d 139, 141 (4th Cir. 1979)*; *Stevens v. Howard D. Johnson Co., 181 F.2d 390, 394 (4th Cir. 1950)*. The moving party bears the **[*391]** burden of showing that there is no genuine issue as to any material fact. *FED. R. CIV. P. 56(c)*; *Pulliam Inv. Co., 810 F.2d at 1286* **[**14]** (citing *Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979))*.

When ruling on a motion for summary judgment, the court must construe the facts alleged in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)*; *Gill v. Rollins Protective Servs. Co., 773 F.2d 592, 595 (4th Cir. 1985)*. A party who bears the burden of proof on a particular claim must factually support each element of his or her claim. "[A] complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial." *Celotex Corp., 477 U.S. at 323*.

Defendant contends that it is entitled to summary judgment with respect to all grounds upon which Plaintiff challenges Ordinance No. 14-19. The court will assess each of the avenues Plaintiff uses to attack the Ordinance.

2. Invalid Time, Place and Manner Restriction

The *First Amendment* protects non-obscene, sexually explicit speech. *See Sable Communications of California., Inc. v. FCC, 492 U.S. 115, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989)*. **[**15]** n4 When a legislative body passes an act that impacts protected speech, it bears the burden, when challenged, of showing either (1) that its action serves a compelling state interest which cannot be served in a less restrictive way, or (2) that its action is a content-neutral time, place, and manner restriction. *See, e.g., Renton, 475 U.S. at 46-47*; *D.G. Restaurant Corp. v. City of Myrtle Beach, 953 F.2d 140, 143-44 (4th Cir. 1992)*. The level of scrutiny applied to a regulation is determined by whether that regulation is aimed at the contents of protected speech. "In sum, regulations that affect *First Amendment* interests and are content-based are evaluated under 'strict scrutiny'; regulations that affect *First Amendment* interests but are content-neutral are evaluated under 'intermediate scrutiny.'" *N.W. Enterprises, Inc. v. City of Houston, 27 F. Supp.2d 754, 773 (S.D.Tex. 1998)* (citing *Renton, 475 U.S. at 46-47*); *see also Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984)*. In order to determine whether a regulation that affects speech is content-based **[**16]** or content neutral, "courts look primarily to the respective government's purpose in enacting the regulation." *University Books and Videos, Inc. v. Metropolitan Dade County, 33 F. Supp.2d 1364, 1369 (S.D.Fla. 1999)* (citing *Ward v. Rock Against Racism, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989))*.

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n4 The corresponding provision of the Maryland Declaration of Rights, Article 40, states that "every citizen of the State ought to be allowed to speak, write and

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publish his sentiments on all subjects, being responsible for the abuse of that privilege." Because Article 40 is in *pari materia* with the *First Amendment to the United States Constitution*, the opinion will focus on *First Amendment* jurisprudence. *See Pendergast v. State, 99 Md. App. 141, 636 A.2d 18 (1994). See also The Pack Shack, Inc. v. Howard County, Maryland, 138 Md. App. 59, 770 A.2d 1028 (2001).*

---------- End Footnotes----------

In *Renton*, the Court upheld a local zoning ordinance that restricted **[**17]** the possible locations for adult businesses, even those engaging in constitutionally protected speech, as a constitutional TPM restriction. Though that ordinance, like the one at issue in this case, differentiated between sexually explicit and other uses, it was deemed content-neutral because the government's purpose in enacting it was to **[*392]** combat the adverse secondary effects that adult businesses are believed to have on the community. Thus, TPM restrictions that burden speech incidental to a content-neutral goal, similar to the one at issue in this case, have been upheld as valid exercises of municipalities' police power. *Renton, 475 U.S. at 49-50; see also City of Erie v. Pap's A.M., 529 U.S. 277, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000); Allno Enterprises, Inc. v. Baltimore County, Maryland, 10 Fed. Appx. 197, 2001 WL 589423 (4th Cir. 2001)* (unpublished disposition); *D.G. Restaurant Corp. v. City of Myrtle Beach, 953 F.2d 140 (4th Cir. 1992); David Vincent, Inc. v. Broward County, Florida, 200 F.3d 1325 (11th Cir. 2000). D.H.L. Assocs. v. O'Gorman, 199 F.3d 50 (1st Cir. 1999); Phillips v. Borough of Keyport, 107 F.3d 164 (3rd Cir. 1997);* **[**18]** *ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413 (8th Cir. 1994).*

Renton sets forth the standard for determining whether such content-neutral zoning ordinances are constitutional:Regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the *First Amendment.* On the other hand, the so-called "content neutral" time, place, and manner regulations are acceptable as long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.*Renton, 475 U.S. at 46-47.* In addition to the two explicit *Renton* requirements regarding substantial governmental interest and reasonable alternative channels, a content-neutral zoning ordinance that imposes distance and space requirements on adult businesses must be narrowly tailored to achieve the government interest. *See Ward, 491 U.S. at 795-802.* Municipalities cannot justify zoning ordinances that incidentally impact speech merely by pointing to their content-neutrality. Rather, they must come forward with"evidence of incidental adverse social **[**19]** effect that provides the important governmental interest justifying reasonable time, place and manner restrictions on speech or expressive conduct." . . . Moreover, the legislative body "must . . . be prepared . . . to articulate and support its argument with a reasoned and substantial basis demonstrating the link between the regulation and the asserted governmental interest."*Phillips, 107 F.3d at 173* (internal citation omitted). Accordingly, the court must assess whether Defendant has shown that Ordinance No. 14-19 fulfills each of these requirements.

a) Substantial governmental interest

In order to establish that the ordinance in question is aimed at a substantial governmental interest, the County must demonstrate that it is aimed at the negative secondary effects of adult entertainment businesses rather than the content of the speech. "Even if a time, place, and manner ordinance regulates only businesses selling sexually explicit materials, the ordinance is content-neutral if its purpose is to lessen undesirable secondary effects attributable to those businesses, such as increased crime, lower property values, or deteriorating residential neighborhoods. **[**20]** " *ILQ, 25 F.3d at 1416.*

In *Renton*, the Court held that a municipality may rely on the secondary effects studies of other cities as evidence of secondary effects when drafting its ordinances. "The [Supreme] Court has not required that a municipality conduct new studies or produce evidence independent of that generated by other cities or towns, so long as whatever evidence the municipality relied upon is reasonably believed to be **[*393]** relevant to the problem sought to be addressed." *Renton, 475 U.S. at 49-50.* Similarly, in *Erie*, the Supreme Court upheld an ordinance banning nudity in public places where the city relied on the secondary effects studies of other cities. Citing the "reasonably believed" test from *Renton*, the Court held that:because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in *Renton, Young. . .* and *California v. LaRue, 409 U.S. 109, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972)*, it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth **[**21]** in *Renton* and [*Young*] to the effect that secondary effects are caused by the

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presence of even one adult entertainment establishment in a given neighborhood.*Erie, 529 U.S. at 296-297.*

In adopting the new zoning provisions, the Montgomery County Council clearly referred to the secondary effects studies of a number of other municipalities and claimed that, "it is the Council's objective to minimize and control these secondary effects and thereby protect the health, safety and welfare of the citizens." Paper no. 31, Ex. 1, at 3. Not only does the preamble to the Ordinance contain references to the studies and explicitly state that the purpose of the zoning ordinance is to combat the secondary effects cited in the studies, but the County attaches the studies in question to its motion for summary judgment so that the court is clearly apprised of the problems the County thought it was facing. *See Phillips, 107 F.3d at 174.* Under *Renton*, Defendant was allowed to rely on these secondary effects studies of other cities so long as whatever evidence it relied upon was reasonably believed to be relevant to the problem sought to be addressed **[**22]** by Ordinance No. 14-19. *See Renton, 475 U.S. at 49-50.* The studies provided by Defendant with its summary judgment motion address the same issues sought to be addressed by the Montgomery County Council, namely crime and other problems created by adult businesses located near each other or near schools (or other locations frequented mainly by children), residential neighborhoods and houses of worship. *See* Paper no. 31, Ex. 3-7.

Plaintiff's only challenge to the reasonableness of Defendant's reliance upon the secondary effects studies of other cities is its claim that under Justice Kennedy's concurrence in the recent Supreme Court case of *Los Angeles v. Alameda Books, 535 U.S. 425, 152 L. Ed. 2d 670, 122 S. Ct. 1728 (2002)*, a plaintiff must be allowed to go to trial to challenge the assumptions made in secondary effects studies relied on by a municipality in enacting a zoning ordinance. Plaintiff misreads *Alameda Books* and Justice Kennedy's concurrence. Justice Kennedy's concurrence, like the plurality, acknowledged that local governments may infer from studies that adult entertainment businesses will create secondary effects. n5 *See id. at 451-52* **[**23]** ("Courts should not be in the business of second-guessing fact-bound assessments of city planners . . . [the city] is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion"). *Alameda Books* does not affect **[*394]** the County's ability to rely on secondary effects studies and certainly does not mandate a trial in every case where a municipality does so.

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n5 *Alameda Books* does not address the specific issue of reliance on secondary effects studies conducted by other municipalities because Los Angeles, unlike the city of *Renton*, had conducted its own study, which the plurality concluded provided sufficient support for the theory underlying the statute at issue. *See id. at 442.*

---------- End Footnotes ----------

Defendant has provided uncontroverted evidence that it relied upon secondary effects studies which it reasonably believed to be relevant to the problems sought to be addressed by Ordinance No. 14-19. Because there is no genuine issue of material **[**24]** fact that Defendant's aim was to try to prevent the secondary effects of adult entertainment businesses, Defendant has successfully demonstrated a substantial governmental interest for Ordinance No. 14-19.

b) Narrow tailoring

When analyzing the constitutionality of the ordinance under the first element of the *Renton* test, whether it serves a substantial government interest, the question was whether the County reasonably believed it was relying on the studies it cited in passing the ordinance. Here, however, the question is not whether the County properly relied on the studies *per se*, but rather whether those particular studies cited by the County can support a TPM restriction on Bigg Wolf's type of business. Though it does not say so in as many words, Bigg Wolf's challenge to the relevance of the secondary effects studies cited by the County, Paper no. 5, at 16-18, is actually a challenge to the narrow tailoring of the ordinance to the problems explicated in those studies. n6 In other words, Bigg Wolf contends that the studies cited by the County do not justify a 10% floor space limit for adult materials where there is no on-site video viewing. n7

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n6 Plaintiff made this argument in its motion for a preliminary injunction, which was incorporated by reference into its opposition to Defendant's motion for summary judgment.

[25]**

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n7 By Plaintiff's own admission, adult materials occupy 61% of the floor space in its store. *See* Wohlfarth Aff. P 5 (attached to Paper no. 33).

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"A content-neutral time, place, and manner restriction is narrowly tailored if it 'promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *D.H.L. Assocs., 199 F.3d at 59* (quoting *Ward, 491 U.S. at 799*). The ordinance in *Renton* was found to be narrowly tailored because it, "affects only that category of theaters shown to produce the unwanted secondary effects." *Renton, 475 U.S. at 52*. This is not a strict test. The County need not prove that Bigg Wolf, or a store with just over 10% of its floor space devoted to adult material, would have the exact same adverse effects on the surrounding community as those in the studies it cites as long as the ordinance, "affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects . . . ." *ILQ, 25 F.3d at 1418*. In other words, the ordinance **[**26]** need not adopt the least restrictive alternative by focusing on the precise adverse effects cited in the studies in order to pass constitutional muster. The County, "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young, 427 U.S. 50, at 71,49 L. Ed. 2d 310, 96 S. Ct. 2440* (plurality opinion).

Furthermore, the Court's recent decision in *Erie, 529 U.S. at 296-297*, where it held that Erie could justify a ban on activity that was of the same character as adult entertainment in *Renton* and *Young*, indicates that the studies do not have to be directly on point in order to pass the narrow tailoring test. The test is whether stores like Bigg Wolf's or others covered by the ordinance are part of a **[*395]** category reasonably believed to cause some of the secondary effects referred to in the studies. *See ILQ, 25 F.3d at 1418*. n8

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n8 Although factually dissimilar to the current case, it is worth noting that in *Alameda Books*, the Supreme Court last year held that a study concerning the secondary effects of a concentration of single-use adult entertainment businesses in an area could be used to support the inference that a combination of adult entertainment businesses in one building presents the same risk of secondary effects. *See Alameda Books, 535 U.S. at 436-439*.

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[27]**

The County asserts that studies cited by the Ordinance can support a TPM restriction on Bigg Wolf's type of business. It notes that the secondary effects study by the City of Garden Grove, for example, dealt with "adult bookstores," which are defined to include an "establishment with a segment or section devoted to the sale, display, or viewing" of materials depicting sexually explicit activities." *See* Paper no. 31, Ex. 3 at 010. Based on its own description, Bigg Wolf would fit within this definition. The County also notes that the study by the City of Whittier addressed a variety of adult businesses, from book stores to theaters, and that the Los Angeles, Phoenix and Amarillo studies also addressed all adult businesses. *See id.*, Ex. 4-7. Bigg Wolf has offered no evidence calling into question the applicability of these studies to its type of store. Accordingly, the Ordinance meets the relatively easy burden of narrow tailoring.

c) Reasonable alternative channels of communication

The parties raise two separate disputes relating to whether the zoning ordinance provides reasonable alternative channels of communication, one legal and one factual. On one hand, Bigg Wolf **[**28]** and the County disagree about the standard for determining whether a site is "available" for relocation and so could be considered an alternative channel of communication. This legal dispute actually encompasses four related determinations: 1) whether to consider the sites available to Bigg Wolf individually or to the group of adult entertainment businesses affected by the ordinance as a whole, 2) whether to consider the reasonableness of alternative avenues of communication at the time the ordinance was passed, at the time suit was filed, at present, or at a time looking forward and projecting the potential number of businesses that might need to locate in the designated zones, 3) whether the site needs to be economically feasible for an adult entertainment business or merely physically available, and 4) whether the sites need to be actually available for sale or rent or merely potentially available. On the other hand, the parties also have a factual dispute over the number of sites that are available within the I-1, I-2 and C-2 zones. n9 The legal dispute, however, will actually be determinative of whether a reasonable number of sites exist because the expert relied upon by Bigg **[**29]**

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Wolf agrees that, alleged constitutional infirmities aside, seven sites do exist in the relocation zones.

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n9 The County contends that 33 such lots exist. *See* Jetter Aff., Paper no. 31, Ex. 18, P 6. Bigg Wolf, however, points to affidavits filed by an expert who, using data provided by the County in the *Mid-Atlantic* case, pared the number of available sites down to only seven. Paper no. 5, Ex. 3, 4.

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i) How to determine which sites are available

Neither the Supreme Court nor the Fourth Circuit has completely refined the test from *Renton* for determining whether particular sites are constitutionally available **[*396]** for adult entertainment business relocation. A case from the Eleventh Circuit, *David Vincent, Inc. v. Broward County, Florida, 200 F.3d 1325 (11th Cir. 2000)*, synthesizes the rulings from other circuits and provides a guideline for answering these questions regarding how to determine the type of sites that should be considered available:

First, the economic feasibility of relocating **[**30]** to a site is not a *First Amendment* concern. Second, the fact that some development is required before a site can accommodate an adult business does not mean that the land is, per se, unavailable for *First Amendment* purposes. . . . Examples of impediments to the relocation of an adult business that may not be of constitutional magnitude include having to build a new facility instead of moving into an existing building; having to clean up waste or landscape a site; bearing the cost of generally applicable lighting, parking or green space requirements; making due with less space than one desired; or having to purchase a larger lot than one needs. Third, the *First Amendment* is not concerned with restraints that are not imposed by the government itself or the physical characteristics of the sites designated by adult use by the zoning ordinance. It is of no import under *Renton* that the real estate market may be tight and sites currently unavailable for sale or lease, or that property owners may be reluctant to sell to an adult venue.

David Vincent, 200 F.3d at 1334-1335.

Bigg Wolf contended in its brief in support of its preliminary injunction motion that the **[**31]** lack of economic feasibility of the sites set forth by the County render them unavailable. However, according to *Renton*, the only requirement is that adult entertainment businesses that need to relocate should be, "on an equal footing with other prospective purchasers and lessees." *Renton, 475 U.S. at 54.* *Renton* does make clear that commercial viability is not the appropriate consideration. *Id. See also David Vincent, 200 F.3d at 1334.* This is further supported in *D.G. Restaurant, 953 F.2d at 147*, where the Fourth Circuit held that the commercial desirability of sites in an industrial zone is irrelevant. Instead, the standard is that, ". . . an obstacle that can be overcome without incurring unreasonable expense does not make a site unavailable, but an obstacle that cannot reasonably be overcome renders the site unavailable." *Woodall v. City of El Paso, 49 F.3d 1120, 1124 (5th Cir. 1995).* That court described unavailable areas as those lacking infrastructure, unsuitable for generic commercial development or "land under the ocean, airstrips of airports, sports stadiums . . . ." *Id.* It is clear that economic **[**32]** feasibility is not the appropriate determination of whether a site is available.

Bigg Wolf asserts that, currently, none of the landlords and owners in the available zones will rent or sell to it and argues that this makes those sites unavailable. Bigg Wolf also asserts that many of the sites identified by the County have insufficient numbers of parking spaces, insufficient handicapped access, and insufficient safety due to competition with such entities as heavy trucks. The test from *David Vincent* makes it clear that local governments are under no obligation either to dictate that third parties make their land available to adult entertainment establishments or even to consider whether restrictive covenants or leases exist among third parties rendering a site unavailable. *See Centerfold Club, Inc. v. City of St. Petersburg, 969 F. Supp. 1288, 1302 (M.D. Fla. 1997).* In *Woodall*, owners' unwillingness to rent or sell to an adult business and the fact that the land is currently unavailable for sale or lease were not considered relevant **[*397]** for constitutional availability under Renton. *Woodall, 49 F.3d at 1125-26.* Therefore, for the purposes of **[**33]** *Renton*, these considerations are irrelevant and the fact that none of the landlords will rent to Bigg Wolf does not make those sites unavailable. Plaintiff's claims regarding insufficient parking spaces and other structural deficiencies at some of the proposed sites are also clearly irrelevant. *See David Vincent, 200 F.3d at 1334-1335.* Accordingly, the third and forth questions set forth above relating to constitutional "availability" have been resolved in favor of the County's contentions.

The first two legal questions set forth above are related: whether to consider the businesses as a group or individually and at what point in time to judge

reasonable alternative sites. Although many courts have not explicitly said so, most have logically analyzed the number of available sites in relation to the number of adult businesses that would need to relocate at the time the ordinance was passed. The situation will always be fluid, with businesses moving in and out, and the courts should not be involved repeatedly with litigation determining the validity of a zoning ordinance. More importantly, if the reasonableness of alternative sites must be reassessed for each business **[**34]** at the time it decides to relocate, an incentive would be created for businesses to holdout and then to claim that there are no available sites after the other businesses have relocated or litigated. Such a situation not only puts enormous bargaining leverage in the hands of the last holdout, it is a nonsensical way to deal with zoning problems.

To the extent that it considers this question, the case law from other circuits supports this time-frame. "The test is whether the restrictions allow for reasonable alternative avenues of communication *currently*, not whether they *always will allow* for reasonable alternative avenues of communication." *The Ranch House, Inc. v. Amerson, 146 F. Supp.2d 1180, 1212-1213 (N.D.Ala. 2001)*. Even the Ninth Circuit, which has a more stringent requirement for adequate alternative channels than this circuit, looks at the number of adult entertainment business that must be relocated at the time that the new zoning regime takes effect. *See Topanga Press, 989 F.2d 1524 at 1532-33*. Most courts considering this question implicitly adopt this time frame and there are no cases that challenge it or demand that the test for available **[**35]** sites include safeguards for future change. *Ranch House, 146 F. Supp.2d at 1213*. Therefore, the court will consider the number of adequate sites relative to the number of adult entertainment businesses in place at the time the ordinance was passed.

ii) Factual dispute immaterial

Even the expert relied upon by Bigg Wolf, Bruce McLaughlin, agrees that there are at least seven sites available for the six adult entertainment businesses which needed relocating at the time the ordinance was passed. n10 Paper no. 5, Ex. 3, 4. McLaughlin then pared down the number of sites to zero for reasons such as deed restrictions, permanent occupants unlikely to relocate, and lack of sufficient **[*398]** infrastructure. *See id.* The criteria cited by McLaughlin, however, are speculative and not legally relevant. n11 *See, e.g., D.G. Restaurant Corp., 953 F.2d at 147* ("The decision to restrict adult businesses to a specific area does not oblige the city to provide commercially desirable land"). Having resolved above that sites need not be economically feasible or presently available to be constitutionally "available", the court is satisfied that the evidence is uncontroverted **[**36]** that at least seven of the sites identified pass constitutional muster.

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n10 The County challenges Bigg Wolf's ability to rely on McLaughlin's affidavits, which were not filed in this case, but rather in the *Mid-Atlantic* case. The County claims that Plaintiff failed to comply with the provisions of *FED. R. CIV. P. 26(a)(2)* by failing to timely identify McLaughlin as an expert and provide a report from him or a list of other cases in which he has testified. The court need not resolve this dispute because even if Plaintiff's reliance upon McLaughlin's affidavits is proper, they still do not create a genuine issue of material fact.

n11 For example, the infrastructure requirement in the Ninth Circuit's *Topanga Press, 989 F.2d at 1532,* has not been adopted by the Fourth Circuit. In any event, Defendant has provided photographs of the available areas, showing fully developed infrastructure supporting the sites. *See* Paper no. 31, Ex. 22-25.

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The *Renton* test does not prescribe a set number **[**37]** or ratio of sites required, but merely states that it must be "reasonable." Courts considering this question have come up with a variety of formulae, but even the Ninth Circuit, generally more hostile to these types of zoning ordinances, has held that the number of sites available must merely be greater than or equal to the number of adult entertainment businesses in existence at the time the new zoning regime takes effect. *See Topanga Press, 989 F.2d at 1532-33*. Therefore, once concerns about their constitutional availability are removed, even the number of sites available by Bigg Wolf's admission is greater than the number of businesses that need to move. Accordingly, as this appears to satisfy even the most generous formulation of the test for reasonable alternative avenues of communication, the County has satisfied the third prong of the time, place, and manner test for constitutionality of the Ordinance. Therefore, Defendant is entitled to summary judgment on this claim.

3. Vagueness and Overbreadth

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Plaintiff asserts that Ordinance No. 14-19 is void for vagueness and is overbroad on its face and as applied to Plaintiff. n12 In the brief submitted in support **[**38]** of its preliminary injunction, Plaintiff specifically cited the definitions of "adult entertainment business" and "adult entertainment material" in § 59-A-2.1 as overly expansive and vague. Plaintiff contends that these definitions would encompass many "mainstream" businesses like Blockbuster and Hollywood Video, popular motion pictures, and erotic fictional literary works. Plaintiff also argues that the statute is unconstitutionally vague in part because it cross-references provisions of the Maryland criminal code to derive the definitions of "sadomasochistic abuse", "sexual conduct" and "sexual excitement", which may be edited or deleted at some future time.

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n12 Although Plaintiff made these claims in its complaint and brief in support of its preliminary injunction motion, it did not press these issues at the hearing and does not address them at all in its opposition to Defendant's summary judgment motion.

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As a threshold matter, as in *Hart Book Stores v. Edmisten, 612 F.2d 821 (4th Cir. 1979),* **[**39]** Plaintiff lacks standing to raise claims of vagueness and overbreadth. *See id. at 833* (citing *Young, 427 U.S. at 61*). Like the plaintiffs in *Hart Book Stores*, Plaintiff here clearly falls within the statute's terms, which designate as an "adult entertainment business" those with adult materials occupying more than 10% of total floor area. Plaintiff freely admits that approximately 61% of its floor area is taken up by the adult section. There is no dispute that most of the materials in this section, as evidenced by photographs provided by Defendant and by **[*399]** Plaintiff's own descriptions, fall within the definition of "adult entertainment material" contained in the Ordinance.

The court in *Hart Book Stores* stated as follows:In [*Young v. American Mini-Theatres, 427 U.S. at 61,*] a majority of the Supreme Court (Justice Powell joined in this portion of the opinion) held that, because the ordinance there clearly applied to them, the respondent adult theaters did not have standing to challenge the ordinance for vagueness. The majority agreed that the usual concerns that permit litigants who are not affected by vagueness **[**40]** in a law touching on expression to raise the claim on behalf of others possibly affected are not present when sexually-explicit materials are at issue . . . ."*Id.* The court noted that for these same reasons, the Supreme Court in *Young* declined to apply the doctrine of overbreadth. *Id.* Because Plaintiff's store clearly falls within the terms of the Ordinance, it lacks standing to challenge them for vagueness, or for overbreadth.

Even if Plaintiff did have standing to mount a challenge on the basis of vagueness and/or overbreadth, the Ordinance would withstand the challenge. The language used in the Ordinance, cited above in the Background section, is not significantly different from language that has survived vagueness challenges in cases such as *Young* and *Hart Book Stores*. As the court in *Hart Book Stores* stated in rejecting the plaintiffs' vagueness argument, "unavoidable imprecision is not fatal and celestial precision is not necessary." *Id.* (citing *Miller v. California, 413 U.S. 15, 27-28 n. 10, 37 L. Ed. 2d 419, 93 S. Ct. 2607*; *Roth v. United States, 354 U.S. 476, 491-92, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957)).* **[**41]** Ordinance No. 14-19 is just as precise, if not more so, as provisions that have been upheld by the Fourth Circuit and the Supreme Court. n13 Accordingly, Defendant is entitled to summary judgment with respect to Plaintiff's challenge on the grounds of vagueness and overbreadth.

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n13 Moreover, Plaintiff has provided no evidence that literary classics or non-adult movies are included within the definition of adult entertainment material or that mainstream video stores will be swept into the definition of adult entertainment business. In fact, the affidavit of Reginald Jetter demonstrated that the County has not included mainstream video stores in that category. *See* Paper no. 31, Ex. 18, P 8.

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4. Prior Restraint

Plaintiff also alleges that the Ordinance creates an unconstitutional prior restraint on protected *First Amendment* speech. Plaintiff particularly faults the fact that the Montgomery County Department of Permitting Services is allegedly vested with discretion to determine whether to classify a permit **[**42]** applicant as an adult entertainment business or not, including making a determination of whether more than 10% of the floor area is used for adult entertainment materials. Plaintiff also asserts that § 59-

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A-6.16(a) fails to provide adequate procedural safeguards by failing to ensure prompt resolution of applications for "adult use permits" and failing to provide for a prompt appeal of a denial or revocation of an adult use permit.

Plaintiff appears to both misunderstand County law and misconstrue the prior restraint doctrine. The prior restraint doctrine applies to a permit requirement, but it does not apply to a zoning ordinance that permits adult businesses by right in certain zones. *See 11126 Baltimore Boulevard v. Prince George's County, 58 F.3d 988, 995 (4th Cir. 1995), cert denied, 516 U.S. 1010, 133 L. Ed. 2d 492, 116 S. Ct. 567* **[*400]** *(1995)* (holding that an ordinance that prohibited adult bookstores from operating anywhere within the county until the county granted it a special exception constituted a prior restraint, as opposed to a Renton-type time, place and manner restriction). Montgomery County does not require adult businesses to go through **[**43]** the process of applying for an "adult use" permit. *See* Paper no. 31, Ex. 18, P 13. n14 Thus, the prior restraint doctrine is not applicable to Ordinance No. 14-19. Zoning restrictions, such as the one at issue here, are subject instead to a time, place, and manner restriction analysis, which the court has conducted above.

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n14 Adult businesses, just like any commercial business, are simply required to obtain a valid Use and Occupancy Certificate as required by Chapter 8 Buildings and Chapter 59 Zoning of the Montgomery County Code. *Id.*

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5. Equal Protection

In addition to the alleged free speech violations, Plaintiff's complaint suggests that the Ordinance's amortization provisions breach the *Equal Protection Clause* by treating adult businesses differently than other businesses. n15 This claim is without merit. First, Defendant has provided evidence that the County Zoning Ordinance also amortizes "off-site signs" and junkyards in addition to adult businesses. *See* Paper no. 31, Ex. 26. In any event, **[**44]** Plaintiff does not claim to be a member of any suspect class and, consequently, Plaintiff's claim of disparate treatment is subject, at most, to rational basis review. In *Hart Book Stores, 612 F.2d at 831*, the Fourth Circuit recognized a statute aimed at preventing the secondary effects of two adult establishments in the same building as being rationally related to an important state interest. In rejecting the plaintiffs' argument that the statute unconstitutionally treated adult businesses differently from other businesses, the court refused to "invalidate [the state's] effort to cope with a problem of commercial regulation under its police power simply because it treats those establishments that are perceived to have undesirable external effects differently from those that do not." *Id. at 832-33.* Under the holding in *Hart Book Stores*, therefore, the Ordinance at issue in the current case easily survives rational basis review.

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n15 Plaintiff's complaint also cites Article 24 of the Maryland Declaration of Rights. Because Maryland courts have generally interpreted this provision as in *pari materia* with the *Equal Protection Clause of the U.S. Constitution*, the court will focus its analysis on federal constitutional law. *See, e.g., Williams v. Prince George's County, Maryland, 112 Md. App. 526, 685 A.2d 884 (Md. Ct. Spec. App. 1996). See also Morrow v. Farrell, 187 F. Supp. 2d 548 (D.Md. 2002).*

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[45]**

D. Defendant's Counterclaim for Injunctive Relief

Defendant argues that it is undisputed that Plaintiff is operating its store in violation of the Ordinance, which the court has recognized as passing constitutional muster, and that Defendant is therefore entitled to injunctive relief. Plaintiff contends that this court lacks jurisdiction over Defendant's counterclaim for injunctive relief because the County's zoning provisions provide for an enforcement procedure starting at the administrative level. Plaintiff does not identify the procedure or explain why such a procedure would preclude the County from seeking injunctive relief.

Contrary to Plaintiff's contention, the court may exercise supplemental jurisdiction over Defendant's counterclaim for injunctive relief, pursuant to *28 U.S.C. § 1367(a)*. However, under *28 U.S.C. § 1367(c)(3)*, the court has discretion to decline exercising supplemental jurisdiction **[*401]** over a claim if the court "has dismissed all claims over which it has original jurisdiction . . . ." n16 In *United Mine Workers of America v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966),* **[**46]** the Supreme

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Court cautioned that "needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." The *Gibbs* Court went on to say that "if the federal law claims are dismissed before trial . . . the state claims should be dismissed as well." *Id.* It seems especially appropriate to decline supplemental jurisdiction on an issue such as enforcement of a County zoning ordinance which, once stripped of its federal constitutional issues, is a land-use function performed by local governments. *See, e.g., Trinity Baptist Church, Inc. v. City of Asheville, 88 F. Supp.2d 487 (W.D.N.C. 1999).* Accordingly, the court declines, pursuant to *28 U.S.C. § 1367(c)(3)*, to exercise supplemental jurisdiction over Defendant's counterclaim for injunctive relief. The court will dismiss the counterclaim for injunctive relief without prejudice.

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N16 This provision applies when a district court has granted summary judgment on the federal claims, in addition to when it has granted a motion to dismiss the federal claims. *See, e.g., Semple v. City of Moundsville, 195 F.3d 708 (4th Cir. 1999); Neiswonger v. Hennessey, 89 F. Supp.2d 766 (N.D.W.Va 2000).*

---------- End Footnotes ----------

[47]**

III. Conclusion

For the foregoing reasons, Plaintiff's motions to consolidate and strike will be denied. Defendant's motion for summary judgment on the declaratory judgment will be granted, but its counterclaim for injunctive relief will be dismissed. A separate order will follow.

/s/

DEBORAH K. CHASANOW

United States District Judge

March 28, 2003

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 28th day of March, 2003, by the United States District Court for the District of Maryland, ORDERED that:

1. The motion of Plaintiff Bigg Wolf Discount Video Movie Sales, Inc. to consolidate its case with *Mid-Atlantic Management Corporation v. Montgomery County, Maryland*, DKC-01-CV-2822, BE, and the same hereby IS, DENIED without prejudice;

2. The motion of Plaintiff Bigg Wolf Discount Video Movie Sales, Inc. to strike certain exhibits to Defendant's motion for summary judgment BE, and the same hereby IS, DENIED;

3. The motion of Defendant Montgomery County for summary judgment BE, and the same hereby IS, GRANTED IN PART;

4. It is hereby DECLARED that Montgomery County, Maryland Zoning Ordinance No. 14-19 is constitutional as a valid **[**48]** time, place, or manner restriction, is not unconstitutionally vague or overbroad, does not constitute a prior restraint on protected speech, and does not violate equal protection;

5. The counterclaim of Defendant Montgomery County for injunctive relief BE, and the same hereby IS, DISMISSED without prejudice; and

6. The clerk shall transmit copies of the Memorandum Opinion and this Order to counsel for the parties and CLOSE this case.

/s/

DEBORAH K. CHASANOW

United States District Judge

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Citation #19
32 F.3d 1436

DODGER'S BAR & GRILL, INC., a corporation, dba Bonita Flats Saloon, Plaintiff-Appellant, and RHONDI DAVIS, SHEILA KING, ELIZABETH LUCAS, RHONDA WHEELER, SERENA PARKER, MELISSA JONES, CHERI DAVIDSON, TAMMY SCHEUMEISTER, ANITA BOWER, MARLEY WESTON, SUZY KELLY, RACHAL WORKMAN, BROOKE UTZ, DEBRA MANESS, LAURIE BOYER, SHELLEY STEWART, VICKI SMITH, JESSICA ALLEN, DEANNA HURST, BRENDA SHOOK, CYNDI SCHMIDT, SUSAN PRINCE, ANGELA THOMAS, DESIREE EDWARDS, ORISSA HANSON, JACKIE ARNETT, ROBIN PACKARD, NICOLE HESTAND, JANA SULLINS, NANCY SESLER, LEWANA DUNCAN, SANDY WATSON, CHRISSIE MALLOY, TINA L. SMITH, Plaintiffs, v. JOHNSON COUNTY BOARD OF COUNTY COMMISSIONERS; JOHNNA (NMI) LINGLE, Chair, Johnson County Commissioner; SUE E. WELTNER, Johnson County Commissioner; BRUCE R. CRAIG, Johnson County Commissioner; MURRAY L. NOLTE, Johnson County Commissioner; DAN (NMI) HOSFIELD, Johnson County Commissioner; FRED ALLENBRAND, Johnson County Sheriff; PAUL (NMI) MORRISON, Johnson County District Attorney, Defendants-Appellees, PLATINUM OF KANSAS, INC., Amicus Curiae.

No. 93-3097

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

32 F.3d 1436; 1994 U.S. App. LEXIS 20735

August 8, 1994, Filed

SUBSEQUENT HISTORY: [1]**

As Amended August 23, 1994.

PRIOR HISTORY: Appeal from the United States District Court for the District of Kansas. (D.C. No. 92-CV-2289-EEO). D.C. Judge EARL O'CONNOR

COUNSEL: Brock R. Snyder, Topeka, Kansas, (John B. Williams, Kansas City, Missouri, with him on the brief), for Plaintiffs-Appellants.

LeeAnne Hays Gillaspie, Chief Deputy County Counselor, Johnson County Legal Department, Olathe, Kansas, for Defendants-Appellees Board of County Commissioners and Paul Morrison, Johnson County District Attorney; (Lawrence L. Ferree, III, and Ronald C. Rundberg, of Ferree, Bunn & Byrum, Overland Park, Kansas, with her on the briefs for Defendant-Appellee Fred Allenbrand, Johnson County Sheriff).

Clyde F. DeWitt, and Gregory A. Piccionelli of Weston, Sarno, Garrou & DeWitt, Beverly Hills, California, and Richard T. Bryant of Copilevitz, Bryant, Gray & Jennings, Kansas City, Missouri, filed an amicus curiae brief on behalf of Platinum of Kansas, Inc.

JUDGES: Before LOGAN and MCKAY, Circuit Judges, and SAM, District Judge. *

* The Honorable David Sam, United States District Judge, United States District Court for the District of Utah, sitting by designation.

OPINIONBY: LOGAN

OPINION: **[*1438]** LOGAN, Circuit Judge.

Plaintiffs Dodger's Bar & Grill, Inc. and more than thirty **[**2]** dancers who are or were employed by Dodger's, appeal from the district court's judgment for defendants, Johnson **[*1439]** County Board of County Commissioners (Board), Sheriff Fred Allenbrand, and District Attorney Paul Morrison, on plaintiffs' claims for injunctive relief and declaratory judgment. Plaintiffs argue that particular sections of the Adult Entertainment Code, drafted and promulgated by defendants to regulate nude dancing in businesses serving liquor in unincorporated areas of Johnson County, Kansas, are facially unconstitutional, overbroad and vague. We affirm the district court's judgment in part and remand for consideration and ruling on one issue.

I

In 1992, several of the defendants began receiving complaints about activities in and around the Platinum Club and the Bonita Flats Saloon, a "nude bar" operating in unincorporated Johnson County, Kansas. During that same time period, nude bars in neighboring Wyandotte and Jackson counties were receiving considerable negative publicity about their operations. One bar in Kansas City, Kansas, was bombed.

The defendant Board received a zoning application from a Wyandotte County entrepreneur and proprietor

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of nude clubs seeking permission [**3] to build a bar and restaurant in Johnson County. Realizing that surrounding municipalities had already begun regulating nude clubs and bars, the Board anticipated that unincorporated Johnson County could become a safe haven and magnet for all such clubs in the area if it did not act. Accordingly, the Board sought the opinion of the sheriff and district attorney on appropriate regulation.

As defendants began to gather information, they received another inquiry about establishing an "upscale" nude club in Johnson County. Defendants studied the issue of regulation for approximately six months, examining ordinances and studies from other municipalities focusing on the harmful secondary effects of nude clubs. Defendants held public Board meetings which were attended by various representatives of plaintiffs. They heard complaints from local residents, including women who had been followed to their homes by patrons exiting plaintiffs' club. There were reports of people urinating in the parking lot and roadways and theft of property from nearby residences. Some citizens expressed concern about the effect of nude clubs on property values in the area and the danger of having the patrons of [**4] such clubs driving around their neighborhoods after drinking alcohol.

The defendant district attorney with input from the Board's counsel worked to draft a code regulating nude clubs. The police department and the district attorney gathered information about plaintiffs' club and found incidents of assault, drug use, drug sales, and other illicit activities. Their investigation also revealed that there was considerable intimate physical contact between the nude or mostly nude dancers and club patrons, which could not be regulated effectively by existing statutes on prostitution or lewd and lascivious behavior. See Appellants' App. 103-04, Ex. 407 (documenting the practice of "lap dancing" which involves a dancer sitting on the lap of a patron while slowly gyrating her buttocks or crotch on the patron's crotch and permitting the patron to fondle her breasts and buttocks). Based on their study and investigation, the Board passed two resolutions, jointly known as the Adult Entertainment Code (AEC), n1 to regulate nude clubs [*1440] serving alcohol in unincorporated Johnson County.

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n1 Res. 67-92, Art. II 2 of the AEC provides as follows:

SECTION 2. APPLICABILITY. This Chapter shall apply from and after its effective date to all persons and all property located within the unincorporated area of Johnson County, Kansas and shall be applicable to any business establishment, whether licensed or not, now located or hereafter locating within or upon any property located in the unincorporated area of Johnson County, Kansas, which serves alcoholic beverages or cereal malt beverages for consumption on the premises, and to any operator of or entertainer for any such establishment.

Res. 67-92, Art. IV 1(A.) and 2(A.) of the AEC provide as follows:

SECTION 1. Nudity and Sexual Conduct Prohibited.

A. No person shall, on licensed premises, perform acts of or acts which constitute or simulate:

(1) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law; or

(2) The touching, caressing or fondling of the breast, buttocks, anus, or genitals; or

(3) The displaying of post-pubertal human genitals, buttocks, or pubic area, or the female breast below the top of the nipple.

SECTION 2. Allowing Persons to Engage in Prohibited Acts.

A. No operator shall allow or permit to remain in or about the licensed premises any person who performs acts of or acts which constitute or simulate:

(1) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law; or

(2) The touching, caressing or fondling of the breast, buttocks, anus or genitals; or

(3) The displaying of post-pubertal human genitals, buttocks, or pubic area, or the female breast below the top of the nipple.

Res. 67-92, Art. V, 2 of the AEC provides:

SECTION 2. PENALTIES. Any person or operator who violates any provision of this

Chapter shall be guilty of a Class B misdemeanor, and, upon conviction shall be punishable by a fine in an amount not less than $ 250.00 and not to exceed $ 1,000.00, or imprisonment in the County jail for a period not to exceed six months or both.

Appellants' App. 29, 30.

Res. 68-92, Art. III, 5 of the AEC provides in relevant part: "Nor shall any person allow or permit such acts prohibited by Chapter 1 [Res. 67-92] to occur in any room, building premises or place within 1,000 feet of a licensed premises or other business premises covered by this Chapter."

Res. 68-92, Art. IV, 2 of the AEC provides:

SECTION 2. PENALTIES. Violation of any provision of this Chapter, and amendments thereto, shall be deemed a public offense and a Class H infraction under the County Code, and shall be punishable, upon conviction, by a fine in an amount not less than $ 100.00 and not to exceed $ 500.00 for each infraction.

Appellants' App. 36, 37.

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[5]**

II

Before oral argument of this appeal we requested the parties to file memorandum briefs addressing whether the notice of appeal filed in this case was sufficient to confer jurisdiction over all the named plaintiffs or only over Dodger's Bar and Grill. *Torres v. Oakland Scavenger Co., 487 U.S. 312, 101 L. Ed. 2d 285, 108 S. Ct. 2405 (1988),* addresses the requirement of *Fed. R. App. P. 3(c)* that the notice of appeal "specify the party or parties taking the appeal" and holds it is not met by the use of "et al." to designate multiple appellants. See *Torres, 487 U.S. at 318.*

The notice of appeal in the instant case identifies the plaintiffs in the caption as "Dodger's Bar & Grill Inc., a corporation, d/b/a/ Bonita Flats Saloon, et al.," and in the body of the notice as "Dodger's Bar and Grill, Inc. and the other individually-named plaintiffs . . . ." Under several of our decisions since Torres, the instant notice of appeal would seem insufficient to give us jurisdiction over any but Dodger's Bar & Grill. See, e.g., *Storage Technology Corp. v. U.S. Dist. Court for Dist. of Colo., 934 F.2d 244, 247-48 (10th Cir. 1991)* **[**6]** ("et al." in caption and notice that contained language "all the Defendants of record herein" did not provide clear point of reference for reviewing court to identify appellants in bankruptcy case); *Laidley v. McClain, 914 F.2d 1386, 1389 (10th Cir. 1990)* ("et al." designation together with "plaintiffs hereby appeal" not sufficient to provide jurisdiction over unnamed plaintiffs under Rule 3(c) and Torres). Nevertheless, *Fed. R. App. P. 3(c)* has recently been amended to provide that "an attorney representing more than one party may fulfill this requirement by describing those parties with such terms as 'all plaintiffs.'" The Advisory Note states that "the amendment allows an attorney representing more than one party the flexibility to indicate which parties are appealing without naming them individually." *Fed. R. App. P. 3* advisory committee's note, 1993 Amendment. Because "changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity," *Landgraf v. USI Film Products, 128 L. Ed. 2d 229, 114 S. Ct. 1483, 1502 (1994),* and the United **[**7]** States Supreme Court order adopting the amendments effective December 1, 1993, instructs us to apply the new rules to all pending appeals "insofar as just and practicable," *61 U.S.L.W. 5365* (U.S. April 27, 1993), we conclude that Rule 3(c) as amended should be applied in this case. Defendants will suffer no prejudice or injustice by the participation of the individual plaintiffs in this appeal, and we believe the designation by the attorney who represents all of **[*1441]** the plaintiffs that the appeal is by Dodger's "and the other individually-named plaintiffs" is sufficient to confer jurisdiction and to meet the "fair notice" requirement that Torres and new Rule 3(c) demand.

III

Turning to the merits, we note that although the Supreme Court has acknowledged that some forms of nude dancing may be properly characterized as "expressive conduct within the outer perimeters of the First Amendment," *Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 2460, 115 L. Ed. 2d 504 (1991),* our analysis of plaintiffs' facial attack on the AEC's constitutionality is framed by doctrine of the Twenty-First **[**8]** Amendment, not the First n2 . Put simply, this is a case primarily about regulating the service of alcohol in nude bars and clubs, not about censoring artistic performance. It is a well-established constitutional priniciple that "the States n3 , vested as they are with general police power, require no specific

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grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power," *California v. LaRue, 409 U.S. 109, 114, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972).* And the police power encompasses "the authority to provide for the public health, safety, and morals." *Barnes, 111 S. Ct. at 2462.* When a regulation does not impinge upon a "fundamental right," the state need only articulate a rational basis for the exercise of police power, see *Bowers v. Hardwick, 478 U.S. 186, 196, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986),* and to date, the Supreme Court has not recognized a fundamental right to unrestrained nude dancing in all settings. Therefore, **[**9]** plaintiffs argue, as they must, that defendants did not provide a rational basis for the challenged AEC provisions.

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n2 The Twenty-First Amendment provides, in pertinent part: "The transportation or importation into any state, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. 21.

The First Amendment provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. Const. amend. 1.

n3 Kansas law provides legal authority for Kansas counties to share in the state's police power. See *Kan. Stat. Ann. 19-101,* 101a-101f.

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More than twenty years ago the Supreme Court upheld the constitutionality of a state regulation with a purpose and language virtually identical to the purpose and language of the AEC in the instant case. In LaRue, the Court indicated that "the broad sweep of the Twenty-First Amendment has been recognized as conferring something more **[**10]** than the normal state authority over public health, welfare, and morals," *LaRue, 409 U.S. at 114,* and that "something more" creates an "added presumption in favor of the validity" of state regulations concerning alcohol. *Id. at 118; New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 718, 69 L. Ed. 2d 357, 101 S. Ct. 2599.* Believing the First and Fourteenth Amendments would be undermined if the "bacchanalian revelries" circumscribed by the liquor regulation in that case were not distinguished from "a performance by a scantily clad ballet troupe in a theater," the Court held that the state's conclusion that "certain sexual performances and the dispensation of liquor by the drink" should not occur on the same premises was entirely rational. *LaRue, 409 U.S. at 118.*

In the instant case, the district court's factual findings are supported by the record and detail, as noted above, a lengthy period of study during which defendants accumulated and **[**11]** reviewed a variety of information before promulgating the AEC. Evidence of assaults, batteries, drug deals, and inappropriate intimate conduct between nude dancers and patrons at the plaintiffs' club combined with the fears of Johnson County residents about their personal safety provide a rational basis to justify the challenged regulation. n4

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n4 We note that the AEC does not regulate erotic nude performances in clubs that do not serve alcoholic beverages, and, significantly, it would appear that briefly-attired, though not totally nude, entertainers may still perform erotic, non-contact dances in clubs serving alcohol without transgressing the legislated guidelines.

---------- End Footnotes ----------

[*1442] IV

Plaintiffs argue that the AEC is overbroad and void for vagueness. As this is a review of action in a declaratory judgment proceeding and plaintiffs have not been charged with any violation of the AEC, we analyze the arguments under the constitutional standards applicable to facial overbreadth and vagueness challenges. In this procedural posture, "a **[**12]** court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside, 455 U.S. 489, 494, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982).* If the AEC does not infringe upon such protected conduct, then the overbreadth challenge will fail. See id. We proceed to this analysis.

A

Plaintiffs argue that the AEC sweeps within its prohibitions conduct protected by the First Amendment, and thus is unconstitutionally overbroad. Fearful that protected expression will be chilled, the Supreme Court recognizes that "the First Amendment

needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma, 413 U.S. 601, 611-12, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973)* (citations omitted). Addressing this concern, the overbreadth doctrine constitutes one of a few limited exceptions **[**13]** to the basic principles "that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied to others, in other situations not before the Court," *id. at 610* (citations omitted), and that "constitutional rights are personal and may not be asserted vicariously." Id. (citing *McGowan v. Maryland, 366 U.S. 420, 429-30, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961)).*

In light of the overbreadth doctrine's unique nature, however, the Supreme Court emphasizes that

> facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.

Broadrick, 413 U.S. at 615. **[**14]** "Particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id.

Plaintiffs essentially offer two overbreadth arguments. First, they rely on *Barnes, 111 S. Ct. at 2456,* in asserting that the AEC restrictions on displaying buttocks and the female breast below the top of the nipple are greater than needed to further the defendants' interest. This argument rests in large part on their observation that the AEC prohibits some attire, such as thong bikinis, that can legally be worn in some public places. n5 Plaintiffs also claim that many bikini styles do not cover what could be considered part of the buttocks, and question whether the AEC requires that a dancer in an "adult entertainment club" wear more clothing than someone in a public swimming area.

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n5 Although plaintiffs characterized this as a vagueness argument in their brief, it is better characterized as an overbreadth argument.

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[15]**

Plaintiffs reason that if the Supreme Court held in Barnes that a regulation requiring dancers to wear a G-string and pasties was constitutional, then an ordinance requiring any more physical coverage must necessarily be unconstitutional and void. We do not agree. As the Court noted in Barnes, a requirement that dancers wear some clothing "does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic." *Barnes,* **[*1443]** *501 U.S. at 570, 111 S. Ct. at 2463.* The Court certainly did not hold that an ordinance requiring dancers to wear something more than Gstrings and pasties would be unconstitutional. As we have noted, the county commission has broad power under the Twenty-First Amendment to regulate the service of alcohol, and the state's power to regulate alcohol outweighs the marginal First Amendment interest in totally nude dancing and other conduct prohibited by the AEC. See *Bellanca, 452 U.S. at 717.* We have no doubt that under the broad powers of the Twenty-First Amendment the county commission can require more clothing be **[**16]** worn by erotic dancers in an establishment serving liquor than by citizens on the street or beaches.

Plaintiffs also claim that the AEC will unconstitutionally restrict the attire of their patrons. But we find the reasoning of the Eleventh Circuit in *Geaneas v. Willets, 911 F.2d 579 (11th Cir. 1990),* cert. denied, *499 U.S. 955 (1991),* persuasive in rejecting this overbreadth argument. Plaintiffs fail to demonstrate any First Amendment interest of either dancers or bar owners in allowing their patrons to wear revealing clothing. Further, because "the chilled expression--the conduct of wearing revealing clothing--rests at a pronounced distance from the 'pure speech'" at the core of the First Amendment, plaintiffs simply do not have standing to assert any rights to wear scant attire that patrons could possibly have in this setting. *Id. at 585-86.*

Even if one can conceive of some impermissible applications of the AEC that alone is not sufficient to make a successful overbreadth challenge. See *Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 800, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984).* **[**17]** Plaintiffs have not demonstrated that

the AEC is unconstitutionally overbroad--that it reaches a substantial amount of protected conduct.

B

Considering the vagueness argument, in this preenforcement context we will "uphold the [plaintiffs'] challenge only if the enactment is impermissibly vague in all of its applications," *Hoffman Estates, 455 U.S. at 495.* Whether a statute, regulation, or local ordinance is unconstitutionally vague is a question of law that we review de novo. See *United States v. Patzer, 15 F.3d 934, 938 (10th Cir. 1993).*

The Fourteenth Amendment Due Process Clause requires that legislation prohibiting particular conduct contain language that provides fair notice and warning and sets reasonably clear guidelines for those enforcing and adjudicating under the legislation. See *Smith v. Goguen, 415 U.S. 566, 572-73, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974); Broadrick, 413 U.S. at 607.* The prohibitions must be "set out in terms that the ordinary person exercising **[**18]** ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 579, 37 L. Ed. 2d 796, 93 S. Ct. 2880 (1973).* In reviewing the AEC for vagueness, "we must have clearly in mind the statutory prohibitions that we are examining." *Letter Carriers, 413 U.S. at 568.* n6 Plaintiffs argue that three particular **[*1444]** provisions of the AEC are unconstitutionally vague; we deal with each in turn.

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n6 The presence of criminal enforcement provisions in Resolution 67-92 of the AEC and the possible infringement of protected expressive activity--albeit protected conduct "marginally" within the "outer perimeters" of the First Amendment, *Barnes, 111 S. Ct. at 2460*--requires us to demand a somewhat greater degree of specificity to pass constitutional muster. *United States v. Gaudreau, 860 F.2d 357, 360 (10th Cir. 1988).* However, "a scienter requirement may mitigate a criminal law's vagueness by ensuring that it punishes only those who are aware their conduct is unlawful," id., and Kansas law provides that all criminal provisions, unless explicitly excepted by their terms, require proof of criminal intent as a necessary element. *State v. Jones, 242 Kan. 385, 748 P.2d 839, 845 (Kan. 1988).* Criminal intent may be established by proof that a person's conduct was "willful," defined as "purposeful, intentional, and not accidental." Id. The presence of this element of scienter effectively overcomes the concerns of plaintiffs and the amicus that an accidental prohibited act, such as a patron accidentally brushing an employee's buttocks, could be punishable under the AEC. Clearly, that type of accidental incidental activity is not a violation of any provision before us.

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[19]**

First, plaintiffs assert that the prohibition against acts which simulate sexual intercourse "leaves unclear at what point an expressive dance becomes a simulation of sexual intercourse." Appellants' Br. at 32. Plaintiffs point to testimony of a police detective that the prohibition would be difficult to enforce because almost all dancing simulates intercourse. They further quote the testimony of the Johnson County district attorney that "if somebody was dancing, for example, like Elvis used to dance and gyrating their pelvis, that probably wouldn't fit the confines, or I would [not] think that would fit the confines of the statute at all." Appellants' App. 100-01. Plaintiffs assert this testimony indicates that the prosecutor is not sure whether a certain type of dance fits under the language of the statute. We read the district attorney's testimony, however, as a rather clear statement that he did not think the example given would be prohibited by the statute "at all," id., and also that he did not anticipate problems in enforcing the ordinance.

Plaintiffs also assert that the AEC language prohibiting displaying of buttocks "fails to specify at what point an individual's buttocks **[**20]** is displayed," Appellants' Br. at 33, and is thus too vague to give notice of what is prohibited. Although the AEC does not define buttocks, we believe the common understanding of the term supplies a clear enough standard by which one could avoid the prohibition. And we will not strike down legislation as vague when a court could "extrapolate [the AEC's] allowable meaning." Geaneas, n7 *911 F.2d at 586* (citing *Grayned v. Rockford, 408 U.S. 104, 110, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972)* (other citations omitted)).

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n7 The Eleventh Circuit in Geaneas found a challenged ordinance was not unconstitutionally vague, because the district court determined that the highest state court would define buttocks as

> the area at the rear of the body which lies between two imaginary lines running parallel to the ground when a person is standing, the first or top such line drawn at the top of the cleavage of the nates [i.e., the prominence formed by the muscles running from the back of the hip to the back of the leg] and the second or bottom line drawn at the lowest visible point of this cleavage or the lowest point of the curvature of the fleshy protuberance, whichever is lower, and between two imaginary lines on each side of the body, which lines are perpendicular to the ground and to the horizontal lines described above, and which perpendicular lines are drawn through the point at which each nate meets the outer side of each leg. The Ordinance would be violated, therefore, if any portion of this area is visible from any vantage point.

Geaneas v. Willets, 911 F.2d 579, 586-87 (11th Cir. 1990) (quoting *Geaneas v. Willets, 715 F. Supp. 334, 339 (M.D. Fla. 1989)).*

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[21]**

Plaintiffs next assert that the AEC is vague in its attempt to prohibit "performing acts of or acts which constitute or simulate: the touching caressing or fondling of the breast [or] buttocks." Appellants' Br. at 34. They argue that the AEC does not specify whether the ordinance prohibits caressing or fondling these regions only if they are exposed or also if covered, and thus is too vague to prevent arbitrary enforcement. Although he could not define its scope in every possible application, plaintiffs' manager stated at trial that without legal counsel he read the AEC and instructed his dancers on both what they could wear and what activities were prohibited. Further, the local law enforcement officers' testimony, with one exception, indicated that the language provided adequate guidance on what activities and conduct are regulated.

Amicus Platinum Club offers additional inventive hypotheticals in an attempt to demonstrate the AEC's vagueness. Amicus argues that the AEC provision prohibiting display or simulated display of the "female breast below the top of the nipple" is vague because it is

> equally amenable to at least two equally reasonable interpretations depending on whether **[**22]** the "top of the nipple" is construed to be the most cephalic point of the areola, (as might seem reasonable if for purposes of this section the subject person is to be viewed and analyzed while standing), or whether the top is construed as the most ventral point on the nipple, (as might seem reasonable if the subject person is to **[*1445]** be viewed from a reclining or horizontal position).

Amicus Br. at 12-13. We agree with the defendants that this argument "ignores the common reference to the top of one's anatomy being in the vicinity of the head with a common understanding that the head does not change its relationship to the rest of the body if one lies down." Appellees' Br. at 31.

Amicus also contends that the AEC fails to explain whether exposure of only a portion of a part of the body which is not to be exposed would be prohibited. To the contrary, the AEC explicitly prohibits "displaying of post-pubertal human genitals, buttocks, or pubic area, or the female breast below the top of the nipple."

In sum, "although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently **[**23]** understand and comply with." *Broadrick, 413 U.S. at 608.* We do not find any of the provisions attacked in the district court to be so vague that they fail to give adequate warning of the activities proscribed, or fail to set out "explicit standards" for law enforcement to apply the AEC. *Id. at 607* (quoting *Grayned, 408 U.S. 104 at 108).*

V

Although we affirm the district court's judgment in virtually every respect, we must remand for appropriate consideration and ruling on one issue that was presented to the district court and argued to us on appeal. In plaintiffs' complaint for declaratory judgment, they asserted rights under Resolutions Number 67-92 and 68-92 which together comprise the AEC. See Plaintiffs' Compl. Decl. J. (Appellants' App. 18). Resolution 68-92 is a zoning statute, which,

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among other things, seems to forbid activities such as sexual intercourse and the displaying of human genitals or buttocks within 1000 feet of a club that serves alcohol.

Plaintiffs elicited testimony at trial **[**24]** in an attempt to prove that these provisions of the AEC are vague or overbroad. Plaintiffs' manager testified that a doorman lives upstairs from Dodger's and that the AEC would seem on its face to forbid him from having sexual intercourse with his girlfriend. A detective testified that the 1000-foot rule is "completely unenforceable" because homes, businesses, and cars could all be located within a short distance of Dodger's bar and be covered by the prohibitions in the AEC.

Having raised the issue in their complaint and presented evidence at trial, the plaintiffs, nonetheless, received no ruling from the district court on this issue. Instead, the district court concluded that although Resolutions 67-92 and 68-92 jointly comprise the AEC, the "instant dispute relates only to 67-92 . . . . Resolution 68-92 is a zoning statute and is not relevant to this case." Dist. Ct. Op. at 4 (Addendum to Appellants' Br. at 4). Having read all the briefing and record material transmitted to us on appeal, we are uncertain why the district court did not address the issues raised by plaintiffs pertaining to the 1000-foot rule contained in 68-92. Given these circumstances, we will follow the general **[**25]** rule on an issue not passed upon in the lower court. See *Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 720 (10th Cir. 1993).* Accordingly, we do not evaluate the merits of plaintiffs' argument or offer any opinion as to the constitution-ality of 68-92, but rather we remand to the district court for a ruling on this matter. n8

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n8 Defendants filed a motion to strike certain matter from plaintiffs' brief and from the brief of amicus curiae. To the extent those briefs and the appendix contain alleged factual matters not before the district court, we grant the motion. We have considered on appeal only what was in the record before the district court.

---------- End Footnotes ----------

IT IS SO ORDERED.

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Citation #20
199 F.3d 1241

AMERICAN TARGET ADVERTISING, INC., a Virginia corporation, Plaintiff - Appellant, v. FRANCINE A. GIANI, in her official capacity as Division Director of the Utah Division of Consumer Protection, Department of Commerce for the State of Utah, Defendant - Appellee. BRUCE W. EBERLE & ASSOCIATES, INC.; FREE SPEECH DEFENSE AND EDUCATION FUND, INC., MIKE HATCH, MINNESOTA ATTORNEY GENERAL, ET AL., Amici Curiae.

No. 98-4158

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

199 F.3d 1241; 2000 U.S. App. LEXIS 429; 2000 Colo. J. C.A.R. 298

January 13, 2000, Filed

SUBSEQUENT HISTORY: [**1] Certiorari Denied October 2, 2000, Reported at: *2000 U.S. LEXIS 4889; 2000 U.S. LEXIS 4888.*

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH. (D. Ct. No. 97-CV-610-B). D.C. Judge Dee V. Benson.

DISPOSITION: AFFIRMED in part and REVERSED in part.

COUNSEL: Mark J. Fitzgibbons, American Target Advertising, Inc., Manassas, Virginia (Gifford W. Price, Mackey, Price & Williams, Salt Lake City, Utah, with him on the briefs), appearing for Appellant.

Jeffrey S. Gray, Assistant Attorney General, Salt Lake City, Utah, appearing for Appellee.

F. Hayden Codding, Codding & Codding, Fairfax Virginia, filed an amicus curiae brief on behalf of Bruce W. Eberle & Associates, Inc.

William J. Olson, John S. Miles, Alan Woll, and John F. Callender, William J. Olson, P.C., McLean, Virginia; Mark B. Weinberg, Weinberg & Jacobs, LLP, Rockville, Maryland; Michael J. Norton, Norton-Lindstone, LLC, Englewood, Colorado; and Herbert W. Titus, Troy A. Titus, P.C., Virginia Beach, Virginia, filed an amicus curiae brief on behalf of the Free Speech Defense and Education Fund, Inc.

Mike Hatch, Attorney General, and Roberta J. Cordano, Assistant Attorney General, State of Minnesota, St. Paul, Minnesota, filed an amicus curiae brief on behalf of Mike Hatch, Minnesota Attorney General, et al.

JUDGES: Before [**2] TACHA, HOLLOWAY, and BALDOCK, Circuit Judges.

OPINIONBY: TACHA

OPINION: [*1246] TACHA, Circuit Judge.

American Target filed this suit against Francine A. Giani in her official capacity as Director of the Utah Division of Consumer Protection. American Target sought declaratory, injunctive, and other relief, asking the district court to hold the Utah Charitable Solicitations Act unconstitutional. On cross motions for summary judgment, the district court granted summary judgment in favor of defendant. American Target filed a timely appeal, and we exercise jurisdiction pursuant to *28 U.S.C. § 1291.* We affirm in part and reverse in part.

I. Background

American Target is a Virginia corporation that provides fundraising services to nonprofit organizations. The corporation is under contract to provide such services to Judicial Watch, Inc., a nonprofit organization located in Washington, D.C. Under this contract, American Target helps manage Judicial Watch's national direct mail campaign.

By virtue of its contract with Judicial Watch, American Target is classified as a professional fundraising consultant under the Utah Charitable Solicitations Act. *Utah Code Ann. § 13-22-2(11)* [**3] (Supp. 1999). The Act requires all professional fundraising consultants to register with the state and obtain a permit. Id. §§ 13-22-5, -9. To obtain the required permit, American Target must complete a written application, pay an annual fee of $ 250 and post a bond or letter of credit in the amount of $ 25,000. Id. § 13-22-9.

American Target has not complied with the registration requirements and is therefore barred from assisting Judicial Watch with its mailing in Utah. American Target claims that the Act violates several provisions of the U.S. Constitution, including the First Amendment, the Commerce Clause and the Due

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Process Clause of the Fourteenth Amendment. We address each constitutional challenge.

II. First Amendment

The First Amendment provides that government "shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. In a facial challenge, American Target argues that the Utah Act operates both as an impermissible abridgement of protected speech and as an unconstitutional prior restraint. Because nothing in the record indicates that the Act will have any different impact upon interests not before this court, we analyze both prongs **[**4]** of the First Amendment challenge as they are presented under the facts of this case. *City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 801-02, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984).* If any provision should fail as applied to American Target, we will then decide if the provision is unconstitutional on its face. To find a provision facially unconstitutional, **[*1247]** we must conclude that "any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas." *Id. at 797.*

A. Protected Speech

We review de novo challenges to the constitutionality of a statute. *United States v. Hampshire, 95 F.3d 999, 1001 (10th Cir. 1996).* In addition, where expressive activity is arguably protected by the First Amendment, this court must make an independent examination of the entire record. *Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984).* After such review, we conclude that all but three of the challenged provisions are consistent with the First Amendment.

Charitable solicitations qualify as protected speech for First Amendment **[**5]** purposes. *Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980).* Content neutral regulation of protected speech is subject to "an intermediate level of scrutiny." *Turner Broad. Sys., Inc. v. Federal Communications Comm'n, 512 U.S. 622, 642, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994).* The "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989).* A measure designed not to "suppress the expression of unpopular views" but rather to control the "secondary" effects of speech will generally be deemed content neutral. *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).*

The Utah Act targets the secondary effects of professional solicitations, i.e., increased fraud and misrepresentation. The Act does not authorize a content-based review of the charitable mailings. It simply facilitates oversight of the mailers' backgrounds and methods. Therefore, the Act **[**6]** is content neutral, and we accordingly subject it to intermediate scrutiny. The state must demonstrate that the Act (1) serves a substantial governmental interest and (2) is "narrowly drawn" to serve that interest "without unnecessarily interfering with First Amendment freedoms." *Village of Schaumburg, 444 U.S. at 636-37.* n1

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n1 American Target contends that we should apply intermediate scrutiny to this content neutral regulation only if we first determine that it is a time, place or manner restriction. The Turner Broadcasting court made no such qualification and we shall not impose one here. In fact, the Supreme Court has suggested that there is no meaningful distinction between evaluation of a content neutral regulation of expressive conduct and a content neutral time, place or manner restriction. *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984)* (observing that the test applied to expressive conduct "in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions").

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"The interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation." *Riley v. National Fed'n of the Blind, 487 U.S. 781, 792, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988).* The stated purpose of the Utah Act is "to protect . . . citizens from harmful and injurious acts." *Utah Code Ann. § 13-1-1* (1996). The registration and permit provisions require applicants to make detailed disclosure about past activities, including descriptions of any injunction, judgment or administrative order entered against them. *Utah Code Ann. § 13-22-9* (Supp. 1999). The grounds for denying a permit center on findings of fraud and misrepresentation. Id. § 13-22-12. The Act's general declarations and specific prohibitions clearly target

fraud. The Act therefore serves a substantial government interest.

All of the Act's provisions must be narrowly drawn to serve this recognized governmental **[*1248]** purpose. We review those statutory provisions construed by the district court to determine whether the state has narrowly tailored them to prevent fraud.

1. Registration and Disclosure Requirements

The Act **[**8]** requires professional fundraising consultants like American Target to meet certain registration and disclosure requirements. Consultants must identify those involved in the solicitation process, disclose the purpose and method of solicitation, declare the existence of any injunctions, judgments, administrative orders, or criminal convictions involving moral turpitude, and provide copies of all agreements concerning fundraising. Id. § 13-22-9.

The Supreme Court has indicated that registration and disclosure provisions do not raise First Amendment problems. In *Secretary of State v. Munson, 467 U.S. 947, 968 n.16, 104 S. Ct. 2839, 81 L. Ed. 2d 786, 52 U.S.L.W. 4875 (1984),* the Court recognized that "concerns about unscrupulous professional fundraisers, like concerns about fraudulent charities, can and are accommodated directly, through disclosure and registration requirements and penalties for fraudulent conduct." In Riley, the Court stressed that the state "may constitutionally require fundraisers to disclose certain financial information." *Riley, 487 U.S. at 795.* The Riley court further found that "the State may itself publish the detailed financial disclosure forms it requires professional **[**9]** fundraisers to file." *Id. at 800.*

Mandatory registration and disclosure enable Utah citizens to make informed decisions concerning their charitable donations. These requirements directly promote Utah's legitimate interest in combating fraud while not unnecessarily interfering with solicitors' protected speech. We find that the registration and disclosure provisions of the Utah Act are narrowly tailored to serve the state's substantial interest in fighting fraud.

2. Registration Fee

The Utah Act also requires fundraising consultants to pay an annual registration fee. The fee imposed must be "reasonable, fair and reflect the cost of services provided." *Utah Code Ann. § 63-38-3.2(2)(a)* (Supp. 1999); *Utah Code Ann. § 13-22-9(1)(a)* (Supp. 1999). Prior to fiscal year 1997, the state assessed a fee of $ 150. The Utah Division of Consumer Protection raised the fee to $ 250 for fiscal year 1997 and thereafter. In an affidavit filed with the district court, Director Giani stated that the Division raised the fee to defray increased regulatory costs caused by a significant jump in applications.

Arguing that the $ 250 fee is excessive, American Target relies almost exclusively **[**10]** upon *Murdock v. Pennsylvania, 319 U.S. 105, 87 L. Ed. 1292, 63 S. Ct. 870 (1943).* In Murdock, the Supreme Court struck a city ordinance that, as applied, required Jehovah's Witnesses to pay a license tax to engage in door-to-door solicitation. The Court declared that "freedom of speech . . . [should be] available to all, not merely to those who can pay their own way." *Id. at 111.* The Court recognized some limits to this principle, however. Cataloguing the failings of the license tax at issue, the Court observed that it was not "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." *Id. at 113-14.* The Court observed that "the constitutional difference between such a regulatory measure and a tax on the exercise of a federal right has long been recognized." *Id. at 115 n.8.*

Murdock "does not mean that an invalid fee can be saved if it is nominal, or that only nominal charges are constitutionally permissible." *Forsyth County v. Nationalist Movement, 505 U.S. 123, 137, 120 L. Ed. 2d 101, 112 S. Ct. 2395 (1992).* Rather, a regulatory fee may **[**11]** be constitutional only if it serves a "legitimate state interest." **[*1249]** Id. The state of Utah, through the Giani affidavit, adequately connects the $ 250 regulatory fee to the state's recognized interest in protecting its citizenry from fraud. The fee does no more than defray reasonable administration costs. We therefore find the fee narrowly tailored to the identified interest.

3. Bond or Letter of Credit

To obtain a permit under the Act, American Target must also provide proof that it is bonded or provide a letter of credit in the amount of at least $ 25,000. *Utah Code Ann. § 13-22-9(4)(a).* The statute requires that the bond or letter of credit "be payable to the state for the benefit of parties who may be damaged by any violation of this chapter." Id. § 13-22-9(4)(b).

The district court relied upon *Dayton Area Visually Impaired Persons v. Fisher, 70 F.3d 1474 (6th Cir. 1995),* to uphold the bonding provision. In Dayton Area, the Sixth Circuit affirmed a district court's holding that a $ 25,000 surety bond requirement under the Ohio Charitable Solicitations Act was narrowly tailored to serve a legitimate state interest. *Id. at 1486.* **[**12]** Significantly, the Dayton Area court reviewed a district court's partial grant and partial denial of a preliminary injunction. This procedural posture limited the nature of the First Amendment analysis and limited

the court to an abuse of discretion review. In our de novo review, we must decide as a matter of law whether the $ 25,000 bond is narrowly tailored to the identified state interest. Dayton Area is therefore inapposite.

The bond requirement, on its face, supports a different state interest than the other challenged provisions of the Act. The disclosure and fee requirements enable prophylactic oversight of professional fundraisers. The bond requirement provides a victim relief fund for those injured through violations of the Act. When a professional fundraiser violates the Act, the state naturally expects the violator to satisfy a tort judgment. But this interest in redress applies across the law in other tort contexts. More importantly, this interest is adequately served by the preventive measures within the Act. Extensive disclosure and vigorous oversight diminish the likely need for a victim compensation fund. An ounce of prevention here is preferable to a pound **[**13]** of cure.

The actual impact of the bond requirement supports our conclusions. The president of American Target, in a sworn affidavit, stated that the company must provide 100 percent collateral for the amount of any outstanding bond. The company does not have enough unpledged collateral on hand to secure the Utah bond and must borrow the full amount. Id. The requirement therefore imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. Bonding may peripherally promote Utah's interest in regulatory oversight, but this goal is "sufficiently served by measures less destructive of First Amendment interests." *Village of Schaumburg, 444 U.S. at 636.* Through the registration, disclosure and fee requirements, the statute provides less intrusive means of fraud prevention. The chilling financial reality of the bond "unnecessarily interferes with First Amendment freedoms," *id. at 637,* and is therefore unconstitutional as applied.

Having found the bond provision unconstitutional as applied to American Target, we now must decide whether any attempt to enforce this provision would create "an unacceptable risk of the suppression of ideas. **[**14]** " *Taxpayers for Vincent, 466 U.S. at 797.* We find that it would. There is evidence in the record that qualifying for a letter of credit is much like qualifying for a loan. While some consultants may qualify for the required letter without 100 percent collateral, this possibility does not save the provision. We are not prepared to allow the constitutionality of this requirement turn on the applicant's credit rating. Furthermore, any posted collateral would go to support victim recovery. We have already **[*1250]** found that the guarantee of victim relief only peripherally supports the recognized state interest in regulatory oversight. The chilling impact of the bond upon protected speech outweighs any fraud protection it might provide. We therefore find that the bond/letter of credit provision of the Utah Act is unconstitutional on its face.

B. Severability

Having found one part of the Act unconstitutional, we must decide whether the objectionable provision can be severed. Severability is an issue of state law. *Leavitt v. Jane L., 518 U.S. 137, 139, 135 L. Ed. 2d 443, 116 S. Ct. 2068 (1996)* (per curiam). In Utah, the test is "whether the legislature **[**15]** would have passed the statute without the objectionable part . . . . Frequently the courts are aided in the determination of legislative intent by the inclusion within a statute of a 'saving clause.'" *Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 779 (Utah 1994)* (quoting *Union Trust Co. v. Simmons, 116 Utah 422, 211 P.2d 190, 193 (Utah 1949)).*

There is no saving clause in the Utah Act to aid our interpretation. Therefore, we must look to whether the statutory provisions "are so dependent upon each other that the court should conclude the intention was that the statute be effective only in its entirety." Id. The bonding/letter of credit requirement is not interrelated in any meaningful sense with the remainder of the Act. Indeed, on its face, the bonding requirement articulates a different purpose than do the other provisions. Elimination of the bonding requirement therefore will not frustrate the Act's stated purpose. Accordingly, we find that it is severable under Utah law.

C. Prior Restraint

American Target also claims that the Act operates as an impermissible prior restraint upon protected speech. A scheme of prior restraint **[**16]** gives "public officials the power to deny use of a forum in advance of actual expression." *Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 553, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975).* American Target is barred from aiding any solicitations within the state until it complies with all the Act's requirements. *Utah Code Ann. § 13-22-6(1)(b)(xiv)(B)* (Supp. 1999). The Act therefore definitionally qualifies as a prior restraint. Because we have struck the bonding requirement, we consider only whether the other challenged provisions establish an unconstitutional prior restraint. n2

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n2 Much of the prior restraint law developed in the context of ordinary licensing and zoning schemes. None of the schemes we encountered carried a restraint like the bonding requirement under the Utah Act. Having already found that requirement an unconstitutional burden upon free speech, we do not address how such a restraint would affect our analysis here. We simply note that so substantial a bonding requirement might operate as a full restraint where applicants cannot muster the required collateral.

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"Prior restraints are not unconstitutional per se." *Southeastern Promotions, 420 U.S. at 558.* However, "any system of prior restraint . . . comes to [the] Court bearing a heavy presumption against its constitutional validity." Id. (internal quotation marks and citation omitted). In particular, there are "two evils" that will not be tolerated in such schemes. *FW/PBS, Inc. v. Dallas, 493 U.S. 215, 225, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990).* First, no system of prior restraint may place "'unbridled discretion in the hands of a government official or agency.'" Id. (quoting *Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988)).* Second, "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *493 U.S. at 226.*

1. Unbridled Discretion

a) § 13-22-9(1)(b)(xiv)

American Target contends that state officials enjoy too much discretion **[*1251]** over the administrative process. The Director of the Division of Consumer Protection has the power to deny, suspend or revoke an application, registration, permit or information **[**18]** card. *Utah Code Ann. § 13-22-12(1).* To exercise this power, the director must find that such action serves the "public interest" and that the regulated entity has violated one or more of thirteen grounds set forth in the statute. Id. n3 These grounds include, among others, the filing of an application that is "incomplete or misleading in any material respect." Id. § 13-22-12(1)(a). The Act also contains a list of specific information which must be included in any application. Id. § 13-22-9. n4 The director retains the **[*1252]** authority to request "any additional information the division may require." Id. § 13-22-9(1)(b)(xiv). American Target contends that this catch-all provision confers unbridled discretion upon the director: she may demand any piece of information from an applicant and lawfully deny a permit if the applicant refuses such request. We agree.

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n3 Section 13-22-12 (1) provides in full:

(1) The director may, in accordance with Title 63, Chapter 46b, Administrative Procedures Act, issue an order to deny, suspend, or revoke an application, registration, permit, or information card, upon a finding that the order is in the public interest and that:

(a) the application for registration or renewal is incomplete or misleading in any material respect;

(b) the applicant or registrant or any officer, director, agent, or employee of the applicant or registrant has:

(i) violated this chapter or committed any of the prohibited acts and practices described in this chapter;

(ii) been enjoined by any court, or is the subject of an administrative order issued in this or another state, if the injunction or order includes a finding or admission of fraud, breach of fiduciary duty, material misrepresentation, or if the injunction or order was based on a finding of lack of integrity, truthfulness, or mental competence of the applicant;

(iii) been convicted of a crime involving moral turpitude;

(iv) obtained or attempted to obtain a registration or a permit by misrepresentation;

(v) materially misrepresented or caused to be misrepresented the purpose and manner in which contributed funds and property will be used in connection with any solicitation;

(vi) caused or allowed any paid solicitor to violate any rule made or order issued under this chapter by the division;

(vii) failed reasonably to supervise his agents, employees, paid solicitors or, in the case of an organization, its professional fund raisers or professional fund raising counsels or consultants;

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(viii) used, or attempted to use a name that either is deceptively similar to a name used by an existing registered or exempt charitable organization, or appears reasonably likely to cause confusion of names;

(ix) failed to timely file with the division any report required in this chapter or by rules made under this chapter; or

(x) failed to pay a fine imposed by the division in accordance with Section 13-22-3;

(c) a professional fund raiser or professional fund raising counselor or consultant does not have a bond or letter of credit in force as required by Subsection 13-22-9(4); or

(d) the applicant for registration or renewal has no charitable purpose.

[19]**

n4 Section 13-22-9 provides, in relevant part:

(1) It is unlawful for any person or entity to act as a professional fund raiser or professional fund raising counsel or consultant, whether or not representing an organization exempt from registration under Section 13-22-8, without first obtaining a permit from the division by complying with all of the following application requirements:

(a) pay an application fee as determined under Section 63-38-3.2; and

(b) submit a written application, verified under oath, on a form approved by the division that includes:

(i) the applicant's name, address, telephone number, facsimile number, if any;

(ii) the name and address of any organization or person controlled by, controlling, or affiliated with the applicant;

(iii) the applicant's business, occupation, or employment for the three-year period immediately preceding the date of the application;

. . . .

(ix) disclosure of any injunction, judgment, or administrative order against the applicant or the applicant's conviction of any crime involving moral turpitude;

(x) a copy of any written agreements with any charitable organization;

(xi) the disclosure of any injunction, judgment, or administrative order or conviction of any crime involving moral turpitude with respect to any officer, director, manager, operator, or principal of the applicant;

(xii) a copy of all agreements to which the applicant is, or proposes to be, a party regarding the use of proceeds;

(xiii) an acknowledgment that fund raising in the state will not commence until both the professional fund raiser or professional fund raising counsel or consultant and the charity, its parent foundation, if any, are registered and in compliance with this chapter; and

(xiv) any additional information the division may require.

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The state may not condition protected speech "upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official." *Staub v. City of Baxley, 355 U.S. 313, 322, 2 L. Ed. 2d 302, 78 S. Ct. 277 (1958).* "'[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.'" *Forsyth County v. Nationalist Movement, 505 U.S. 123, 131, 120 L. Ed. 2d 101, 112 S. Ct. 2395 (1992)* (quoting *Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51, 22 L. Ed. 2d 162, 89 S. Ct. 935 (1969)).*

In a facial challenge to a city licensing scheme, the Supreme Court considered a catch-all provision that authorized the imposition of "other terms and conditions deemed necessary and reasonable by the Mayor." *City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 754 & n.2, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988)* (internal quotation marks and citation omitted). The Court held that this section of the statute was unconstitutional on its **[**21]** face because it presumed that the mayor would "act in good faith and adhere to standards absent from the ordinance's face." *Id. at 770.* "The doctrine [forbidding unbridled discretion] requires that the limits the city claims are

implicit in its law be made explicit by textual incorporation." Id. Like the catch-all provision in City of Lakewood, § 13-22-9(1)(b)(xiv) confers unconstitutional discretion on the director because it presumes that she will use her blanket authority to request additional information only in good faith and consistent with implicit standards. As a result, § 13-22-9(1)(b)(xiv) threatens to overwhelm the narrow and objective provisions that precede it. Cf. *Beal v. Stern, 184 F.3d 117, 126 n.6 (2d Cir. 1999)* ("The existence of standards does not in itself preclude a finding of unbridled discretion, for the existence of discretion may turn on the looseness of the standards or the existence of a condition that effectively renders the standards meaningless as to some or all persons subject to the prior restraint.").

We therefore hold that § 13-22-9(1)(b)(xiv), construed in light of the director's authority to deny **[**22]** an incomplete application, is unconstitutional on its face and we sever it from the Act. n5 Any attempt by the state to invoke this blanket authority "would create an unacceptable risk of the suppression of ideas." *Taxpayers for Vincent, 466 U.S. at 797.*

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n5 Utah law on severability, see supra Part II.B., requires us to sever this unconstitutional provision. We must decide "whether the remaining sections [of the statute], standing alone, will further the legislative purpose." *Stewart, 885 P.2d at 779.* The remaining provisions mandate disclosure of an applicant's biographical, financial and criminal background along with copies of relevant agreements. This disclosure enables the state oversight necessary to achieve the Act's stated purpose of "protecting . . . citizens from harmful and injurious acts." *Utah Code Ann. § 13-1-1.*

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b) § 13-22-12(1)(b)(vii)

Section 13-22-12(1)(b)(vii) authorizes the state to deny a permit if the applicant has "failed reasonably to supervise **[**23]** his agents, employees, paid solicitors or, in the case of an organization, its professional fund raisers or professional fundraising counsels or consultants." Instead **[*1253]** of providing "narrow, objective and definite standards to guide the director," *Shuttlesworth, 394 U.S. at 150-51,* this provision imposes a vague requirement: the applicant must "reasonably . . . supervise" its agents and employees. Nowhere does the statute define or limit the nature of such supervision. "Imprecise language may vest authorities with the discretion to determine which groups and individuals are entitled to exercise First Amendment rights." *Association of Community Orgs. for Reform Now v. Municipality of Golden, 744 F.2d 739, 747 (10th Cir. 1984).*

Given the placement of this provision within the statutory text, we can only speculate as to a limiting construction. Perhaps the provision is designed to merely punish the applicant if an agent or employee violates the Act under his failed supervision. However, we decline to read words into the statute that the Utah Legislature did not ratify. The state must make explicit the necessary limits to the director's discretion. As **[**24]** enacted, § 13-22-12(1)(b)(vii) also confers unbridled discretion on the state and therefore is unconstitutional on its face. n6

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n6 Based on the foregoing analysis of severability, we also find this provision severable from the statute as a whole.

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2. Time Limits

Time limits upon a prior restraint allay "the risk of indefinitely suppressing permissible speech." *FW/PBS, 493 U.S. at 227.* In evaluating a facial challenge to a state act, we must consider the state's own construction of the act, including its implementation and interpretation. *Forsyth County, 505 U.S. at 131 (1992).* The state, by regulation, requires that all initial applications and renewals of registration be processed within ten days of their receipt by the Division of Consumer Protection. Utah Admin. Code R152-22-3(4) (WESTLAW through July 1999). American Target claims that the ten-day delay for administrative processing is unconstitutionally lengthy.

In *Freedman v. Maryland, 380 U.S. 51, 58-60, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965),* **[**25]** the Supreme Court held that any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained. n7 Here, the restraint imposed prior to judicial review is both clearly specified and brief. Upon denial of an initial or renewal application, the applicant is entitled to an administrative hearing within five business days. Utah Admin. Code R152-22-11(2). Administrative

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determinations must then be issued within five business days of the hearing. Id.

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n7 The Freedman court also found that prompt judicial review must be available and that the licensor must bear the burden in court to suppress the protected speech. *Freedman, 380 U.S. at 58-59;* see also *FW/PBS, 493 U.S. at 227* (summarizing the Freedman factors).

The modern interpretation of these Freedman safeguards has provoked some confusion among the circuits. See, e.g., *Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097, 1101 (9th Cir. 1998)* (summarizing the circuit split over the meaning of prompt judicial review); 11126 *Baltimore Blvd., Inc. v. Prince George's County, 58 F.3d 988, 996 n.12 (4th Cir. 1995)* (en banc) (concluding that the splintered opinions in FW/PBS leave the burden of proof safeguard "subject to some speculation"). In its briefs, American Target makes only stray references to the Act's impact on judicial relief. We find such references insufficient to trigger appellate review and therefore do not address the scope of judicial relief necessary under Freedman. See *Murrell v. Shalala, 43 F.3d 1388, 1390 n.2 (10th Cir. 1994)* (finding that a "few scattered statements" in plaintiff's argument "failed to frame and develop an issue sufficient to invoke appellate review").

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In addition, the state maintains the status quo during administrative review. The status quo for a new applicant like American Target is non-operation. See *East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220, 225 (6th Cir. 1995)* (status quo for business seeking permit is non-operation); *TK's Video, Inc. v. Denton County, 24 F.3d 705, 708* **[*1254]** *(5th Cir. 1994)* (applicant not free to operate while license is pending). Thus, Utah's restraint of American Target during the brief period of administrative review is constitutional.

III. Commerce Clause

American Target also claims that the Act as applied places an undue burden upon interstate commerce. We disagree. We review American Target's Commerce Clause challenge de novo. *United States v. Hampshire, 95 F.3d 999, 1001 (10th Cir. 1996).* The Commerce Clause not only empowers Congress to "regulate Commerce . . . among the several States," U.S. Const. art I, § 8, cl. 3, but also "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce," *Oregon Waste Sys. v. Dep't of Envtl. Quality, 511 U.S. 93, 98, 128 L. Ed. 2d 13, 114 S. Ct. 1345 (1994).* **[**27]** This implied restraint upon the states is often referred to as the negative or "dormant" aspect of the Commerce Clause.

To evaluate a dormant Commerce Clause challenge, this court must first determine whether the act in question "regulates evenhandedly" among economic interests or instead "discriminates against interstate commerce" either on its face or in practical effect. *Oregon Waste Sys., 511 U.S. at 99* (quoting *Hughes v. Oklahoma, 441 U.S. 322, 336, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979)).* Discrimination in this context "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Id. The Utah Act plainly does not distinguish between in-state and out-of-state businesses. American Target's status as a Virginia corporation doing business in Utah is legally irrelevant. It is American Target's status under the Act as a professional fundraising consultant that triggers the licensing requirements.

Because the Act regulates evenhandedly among in-state and out-of-state consultants, this court must balance various interests in the constitutional assessment. The Act must be **[**28]** upheld if it serves a "legitimate public interest," its effects on interstate commerce are only "incidental," and the burden imposed on interstate commerce is not "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970).* The party challenging a statute that regulates evenhandedly bears the burden of proving the statute's excess. *Dorrance v. McCarthy, 957 F.2d 761, 763 (10th Cir. 1992).*

As discussed previously, the Supreme Court has recognized the public interest in curtailing fraudulent solicitations. *Riley, 487 U.S. at 792; Village of Schaumburg, 444 U.S. at 637.* Because we have found that the bond is an unconstitutional burden upon free speech, the $ 250 fee, along with the registration and disclosure requirements, remain for our consideration. Since the Act applies to all fundraising consultants who operate within Utah, its provisions certainly

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burden interstate commerce for out-of-state firms like American Target. However, the burden is minimal. Thus, we must consider whether the identified public purpose could "be promoted **[**29]** as well with a lesser impact on interstate activities." *Pike, 397 U.S. at 142.* In its legitimate campaign against fraudulent solicitations, the state would be severely hampered if allowed only to regulate in-state solicitors. Therefore, we find that the burdens the Act imposes on interstate commerce are incidental and not clearly excessive in relation to the legitimate public interest.

American Target contends that another line of Commerce Clause authority applies to this case. Citing *National Bellas Hess, Inc., v. Department of Revenue, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967),* and *Quill Corp. v. North Dakota,* **[*1255]** *504 U.S. 298, 119 L. Ed. 2d 91, 112 S. Ct. 1904 (1992),* American Target identifies a bright-line rule prohibiting the regulation of interstate commerce where the regulated entity's only connection to the state is by common carrier or the U.S. mails. Both Bellas Hess and Quill concern the levy of taxes upon out-of-state entities. The Supreme Court in Quill repeatedly stressed that it was preserving Bellas Hess' bright-line rule "in the area of sales and use taxes." *Quill, 504 U.S. at 316;* see also *id. at 311* **[**30]** ("Bellas Hess . . . stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause."); *id. at 317* ("Our reasoning . . . does not compel that we now reject the rule that Bellas Hess established in the area of sales and use taxes."). The Utah Act imposes licensing and registration requirements, not tax burdens. The Bellas Hess/Quill bright-line rule is therefore inapposite.

IV. Due Process

Finally, American Target submits that the Utah Act as applied confers state jurisdiction in a manner inconsistent with due process. Again, we disagree.

The Due Process Clause of the Fourteenth Amendment requires that no state "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. Judicial jurisdiction cannot extend to an individual consistent with due process unless "he have certain minimum contacts [with the jurisdiction] . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945)* **[**31]** (quoting *Milliken v. Meyer, 311 U.S. 457, 463, 85 L. Ed. 278, 61 S. Ct. 339 (1940)).* The Supreme Court has tailored this jurisdictional principle to the corporate context. "So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Burger King v. Rudzewicz, 471 U.S. 462, 476, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)* (quoting *Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774-75, 79 L. Ed. 2d 790, 104 S. Ct. 1473 (1984)).*

In its agreement with Judicial Watch, American Target promises to suggest lists of potential Utah donors, design targeted mailings, help select optimum dates for mailing, and act as a general consultant concerning the solicitation process. To fulfill its obligations under this agreement, American Target must purposefully direct efforts toward residents of the state. Therefore, jurisdiction can be asserted consistent with due process.

Without apparent authority, American Target claims that there must be a higher level of business activity to support the **[**32]** legislative or regulatory jurisdiction asserted here. Charting the due process limits on legislative jurisdiction, the Supreme Court has employed language reminiscent of that used in the personal jurisdiction caselaw. "There must be at least some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction." *Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 315 n.2, 26 L. Ed. 2d 252, 90 S. Ct. 1731 (1970)* (Harlan, J., dissenting). See generally *Adventure Communications v. Kentucky Registry of Election Fin., 191 F.3d 429, 437 (4th Cir. 1999)* (concluding that "although not identical, judicial and legislative jurisdiction are determined pursuant to like guidelines") If there is a distinction to be drawn between the two inquiries, it is not one necessary to the disposition of this matter. American Target has sufficiently satisfied either formulation of minimum contacts to support Utah's assertion of regulatory jurisdiction.

[*1256] For the reasons discussed above, we AFFIRM in part and REVERSE in part. In addition, we deny the outstanding motion by Appellant American **[**33]** Target to strike the brief of amici curiae Mike Hatch, Minnesota Attorney General, et al., and grant the motion for leave to respond.

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Citation #21
721 F.2d 1281

M. S. NEWS COMPANY a Kansas corporation, Plaintiff-Appellant, v. ANTONIO CASADO, Mayor of the City of Wichita, Kansas, ROBERT C. BROWN, ROBERT KNIGHT, GARY PORTER, and CONNIE PETERS, members of the Board of Commissioners of the City of Wichita, Kansas, RICHARD LaMUNYON, Chief of Police of the City of Wichita, Kansas, and JOHN DEKKER, City Attorney for the City of Wichita, Kansas, Defendants-Appellees

No. 80-2093

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

721 F.2d 1281; 1983 U.S. App. LEXIS 15243

November 16, 1983

PRIOR HISTORY: [**1]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

DISPOSITION: Affirmed

COUNSEL: Robert C. Brown of Smith, Shay, Farmer & Wetta, Wichita, Kansas, (Jack Focht), for Plaintiff-Appellant.

Stanley A. Issinghoff, Wichita, Kansas, (Thomas R. Powell), for Defendants-Appellees.

Robert T. Stephan, Attorney General of Kansas and Thomas D. Haney, Deputy Attorney General of Kansas, for the State of Kansas as Amicus Curiae in support of Defendants-Appellees.

JUDGES: Seth, Chief Judge, and Holloway and McWilliams, Circuit Judges.

OPINIONBY: HOLLOWAY

OPINION: [*1284] HOLLOWAY, Circuit Judge

Plaintiff M.S. News Company (News), is a wholesale and retail distributor of periodicals and publications in Wichita, Kansas. n1 It appeals from dismissal of its action for injunctive and declaratory relief against enforcement of a portion of a Wichita ordinance. The ordinance, Number 36-172, amended sections 5.68.150 and 5.68.155 of the Code of the City of Wichita and created 5.68.156. This section prohibits the promotion of sexually oriented materials to minors. It is the sole portion of the ordinance [*1285] at issue in this action, and it is reproduced as an appendix to this [**2] opinion.

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n1 At the time of the filing of this action before the district court, News was a wholesale distributor of various periodicals and publications in Wichita while a co-plaintiff, Town Crier of Wichita, Inc., was a retailer of such goods. News has since acquired the assets of Town Crier of Wichita, Inc., and is a wholesale and retail distributor of periodicals and publications. Thus, News is the only plaintiff-appellant. *See* Brief of Appellant at 3-4.

---------- End Footnotes ----------

The Wichita ordinance is designed to prevent minors from being exposed to sexually oriented materials that are harmful to them. The ordinance defines "harmful to minors" and makes it an offense to display such material to minors if, as a part of the invited general public, they will be exposed to it. It further proscribes, *inter alia*, selling, furnishing or presenting to minors any material or performance that is harmful to them.

The controlling facts are not in dispute. By early August 1979, plaintiff News became aware of the impending passage [**3] of the subject ordinance. On August 20, News brought this action against all members of the Board of Commissioners, the Chief of Police, and the City Attorney of Wichita. It sought a declaratory judgment that Section 5.68.156 "is unconstitutional on its face and as applied," and injunctive relief restraining the defendants from enforcing the section. The district judge promptly issued a temporary restraining order.

Defendants filed a motion to dismiss with a supporting brief claiming, *inter alia*, that the complaint failed to state a cause of action. News then filed a reply brief contesting the motion. The district court held a hearing to consider plaintiff's request for a permanent injunction and the defendants' motion to dismiss, heard argument, and took the matter under advisement. The judge shortly thereafter dissolved the temporary restraining order, denied the request for preliminary

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and permanent injunctive relief and granted defendant's motion to dismiss. Plaintiff appeals.

Plaintiff makes four main arguments on appeal, contending that the ordinance: (1) goes beyond the permissible scope of *Ginsberg v. New York, 390 U.S. 629, 20 L. Ed. 2d 195, 88 S. Ct. 1274 (1968),* **[**4]** and is overbroad and vague both on its face and as applied; n2 (2) violates the Equal Protection Clause of the Fourteenth Amendment; (3) creates a prior restraint in violation of the First Amendment; and (4) deprives defendants of their Sixth Amendment right to a jury trial. We will consider each of these contentions in turn. n3

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n2 By dismissing plaintiff's action, the district court refused to enjoin enforcement of the newly enacted ordinance. The court held that on its face the ordinance was constitutional; the district court did not decide whether the ordinance is constitutional as applied. I R. 119. In such circumstances, we consider only whether the ordinance is constitutional on its face.

n3 If the district court considers matters outside the pleadings, Rule 12(b) requires the court "to treat the motion to dismiss as one for summary judgment and to dispose of it as provided in Rule 56 [Fed. R. Civ. P. 56]." *Carter v. Stanton, 405 U.S. 669, 671, 31 L. Ed. 2d 569, 92 S. Ct. 1232 (1972)* (per curiam); *see Owens v. Rush, 654 F.2d 1370, 1377 n.9 (10th Cir. 1981);* 6 J. Moore & J. Wicker, *Moore's Federal Practice* (Part 2), P56.11[2] (1982). Here the district court had before it matters outside the pleadings, including two affidavits in support of News' request for a temporary restraining order and a preliminary injunction. *See* II R. We therefore review the dismissal as an order granting summary judgment.

---------- End Footnotes ----------

[5]**

I

FACIAL OVERBREADTH AND VAGUENESS

Plaintiff News challenges the ordinance for overbreadth and vagueness. It essentially says that the realistic effect of the ordinance will be to limit, by its overbroad application, the access of adults, and minors approaching adulthood, to constitutionally permissible material. News further argues that the ordinance is vague in that it neither affords fair warning to those within its reach, nor provides explicit standards for those who enforce it. Brief of Appellant at 17.

Ginsberg v. New York, 390 U.S. 629, 20 L. Ed. 2d 195, 88 S. Ct. 1274 (1968), rejected a vagueness challenge to a New York statute similar to the Wichita ordinance. The Supreme Court there held that it is constitutional to proscribe the sale of "girlie magazines" to minors, where the magazines contained defined forms of sexually oriented material, even though such material was not obscene for adults. The Wichita ordinance at issue is almost identical to the **[*1286]** statute upheld in *Ginsberg. Ginsberg, supra, 390 U.S. at 645-47.* Plaintiff attempts to distinguish *Ginsberg* by pointing out differences between the two laws.

There **[**6]** are two principal differences between the Wichita ordinance and the statute in *Ginsberg* that are relevant to the constitutionality of the Wichita ordinance on its face. First, the Wichita ordinance uses the *Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973),* obscenity test, n4 and second, it proscribes not just the dissemination of material harmful to minors, as *Ginsberg* did, but also the display of such material. n5 We find no constitutional infirmity in the ordinance resulting from either of these changes, or in any of the prohibitions of display, sale or presentation of proscribed materia ls to minors.

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n4 The ordinance in *Ginsberg* used the test approved in *Memoirs v. Massachusetts, 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966).* Since then, in *Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973)* the Supreme Court has enunciated a somewhat different test. Under *Miller*, to determine if material is obscene and therefore unprotected, the trier of fact must inquire:(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.*Miller, supra, 413 U.S. at 24* (citations omitted). The Wichita ordinance and the statute approved in

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Ginsberg both adapted the current obscenity test so it could be used to determine whether material is harmful to minors.

[**7]

n5 Plaintiff also argues that the ordinance "exceeds the rights conferred on the Government by *Ginsberg v. New York*." Brief of Appellant at 10. Plaintiff argues it is inconsistent with *Ginsberg* to create an affirmative defense for displays that have a bona fide governmental, educational or scientific purpose. We disagree and address the equal protection issues stemming from this later. *See infra* Part II.

Plaintiff's contention that the ordinance is inconsistent with *Ginsberg* because it proscribes distribution and display of material that is not "suitable" for minors is without merit. The ordinance approved in *Ginsberg* and Wichita's ordinance both use this term in the same context.

We similarly reject plaintiffs' contention that the Wichita ordinance unconstitutionally expands the definition of obscenity to include "within its proscriptions . . . definitions which are also incongruous with the 'patently offensive ' element of *Miller* and which encompass depictions of sexual conduct which are clearly legitimate and not 'hard core. '" Brief of Appellant at 13. Although the ordinance does proscribe dissemination of some material protected as to adults, the proscription applies only to dissemination or display to juveniles, not adults. Plaintiff's argument implicitly rejects the rule from *Ginsberg* that it is constitutional to proscribe dissemination of generally protected materials to juveniles when such materials are harmful to them. Later cases recognize that the state has a legitimate interest in preventing juveniles from being exposed to sexually oriented materials even when they are not obscene as to adults. *See, e.g., New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348, 3354, 73 L. Ed. 2d 1113, 50 U.S.L.W. 5077, 5080 (1982); FCC v. Pacifica Foundation, 438 U.S. 726, 748-50, 57 L. Ed. 2d 1073, 98 S. Ct. 3026 (1978)* (plurality); *Miller v. California, supra, 413 U.S. at 19.*

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[**8]

A. *Application of the Miller test*

We are unable to discern any substance to plaintiff's argument that replacing the *Memoirs* test with the *Miller* test creates either an overbreadth or vagueness problem. The ordinance in *Ginsberg* prohibited distribution to minors of material that was "harmful to minors." In defining "harmful to minors," the *Memoirs* obscenity test was adapted so that material could not be distributed to minors if it: (1) appealed to the prurient interest of minors; (2) was patently offensive to what the adult community believed was suitable for minors; and (3) was utterly without social importance for minors. *Ginsberg, supra, 390 U.S. at 646.* The Wichita ordinance is virtually identical to that upheld in *Ginsberg* except that the *Miller* obscenity test is used rather than the *Memoirs* test. Although the ordinance alters the *Miller* test so that it can be used for determining what material is harmful to minors, this is precisely what the ordinance in *Ginsberg* did with the old *Memoirs* test. We reject the argument that the use of the *Miller* test [*1287] rendered the ordinance overbroad or vague. n6 [**9]

- - - - - - - - - - - - - - Footnotes - - - - - - - - -

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n6 We are not faced with an ordinance that is overbroad because it prohibits dissemination to minors of material that is not even obscene as to them. The Wichita ordinance is limited so that only material that is obscene as to minors may not be exposed to them. When courts have found similar legislation overbroad, generally the legislation has in some way sought to regulate material that is not obscene even as to minors. *See Erznoznik v. City of Jacksonville, 422 U.S. 205, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975)* (ordinance making it an offense for outdoor drive-in theatre to exhibit film containing any nudity); *American Booksellers' Ass'n v. McAuliffe, 533 F. Supp. 50 (N.D. Ga. 1981)* (statute prohibiting display or sale to minors of material containing nude figures held overbroad because prohibition extends to material not obscene as to minors); *Allied Artists Pictures Corp. v. Alford, 410 F. Supp. 1348 (W.D. Tenn. 1976)* (ordinance overbroad because it prohibited exposing juveniles to films containing language that was not obscene as to juveniles); *American Booksellers*

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Ass'n, Inc. v. Superior Court, 129 Cal. App. 3d 197, 181 Cal. Rptr. 33 (2d Dist. 1982) (ordinance overbroad because it required sealing material containing any photo whose primary purpose is sexual arousal regardless of whether obscene as to minors); *Calderon v. City of Buffalo, 61 A.D.2d 323, 402 N.Y.S. 2d 685 (1978)* (ordinance overbroad because it prohibited sale and exhibition to juveniles of material that was not obscene as to juveniles); *Oregon v. Frink, 60 Or. App. 209, 653 P.2d 553 (1982)* (statute prohibiting dissemination of all nudity to minors overbroad because it does not limit prohibition to material that is obscene as to juveniles).

Nor are we faced with an ordinance whose standard for determining whether material is obscene either to minors or adults is vague. The Wichita Ordinance uses almost the identical language approved in *Ginsberg* with the exception of using the *Miller* test. When legislation designed to protect minors from sexually oriented matters has been found to be unconstitutionally vague, the standard for evaluating whether the material was obscene as to minors has generally been the source of the vagueness. *See, e.g., Rabeck v. New York, 391 U.S. 462, 20 L. Ed. 2d 741, 88 S. Ct. 1716 (1968)* (per curiam); *Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 20 L. Ed. 2d 225, 88 S. Ct. 1298 (1968); American Booksellers Ass'n v. McAuliffe, 533 F. Supp. 50 (N.D. Ga. 1981); Hillsboro News Co. v. City of Tampa, 451 F. Supp. 952 (M.D. Fla. 1978); Calderon v. City of Buffalo, 61 A.D.2d 323, 402 N.Y.S. 2d 685 (1978).* We are satisfied that the standard used in the Wichita ordinance is not afflicted with such vagueness.

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[10]**

B. *The prohibitions of the ordinance protecting minors*

The Wichita ordinance prohibits (a) displaying material "harmful to minors," (b) selling, furnishing or presenting such material to minors; and (c) presenting to a minor any "performance" harmful to him. We feel that *Ginsberg* has already upheld all such prohibitions except that of display. We therefore focus on the overbreadth and vagueness challenges to the display prohibition.

The ordinance prohibits displaying materials harmful to minors when minors "as a part of the invited general public, will be exposed to view such material." The ordinance provides that such material is not displayed if it is "kept behind devices commonly known as 'blinder racks' so that the lower two-thirds of the material is not exposed to view." We believe this provision is neither vague nor overbroad.

Although First Amendment challenges to legislation under the overbreadth and vagueness doctrines are related, n7 they are distinct. The vagueness doctrine is anchored in the Due Process Clauses of the Fifth and Fourteenth Amendments, n8 and protects against legislation lacking sufficient clarity of purpose and precision in drafting. **[**11]** *See Erznoznik v. City of Jacksonville, supra, 422 U.S. at 217-18; Grayned v. City of Rockford, 408 U.S. 104, 108-14 n.5, 33 L. Ed. 2d 222, 92 S. Ct. 2294 & n.5 (1972).* Overbroad legislation need not be vague, indeed it may be too clear; its constitutional infirmity is that it sweeps protected activity within its proscription. *See Erznoznik v. City of Jacksonville, supra, 422 U.S. at 212-13; Grayned v.* **[*1288]** *City of Rockford, supra, 408 U.S. at 114.* We consider the overbreadth and vagueness issues separately. n9

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n7 *See, e.g., Village of Hoffman Estates, Inc. v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.6, 71 L. Ed. 2d 362, 102 S. Ct. 1186 & n.6 (1982)* (In determining whether there is substantial overbreadth the vagueness of the enactment should be analyzed).

n8 *See, e.g., Parker v. Levy, 417 U.S. 733, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974)* (Fifth Amendment); *Baggett v. Bullitt, 377 U.S. 360, 12 L. Ed. 2d 377, 84 S. Ct. 1316 (1964)* (Fourteenth Amendment).

[12]**

n9 In *Village of Hoffman Estates, Inc. v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982),* the Court indicated that in considering a facial challenge to the constitutionality of a statute for overbreadth and vagueness, a court should first consider the overbreadth question and then the vagueness question.

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1. *Overbreadth*

As noted, plaintiff News argues that the Wichita ordinance is overbroad, restricting the access of adults and minors approaching adulthood to constitutionally permissible publications. Brief of Appellant at 17. News says that as commercial enterprises seek to avoid violating the ordinance, the natural tendency will be to limit materials available for view by anyone. *Id.* at 13.

We disagree. First, as noted, with respect to the sale or distribution of materials "harmful to minors," the ordinance has a clear and acceptable standard that will permit sale or distribution to adults of such materials. Second, the portion of the ordinance dealing with display of material "harmful to minors" is reasonably **[**13]** structured. It is true that compliance with the ordinance will to some degree restrict the viewing by adults of materials which are, as to adults, constitutionally protected. However, the restriction is reasonable and does not offend the First Amendment.

Reasonable time, place and manner regulations are permissible where the regulations are necessary to further significant governmental interests, *Young v. American Mini Theatres, 427 U.S. 50, 63 n.18, 49 L. Ed. 2d 310, 96 S. Ct. 2440 & n.18 (1976)* (plurality), and are narrowly tailored to further the State's legitimate interest. *Grayned v. City of Rockford, supra, 408 U.S. at 116-17.* n10 We find *Young, supra,* instructive. In *Young* the plurality held that Detroit zoning ordinances providing that an adult theatre may not be located within 1000 feet of any two other adult theatres (or other "regulated uses") or within 500 feet of a residential area, was consistent with the First and Fourteenth Amendments. The plurality recognized that this was content-based regulation but upheld it because the city had a sufficient interest in preserving the quality of urban life and the ordinance **[**14]** did not suppress or greatly restrict access to lawful speech. *Young, supra, 427 U.S. at 63-72 & n.35* (plurality). Similarly the display provision of the Wichita ordinance is a regulation based on content. We believe that it is likewise justified by the substantial governmental interest in protecting minors from exposure to harmful adult material. n11 *See supra* note 5.

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n10 One member of the plurality in *Young v. American Mini Theatres, supra,* would require that the regulation be no more intrusive than necessary to achieve the governmental purpose. *Young, supra, 427 U.S. at 79-80* (Powell, J., concurring). The other four members of the plurality implied that the zoning ordinances might not be upheld but for the district court's finding that there were myriad locations where such theatres could be opened. *Young, supra, 427 U.S. at 71-72 n.35* ("The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to lawful speech.").

n11 Other courts have similarly viewed restrictions on displaying sexually oriented materials to minors as time, place or manner regulations. *See, e.g., American Booksellers Ass'n., Inc. v. Superior Court, 129 Cal. App. 3d 197, 181 Cal. Rptr. 33 (1982)* (ordinance requiring any material whose "primary purpose" was "sexual arousal" to be sealed was held overbroad because it restricted adults' access to materials they had right to obtain); *Dover News, Inc. v. City of Dover, 117 N.H. 1066, 381 A.2d 752 (1977)* (per curiam) (In dicta, court approves of a regulation requiring material harmful to minors to be displayed no lower than sixty inches).

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[15]**

Moreover, the proscription on display of material harmful to minors does not unreasonably restrict adults' access to material which is not obscene as to them. n12 The **[*1289]** ordinance permits the "display" of material harmful to minors if it is in blinder racks which conceal the lower two-thirds of the material. Thus, adults may still have some access to materials not obscene as to them, and they may purchase such material.

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n12 Legislation whose purpose was to protect minors from exposure to sexually oriented materials has been stricken as overbroad when it unnecessarily restricted adults' access to the material. *See, e.g., Butler v. Michigan, 352 U.S. 380, 381, 383, 1 L. Ed. 2d 412, 77 S. Ct. 524 (1957)* (statute proscribing sale of any book "manifestly tending to the corruption of the morals of youth" "not reasonably restricted

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to evil with which it is said to deal" because it reduces adult population "to reading only what is fit for children."); *Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987, 997 (D. Utah 1982)* (despite asserted child protection justification, statute proscribing distribution of indecent material by wire or cable held overbroad because it proscribes distribution to homes having no children); *see also Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1166 n.8, 1172-73 (D. Utah 1982)* (ordinance analogous to statute in *Wilkinson, supra*, held overbroad, following reasoning of *Wilkinson*).

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[16]**

In considering News's claim of overbreadth, n13 we must remember that invalidating legislation as overbroad on its face is "manifestly strong medicine" and is employed sparingly and "only as a last resort." *New York v. Ferber, 458 U.S. 747, 769, 102 S. Ct. 3348, 3361, 73 L. Ed. 2d 1113, 50 U.S.L.W. 5077, 5084 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916, 37 L. Ed. 2d 830 (1973); Nat'l Gay Task Force v. Board of Education, 729 F.2d 1270 (10th Cir. 1983).* In *Ferber*, the court implied that when conduct plus speech is involved, the overbreadth "'must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. '" *New York v. Ferber, supra, 458 U.S. at 770, 102 S. Ct. at 3362, 50 U.S.L.W. at 5084, (quoting Broadrick v. Oklahoma, supra, 413 U.S. at 615, 93 S. Ct. at 2917).* Moreover, legislation should not be held facially overbroad unless it is not readily subject to a narrowing construction, and the deterrent effect on speech is real and substantial. *Young v. American Mini Theatres, supra, 427 U.S. at 60; Erznoznik v. City of Jacksonville, supra, 422 U.S. at 216.* **[**17]** n14

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n13 It is not clear if plaintiff argues that the ordinance is overbroad merely because it regulates the distribution of materials that are constitutionally protected as to adults, or whether the display provision itself is overbroad. *See* Brief of Appellant at 17, 20. We have already rejected the former argument, and we address the latter because we believe plaintiff raises the argument at least implicitly.

n14 The Supreme Court has said "even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . . '" *New York v. Ferber, supra, 458 U.S. at 770 n.25, 102 S. Ct. at 3362, 50 U.S.L.W. at 5084 n.25* (legislation prohibiting sale of pornography in which children are engaged in explicit sexual acts); *Parker v. Levy, 417 U.S. 733, 760, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974)* (military articles prohibiting, *inter alia*, disobeying a lawful command from a superior) (quoting *CSC v. Letter Carriers, 413 U.S. 548, 580-81, 37 L. Ed. 2d 796, 93 S. Ct. 2880 (1973)).*

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[18]**

The portion of the Wichita ordinance proscribing display to minors is conduct plus speech because it regulates the manner in which material with a particular content can be disseminated; it does not regulate pure speech itself. Thus, there must be substantial overbreadth for the ordinance to be held overbroad on its face. We find no such infirmity. As noted, the display portion of the ordinance does not restrict minors' access to materials which they have a constitutional right to obtain. *See Ginsberg, supra, 390 U.S. at 634-43.* The ordinance only prohibits displaying material "harmful to minors," and this term is defined to include only material that is obscene as to minors under the *Miller* test as adapted to evaluate whether material is harmful to minors. Although minors are entitled to a significant measure of First Amendment protection, *Erznoznik v. City of Jacksonville, supra, 422 U.S. at 212-13; Tinker v. Des Moines School District, 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969),* a narrowly drawn ordinance restricting their access to sexually oriented material does not abridge their First Amendment rights. **[**19]** *See Ginsberg, supra, 390 U.S. at 634-43.*

We therefore hold that the display provision of the ordinance is not overbroad on its face.

[*1290] 2. *Vagueness*

If a law threatens to inhibit First Amendment freedoms a more stringent vagueness test is used. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra, 455 U.S. at 499; Hynes v. Mayor of Oradell, 425 U.S. 610,*

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620, 48 L. Ed. 2d 243, 96 S. Ct. 1755 (1976). In the First Amendment area vague laws offend three important values. First, they do not give individuals fair warning of what is prohibited. Second, lack of precise standards permits arbitrary and discriminatory enforcement. Finally, vague statutes encroach upon First Amendment freedoms by causing citizens to forsake activity protected by the First Amendment for fear it may be prohibited. n15 *Grayned v. City of Rockford, supra, 408 U.S. at 108-09; see Hynes v. Mayor of Oradell, supra, 425 U.S. at 620-22; see also General Stores, Inc. v. Bingaman, 695 F.2d 502, 503 (10th Cir. 1982). Hejira Corp. v. MacFarlane, 660 F.2d 1356, 1365 (10th Cir. 1981).* **[**20]**

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n15 As *Grayned* noted, this third value is related to the first two. *Grayned, supra, 408 U.S. at 109.* Concern for this third value is unique to laws which seek to regulate First Amendment rights. The first two values are offended by any vague law. *See, e.g., United States v. Salazar, 720 F.2d 1482 (10th Cir. 1983)* (considering the first two values from *Grayned* and holding that law prohibiting illegal possession of food stamps is not unconstitutionally vague).

---------- End Footnotes ----------

We find no vagueness defect in the Wichita ordinance. First, the ordinance provides fair warning of what is prohibited. It plainly prohibits displaying material harmful to minors in a manner so that minors will be exposed to it. Although it is not "an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children," *Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 689, 20 L. Ed. 2d 225, 88 S. Ct. 1298 (1968),* **[**21]** "'. . . the Constitution does not require impossible standards '; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . . '" *Roth v. United States, 354 U.S. 476, 491, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957)* (quoting *United States v. Petrillo, 332 U.S. 1, 7-8, 91 L. Ed. 1877, 67 S. Ct. 1538 (1947)).* We believe that the ordinance does this. The obscenity standard as to minors is clearly defined. Common understanding and practices provide commercial establishments with sufficient notice of the type of display the ordinance is designed to prohibit. *See Broadrick v. Oklahoma, supra, 413 U.S. at 608; Miller, supra, 413 U.S. at 27.*

Furthermore, whatever imprecision is present is mitigated by the ordinance's scienter provision. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra, 455 U.S. at 499* ("Scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.") (footnote omitted). **[**22]** The ordinance defines knowingly in terms almost identical to the definition approved in *Ginsberg. See Ginsberg, supra, 390 U.S. at 646.* In addition to the degree of scienter that the Constitution requires be shown to obtain a conviction for violating obscenity laws, n16 the Wichita ordinance, as *Ginsberg* did, makes it an excuse from liability if one makes an honest mistake as to a minor's age. n17

---------- Footnotes ----------

n16 To satisfy the scienter requirement, the prosecution must show that the defendant knew the contents of the material and its nature and character. *E.g., Hamling v. United States, 418 U.S. 87, 123-24, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974); Hunt v. State of Oklahoma, 683 F.2d 1305, 1308 (10th Cir. 1982); United States v. Sherwin, 572 F.2d 196, 201-02 (9th Cir. 1977), cert. denied, 437 U.S. 909, 57 L. Ed. 2d 1140, 98 S. Ct. 3101 (1978).*

n17 Plaintiff also argues that the term minors is vague. We reject this contention. The Wichita ordinance defines minor to mean "any unmarried person under the age of eighteen (18) years." The *Ginsberg* Court upheld a statute defining minor to be "any person under the age of seventeen years." *Ginsberg, supra, 390 U.S. at 645.* We see no difference of constitutional magnitude between these two definitions.

Moreover, the Wichita ordinance makes it a defense to a prosecution if an honest mistake was made as to the age of the minor. This sufficiently protects commercial enterprises from whatever vagueness inheres in the definition of minor.

---------- End Footnotes ----------

[23]**

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[*1291] Second, we do not perceive any real danger of arbitrary enforcement. To violate the ordinance, one must display material which, taken as a whole, must fail the *Miller* test as applied to minors. This sufficiently constrains the discretion of the authorities. The ordinance adopts the correct standard for evaluating whether material is harmful to minors and we will not assume that the authorities will act in bad faith.

Third, we are not persuaded that the ordinance will lead citizens to forsake activity protected by the First Amendment. The ordinance is narrowly drawn within the confines of the *Miller* and *Ginsberg* standards. It provides fair warning of what is prohibited, and sufficiently constrains the discretion of the authorities. In such circumstances we do not believe it chills the exercise of First Amendment rights.

In sum, we are not persuaded to hold the Wichita ordinance invalid for vagueness.

II

EQUAL PROTECTION

The Wichita ordinance provides that it is an affirmative defense if the material or performance was "displayed, presented or disseminated to a minor at a recognized and established school, church, museum, medical clinic, hospital, [**24] public library, governmental agency, quasi-governmental agency and [if this was done] for a bona fide governmental, educational or scientific purpose." Plaintiff News argues that the ordinance is violative of the Equal Protection Clause of the Fourteenth Amendment because only commercial establishments are subject to its sanctions.

We disagree. The ordinance creates a classification that distinguishes between commercial enterprises and non-commercial enterprises. Such classifications are upheld if they are rationally related to a legitimate state interest. *See New Orleans v. Dukes, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976)* (per curiam); *Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810-14, 49 L. Ed. 2d 220, 96 S. Ct. 2488 (1976); Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821, 831 (4th Cir. 1979), cert. denied, 447 U.S. 929, 65 L. Ed. 2d 1124, 100 S. Ct. 3028 (1980).* n18 *See also Schilb v. Kuebel, 404 U.S. 357, 364, 30 L. Ed. 2d 502, 92 S. Ct. 479 (1971)* ("Classifications will be set aside only if no grounds can be conceived to justify them. . . .").

---------- Footnotes ----------

n18 We note that in *Ginsberg, supra, 390 U.S. at 641,* the Court said that "to sustain state power to exclude material defined as obscenity by § 484-h requires only that we be able to say that *it was not irrational* for the legislature to find that exposure to material condemned by the statute is harmful to minors." (emphasis added).

---------- End Footnotes ----------

[**25]

We rejected a similar argument in *Piepenburg v. Cutler, 649 F.2d 783 (10th Cir. 1981).* In *Piepenberg* a state statute prohibited exhibiting pornographic films and created an affirmative defense if their distribution "was restricted to institutions or persons having scientific, educational, governmental, or other similar justification for possessing pornographic material." *Id. at 785.* We rejected the argument that this violated the Equal Protection Clause, reasoning that it was possible to conceive of justifications for the classification.

We likewise believe that the Wichita ordinance's classification must be upheld. Distinguishing between commercial and non-commercial institutions bears a rational relationship to a legitimate state interest. The Supreme Court has recognized that there are "legitimate state interests at stake in stemming the tide of commercialized obscenity. . . ." *Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973); see also Young v. American Mini Theatres, supra, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310* (upholding zoning ordinances applicable [**26] to adult theatres or similar establishments). Commercial [*1292] enterprises have the economic incentive to make sales and are therefore more likely to press the display and dissemination of material harmful to minors. Hence, making a distinction between commercial and non-commercial enterprises is sufficiently grounded in a legitimate state interest.

We conclude that the ordinance does not violate the Equal Protection Clause.

III

PRIOR RESTRAINT

Plaintiff argues that the ordinance creates an impermissible prior restraint. It contends that the threat of criminal prosecution, the substantial penalties available to a prosecutor, and the almost indefinable standards combine to create an unconstitutional prior restraint on the right to distribute their materials. Brief of Appellant at 34. We disagree.

The ordinance creates a penalty for violating its terms. It does not require prior approval of the authorities before any material can be distributed or displayed. "There is a world of difference between a government

statement that one cannot speak at all and a statement that one can speak out at some risk of paying a specified cost." Hunter, *Toward a Better Understanding* **[**27]** *of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 Cornell L. Rev. 283, 293 (1982).

The Supreme Court has expressed a preference for subsequent punishment over prior restraint. *See, e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975); Carroll v. Princess Anne, 393 U.S. 175, 180-81, 21 L. Ed. 2d 325, 89 S. Ct. 347 (1968); see also Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 589, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976)* (Brennan, J., concurring); *New York Times Co. v. United States, 403 U.S. 713, 733-37, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971)* (White, J., concurring). The Court has suggested that although the Government may not be able to restrain an individual from expressing himself, it does not follow that he cannot be punished if he abuses his rights. *Southeastern Promotions, Ltd. v. Conrad, supra, 420 U.S. 558-59.*

We are mindful that the Supreme Court has held that a system of prior administrative notice of a determination of obscenity as to particular publications, with subsequent criminal prosecution **[**28]** for distribution possible, violated constitutional rights protected by the Fourteenth Amendment. *See, e.g., Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70-71, 9 L. Ed. 2d 584, 83 S. Ct. 631 (1963).* n19 Such a conclusion is not justified here, however, because there is no such prior administrative determination, nor any significant risk that one may be prosecuted for engaging in protected conduct. We cannot say that on its face the Wichita ordinance has the infirmities of a prior restraint. The standard by which materials are to be judged is neither overbroad nor vague and there have been no threats of bad faith enforcement.

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n19 *See, e.g., Bantam Books v. Sullivan, supra, 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584* (State Commission notified book distributors that it has found publications objectionable and that it would recommend prosecution of distribution thereof because the Commission believed books were tending to the corruption of the youth); *see also Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. denied, 450 U.S. 919, 67 L. Ed. 2d 346, 101 S. Ct. 1366 (1981)* ("penalty of suspension or revocation [of theatre's license on finding it had shown obscene film] is unconstitutional prior restraint" because decision that movie is obscene is made and license is revoked before opportunity to have a court determine if movie is obscene); *Penthouse Internat'l Ltd. v. McAuliffe, 610 F.2d 1353* (5th Cir.), *cert. dismissed, 447 U.S. 931, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980)* (where authorities embarked on program of arresting everyone who distributed certain publications and made this action public, causing retailers in county to cease selling publications, the conduct amounted to an informal system of prior restraint); *Drive In Theatres, Inc. v. Huskey, 435 F.2d 228 (4th Cir. 1970)* (County Sheriff announced he would prosecute anyone showing a movie rated "R" or "X" because he believed they were obscene); *Bee See Books Inc. v. Leary, 291 F. Supp. 622 (S.D.N.Y. 1968)* (Stationing police officers in bookstores indicated to patrons that material sold was illegal and this constituted advance censorship).

---------- End Footnotes ----------

[29]**

[*1293] We conclude that the ordinance imposes no unlawful prior restraint.

IV

TRIAL BY JURY

News also contends that the ordinance is unconstitutional because it violates the Sixth Amendment right to trial by jury. More specifically, it argues that prosecutions under the ordinance take place before the Municipal Court for the City of Wichita where trial is to the court, n20 and the trial occurs without any determination on obscenity by a jury, which is essential since contemporary community standards must be applied.

---------- Footnotes ----------

n20 Section 12-4502 provides:

Trial. All trials in municipal court shall be to the municipal judge or the municipal judge pro tem.

Kan. Stat. Ann. § 12-4502 (1982).

---------- End Footnotes ----------

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Relying on *Miller, supra, 413 U.S. at 26, 30, 33-34,* News says "that the only manner in which the facts can be found so as to determine the prevailing standards in the adult community is through the decision of a jury." Brief of Appellant at 24. News reasons that the obscenity test "requires the **[**30]** participation of the community wherein the action is brought." *Id. at 25.* Likewise, News points to statements in *Hamling v. United States, 418 U.S. 87, 105, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974),* that a juror is permitted "to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination. . . ." News also relies on statements in *Ballew v. Georgia, 435 U.S. 223, 55 L. Ed. 2d 234, 98 S. Ct. 1029 (1978),* as support for its position that a jury trial is constitutionally required in the first instance in obscenity cases. n21

---------- Footnotes ----------

n21 News cites the following statement in *Ballew, supra, 435 U.S. 223* :

> We do not rely on any First Amendment aspect of this case in holding the five-person jury unconstitutional. Nevertheless, the nature of the substance of the misdemeanor charges against petitioner supports the refusal to distinguish between felonies and misdemeanors. The application of the community's standards and common sense is important in obscenity trials where juries must define and apply local standards. *See Miller v. California, 413 U.S. 15, [37 L. Ed. 2d 419, 93 S. Ct. 2607]* (1973). The opportunity for harassment and overreaching by an overzealous prosecutor or a biased judge is at least as significant in an obscenity trial as in one concerning an armed robbery. This fact does not change merely because the obscenity charge may be labeled a misdemeanor and the robbery a felony.
>
> *Id.* at 241 n.33.

---------- End Footnotes ----------

[31]**

The defendants respond to the jury trial argument, *inter alia*, by pointing to the right to a jury trial *de novo* on appeal in such cases. Kansas, like numerous states, has a two-tier system for adjudicating specific cases. In Kansas, "the municipal court of each city shall have jurisdiction to hear and determine cases involving violations of the ordinances of the city." *Kan. Stat. Ann. § 12-4104* (1982). Some states provide a jury trial in each tier; others provide a jury only in the second tier but allow an accused to by-pass the first; and still others do not allow an accused to avoid a trial of some sort at the first tier before he obtains a trial by jury at the second. *See Ludwig v. Massachusetts, 427 U.S. 618, 620, 49 L. Ed. 2d 732, 96 S. Ct. 2781 (1976).*

Under the Kansas procedure, on a plea of no contest a finding of guilty may be adjudged. *Kan. Stat. Ann. § 12-4406(b)* (1982). If an accused pleads guilty, the municipal judge may hear evidence touching on the nature of the case, otherwise ascertain the facts, and then may refuse or accept the plea, assess punishment and enter the proper judgment. *Kan. Stat. Ann. § 12-4407.* All trials in the **[**32]** municipal court are to the municipal judge or the municipal judge pro tem. *Kan. Stat. Ann. § 12-4502.* However, the accused has the right to appeal and then the case is tried *de novo* in the district court where trial by jury may be requested. n22

---------- Footnotes ----------

n22 Three Kansas statutes delineate this procedure. *Section 22-3610, Kan. Stat. Ann.* (1981), provides:

> 22-3610. Hearing on appeal. When a case is appealed to the district court, such court shall hear and determine the cause on the original complaint, unless the complaint shall be found defective, in which case the court may order a new complaint to be filed and the case shall proceed as if the original complaint had not been set aside. *The case shall be tried de novo in the district court.*
>
> (emphasis added).
>
> *Section 12-4601, Kan. Stat. Ann.* (1982), provides:
>
> Appeal; stay of proceedings. *An appeal may be taken to the district court in the county in which said municipal court is located:*
>
> (a) *by the accused person in all cases;* and
>
> (b) By the city upon questions of law. *The appeal shall stay all further proceedings upon the judgment appealed from.*
>
> (emphasis added).
>
> *Section 22-3609(5), Kan. Stat. Ann.* (1981), providesthat in such appeals from

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municipal courts, *trial by jury may be requested.*(emphasis added).

---------- End Footnotes- - - - - - - -
- - - - - -

[33]**

[*1294] The Supreme Court has said that such a procedure affords an accused "the absolute right to have his guilt determined by a jury composed and operating in accordance with the Constitution." *Ludwig v. Massachusetts, supra, 427 U.S. at 625.* Moreover, it provides him a clean slate. *Colten v. Kentucky, 407 U.S. 104, 112-19, 32 L. Ed. 2d 584, 92 S. Ct. 1953 (1972).* n23 Hence we cannot agree that the decisions of the Supreme Court, considered together, call for a holding that this Kansas procedure for obscenity prosecutions is invalid. The Court's decisions in *Ludwig* and *Colten* have upheld the two-tier systems and the earlier *Callan* decision is distinguishable, as we have explained. See note 23 *supra*.

- - - - - - - - - - - - - - Footnotes- - - - - - - - - -
- - - - - -

n23 Plaintiff News relies, *inter alia*, on *Callan v. Wilson, 127 U.S. 540, 32 L. Ed. 223, 8 S. Ct. 1301 (1888).* In *Ludwig, supra, 427 U.S. at 629-30,* the Supreme Court pointed out that *Callan* recognized that the sources of the right to jury trial in the federal courts are several and include Art. III, § 2, cl. 3, of the Constitution which requires that "the trial of all Crimes . . . shall be by Jury." That language was said to be capable of being read as prohibiting, in the absence of a defendant's consent, a federal trial without a jury; and the court noted that the provision is not applicable to the *States. 427 U.S. at 630.* The right of trial by jury in state court as a matter of federal constitutional law derives from the Sixth Amendment as applied to the States through the Fourteenth Amendment. *Duncan v. Louisiana, 391 U.S. 145, 149-50, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968).*

Furthermore, *Ludwig* also noted that to the extent that *Callan* may have rested on a determination that the right to a second tier jury trial was unduly burdened by a requirement that an accused be "fully tried" without a jury at the first tier, *Callan* was not controlling in a Massachusetts case like *Ludwig* because the defendant was able to circumvent trial in the Massachusetts first tier by "admitting to sufficient findings of fact." *427 U.S. at 630.*

We believe that the instant Kansas case is distinguishable from *Callan*, as was the Massachusetts case in *Ludwig*. The Kansas two-tier system also permits a defendant to avoid being "fully tried" at the first tier. In a Kansas municipal court a defendant can plead guilty or no contest, *Kan. Stat. Ann. § 12-4406* (1982), and sentence must be imposed without unreasonable delay. *Id.* § 12-4507. The defendant then can appeal to the district court where he "has an absolute right to a trial *de novo* . . .," *State v. Parker, 213 Kan. 229, 516 P.2d 153, 158 (1973),* and the appeal stays "all further proceedings upon the judgment appealed from." *Kan. Stat. Ann. § 22-3609(1)* (1981); *see also Id.* § 12-4601 (1982). The defendant is entitled to "a trial *de novo* . . . regardless of lack of error or *the nature of his plea* in the lower court." *State v. Parker, supra, 516 P.2d at 157* (emphasis added). "The defendant's right to a new trial is unrestricted in that all he is required to do to obtain it is to appeal." *Id., 516 P.2d at 158.*

We feel that both grounds used in *Ludwig* to distinguish *Callan* apply here and that the Kansas procedure is supported by *Ludwig*.

---------- End Footnotes- - - - - - - -
- - - - - -

[34]**

We must now consider whether the reference to "the average person, applying contemporary community standards" in the First Amendment obscenity test, *see Roth v. United States, 354 U.S. 476, 479, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957),* as well as the numerous references to the jury system which the Court has made while construing and defining this test, constitutionally mandate a jury trial in the *first* instance. News cites state court decisions holding that in obscenity cases an accused must have a jury trial at the first tier. *See City of Kansas City v. Darby, 544 S.W. 2d 529, 532 (Mo.1976)* **[*1295]** *appeal dismissed, 431 U.S. 935, 53 L. Ed. 2d 252, 97 S. Ct. 2644 (1977); cf. City of Duluth v. Sarette, 283 N.W. 2d 533, 537-38 (Minn. 1979).* The *Darby* case, which relied on the above-mentioned portions of *Miller* and *Hamling*, capsulizes plaintiff's point, stating that it held "*in obscenity cases only*, that a trial by jury is required in the first instance

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and that a trial by jury after appeal to circuit court 'does not satisfy the requirements of the Constitution. '" (quoting *Callan v. Wilson, 127 U.S. 540, 557, 32 L. Ed. 223, 8 S. Ct. 1301 (1888)).* **[**35]** (emphasis in original).

We are not persuaded to follow these decisions. The Supreme Court has not held that the trier of fact in cases applying the obscenity test must, *ipso facto*, be a jury. The Court has recognized that there is no constitutional right to a trial by jury in state civil proceedings to determine what is obscene material. *Alexander v. Virginia, 413 U.S. 836, 37 L. Ed. 2d 993, 93 S. Ct. 2803 (1973).* Indeed it has been held by some courts that criminal prosecutions for obscenity need not be by jury trials. *See Coble v. City of Birmingham, 389 So. 2d 527, 533 (Ala. Crim. App. 1980); Holderfield v. City of Birmingham, 380 So. 2d 990, 991-93 (Ala. Crim. App. 1979), cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114.*

And even assuming that the jury system may be the desirable method for judging obscenity by community standards, the Kansas procedure is not unconstitutional in view of the right it provides for a *de novo* jury trial on appeal. *Commonwealth v. Rich, 63 Pa. Commw. 30, 437 A.2d 516, 520-21 (1981); Manns v. Commonwealth, 213 Va. 322, 191 S.E.2d 810,* **[**36]** (1972); *Walker v. Dillard, 363 F. Supp. 921 (W.D. Va. 1973), rev'd on other grounds, 523 F.2d 3* (4th Cir.), *cert. denied, 423 U.S. 906, 46 L. Ed. 2d 136, 96 S. Ct. 208 (1975).* In the *de novo* jury trial the accused has a clean slate. *Colten v. Kentucky, supra, 407 U.S. at 119.* Moreover the appeal stays "all further proceedings upon the judgment appealed from," *Kan. Stat. Ann. § 12-4601* (1982). n24

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n24 As amicus curiae, the State of Kansas argues that there can be no violation of the Sixth Amendment right to a jury trial because a violation of the ordinance is a petty offense. The amicus points out that the maximum penalty under the ordinance is a fine of not more than five hundred dollars and a jail term not to exceed one month. Although we recognize that a petty offense is "usually defined by reference to the maximum punishment that might be imposed . . .," *Ludwig v. Massachusetts, 427 U.S. 618, 624-25, 49 L. Ed. 2d 732, 96 S. Ct. 2781 (1976),* and that a maximum one month sentence and five hundred dollar fine might be light enough to be a petty offense, *see Baldwin v. New York, 399 U.S. 66, 26 L. Ed. 2d 437, 90 S. Ct. 1886 (1970)* (plurality); *Duncan v. Louisiana, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968),* we do not rest our decision on this ground.

The ordinance is uniquely subject to repetitive violation, creating the threat of substantial penalties. Under the ordinance, "each day that any violation of [the ordinance] occurs or continues shall constitute a separate offense [, and] every act, thing, or transaction prohibited by [the ordinance] shall constitute a separate offense as to each item, issue or title involved. . . ." In such circumstances, we are not inclined to rely on the "ill-defined, if not ambulatory" boundaries of the petty offense category. *Duncan v. Louisiana, supra, 391 U.S. at 160.* It is on the other grounds discussed that we uphold the ordinance.

---------- End Footnotes ----------

[37]**

We find no violation of plaintiff News's constitutional rights under the First or Sixth Amendments in the procedure laid out for prosecution of violations of the ordinance.

V

In sum, we are not convinced that there is any substantive or procedural infirmity demonstrated in the Wichita ordinance. Accordingly the judgment is

AFFIRMED.

APPENDIX

Section 5.68.156 to ordinance number 36-172 of the Code of the City of Wichita, Kansas, provides as follows:

Displaying material harmful to minors.

(1) *Definitions.* Minor means any unmarried person under the age of eighteen (18) years.

[*1296] 'Harmful to Minors' means that quality of any description, exhibition, presentation or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse when the material or performance, taken as a whole, has the following characteristics:

(a) The average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors; and

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(b) The average adult person applying contemporary community standards would find that the material or performance **[**38]** depicts or describes nudity, sexual conduct, sexual excitement or sado-masochistic abuse in a manner that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors; and

(c) The material or performance lacks serious literary, scientific, educational, artistic, or political value for minors.

'Nudity ' means the showing of the human male or female genitals, pubic area, or buttocks with less than a full opaque covering; the showing of the female breast with less than a full opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state.

'Sexual conduct ' means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person be a female, breast.

'Sexual excitement ' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

'Sado-masochistic abuse ' means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically **[**39]** restrained on the part of one so clothed.

'Material ' means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, record, or recording tape, video tape.

'Performance ' means any motion picture, film, video tape, played record, phonograph or tape, preview, trailer, play, show, skit, dance, or other exhibition performed or presented to or before an audience of one or more, with or without consideration.

'Knowingly ' means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(a) The character and content of any material or performance which is reasonably susceptible of examination by the defendant, and

(b) The age of the minor; however, an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

'Person ' means any individual, partnership, association, corporation, or other legal entity of any kind

'A reasonable bona fide attempt ' means an attempt to ascertain the true age of the minor by requiring production of a driver's **[**40]** license, marriage license, birth certificate or other governmental or educational identification card or paper and not relying solely on the oral allegations or apparent age of the minor.

(2) *Offenses*. No person having custody, control or supervision of any commercial establishment shall knowingly:

(a) display material which is harmful to minors in such a way that minors, as a part of the invited general public, will be exposed to view such material provided, however, a person shall be deemed not to have "displayed" material harmful to minors if the material is kept behind devices commonly known as "blinder racks" so **[*1297]** that the lower two-thirds of the material is not exposed to view.

(b) Sell, furnish, present, distribute, allow to view, or otherwise disseminate to a minor, with or without consideration, any material which is harmful to minors; or

(c) Present to a minor or participate in presenting to a minor, with or without consideration, any performance which is harmful to a minor.

(3) *Defenses*. It shall be an affirmative defense to any prosecution under this ordinance that:

The material or performance involved was displayed, presented or disseminated **[**41]** to a minor at a recognized and established school, church, museum, medical clinic, hospital, public library, governmental agency, quasi-governmental agency and persons acting in their capacity as employees or agents of such persons or organizations, and which institution displays, presents or disseminates such material or performance for a bona fide governmental, educational or scientific purpose.

(4) *Penalties*. Any person who shall be convicted of violating any provision of this section is guilty of a misdemeanor and shall be fined a sum not exceeding Five Hundred Dollars ($ 500.00) and may be confined in jail for a definite term which shall be fixed by the court and shall not exceed one (1) month. Each day that any violation of this section occurs or continues shall constitute a separate offense and shall be punishable as a separate violation. Every act, thing, or transaction prohibited by this section shall constitute a separate offense as to each item, issue or title involved and shall be punishable as such. For the purpose of this section, multiple copies of the same identical title, monthly issue, volume and number issue or other such

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identical material shall constitute **[**42]** a single offense.

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Citation #22
1996 U.S. App. LEXIS 15311

DENNIS LEE CORTESE; DEBBIE DUZ DONUTS, trade name for 3-D Donuts, Corp., Plaintiffs-Appellants, v. JAMES L. BLACK, Ex-Sheriff of Larimer County, Colorado; RONALD PETITT; ANDREW JOSEY; CHARLES NICHOLS, Deputy Sheriff of Larimer County, Colorado; LARIMER COUNTY SHERIFF'S DEPARTMENT; LARIMER COUNTY BOARD OF COUNTY COMMISSIONERS, Defendants-Appellees.

No. 95-1429

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

1996 U.S. App. LEXIS 15311

June 25, 1996, Filed

NOTICE:
PUB-STATUS: [*1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *87 F.3d 1327, 1996 U.S. App. LEXIS 32544.*

PRIOR HISTORY: (D.C. No. 92-B-209). (D. Colo.). Lewis T. Babcock, District Judge.

DISPOSITION: AFFIRMED.

COUNSEL: DENNIS LEE CORTESE, Plaintiff - Appellant, Pro se, Ft Collins, CO.

For JAMES L. BLACK, Ex-Sheriff of Larimer County, Colorado, RONALD PETITT, ANDREW JOSEY, CHARLES NICHOLS, Deputy Sheriff of Larimer County, Colorado, LARIMER COUNTY SHERIFF'S DEPARTMENT, LARIMER COUNTY, COLORADO, LARIMER COUNTY BOARD OF COUNTY COMMISSIONERS, Defendants-Appellees: George H. Hass, Jeannine Sue Hagg, Harden, Schmidt, Hass, Hoag & Hallberg, Fort Collins, CO.

JUDGES: Before PORFILIO, JONES, ** and TACHA, Circuit Judges.

** Honorable Nathaniel R. Jones, Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

OPINIONBY: Deanell Reece Tacha

OPINION: ORDER AND JUDGMENT *

---------- Footnotes ----------

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

---------- End Footnotes ----------

[*2]

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See *Fed. R. App. P. 34(a)*; *10*th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiffs-appellants appeal from the district court's entry of summary judgment in favor of defendants on their claims that their constitutional rights were violated when defendants attempted to prevent them from opening their business, and once opened, closed the business pursuant to a state nuisance statute. Plaintiffs' complaint is based on *42 U.S.C. § 1983*. Our jurisdiction arises from *28 U.S.C. § 1291* and we affirm.

Plaintiffs owned and operated a topless doughnut shop that also sold sexually oriented books and videotapes. After plaintiff Cortese sold illegal drugs to an undercover police officer, the defendant police officers obtained arrest warrants for Cortese and Gary Petty, an employee of the business. Also based on the illegal drug sales and pursuant to a state nuisance statute, defendants sought and obtained a temporary restraining order from a state court against conducting further [*3] business at the doughnut shop. Plaintiffs ultimately abandoned their claims in the state court nuisance action.

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Cortese entered an Alford plea to the criminal drug charges brought against him, thus permitting him to maintain his claim that the drugs were planted by defendants as an excuse to close the business. It was after he entered a plea to the criminal charges that he admitted that he had provided the drugs. Plaintiffs allege that defendants engaged in a course of action to close plaintiffs' business, thus violating various constitutional rights. For a complete recitation of the facts, see *Cortese v. Black, 838 F. Supp. 485 (D. Colo. 1993).*

On appeal, plaintiffs claim (1) the police investigation of plaintiffs' business was motivated to close the business, not for a legitimate purpose; (2) the business was subjected to an unconstitutional search and seizure during the execution of the arrest warrant on Gary Petty; (3) the state nuisance statute under which the temporary restraining order was issued resulted in the unconstitutional restraint of freedom of expression because defendants seized constitutionally protected materials; (4) enforcement of the nuisance statute **[*4]** at plaintiffs' business violated equal protection because the statute was not employed to close other businesses; (5) seizure of the business was effected without affording plaintiffs constitutionally required pre-seizure notice and an opportunity to be heard; (6) plaintiffs' § 1983 claims are not barred by either the doctrine of res judicata or the entry of an Alford plea to the drug charges; and (7) summary judgment was inappropriate because there exist disputed material facts.

We review the grant of summary judgment de novo, applying the same standard as the district court. *Applied Genetics Int'l, Inc., v. First Affiliated Secs., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990).* "Summary judgment is appropriate when there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law." *Russillo v. Scarborough, 935 F.2d 1167, 1170 (10th Cir. 1991).* We view the record in the light most favorable to the nonmoving party. *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991).*

We first address plaintiffs' argument that the police took action to close their business in violation of their constitutional **[*5]** rights. They contend that the drugs Cortese was accused of providing to an undercover police officer were planted by the police to provide an excuse to arrest Cortese and close the business. During his deposition, however, Cortese admitted that it was he who had provided the drugs to the undercover officer. Therefore, plaintiffs' claim that the police investigation was unlawfully motivated must fail.

As a corollary to their argument that the police acted improperly, plaintiffs argue that Cortese's initial statement to the district court denying that he had provided the drugs was not a "material lie." See appellants' brief at 16-21. The district court did not, however, sanction plaintiffs because Cortese had lied about having provided the illegal drugs. Instead, the court resolved the legal issues based on Cortese's admission. Accordingly, we do not address whether Cortese's lie to the court was "material."

We turn to plaintiffs' claim that the business was subjected to an unlawful search and seizure. They allege that defendants unlawfully seized a constitutionally protected videotape during the arrest of Petty. It is undisputed that the police officers, believing the videotape **[*6]** was a bootleg tape, removed it from plaintiffs' business on April 4, 1990, and returned it on April 13, 1990. It is also undisputed that the police served the temporary restraining order on the evening of April 4, 1990, at which time they had the legal right to enter the business and inventory its contents, thus permitting them to have possession of the videotape. Viewing the record in the light most favorable to the nonmoving party, as the district court did, we assume that the videotape was seized without a search warrant or an arrest warrant. Even so, we conclude that any Fourth Amendment violation was de minimis in view of the facts that defendants seized only one item, and had possession of it illegally for only a few hours. See *Artes-Roy v. City of Aspen, 31 F.3d 958, 962-63 (10th Cir. 1994)* (officer's warrantless entry into plaintiff's foyer, even if Fourth Amendment violation, was de minimis); see also *Hudson v. McMillian, 503 U.S. 1, 9-10, 117 L. Ed. 2d 156, 112 S. Ct. 995 (1992)* (in prison context, de minimis uses of physical force are excluded from constitutional recognition); *Artes-Roy, 31 F.3d at 962-63* (collecting cases). Accordingly, there was "no actionable constitutional wrong." *Artes-Roy,* **[*7]** *31 F.3d at 963* (quotation omitted).

Plaintiffs also maintain that the restraining order issued under the state nuisance statute, *Colo. Rev. Stat. § 16-13-303*, deprived them of their First Amendment rights to freedom of expression. They assert that the order to close the business deprived them of the right to sell constitutionally protected books and videotapes. The business, however, was closed because the owner/manager provided illegal drugs to an undercover policeman, not because the business was sexually oriented. The drug activity "carried on in this case manifests absolutely no element of protected expression." *Arcara v. Cloud Books, Inc., 478 U.S. 697, 705, 92 L. Ed. 2d 568, 106 S. Ct. 3172 (1986).* Consequently, the First Amendment is not implicated by the enforcement of the Colorado nuisance statute intended to prevent any building from being used for the unlawful sale, distribution or storage of illegal

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drugs. *Colo. Rev. Stat. § 16-13-303*; *Arcara, 478 U.S. at 707;* accord *O'Connor v. City & County of Denver, 894 F.2d 1210, 1217 (10th Cir. 1990)*(First Amendment not implicated by enforcement of criminal code prohibiting public sex acts even though result was to close theater).

Plaintiffs also **[*8]** assert that they were selected for prosecution because of the nature of their business. To maintain a claim of selective prosecution, plaintiffs must show that they have been singled out for prosecution while others similarly situated generally have not been prosecuted for similar conduct, and that the government selected them to prevent them from exercising their constitutional rights or for other impermissible reasons. *United States v. Furman, 31 F.3d 1034, 1037* (10th Cir.), cert. denied, *130 L. Ed. 2d 555, 115 S. Ct. 651 (1994).* To support their claim of selective prosecution, plaintiffs cite Cortese's testimony that he knew of other establishments that were not treated as harshly as plaintiffs' in allegedly similar situations. Inadmissible hearsay, however, cannot defeat summary judgment "because a third party's description of a witness' supposed testimony is not suitable grist for the summary judgment mill. Furthermore, generalized, unsubstantiated, non-personal affidavits are insufficient to successfully oppose a motion for summary judgment." *Thomas v. International Business Mach., 48 F.3d 478, 485 (10th Cir. 1995)*(quotations omitted). Cortese's generalized references to what happened **[*9]** to other establishments is inadmissible hearsay, insufficient to defeat summary judgment. See *Swoboda v. Dubach, 992 F.2d 286, 291 (10th Cir. 1993)* (appellate court may affirm district court's judgment for reasons other than those relied on by the district court).

Plaintiffs next allege that their constitutional rights to procedural due process were violated when the police officers served the temporary restraining order without first providing plaintiffs with notice and an opportunity for a hearing. The temporary restraining order was based on Cortese's illegal drug activity. Its purpose was not to forfeit the business, even though defendants later requested a forfeiture to which plaintiffs did not object. The temporary restraining order was authorized by state statute, and issued by a state district court; it was not initiated by self-interested private parties. Furthermore, the temporary restraining order provided plaintiffs an opportunity for an immediate hearing. Consequently, we conclude that this case "presents an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process." *Calero-Toledo v. Pearson Yacht Leasing* **[*10]** *Co., 416 U.S. 663, 679-80, 40 L. Ed. 2d 452, 94 S. Ct. 2080 (1974);* see *Swoboda, 992 F.2d at 291* (appellate court may affirm district court's judgment for reasons other than those relied on by the district court).

We dispose of plaintiffs' argument that their § 1983 claims are not barred by the doctrine of res judicata or by Cortese's guilty plea by noting that the district court found that the claims were not barred for either of those reasons. The district court addressed the merits of plaintiffs' § 1983 claims, concluding that defendants were entitled to summary judgment.

Finally, plaintiffs assert that summary judgment was inappropriate because there exist genuine issues of material fact. See *Fed. R. Civ. P. 56(c)*. Plaintiffs object to the district court's reliance on defendants' affidavits because they refute plaintiffs' allegations. Rule 56(c) provides that affidavits may support a summary judgment motion. See *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*(it is from Rule 56(c)'s list of materials "that one would normally expect the nonmoving party to make the [required] showing"). Plaintiffs also point to various discrepancies in the parties' statements. E.g., appellants' brief at **[*11]** 19-21. We determine that the disputed matters are not material to the legal issues presented, and do not preclude summary judgment. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*(existence of some disputed facts will not defeat summary judgment; there must exist genuine issue of material fact).

The judgment of the United States District Court for the District of Colorado is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Deanell Reece Tacha

Circuit Judge

2-357

End Of LexisNexis(TM) Get & Print Report

Session Name: GP011118

Date: November 18, 2004

Client: KS_Dickinson_County

EXHIBIT 2

COPY

Honorable Alan A. McDonald

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

WORLD WIDE VIDEO OF WASHINGTON, INC., Plaintiff, v. CITY OF SPOKANE, Defendant.	No. CS-02-0074-AAM DECLARATION OF TIM SZAMBELAN IN SUPPORT OF CITY OF SPOKANE'S MOTION FOR SUMMARY JUDGMENT

I, TIM SZAMBELAN, hereby declare under penalty of perjury under the laws of the state of Washington that the following is true and correct.

1. I am of legal age, am competent to testify, and I make this declaration on my own personal knowledge.

2. I have been an assistant city attorney for the City of Spokane (the "City") since 1991.

3. I have knowledge of the contents of the Legislative Record from City Ordinances No. 32778 and 33001 (the "Ordinances"). Attached hereto as exhibits are excerpts of the Legislative Record of the Ordinances.

I declare under penalty of perjury under the laws of the State of

PRESTON GATES & ELLIS LLP
701 FIFTH AVENUE
SUITE 5000
SEATTLE, WASHINGTON 98104-7078
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Washington that the foregoing is true and correct:

EXECUTED this 24th day of July, 2002 at Spokane, Washington.

TIM SZAMBELAN

PRESTON GATES & ELLIS LLP
701 FIFTH AVENUE
SUITE 5000
SEATTLE, WASHINGTON 98104-7078
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

CODE ENFORCEMENT COMPLAINT FORM

CODE ENFORCEMENT
MUNICIPAL BUILDING/BOX 165
808 WEST SPOKANE FALLS BLVD
SPOKANE WA 99201-3333
(509) 625-6083

PLEASE COMPLETE ALL APPLICABLE INFORMATION AND RETURN TO THE ABOVE ADDRESS. PROVIDE AS MANY RELEVANT DETAILS AS POSSIBLE INCLUDING SPECIFIC ADDRESSES, LICENSE PLATE NUMBERS, ETC.

YOU MUST SIGN YOUR COMPLAINT BEFORE THE CODE ENFORCEMENT OFFICE CAN INVESTIGATE THE MATTER, UNLESS A LIFE THREATENING ISSUE EXISTS OR IF IT IS OTHERWISE DEEMED APPROPRIATE TO ACT.

ONE PROPERTY PER COMPLAINT FORM, PLEASE.

entered

VIOLATION INFORMATION:

ADDRESS OF PROPERTY BEING COMPLAINED ABOUT: 4801? 4811 N. Market
Spokane Wa 99207

PROPERTY OWNER (IF KNOWN) _____

NAME OF RESIDENT: Hollywood Adult Store PHONE NUMBER: _____

SUMMARY OF COMPLAINT: Store in violation — within Radius of 750 ft of Residential area
Erotic material found on our property

(If necessary use back of complaint form.)

HOW LONG HAS VIOLATION EXISTED? 3 or 4 weeks

COMPLAINANT INFORMATION: (REQUIRED)

YOUR NAME: Hillyard Dental Clinic Dr Joseph Astevino

YOUR ADDRESS: 4817 N Market Spokane Wa 99207

SPO 000004

HOME PHONE NUMBER: 327-7610 WORK PHONE NUMBER: 466-7300

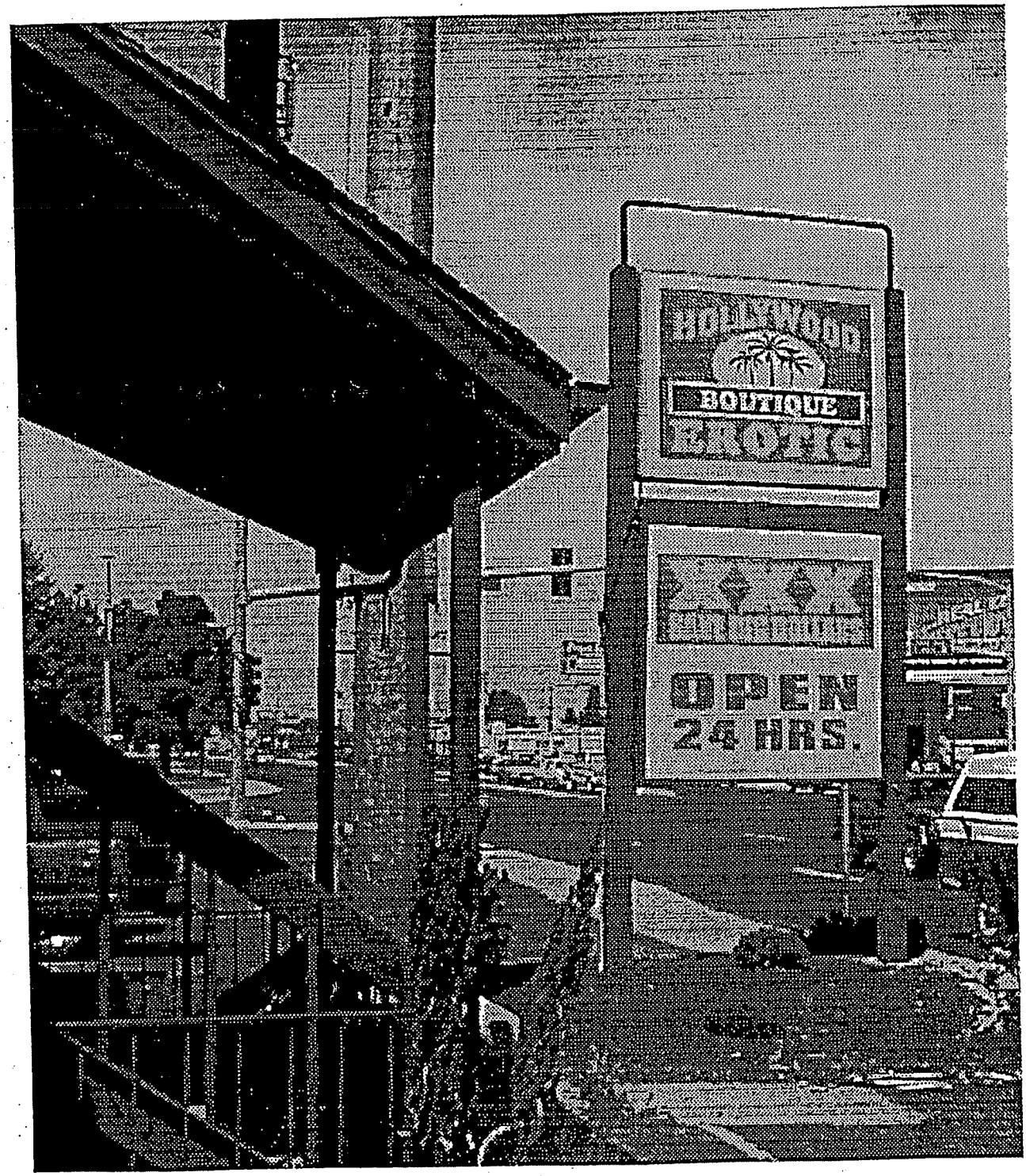
CONFIDENTIALITY PREFERENCE - DISCLOSURE OF INFORMATION REVEALING YOUR IDENTITY WILL DEPEND ON APPLICATION OF THE PUBLIC DISCLOSURE LAW, CHAPTER 42.17 RCW, OTHER APPLICABLE STATUTES AND WHETHER THE COMPLAINT IS CRIMINALLY PROSECUTED. WITH THAT UNDERSTANDING, PLEASE PUT YOUR INITIALS IN THE SPACE THAT INDICATES WHETHER OR NOT YOU DESIRE THAT INFORMATION REVEALING YOUR IDENTITY BE DISCLOSED. FAILURE TO SELECT DISCLOSURE OR NON-DISCLOSURE WILL RESULT IN THAT INFORMATION BEING SUBJECT TO DISCLOSURE.

RECEIVED
DEC 01 1998

EA DO NOT DISCLOSE _____ YOU MAY DISCLOSE
INITIAL INITIAL

SIGNATURE: Joseph Astevino DATE: 11-30-98

2-361



2-362

CODE ENFORCEMENT COMPLAINT FORM

CODE ENFORCEMENT
MUNICIPAL BUILDING BOX 165
808 WEST SPOKANE FALLS BLVD
SPOKANE WA 99201-3333
(509) 625-6083 FAX 625-6802

PLEASE COMPLETE ALL APPLICABLE INFORMATION AND RETURN TO THE ABOVE ADDRESS. PROVIDE AS MANY RELEVANT DETAILS AS POSSIBLE INCLUDING SPECIFIC ADDRESS, LICENSE PLATE NUMBERS, GARBAGE (HOUSEHOLD, YARD WASTE, WOOD) ETC.

A SIGNED COMPLAINT FORM IS NECESSARY BEFORE THE CODE ENFORCEMENT OFFICE CAN INVESTIGATE, UNLESS A LIFE THREATENING ISSUE EXISTS OR IF IT IS OTHERWISE DEEMED APPROPRIATE TO ACT.

ENFORCEMENT NUMBER

VIOLATION INFORMATION:
ONE ADDRESS PER COMPLAINT FORM:

ADDRESS OF PROPERTY BEING COMPLAINED ABOUT: 3813 N Ahrens

PROPERTY OWNER (if known): Mario Baldanti

NAME OF RESIDENT: _____ PHONE NUMBER: _____

SUMMARY OF COMPLAINT: Adult Bookstore

(If necessary use the back of complaint form.)

HOW LONG HAS VIOLATION EXISTED? Just beginning

COMPLAINANT INFORMATION: (REQUIRED)

PRINT YOUR NAME: Velma Amundson

YOUR ADDRESS: 3804 N Atlantic

Spokane Wa ZIP CODE: 99205

HOME PHONE NUMBER: 537 8554 WORK PHONE NUMBER: _____

CONFIDENTIALITY PREFERENCE: DISCLOSURE OF INFORMATION REVEALING YOUR IDENTITY WILL DEPEND ON APPLICATION OF THE PUBLIC DISCLOSURE LAW, CHAPTER 42.17 RCW, OTHER APPLICABLE STATUTES AND WHETHER THE COMPLAINT IS CRIMINALLY PROSECUTED. WITH THAT UNDERSTANDING, PLEASE INITIALS IN THE SPACE THAT INDICATES WHETHER OR NOT YOU DESIRE INFORMATION REVEALING YOUR IDENTITY BE DISCLOSED. FAILURE TO SELECT DISCLOSURE OR NON-DISCLOSURE WILL RESULT IN INFORMATION BEING SUBJECT TO DISCLOSURE.

RECEIVED

VA INITIAL DO NOT DISCLOSE _____ INITIAL YOU MAY DISCLOSE

JUL 26 2000

SIGNATURE: Velma M Amundson DATE: 7/25/00

COMPLAINT.SIENT (7-10-99)

SPO 000093

2-363

CODE ENFORCEMENT COMPLAINT FORM

CODE ENFORCEMENT
MUNICIPAL BUILDING BOX 165
808 WEST SPOKANE FALLS BLVD
SPOKANE WA 99201-3333
(509) 625-6083 FAX 625-6802

PLEASE COMPLETE ALL APPLICABLE INFORMATION AND RETURN TO THE ABOVE ADDRESS. PROVIDE AS MANY RELEVANT DETAILS AS POSSIBLE INCLUDING SPECIFIC ADDRESS, LICENSE PLATE NUMBERS, GARBAGE (HOUSEHOLD, YARD WASTE, WOOD) ETC.

A SIGNED COMPLAINT FORM IS NECESSARY BEFORE THE CODE ENFORCEMENT OFFICE CAN INVESTIGATE, UNLESS A LIFE THREATENING ISSUE EXISTS OR IF IT IS OTHERWISE DEEMED APPROPRIATE TO ACT.

ENFORCEMENT NUMBER

VIOLATION INFORMATION:
ONE ADDRESS PER COMPLAINT FORM:

ADDRESS OF PROPERTY BEING COMPLAINED ABOUT: 3813 N. [redacted] DIVISION ST.
SPOKANE, WA.

PROPERTY OWNER (if known): MARCO BARBANTI

NAME OF RESIDENT: _____ PHONE NUMBER: _____

RY OF COMPLAINT: According to information I have the above named person is planing to open an adult bookstore or an entertainment establishment at the above address. According to Zoning Code 11.19.143-B2-1 Zone the (over)
(If necessary use the back of complaint form.)

HOW LONG HAS VIOLATION EXISTED? _____

COMPLAINANT INFORMATION: (REQUIRED)

PRINT YOUR NAME: FLOYD D. CONNOR

YOUR ADDRESS: 3818 N. ATLANTIC ST.
SPOKANE, WA. ZIP CODE: 99205-3067

HOME PHONE NUMBER: 509-327-8806 WORK PHONE NUMBER: NONE

CONFIDENTIALITY PREFERENCE: DISCLOSURE OF INFORMATION REVEALING YOUR IDENTITY WILL DEPEND ON APPLICATION OF THE PUBLIC DISCLOSURE LAW, CHAPTER 42.17 RCW, OTHER APPLICABLE STATUTES AND WHETHER THE COMPLAINT IS CRIMINALLY PROSECUTED. WITH THAT UNDERSTANDING, PLEASE INITIALS IN THE SPACE THAT INDICATES WHETHER OR NOT YOU DESIRE INFORMATION REVEALING YOUR IDENTITY BE DISCLOSED. FAILURE TO SELECT DISCLOSURE OR NON-DISCLOSURE WILL RESULT IN THAT INFORMATION BEING SUBJECT TO DISCLOSURE.

_____ DO NOT DISCLOSE _____ YOU MAY DISCLOSE
INITIAL INITIAL

SIGNATURE: Floyd D. Connor DATE: July 24, 2000

I:\COMPLAIN.SIG (12-10-99)

Pg 2
(Floyd Armor)

above named person
is in violation of the code as ~~he~~ is less than
750 feet from a public playground known as "Clark
Park" which is just across Garland Avenue and
this bookstore is only about 20 to 30 feet from
one family residence as I live across the alley
from the proposed site. Also I don't want
that bookstore close to other children that
lives within the 750 foot area.

CODE ENFORCEMENT COMPLAINT FORM

CODE ENFORCEMENT
MUNICIPAL BUILDING BOX 165
808 WEST SPOKANE FALLS BLVD
SPOKANE WA 99201-3333
(509) 625-6083 FAX 625-6802

PLEASE COMPLETE ALL APPLICABLE INFORMATION AND RETURN TO THE ABOVE ADDRESS. PROVIDE AS MANY RELEVANT DETAILS AS POSSIBLE INCLUDING SPECIFIC ADDRESS, LICENSE PLATE NUMBERS, GARBAGE (HOUSEHOLD, YARD WASTE, WOOD) ETC.

A SIGNED COMPLAINT FORM IS NECESSARY BEFORE THE CODE ENFORCEMENT OFFICE CAN INVESTIGATE, UNLESS A LIFE THREATENING ISSUE EXISTS OR IF IT IS OTHERWISE DEEMED APPROPRIATE TO ACT.

ENFORCEMENT NUMBER

VIOLATION INFORMATION:
ONE ADDRESS PER COMPLAINT FORM:

ADDRESS OF PROPERTY BEING COMPLAINED ABOUT: 3813 N. Division
Spokane, WA. 99205

PROPERTY OWNER (if known): Marco Barbanti

NAME OF RESIDENT: _____ PHONE NUMBER: _____

SUMMARY OF COMPLAINT: Please do not approve Business opening in above Adress. It is obvious to be in violation of: 11.19.143 - B2.1 ZONE I Live in the same - Block seperated by Alley. My grandchildren are frequent visitors & have many children on this block living here! Please say NO!
(If necessary use the back of complaint form.)

HOW LONG HAS VIOLATION EXISTED? _____

COMPLAINANT INFORMATION: (REQUIRED)

PRINT YOUR NAME: Karen L. Rel

YOUR ADDRESS: 3804 N. Atlantic St.

Spokane, WA. ZIP CODE: 99205-3017

HOME PHONE NUMBER: 325-6417 WORK PHONE NUMBER: 325-6417

CONFIDENTIALITY PREFERENCE: DISCLOSURE OF INFORMATION REVEALING YOUR IDENTITY WILL DEPEND ON APPLICATION OF THE PUBLIC DISCLOSURE LAW, CHAPTER 42.17 RCW, OTHER APPLICABLE STATUTES AND WHETHER THE COMPLAINT IS CRIMINALLY PROSECUTED. WITH THAT UNDERSTANDING, PLEASE INITIALS IN THE SPACE THAT INDICATES WHETHER OR NOT YOU DESIRE INFORMATION REVEALING YOUR IDENTITY BE DISCLOSED. FAILURE TO SELECT DISCLOSURE OR NON-DISCLOSURE WILL RESULT IN INFORMATION BEING SUBJECT TO DISCLOSURE.

_____ DO NOT DISCLOSE (INITIAL) KLR (INITIAL) YOU MAY DISCLOSE

SIGNATURE: Karen L. Rel DATE: 7/24/2000

I:\COMPLAIN.SIG(12-10-99)

SPO 000096

2-366

Attachment "A"

PROPOSED AMENDMENT TO THE SPOKANE COUNTY ZONING CODE
"Adult Retail Use Establishments"

Added wording is in underlined
Deleted wording is in strike-through.

Amend Chapter 14.300(Definitions) as follows:

~~Adult Bookstore: An establishment having as a substantial or significant portion of its stock in trade, books, magazines and other periodicals which are distinguished or characterized by their emphasis on matters depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section.~~

Adult Entertainment Establishment: An establishment defined pursuant to Chapter 7.80 of the Spokane County Code. ~~An enclosed building, or any portion thereof, used for presenting performances, activities, or material or relating to "specified sexual activities" or "specified anatomical areas," as defined in this section, for observation by patrons therein; Provided, however, that a motion picture theater shall be considered an adult entertainment establishment if the preponderance of the films presented is distinguished or characterized by an emphasis on the depicting or the describing of "specified sexual activities" or "specified anatomical areas"; provided further, however, that a hotel or motel shall not be considered an adult entertainment establishment merely because it provides adult closed circuit television programming in its rooms for its registered guests~~

Adult Retail Use Establishment:
A retail establishment which, for money or any other form of consideration, devotes a significant or substantial portion of stock in trade, to the sale, exchange, rental, loan, trade, transfer, or viewing of adult oriented merchandise.

"Adult oriented merchandise" means any goods, products, commodities, or other ware, including but not limited to, videos, CD Roms, DVDs, magazines, books, pamphlets, posters, cards, periodicals or non-clothing novelties which depict, describe or simulate specified anatomical area or specified sexual activities.

"Specified anatomical areas" means
1) less than completely and opaquely covered human genitals, pubic region, buttock, or female breast below a point immediately above the top of the areola; or
2) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

"Specified Sexual Activities means any of the following:
1) Human genitals in a state of sexual stimulation or arousal;
2) Acts of human masturbation, sexual intercourse, sodomy, oral copulation, or bestiality; or

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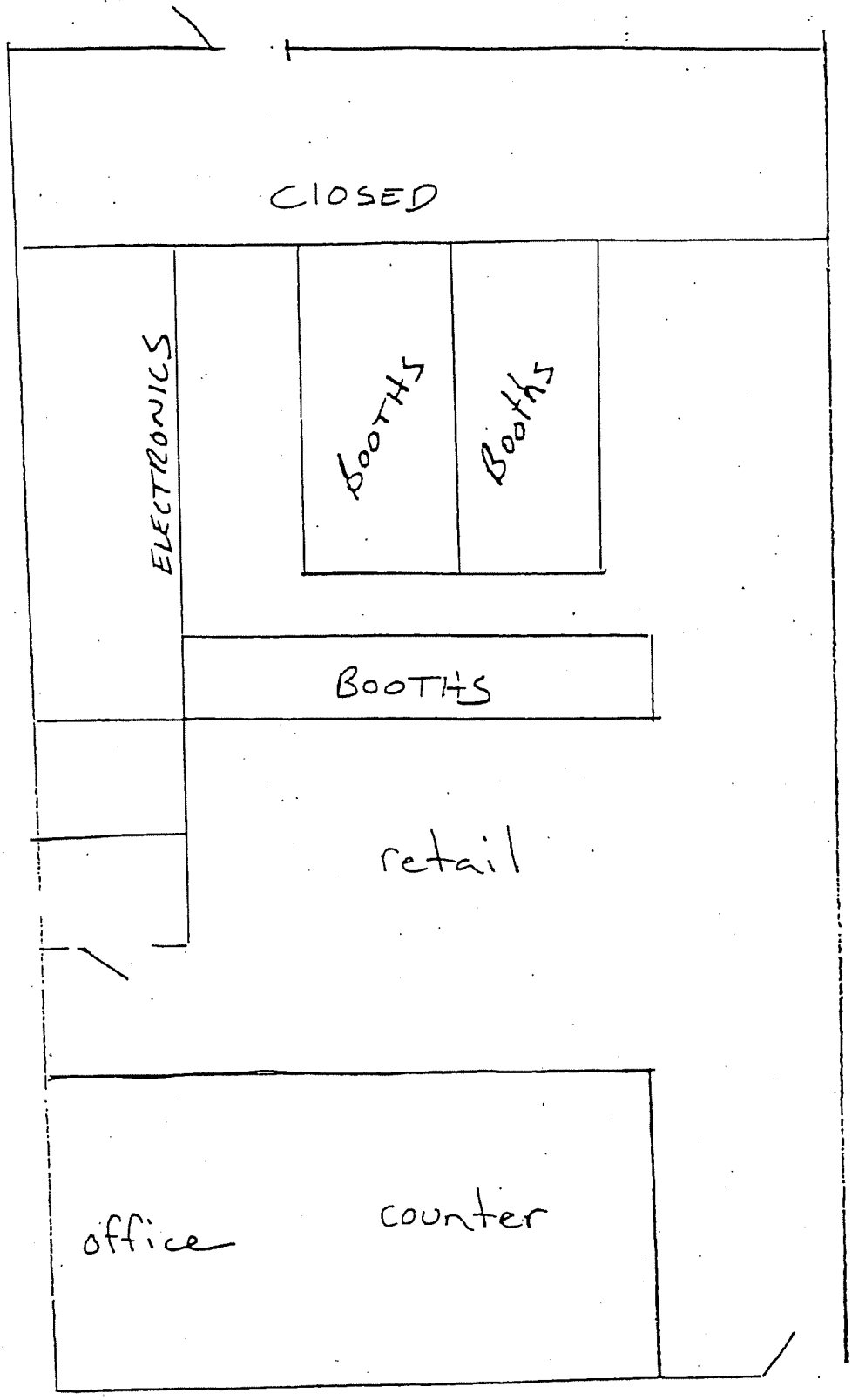
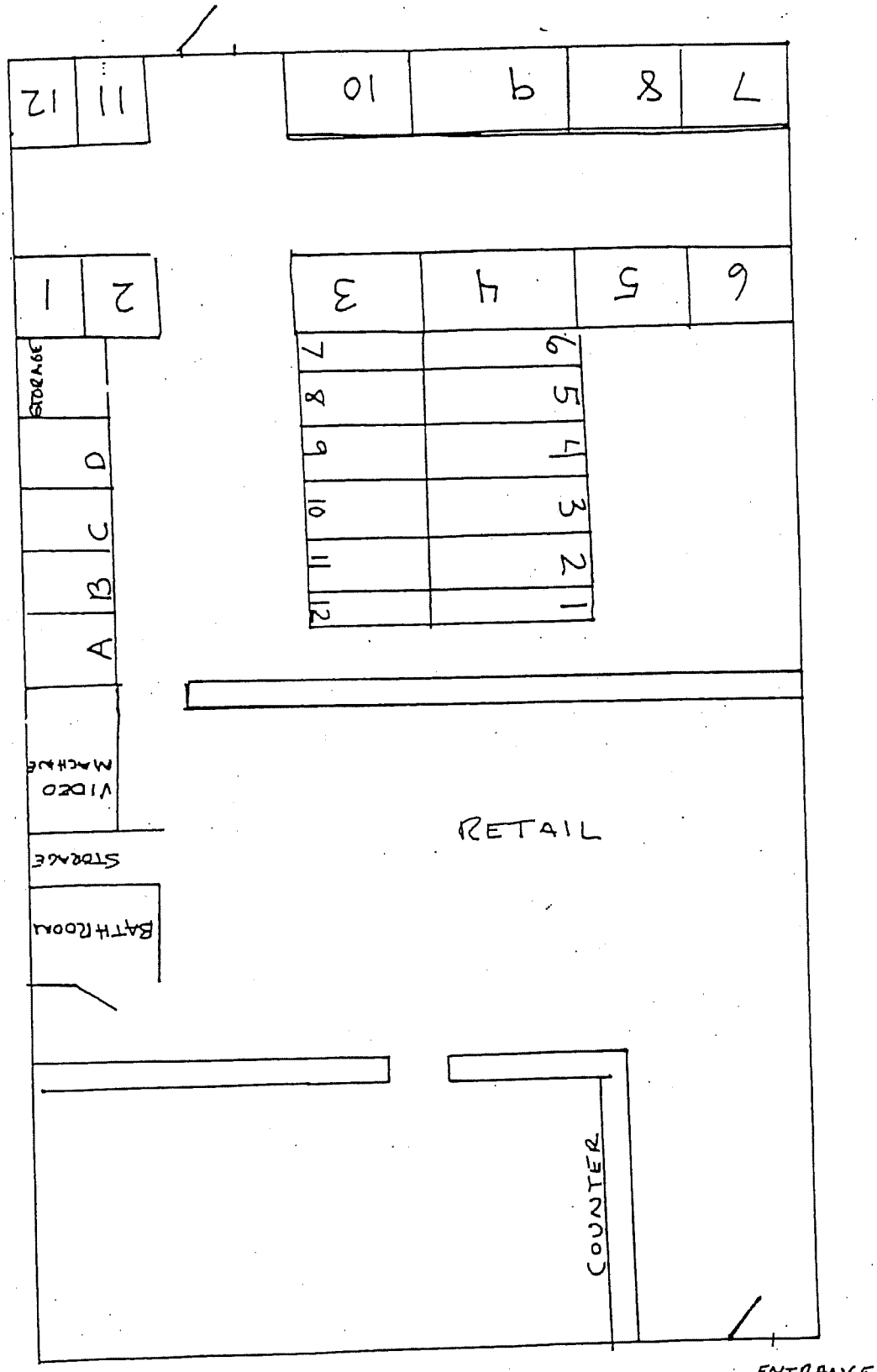


1811 E. Sprague
2/11/97

2-369

SPO 001063



origional configuration

1811 E Sprague
2-21-95

SPO 001064

2-370

CONFIDENTIAL

MISC[ ] TELEPHONE[ ] FIELD REPORT[X] xx

CITY[X] COUNTY[ ] COMPLAINT#

DATE: 07-28-98 OFFICER'S REPORT: DTP PAGE OF

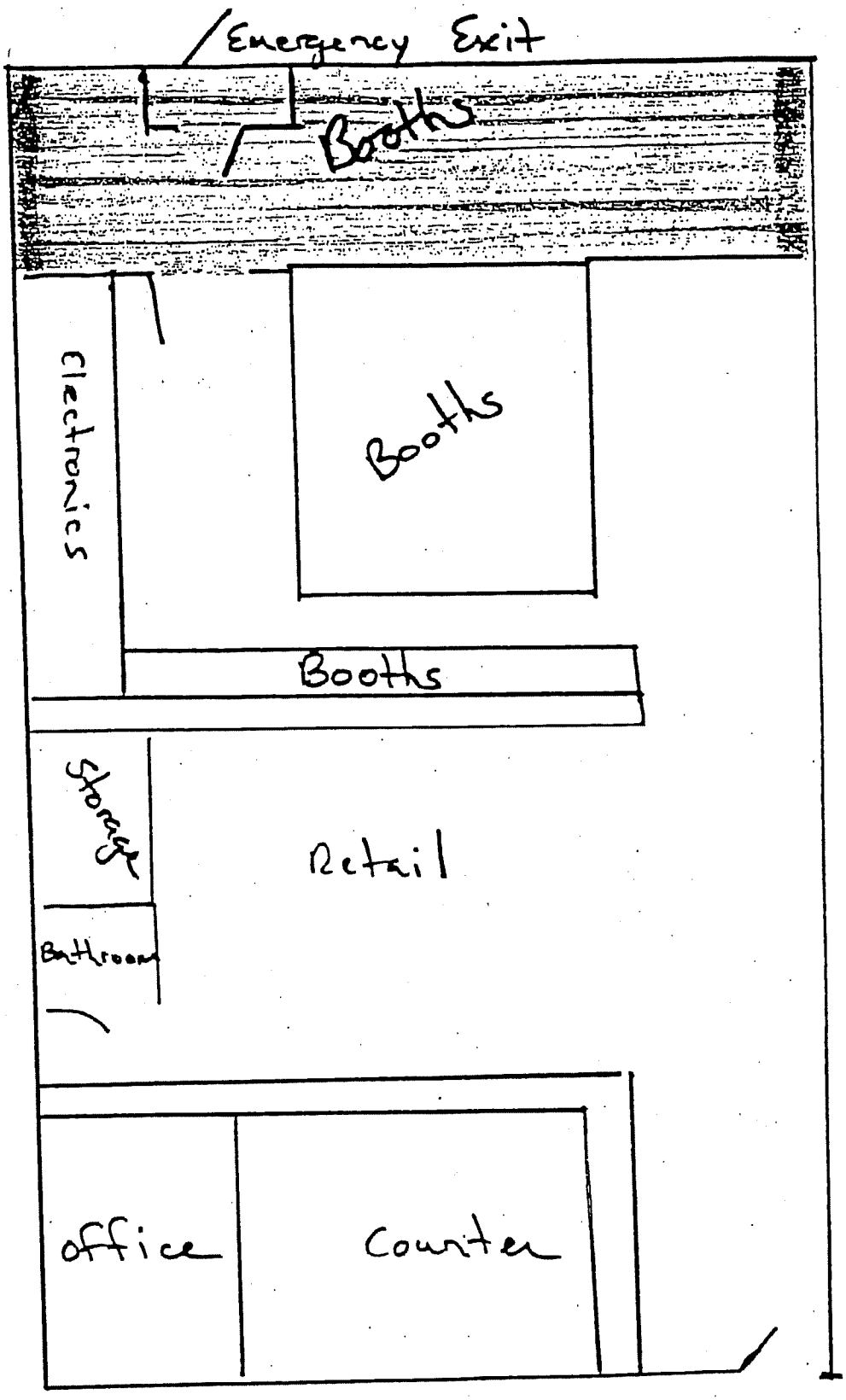
CONVERSATION WITH:

ADDRESS: 1811 E. Sprague

PHONE NUMBER:

LOCATION OFCOMPLAINT: 1811 E. Sprague World Wide Video

NARRATIVE (Complaint & action taken) The subject property is operating booths in the rear of the store in two areas. The first area was open, had full closing booths with lockable doors. Glory holes were in these booths, and the customer had a choice of pornographic viewing material that is metered out based on tokens paid. The secondary booth area was not operational. The door leading into this area was partially open with a fan located inside the first viewing area. Flexible hose on the floor ran inside the secondary booth are for ventilation. A sign indicating that the second area was closed was hanging from the doorway. An outside entrance located in the second viewing area was open, probably to allow for air flow.



1811 E Sprague

CONSTRUCTION WITHOUT PERMIT

SPO 001066

2-372

MINUTES

CITY PLAN COMMISSION
WEDNESDAY, FEBRUARY 13, 2002
PLANNING DEPARTMENT CONFERENCE ROOM 200-2B
CITY HALL – SPOKANE, WASHINGTON

MEMBERS PRESENT: Stanley Stirling, President, Ted Horobiowski, Jeff Bierman, David Bray, Karen Byrd, Charis Keller, William Kelley and Jim Wilson.

MEMBERS ABSENT: Candace Dahlstrom and Julie Dhatt-Honekamp.

LIAISON PRESENT: Al French, Council Member.

STAFF PRESENT: John Mercer, Planning Director and Secretary to the Plan Commission; Louis Meuler, City Planner; Dick Raymond, Principal Engineer; Jim MacInnis, Principal Engineer; Lars Hendron, Principal Engineer; and Tim Szambelan, Assistant City Attorney. Ken Pelton, City Planner present at the afternoon workshop.

PUBLIC HEARING

President STAN STIRLING called the meeting to order at 1:14 p.m. This is a public hearing by the City Plan Commission and the proposed amendments to the text of the Spokane Municipal Code regarding Adult Retail Establishments and Adult Entertainment Establishments. The second hearing will be on the Six Year Water and Sewer Capital Improvement Program 2002-2007.

A. Proposed Amendments to the text of the Spokane Municipal Code with regards to Adult Retail Establishments and Adult Entertainment Establishments.

LOUIS MEULER advised that this was the second hearing related to the same topic area with copies of the proposal and a map available for review. The main change is in the zoning code relating to how Adult Retail and Entertainment Establishments can locate within the City of Spokane. The location requirements in the main proposal, B2-1 zone, to change from the nearest building to the nearest building to property line to property line and must distant themselves 750 feet from public

2-373 SPO 001474

library, park, schools, daycare, church and from another adult retail use establishment. Another change would apply these same standards that to uses and zones both within the City of Spokane and outside the City of Spokane. Item 3 clarifies the County zones that would be buffered. The major amendment would include a new zoning category for these uses to relocate; the M1 zone (light industrial zone). The M1-1 zone was removed from the proposal since the hearing in December. Item 3 would continue to exclude the uses from the M2 and the M3 zones. Item 4 regarding the CBD 5 zone downtown, updates the code with the current definitions of adult use entertainments, and makes this zone subject to the special provisions of SMC 11.19.143. Item 5 clarifies Title 10, which controls the hours of operation(could not operate during the hours of 2:00 a.m. and 10:00 a.m).

Mr. Meuler then pointed out on a map where the adult uses could relocate presently verses the proposed changes.

Mr. Meuler responded to Mr. Horobiowski's inquiry as to the reason the M1-1 zone was removed. It was removed because there are still many non-conforming residential uses within this light industrial zone.

Mr. Meuler responded to Mr. Horobiowski's inquiry; the reason for the amendment is to allow for more property to be available for this type of use. Mr. Meuler confirmed that the approximate number of parcels available under the proposed amendment and including the 750-foot separation is 29 potential simultaneous sites and 610 parcels and 360 acres within parcels. This is compared to 7 simultaneous sites from the initial ordinance adoption not including the CBD zone, which is not yet calculated. Today there are 7 uses today in the City of Spokane that are non-conforming and have 1 year from March 9, 2001 to relocate. All 7 of them have requested extensions for the termination dates to allow them time to find an appropriate place to relocate to.

Mr. Stirling opened the floor up for public testimony.

Public Testimony by:

1. **Richard Mertens**

Tim Szambelan explained that if an adult entertainment establishment legally establishes in a location and if a church locates within 750 feet, that adult use would have non-conforming use rights.

Mr. Meuler explained why the adult uses are mainly located in the northeastern area and the history of the city's zoning geography.

2. **Penny Lancaster**

Verbatim

3. **Karen Roberts**

Hello. I'm Karen Roberts. I live at 3804 North Atlantic Street. I'm the southwest corner of Garland and Division, just a mere few feet from my shop and my backyard is, and I will refer to it as my Triple X Boutique. I have always loved my neighborhood. Uh, I am non-judgmental of people's ways of life. We've always had a time of helpfulness to each other when we need it. We have a lot of elderly people in our community and our neighborhood as well. And I'm the night owl. I watch all of the businesses at night for our block watch. And I have learned a new language. I have learned a new way of life that is totally foreign to me.

I'm hear to tell you the impact that the Triple X Boutique has had on me personally, and my small business at my home and what I've observed since the Triple X opened for business. It came in, in the night. I got up the next morning and saw this vivid store painted. It is right next door to a real estate. They have only two parking spots at the Triple X but they use the realtor's parking area all the time.

I work late in my home office at night, from my workshop behind my house, which is my two care garage. I make beds. Um, I use my computer. I face the alley and their lights come right into my office all night long when I'm out there working. I've observed and seen many things that have upset me and my security and well-being and peace of mind. I want to share with you what I consider an unbiased but honest observations and personal experiences I've seen and had. I'm rarely away from my property so I observe a lot. I don't stress observing a lot, it comes to me, I don't need to look for it. My workshop is separate from the house and it's next to the alley so I'm in two areas both facing the alley and back entrance.

Shortly after the Triple X Boutique was open for business, I was working at night, it was around eleven, in my shop alone as my husband was in the hospital. I heard a man yelling at me. I jumped, I turned, obviously I could see what he was doing. He was masturbating and asking me if I would f--- him and other vulgarities. I beat feet for the house. I called 911 and of course he was gone as quickly as I left too.

I am still affected by that. I don't work at night any longer. A neighbor who used to live three houses north of me in the same block had young children that played in this alley that separates us from the Triple X. Nice

little rolling hills and stuff for their skateboards. I got them to watch for traffic. One little boy who had to have been only, maybe 4 says, "What's pornaphy?" to his brother. His brother says, "Oh, dirty pee pee." Why should they have to have this kind of influence? It is affecting them.

At various times around the clock, and I do mean 24 hours a day, I've heard and seen cars and groups meeting in the parking lot, obviously partying. They are all leaving together after they go into the Triple X and get whatever it is that they get. One night a taxi pulled up. Now you have to realize this has been going on since they opened. This isn't just me sitting out there waiting for something to happen. One night a taxi pulled up in the parking lot of the real estate office, he got out, leaned against the door of his car, and a young girl came between the two buildings of the Triple X and the real estate office, and she ... they exchanged something, I'm assuming it was money, and she performed oral sex. She left, he got in the taxi and left. These are all things that are happening outside of the business establishment. Believe me, none of this was going on before this business moved in.

We used to have an all night doughnut shop on the corner of Garland and Division. Many of us night owls couldn't sleep ... we'd meet up there and have coffee and doughnuts. And I love my maple bars. When I die I know that I'm going to maple bar heaven. But, now we don't see anybody walking at night in our neighborhood. We see a lot of traffic and I do mean a lot of traffic.

When they come in the day time, they park in front of our house on Atlantic, walk around through the alley nonchalantly, go into the back entrance, come back out carrying a Nordstrom's or a Bon Marche sack with whatever it is that they just bought.

Now my customers come to my shop and it's a garage. I've had occasions of their children picking up video covers from these videos that they get there. Mothers saying, "Ah, yuck! Get it out. Get in the car, we're leaving." There went my possible sale. This is my business, this is how I live. My husband and I work very hard because we didn't fit the molds,we couldn't get jobs. My husband is disabled with no pancreas, by the way 3 in the state that's living without one. I'm so hurt and so angry because we're not being protected by letting that business come in there in the first place. We're talking less than 50 feet, less than 130 feet from the park. Why? Why? I'm not going to cry today, I promised myself that. Now, besides having to pick up pornography covers, pick up pregnancy tests, fast food wrappers, beer bottles, wine bottles, these are not there before, this is all started since this business opened up. I wear rubber gloves, go out every morning, and pick up condoms, etc.

Now some customers, on a lighter note, you know with the Bon Marche thing, they're daytime people, they're total different group,they're non-evasive, they don't bother. The amount of traffic is heavier on the weekends late at night, and I do mean all night long. Groups meet there. Taxi cab drivers meet groups there. They all leave together once they have one person go in ... come out with a box of stuff. They have a lot of young girls come that come in there with truck drivers in their tractor trailer rigs, without the trailers, that are ... I've learned from my husband that they're probably prostitutes. Um, they're pretty scantily clad and this is in this winter. Am I the neighborhood pinched nose, spinster, busy body? No, I am not. Ever since the incident of this man outside my shop window, I've been on guard. It may seem to some folks that I'm overreacting. I can assure you before this ever happened my neighborhood never had these occasions.

I miss the people walking in the alley hand in hand, walking their dogs. One old man that faithfully walked his dog every night at 9:15. Why 9:15 I don't know but his says, "I'm on time," as he'd go by. He's no longer doing this.

It's open 24/7 guys and it's never caused us any problems before that. My husband and I used to enjoy walking up the alley late at night too. And I've had occasions of customers coming to my house for gas ... they're locked out of their car. I've tried to help them. These are customers of the Triple X Boutique. Several, and I have to say about 3 or 4 times now, after I couldn't help them, I went back to my house cause its gettin dark. They come back 2 hours later and bang on my back door and say, "Hey lady have you got a coat hanger maybe?" Yes I should help my fellow man but guys, come on, I think this is asking a lot. I don't go out at night, even in my back yard. My neighbors don't venture out much at all.

I pray I won't be a target for any of the Triple X followers for giving this testimony today cause I'm really scared for being here today. My husband and my castle is no longer protected by our moat the alley. To me it's full of alligators out to get me. I pray you've all listened to my story and you take it to heart.

Thank you.

Stan Stirling: Any questions?

Karen Roberts: I'm going to hold up what I get in my yard. (Mrs. Roberts holds up a cover to a video)

4. **Anne Mertens**
5. **Paul Hamilton**

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Mr. Stirling closed public testimony.

Mr. Bray explained to the public that the Commission has an obligation to be fair and meet the needs of the community but they cannot regulate someone out of business. The Commission also needs legislative record to support a decision; increasing the buffer zone to 1000 feet runs the risk of not being supported legally.

Commission members clarified to the public that though 29 sites are zoned as available, it does not make 29 sites readily available for the uses to relocate.

DAVID BRAY made the motion to accept these amendments to the ordinance as written as a recommendation to the City Council.

M/S by CHARIS KELLER.

Ted Horobiowski asked Mr. Meuler to explain the 750 feet verses the County's 1000 feet buffer. Mr. Meuler explained the spatial relationship; the geography within the City is roughly 58 square miles compared to the entire County, which is over 1850 square miles and the zoning configuration leaves limited buffering possibilities for the City.

Mr. Mercer confirmed the motion with Mr. Bray.

The motion passed unanimously.

10 minute break

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John Mercer, Secretary

M I N U T E S

SPOKANE CITY PLAN COMMISSION
WEDNESDAY, NOVEMBER 29, 2000
CITY COUNCIL CHAMBER
AND
PLANNING DEPARTMENT CONFERENCE ROOM 200-2B
SPOKANE, WASHINGTON

MEMBERS PRESENT: Stanley Stirling, President; Phyllis Meyer, Vice-president; David Bray; Candace Dahlstrom (arrive at 10:00 a.m.); Robert Herold; Ted Horobiowski; William Kelley; Phyllis Meyer; George Nachtsheim (arrive at 1:30 p.m.).

MEMBERS ABSENT: Mike Kennedy; Jim Wilson.

LIAISON PRESENT: Al French, Neighborhood Council Liaison.

LIAISON ABSENT: Rob Higgins, City Council Liaison.

President Stanley Stirling called the meeting to order at 9:45 a.m. with a quorum present.

1. PUBLIC HEARING

   A. A public hearing to consider proposed text amendments to the Spokane Municipal Code Section 11.19. (Zoning Code) with regards to the definitions and regulations for 'Adult Use Establishments."

Mr. Stirling called on Patti Connolly Walker, Spokane County Prosecuting Attorney's Office for a report on the above described issue.

Ms. Walker said for the record she is also employed by the City as a City Attorney. Her office is in the county building. She went on to say that being presented is an Adult Retail Use Establishment Ordinance which are historically referred to in the city code as 'adult businesses' or 'adult bookstores'. The reason for the change in wording is that in the last several years the City of Spokane has been working with other cities across the state to develop an ordinance essentially working from a model ordinance so that all the cities and counties across the state that are looking at this issue would be 'on the same page.'

Therefore, they are not different terminology, different definitional sections so that when there are challenges to this type of an ordinance, staff can rely on what other entities have done.

Ms. Connelly said she would like to begin by talking about the type of business. People think that because these businesses sell material that is protected by the first amendment that there can be no regulation or zoning of this type of business and that is an incorrect assumption. They proceed when enacting ordinances of this type with the assumption that the material that is being sold, rented, leased, loaned, out of these businesses is protected by the first amendment. Occasionally it is discovered that these businesses do sell material which is considered obscene so it is not just regular adult pornography but it is pornography that crosses the line of protected material and is unprotected obscenity. The attorney's office begin with the assumption that the material that is sold in these facilities is entitled to first amendment protection. That doesn't mean that the business can't be regulated in any way. These businesses are treated essentially, from the court's perspective the same as an adult entertainment establishment that provides on-site viewing of adult activities like nude dance establishments. The other type of facility in the city and county are referred to as adult arcade establishments. Those are facilities that have peep show booths and also sometimes in the peep show booths not just video viewing but live dancing in the peep show booths. Each of these type of facilities do engage in activities are at the periphery of first amendment protection. With book stores they are a little more clear. They are entitled to full first amendment protection. The Courts have looked at this issue and determined that it is permissible for cities and counties to legislate, regulate, license, these types of facilities because of one main issue. That is that these types of businesses have historically been shown to produce as adverse secondary effects. Those adverse secondary effects are well-documented in the case law. There have been numerous studies over the last 25 years which have well-demonstrated the fact that adult entertainment businesses in general cause neighborhood blight, they cause a down-turn in property values, increase in crime and a whole host of other problems. For this reason the courts have determined that it is permissible to zone, regulate or license a book store, an adult entertainment establishment that is essentially a book store because they have been shown to produce similar adverse secondary effects to other adult entertainment establishments. So that the fact that you have a business that does not have on site viewing of adult entertainment activities, so you go into the retail use establishment or the adult bookstore, you merely purchase, rent, borrow, material. You don't actually watch in a arcade peep show booth or look at nude dancing in the establishment. The mere fact that you can purchase that material and take it away has for a variety of reasons caused the adverse secondary effects that has been previously mentioned. Therefore, the courts have determined that cities and counties do have a substantial governmental interest in curbing the adverse secondary effect of those businesses and one of the ways that a city or county can do that is by zoning these facilities.

Some cities and counties have gone to concentration models where they have essentially set up a 'red light district'. They will require that all of the adult entertainment facilities locate in an industrial, for example. The purpose of that is to remove them from

residential areas. For some cities and counties that works well because they have an area that is separated from the rest of their population. Most cities go with a dispersement model. That is what is being proposed to the Commission. The dispersement model is one that requires the facilities not locate within a certain distance of other businesses or residences that might experience adverse secondary effects if they are located in close proximity to one of the adult retail use establishments. The zoning buffers being recommended are the same recommended when the adult arcade ordinance was enacted. It is believed that the adverse secondary effects are very similar. A lot of the same issues are being dealt with and the distancing requirement of 750', in terms of requiring that these businesses not be within 750' is a reasonable distance given the makeup of Spokane and the issues that the Plan Commission determines in terms of planning and preparing for uses in the future. The goal is to keep the businesses as far away as possible from places where children might congregate, such as schools, churches, day cares, parks, residences but allow them to locate within the City of Spokane but require that they not be located in close proximity or within 750' of other adult entertainment establishment. It has been found that where these facilities are allowed to congregate impact on the neighborhood is increased for example along East Sprague.

Ms. Walker said what cannot be done is zone the places out of business. It is not permissible according to state & US Supreme Court. These businesses do have a first amendment right to sell material and they have a right to do it in most communities. Therefore the ordinance being proposed is 'content natural'. If the ordinance is designed to curb the 'adverse secondary effects' it is considered content neutral. It does not mean that the city can't target a business that sells first amendment protected material. What content neutral means is that the city is dealing with the business that sells first amendment protected material, adult entertainment merchandise in a way that ensures that a substantial government interest, or compelling governmental interests which is to curb the adverse secondary effects. An ordinance needs to be narrowly tailored to achieve that interest. It is done by insuring that there are reasonable alternative avenues of communication for those businesses. The city insures that there are sufficient sites where they can locate within the city. Currently there are six retail use establishments in the City of Spokane.

Spokane does not, as do some cities, require that each adult entertainment use be a single use only. Some cities and counties have limited the use. Those cities that have done that have a great deal of problems. It is also difficult to establish that having a place that has adult material for sale and nude dancing in the same establishment causes more or worse adverse secondary effects. It is very difficult to separate those out. For that reason, staff is recommending the ordinance before the Commission today. It does not state that one cannot have an adult bookstore in the same facility as a adult nude dance establishment or as an arcade facility. What has been done is to ensure that there is sufficient number of alternative avenues for these places to sell their ware or loan their merchandise or trade it in whatever fashion they choose. The Planning Department has insured that there is a sufficient number of sites to which these businesses (the six businesses currently not conforming with what is proposed today) to relocate to.

With regard to relocation, case law has come down to a case by case basis by making an analysis as to whether or not a city or county has provided alternative avenues of communication if they have provided enough sites. Part of the reason for that is that the courts will look at a Planning Department's purpose or a Planning Commission's purpose when they are developing a growth management act or a overall plan for their city or county. When they do that the courts are required to look at each situation on a case by case basis. Some of the courts have said that is permissible if you have a certain percentage of land available for these businesses to locate or if there are a certain amount of sites or a specific type of site. The bottom line is – is there the same number of sites or more sites available for relocation than the number of businesses currently in operation in the community. Staff believes that the 750' dispersement model is a reasonable one for the Plan Commission to recommend adoption on because there is a reasonable alternative avenue of communication for these businesses.

Further, with regard to the relocation aspect, the City in its retail use ordinance indicated that these businesses that are retail use establishments will be required to relocate if they are not in conformance with the 750' dispersement model within one year of the adoption of the ordinance. That is the amortization provision. The amortization provision allows these businesses one year. The intent is that they should be given a sufficient amount of time to recoup any money that they might have expended at that particular location. What the courts have said is that they have a constitutional right to sell the material, to make it available for viewing but they don't have a constitutional right to make a profit. A city has to permit the businesses to locate someplace and have a viable business. To insure that occurs, an amortization period is provided. The recommended amortization period is one which has been adopted by many other cities and counties across the country. Also, built into the amortization provision a hardship provision where a business can demonstrate that they will incur substantial hardship or the facility is not for use for any other purpose they can ask for an additional amortization period (have the amortization period be extended). Spokane County adopted essentially the same ordinance a year ago, being proposed to the Commission today. The County Planning Commission chose to recommended an amortization period of five years. Ms. Walker said it is her opinion that that is overly generous. It delays the time within which the city or county will be sued because it gives the business plenty opportunity to get into other areas or find sites. She said she is recommending the one year amortization period.

Ms. Walker said one of the issues that comes up with this type of ordinance is the language that chosen in relation to the definitional provision. She read that into the record as follows:

> An adult retail use establishment is an enclosed building or any portion thereof which for many or any other form of consideration devotes a significant or substantial portion of stock in trade to the sale, exchange, rental, loan, trade, transfer, or viewing of adult oriented merchandise.

Ms. Walker explained to the Commission that adult oriented merchandise is defined the same way as adult arcade businesses is defined and in the County for nude dance

establishments. The adult oriented merchandise definition essentially says that if there is specified sexual activities for specified sexual material then that falls within the category of adult oriented merchandise. Those definitional provisions have been tried over and over again over the last 25 years and always withstood constitutional challenge.

With regard to the "devotes a significant or substantial stock in trade" provision has also been tried over the last several of years. Not just in this area but also having to do with other provisions have to do with other provisions in the United States code.

She said she is proposing the substantial stock in trade definitional provision because she believes it is defensible, reasonable, it is not difficult for adult retail businesses to determine whether in fact they fall within that criteria or not. This does not apply to the 7-11 that has a couple of adult entertainment videos for sale or rent, it doesn't target the kind of business that might have a little risqué lingerie or anything of that nature. It is intended to encompass only businesses that sell adult entertainment material to individuals who go there for that purpose. The way to demonstrate the way she has done her homework is by presenting a very detailed legislative record. Some cities and counties don't have the experience of having a very good local legislative record.

Ms. Walker said she would give a list of the kind of adverse secondary effects that are expected and are well documented in the legislative record. These pop up repeatedly in court cases. Both the US and the State Supreme Court have discussed at length these kind of businesses and what they do to neighborhoods and communities. The kinds of adverse secondary effects seen locally are an impact on the surrounding neighborhoods, in residential neighborhood traditionally crime rates increased, property values decrease and an increase in transiency. The values of residential and commercial properties tend to be diminished dramatically and the closer the distance to the residence or to the business of the adult entertainment establishment the more dramatic the increase or the decrease in property values. The increase tends to be more dramatic where there is a concentration of businesses. So if there is more than one adult entertainment establishment in close proximity to another adult entertainment, historically there is worse adverse secondary effects in that area.

DAVID BRAY asked for a definition of "viable alternative location".

Ms. Walker said in the State of Washington is the Renton case, which dealt with the same issue. The bottom line is that you can't provide them an alternative location that is under water. You have to insure that it is in an area where there is a sufficient infrastructure, where roads can lead to these facilities. It can't be a remote or unbuildable location that it is not a reasonable alternative. It is not necessary to say there is a certain number sites and show where they are located. All that is necessary is to say that there are sufficient sites available. The city does not have to find those sites for them.

PUBLIC TESTIMONY:

JOE ASTERINO, 4717 N. Market, said he is one of four dentists in downtown. The practice has been there since 1947. He said he has been there 35 years through "thick and thin". Bikers, bars, fights, but the detrimental aspect of the book store right next door to them has financially impacted them. His staff has to go out and pick up books, wrappers, every morning. Female employees have been rudely accosted. Three weeks ago they tried to usher some young men off their property that had been around the book store (Hollywood Boutique) and they proceeded to get a rock and throw it through one of his patients windows. (That's on a police report). A pedidontist in his building sees a lot of children. The patients parents of these children are not happy with them. They will go elsewhere. This is a financial impact that they aren't going to stand for. He is in the process of selling his practice, his part of the practice. There is hundreds of thousands of dollars involved in this. They are the largest employer in downtown Hillyard. Three people have looked at his practice and have all commented on the aspect of an adult bookstore next door to them. This bookstore is within 700' of residential and single dwellings. So they are already illegally located. He said he understands that Ms. Walker has said this cannot be defended but he has obtained legal advice as a result of the violent incident and until a few days my attorney has been in the process of looking for someone who will handle this case on a financial aspect. The new patient load in just this year has dropped 18 percent. This is a practice that has been in existence a long time. They are not according legal counsel, the bookstore would be one of the people they would go after, but so would the city for allowing this with the statute on the book. I understand that the period to move is a year. For him that's too short. Three months to a month, six months is too long.

RON HANSEN, N. 3809 Division, owner of Century 21/Advance said he has been at that location 6 ½ - 7 years. He discovered through several of his agents who saw a sign copy deliver a xxx type sign for the building next door to him on Friday, July 21, that this type of business was trying to open in the building next door to him. Obviously he had grave concerns and immediately contacted everybody he could think of at the city, city council people, code enforcement people, building department people, special prosecutors, the police department and initially was told they would not be allowed to open. They were in violation of the current ordinance and I'm going to make a couple of points today and probably the main one that supports what Ms. Walker has done, and he appreciates the research she has done, she's done an excellent job in preparing what she has, and understands what she has done will not help his business at this point because of things like an amortization period. He wants to give the Commission the facts about the adverse secondary effects on his business. As time insured after July 21 it became apparent the city was not going to stop this place from opening and they did. Since that time he invested a sum of money to put high speed internet to all the desks in his office because he was in the process of expanding, recruiting some new agents. He had five commitments from a

couple of other offices, one that was about to close down on N. Division and a couple of other people from various offices and he was going to be full and he was going to be able to pay back the money he had invested to do the remodel. What happened he invested that money and the place next door began to open. He not only didn't get any of those people, and they were very specific on the reason, they didn't come to work for me and apologized to me, they understood my problem but they didn't want to make it their problem and they didn't want to have to bring their clients into a driveway that was shared with a porn shop. Their words. We can call it an adult bookstore but out there in the street people are a little more colloquial. They didn't want to bring their clients into a porn shop drive way and turn left instead of right and come to the Century 21 office. He did loose a couple of agents that had been with me for some time. One worked with him for 24 years, which was tough but business was effected. He had other reasons, doing some other things, but this hurried his decision. He said he thought he was going to get an agent who was going to overlook this, hopefully the week they could shut the place down or he would move, after an interview process and a couple of phone calls he called and said "Ron, looking at the whole picture, talking to my clients, praying over it with my wife, there is no way I can come to work there right now, and I apologize to you because I really wanted to go to work for your company." In total he has had 8-9 agents that he doesn't have working for him specifically because of that bookstore next door. The incidents that are happening around the neighborhood – there are residential homes directly behind his office, directly behind the porn shop, virtually the porn's parking lot goes right up to their fences. There are children in these homes, there are elderly people. One has been there 54 years, one has been 50 years, they are afraid to go in their back yards especially at night. He has had personal incidents where he has had to call 911 because he was personally threatened by a guy who was inebriated, pulling into his parking lot on a Saturday. He was working about 7:00 – 7:30 in the evening. He just asked him – he didn't even pull into a parking spot in my parking lot, he pulled into the middle of the parking lot, stopped and said you don't want me to park it should be posted. Well, he was standing in front of a 4' x 8' sign that said no parking with the towing and all that. He asked him to please move, because he isn't supporting the parking for the bookstore next door. He came at him and he got into his car and called 911 and it turned into an ugly thing. They have had several of their clients turn around and leave because of some shouting matches going on at the back door. They don't go in their front door, they only have a back door entry and they pull up, see that place and they don't want to come there. He has had clients that he's asked to meet him at the office, and they ask if he's the one that's right next to the bright green porn shop and ask to meet him somewhere else. He said he doesn't know how many clients he's lost that haven't turned in. He doesn't know who drove by and didn't turn in. He said he is in a situation where he's been in the real estate business quite a while and there's been ups and downs in the market since 1976. From 1980 to 1990 there was virtually no increase in values in Spokane but the costs kept going up. The sales were tough to get, but he was able to weather that. Then 1990-1993 Spokane was really on fire in real estate and things were going very well and

things were going great. Right after that he moved into his current building and things have been flat since about 1994 in real estate. You can make a living but not really rolling. All of a sudden, he weathered that, three – four months ago one little bright green porn shop opens up next door and his business is in threat of closing at this point. The money that he could have used to make a move has been eaten up with the lack of income because of that thing being there. It is the only reason. It is the sole reason. He said he was in the best position he had been in in six years to have his business move forward until this happened. He worked with the city very closely, the city manager, the mayor, the mayor's office, Ms. Walker's office has been very very sympathetic but it hasn't helped his business. His last statement is that in relation to the amortization period this new ordinance proposed, says proposed "amendment", because they are amending an existing ordinance, there is an ordinance in place, that disallows that book store to be where it is. They're is supposed to be 750' from a park, there about 160' lot line to lot line. They're supposed to be 750' from a residential zone, they are back to back, connected. There are some other violations you could probably find in there but on that point alone, his financial loss as hard as it is for him, kind of pales in comparison to the potential lowering of community standards and the danger to the community. There are children there and there are elderly people. He really feels for the doctor who spoke before because they have a very similar experience. Allowing this place to stay open after the City Council would get this with the Commission's approval, get stamped out and in place and then given a year – she understands from Ms. Walker that the owners of these businesses can wait up to 30 days prior to the end of the amortization period and then file for a stay and start the court actions. The city is going to be in court over this. The owners of the book store have said so in interviews to the newspaper and to the TV stations news, that they will take the city to court. Delaying trying to shut them down is not going eliminate the court suit. It might leave them in place long enough where instead of the abduction of a couple of students that happened recently, we know there is a tie to it, unless we are intentionally naïve we know there is tie to it. What if it's a little girls, or a lady that has lived there for 54 years and she's abducted or raped. The loss of his business or his income will pale in comparison to the liability the city will have. He thinks they need to go ahead and put their foot down, forget the amortization period. He understands the city will be at risk but they'll be in court anyway. He hopes the Commission will consider the evidences, that legal businesses that have never violated an ordinance, existing or new ordinances, are loosing their businesses. They want to give somebody that has damaged those businesses another year? To damage more businesses? Or the final strangle hold to put those already damaged out of business? That doesn't seem fair.

MRS. MEYER asked why the permit went through. It is semantics in terms of the definition of the ..

Mr. Hanson said that is a matter of opinion. Ms Walker has done a lot of work in conjunction with the County over a year ago to put a County ordinance together.

When that was complete, that work in that completed ordinance, which the Commission sees before them was taken to Jim Sloane, City Attorney, and was told they were ready to go and he thought there were greater priorities in place at the time. He went on to say that he was in the Mayor's office about two weeks ago, with the Mayor, the City Manager, the City Attorney, Ms. Walker, Mr. Mercer and a couple of others. In that meeting, he expressed that he had contacted everybody he could think of at the city on July 21, 22nd , 23rd and 24th and that was 3 ½ weeks prior to the opening of the business. At that time, sometime between when he first contacted the city and the opening of the business, Ms. Walker was made aware of the situation. Ms. Walker had gone to Mr. Sloane at that time and said there was two options, they could do an interim ordinance or do a moratorium and after her research decided that the interim ordinance would be much more defendable by the city and stop this place from opening. For some reason Mr. Sloane decided it wasn't a priority at that time also. The business license itself isn't subject, at the time its applied for to review ordinances and that type of thing. It's an administrative type thing. It's up to the code enforcement and the Legal Dept. of the use to use the laws and powers that be at the city, whatever the process is to shut them down. They should have been shut down before they opened. There's no doubt about that. I have talked to attorneys also. He said he has not talked to the people at the city about litigation or trying to recoup losses or damages. The thoughts have been there though. Because he wanted to be an advocate with the city to try get done what needed to be done through the proper channels and work with them to get the place shut down. He didn't want to have to flee from an illegal business (in his opinion) when he's been operating a business for 24 years legally. It doesn't seem right. But with these amortizations periods is apparently what is going to happen because he can't afford to stay there and he can't afford to move. He said he hopes the Commission considers his testimony, he knows there are legal constraints, but it also has to be considered what the right thing to do is. Adverse effects have obviously been established for this type of business or they wouldn't all be here today. There wouldn't be an old ordinance if they hadn't been established. His question from a personal view is there are adverse effects established why is it necessary to allow them anywhere, if it has been shown that it is bad for the public safety. There are cities that don't and have defended themselves successfully. He guesses it is just community standards and in our city we are saying our standards say in the right place they are OK. That is his personal opinion. If there is a preponderance of community desire to be able to have these kind of businesses, they need to be restricted. The public safety needs to be protected. They need to protect the kids behind this place, those elderly people and selfishly his business. He thinks he is entitled to that too.

ROBERT HEROLD said that as he reads it, Mr. Hansen is right, it is changing the definition. It is establishing the amortization and tightening up language here and there. If this is an enforcement question, as it appears that it was, why wasn't it just enforced? How can you have other priorities? He said he was very confused. Mr. Hanson's particular issue appears to be an enforcement issue not a planning

issue and he frankly doesn't understand why the enforcement didn't take place. Maybe that's an inappropriate question for him to ask.

Mr. Hanson said it is probably an appropriate question. He said they are all pretty much aware that the city has gone through some times when they have been defending themselves in lawsuits over bridges and with the Marks family and a few other issues that have cost the city a lot of money. Apparently they are getting some money back on the bridge issue. That's great. But the city was in a very tender time when this all started. They didn't want to go to court over anything. They were concerned about what it might cost the city. That is from city officials at the highest level. The city did try to shut down (and he's not sure of the exact name) the same ownership of the building, Mr. Barbanti, a building across the street from Northtown. The city did attempt to shut that down. There was a hearing examiner review and based on that the city got a little skittish that they could defend themselves on the current ordinance because of the way it was handled, it was found in favor of Mr. Barbanti and World Wide Novelty. The reason, if you read the material from the Hearing Examiner, had nothing to do, or very little to do, with the ordinance but the fact the city brought no evidence. The Hearing Examiner wouldn't find with prejudice as the plaintiff wanted because the city might want to come again or the neighbors might want to come again that are being violated, the ordinance is being violated obviously. They asked for bookkeeping to show how much of certain items were being sold an then at the time of the hearing waived their request. They hadn't even counted the videos, or books, or square footage. They brought no evidence. So the Hearing Examiner couldn't find for the city because there was no evidence. (That is file #92-90-AP). There are some good people working on this and he appreciates the people that have worked hard. The will of the City Council or the will of the enforcement people, how its effected, maybe Mr. Sloane has other things on his mind and this issue isn't at the top of his mind the last few months. There needs to be a point where the city picked its fight. The city is going to get sued if they are not allowed to open, but that is the right fight to pick. Don't let the city and the people be at risk and the businesses at risk because they are acting lawfully. If the city is going to get sued, pick the fight that supports the laws and the support the public good.

DAVID BRAY said he had a question for Ms. Walker. Relative to what Mr. Hanson said. He is curious about Mr. Hansen's and Mr. Herold's concern relative to enforcement and provide some assurances that if this ordinance is passed today the one year amortization period will be enforced, or anything relative to this situation that could give the community some assurances this would pass.

Ms. Walker said Mr. Hansen is correct. The City does currently have a provision that deals with adult bookstores and zones them very similar to what is being proposed today. The definitional section has been changed and added some information that staff thinks is necessary to change the stock and trade issue a little bit. It is not that dissimilar to what is already on the books. She said it is her position that after studying the issue with respect to retail book establishments or

bookstores separate from other adult entertainment establishments that that provision is not enforceable. It is not enforceable because it is not defensible. The city could enforce it, the city would be sued, and the city would lose. That is her position. It has been her provision that the city should repeal that provision or amend it which has been recommended over a year, which they were unable to do for a variety of reasons. It wasn't here decision to make.

Mr. Bray said with the few changes what makes this more defensible than the old one.

Ms. Walker said the reason she doesn't think the old provision is defensible is because there was not a sufficient legislative record to support. In 1985-86 the city first started looking at these issues. That was before she joined the City Attorney's office on the civil side. She went back through all the records when she first started working in this area and reviewed the legislative record that they had in place to support the bookstore part of the zoning provision. Essentially what the did was say book stores, adult arcade facilities, nude dance facilities, all adult entertainment establishments shall be zoned in this way which is essentially be recommended now. What they didn't do when they created the legislative record and through no fault of the staff that did it, they didn't separate out the adverse secondary effects that occur as a result of retail use establishments. The reason they didn't do that is because nobody else was doing. There hadn't been legal challenges. Nobody knew it would be a problem to not separate these kinds of adult entertainment businesses. It wasn't until subsequent to that the challenges started to occur. There was about a 15 year period where there was a lot of active litigation in this area. A lot of it comes specifically out of Washington State. There is a lot of good case law in this state dealing with these issues. When she started to look at the issue, when she was first brought on to look at these issues, the city was being sued over the adult arcade ordinance. Upon review of that ordinance it was her position that it didn't' do anything. It was a two liner. All it said was you had to have the booths all lined up in a row, and you have to keep the lighting at a certain level. That didn't meet the needs of the community. The city revamped that ordinance. They wrote a comprehensive 20 page ordinance that dealt with all the problems attendant to that business. At the same time she studied all the issues with respect to all different types of adult entertainment facilities. Looked at all the case law in the area. There is a lot of case law in this area. It's become a very narrow area to practice in but it also there is a lot of information at there to rely upon from other cities and counties law suits. These businesses do not have a problem spending money defending or challenging ordinances of this type to continue to operate. Many cities and counties back down and they don't enforce. The city didn't want to do that in Spokane. What was done with the arcade provisions in 1993 said they would enforce it and wrote a new ordinance, litigated 5-6 years and were successful every step of the way. Litigated in state court, federal court, multiple challenges from multiple businesses in all different levels. Prosecuted facilities for violating the ordinance and were successful all the way along. They have a good track record both in the

city and the county. The problem why they can't enforce this is because there is not a legislative record that supports. Back in the mid-80's they didn't know what they know now. They didn't know they had to say specific things to have it upheld. The kinds of things she has discussed with the Commission today. So when she looks back at it, when they initially looked at enforcing the ordinance it was determined that all the businesses they had at that time were grandfathered in so the enforcement issue in the early '90s was not an issue with respect to all of the existing businesses. When the city enacted the original 750' for all these businesses it, for whatever reason, grandfathered him. Didn't want to deal with the litigation. And part of that was because amortization was a new thing, and they were getting challenged. Now they know they can put in amortization periods, require relocation and can do it as long as there is a good legislative record. With respect to why the Hillyard business and the Division business have not been enforced, which are both owned by Jim Sicilia, an individual out of California, have had many lawsuits with him over the years. He owns World Wide Video which is litigious all over the state. The reason they didn't enforce the two new businesses was because they didn't feel the ordinance was defensible. If they had enforced they likely would have lost. What they opted to do instead was write a new ordinance. Unfortunately, only the County wanted to proceed that new ordinance. Consequently the Hillyard business opened, the city took another look at the issue, updated all the research that she had done in the past, and presented to the County Commissioners and the County Planning Commission what she believes to be a defensible ordinance. In doing that she has worked with other cities and counties to make sure they are all the same page. The Hillyard business and the Division business were not grandfathered in and they weren't existing when the original provision was enacted. Yes, they are technically in violation of the provision for zoning bookstore but in her opinion it is not defensible. The city was actually sued by Mr. Sicilia in 1996 in the County over the County's adult bookstore ordinance at that time. They knew they were going to be addressing this issue and adopting a new ordinance and were able to get them to agree to dismiss their lawsuit. Now there are additional businesses and they are attempting to deal with those.

STANLEY STIRLING asked Ms. Walker if she thought the year amortization is the least length of time she can defend.

Ms. Walker said she has found no support in the case law to indicate they could go with a lesser period. That is not to say that the courts in reviewing the constitutionality of an ordinance would not look at all of the facts including the facts specific to our community. To answer the question as honestly as possible, if they went with the lesser amortization period that she could defend it successfully. The one year is a sure thing. There are a lot of adverse secondary effects in these cases of two businesses in two communities that have been impacted and are requesting a lesser amortization period.

KAREN REL, 3804 N. Atlantic Street, said her back fence is next to the alley that goes to the XXX store. She is also a small business out of her home. Her husband and she are the sole proprietors. She deals with the public daily. Mostly on the phone, but they do have drop in customers. She works at night doing her bookkeeping. The office she works in faces her back yard and directly into the arcade's parking area, next to the real estate. Last night between 11:30 p.m. and 1:15 a.m. there were 27 cars that pulled in and left. Some went in, some came out, some went to another car that was parked in this lot that they have gone in. She said she has seen limousines pull up. They have come out of the arcade giving them boxes. She isn't sure of all the terminology. That's not her world. She doesn't understand all of it. Is there an escort service going on in her backyard? These aren't people she wants to invite to her barbeques next summer. At night time there is more activity than there will ever be in the daytime. She said she wasn't not trying to pass a moral judgment on anyone. She said she was scared. She no longer can work in her shop, that their garage was converted into by herself. She has gone out to the shop at 8:30 at night when all the other businesses are closed on Division with the exceptions of the restaurants that have bars. They even have to close at 2:00 a.m. in the morning. But this place can go all night long. And they do. They're slamming, they're screaming at each other. They're urinating out in public. In the afternoon when the kids come home from school there is a group of children that come through the alley and there is a scuba diving place that is directly behind her house, right on Division. Scuba diving, real estate, triple X and the cellular phone place. These kids play in this alley. It's a perfect slope for their skateboards. She is in her shop right next to the alley, she hears the kids talking about going and getting some "porn". They discuss what their opinion of "porn" is. These kids are between 8 and 12. There has been impact on their business. She and her husband have struggled very hard to just support themselves, to not be on the roll of the welfare system. Nobody wanted to hire them so they made their own business. Their customers come and soon as they see the triple x will leave because they have their kids with them. She is not a radical. When she is in her shop doing her work an someone beats on the window with their fist and says "Hey bitch do you want to f---". Do I call 911? When the police get there they are gone. Can she give a description? She can't get out to see a license plate number quickly enough. Chief Bragdon is a customer of theirs and he told her that she had to come to these meetings, she needs to call someone and that's why she came today. She doesn't like the year amortization at all. Something needs to be done now. Why are they open 24 hours a day. They came in the night and painted that ugly chartreuse. Nobody did anything when the signed petitions. Nothing was done.

Ms. Meyer said she mentioned several times the sign in the front. The sign bothers her also. It's a large large sign and in the ordinance the signage is addressed as just a regular business sign and she is wondering – if the sign was regulated more closely would we have as much difficulty? She is not trying to dismiss what is already going on. The sign is obviously very large and very colorful. Its purpose is to bring people in. She is wondering is the sign is

regulated. She is wondering if there special regulations for signs of this nature. Also, is there a sign in the back of the building?

Mrs. Rel said there is a sign over their door. And one in front. It is purple and chartreuse.

Ms. Walker said she doesn't know if they specifically looked at the sign issue. At one point it was addressed, there was an addition to the back of the building at the Division and Garland building, there was some indication they were out of compliance with the other zoning provisions. Her relocation is that she doesn't know if the sign issue was one specifically determined but Dave Nakagawara and his staff looked at those issue and her understanding is that they haven't come up with anything that would be a violation sufficient to require a closing of the business at this time.

Mrs. Meyer asked what about sufficient to just redo the sign. Isn't it in the right-of-way?

Ms. Walker said she doesn't know if it is in violation of their general signage ordinances. What she can tell the Commission is that it be in compliance with the sign ordinances that all city businesses are required to be in compliance with. With respect to signage and adult entertainment is that the state supreme court has spoken to that issue. They have indicated they do not want jurisdictions treating these businesses differently from other businesses. Therefore they will be painted in garish, eye-catching colors in an effort to draw in business and there is no violation to have neon signs in your windows. That also could be considered part of the adverse secondary effects. There are reasons that you don't want these businesses located next to residences.

PENNY LANCASTER, 14816 E. Farwell, said on behalf of the citizens she would like to thank Patti Walker for all the work she has done, all the research, to craft such an excellent ordinance. She said she first became concerned about the injustices suffered by businesses and neighbors that were forced to live with adult bookstores in their neighborhoods back in 1992. At that time the city was unwilling to defend their zoning against the retail only outlets but the Hearing Examiner, Greg Smith, made it clear that the concerns of the citizens shouldn't be swept under the rug. He wrote in his decision: ". . . violations of the ordinance are fundamentally unfair to surrounding property owners and, therefore, if the ordinance is in fact being violated it is much more fair for the property owners to have another opportunity to prove the violation." Well, today testimony from Spokane citizens and other communities has been shared which substantiates the risks that these businesses pose to the public health, safety, morals, and general welfare of the citizens of Spokane. I have interviewed people living near the Erotique Boutique on Wellesley, Garland and Division, and on Market in Hillyard. In every case the comments include complaints abut men parking away from the store and walking down the alley to access the store, offensive video

wrappers found in their yards, late night traffic, doors slamming, fear of using their own yards for relaxation or recreation, concern for young people waiting for the bus in front of the bookstore, fear of accessing other businesses nearby at night, and children looking in garbage cans for materials from the store. One resident said, "We are mainly senior citizens. Who'd want to buy our home and move into this area now?"

She continued by saying that at least 10 communities in western Washington are in the process of adopting and enforcing a similar ordinance. They are concerned, as we should be, that these businesses attract prostitution and violence against women.

The economic impact of trying to do legitimate business near one of the bookstores is dramatically illustrated by the problems incurred by Century 21, Dr. Asterino, and retail businesses on Wellesley, next to Erotique Boutique. She suggested the Commission drive down the 4800 block on Market or in the East Central Neighborhood and they will understand what economic divestment means, they will understand what dilapidation and property devaluation means, and why we should prevent an imminent threat of serious environmental degradation. These are serious impacts and the families and businesses should not have to put up with it another day longer. Please do not ask them to wait another year. If the rationale for this ordinance is eliminating the harmful secondary effects of Adult Retail Use Establishments, how can the Commission advocate leaving them in place for another year? The courts have upheld shorter amortization periods. A six month amortization period was upheld in Hartley v. Colorado Springs, 7250 Corp. v. Bd. Of County Commissioners, and Hart Book Stores, Inc. v. Edmisten. A 90 day waiting period was upheld in Pennsylvania NW Distributors v. Zoning Hearing Board and Northend Cinema, Inc. V. City of Seattle. The initial investment of these adult retail businesses has no doubt been recovered many times over – especially when you consider the low cost of fluorescent green or pink paint and the generous support of their landlord Marco Barbanti.

The Plan Commission should also recommend a second amendment: restricting their hours of operation to those of most other retail businesses. The security of nearby businesses, patrons, or employees is threatened by the increase in traffic late at night. This ordinance, as you know, is a content-neutral, TIME, place, and manner regulation. Constitutionally, municipalities have the authority to restrict hours of operation for purposes of protecting citizens and property. Please consider amending this ordinance by setting the hours of operations from 10 a.m. to 10:00 p.m.

If Mr. Sicilia, the manager of many of these stores, wants to content that he is not operating an adult bookstore because he sells high heels and lingerie, in addition to hardcore pornographic videos and magazines (according to his interview in the Spokesman-Review), then let him take down his triple x neon signs, and shut all

his videos and magazines in a back room with a warning for adults only like they do at Zip Trip convenience stores. Instead, he uses his aesthetically offensive signage to draw in people looking for material that appeals to their prurient interests. His own advertising and any other observer would conclude that his "stock in trade" (we're not talking about stock on the shelf) is substantially adult pornographic material.

She concluded by saying that hopefully, the Commission, the City Council, and the community are all beginning to become aware of the dangerous connection between the materials sold in these stores and the attraction for men who commit sexual crimes against women and children. Because of the recent kidnapping and sexual assault of two Mukogawa students she asked the Commission to recommend that the City Council pass this ordinance after reducing the amortization period to less than six months and restricting their hours of operation from 10:00 a.m. to 10:00 p.m.

Mr. Bray asked Ms. Lancaster regarding the reduced time of amortization, was that also in case of relocation.

Ms. Lancaster, she is not sure. These did not specifically have to do with relocating, rather regulations on the inside of the business and the way the business run. She thinks the main point the courts are looking it do the businesses, have they been compensated for the cost of relocating and does it weigh with the good of the community. She thinks the Commission has evidence before them that these businesses have been in business long enough to recoup any relocation costs and that the good of the community is at stake. Why should the businesses around them and residences have to put up with them one day longer. She thinks six months is too long.

Mr. Bray said the good of the community notwithstanding, he thinks the concern is, if he understood Ms. Walker, was the probable challenges by these businesses to that short of a period. He would add to that the cost to city government and therefore the taxpayers in the long run. This has to be weighed carefully whether this can be done effectively in six months or a year and cost effectively as well.

Ms. Lancaster said she thinks the courts are looking at a balance act. The Commission has plenty of evidence to weigh in favor of the city moving these places and six months is a reasonable time for them to pack up their goods and move, especially when they don't own the property. They're only renting. Its not like there is a major cost that they have to recoup. She said "have courage and do it."

Mr. Stirling advised the audience that there is about ½ hour left and the Commission will not be making a decision today. The citizens will have an opportunity to send in written comments.

GINNY FOSTER, 4810 S. Stark Lane, said she and her husband moved to Spokane four ago by choice. In the process of making a decision they gathered information from the Chamber of Commerce, school districts and realtors. They wanted to know if Spokane would be a good place to bring their family. They spent a full week of wining and dining as guests of their prospective employer and decided to move 2500+ miles away from their nearest relative. Not long after they settled in Spokane they discovered the "dirty little secret." Spokane is a haven for convicted sex offenders and in the four years they have been here the businesses that feed that sickness have continued to invade Spokane virtually unregulated. The Chamber of Commerce, realtors and the Welcome Wagon people neglected to point out the blight this industry has brought on Spokane. Now the nation knows what's been lurking around every corner from U-City to the University campus. It is time to public acknowledge that we are sick and it is up to the elected and appointed officials to begin the remedy of enforcing existing laws and vigorously regulating these industry in accordance with a community standard to be proud of.

KIMBERLY DRAKE, PO BOX 13036-99213, said she is the Executive Director of Citizens for Community Values, but importantly it is important to understand that she is a victim of pornography. Pornography is not a victimless crime. It is not victimless at all. She said she is the ex-dancer that everybody writes about in the newspaper, that came out of DeJ'Vu three years ago. She said she thinks it is important to understand that not only does pornography have secondary adverse effects but it also affects the behavior of the user. It is like advertising. To deny the impact of what we view and read is to deny the impact of the individuals and companies that are willing to pay $3 ½ million for a 30 second spot on the Super Bowl this year. Fifty-six companies are willing to do that. Those companies are either stupid, charitable or extremely intelligent and she would submit the latter. If pornography is like advertising, what is pornography selling? Pornography is selling lies about relationships, it tells us that women have value from the neck down. That sex is a spectator sport. The more participants the better. And we know from the Mukagawa incident that it is combining sexual arousal with violence. This is very dangerous. The objectification of women in pornography is the key factor in domestic violence. She said she knows Spokane also has a problem with domestic violence that is astronomical. She submits pornography has a part to play in that. She said she would like to tell the Commission how pornography has effected her life.

> "When I was 12 years old a man I was baby-sitting for, he was a single father of two daughters introduced me to pornography and inappropriate touch. At 14 years old she was raped by a boy who was a friend of the family, he was the head life guard at the yacht club where my parents belonged and he was the star basketball player at the high school in our neighborhood. He continued to show pornography after the rape and continued to abuse me for a year until he was killed in a car accident. I began to numb the pain of that and self-medicate through drugs and

alcohol. I got married at 20 and six months into my marriage pornography was introduced by a cable television. My husband, I thought would leave me, if I told him this made me jealous, it hurt and it made me angry. And so, instead of telling him what I really felt, with the fear of abandonment and rejection driving my decision, I chose to participate in the pornography that he was looking at. I suffered from what is called "the centerfold syndrome". I tried to become what it was my husband was looking at in order to be loved, and to be the apple of his eye. I wanted to be his centerfold. I wanted to be the one that he loved more than anything. Isn't that what all wives want? Isn't that what all husbands want from their wives? We want to know that we are important, that we are significant and that we matter. In attempt to become it was that my husband was looking at, I made the decision, although I had a background of business management, sales and marketing, I had my own business for 10 years, I made the incorrect decision to become a stripper at the De J'Vu. In December of 1994 I entered an amateur contest. I was just shy of my 32nd birthday and I won $50. I felt important. By February of '95 I worked in the industry. Now let me tell you as it relates to the hours of operation which is not included in this ordinance. I also do recommend that the hours of operation be regulated. You have the opportunity, by law, to regulate the time, the place, the manner. The how, the when, and the where. The law gives you that ability to do that. I encourage all of you to do that the full extent of the law. I didn't go into sexually oriented businesses to buy pornography, videos, magazines, sex toys and sometimes lingerie but most of my lingerie, ladies and gentlemen, was bought in Nordstroms and the Bon Marche and my high heels were bought in the shoe stores. I didn't go to the porn shops or the sexually oriented businesses or the adult bookstores or whatever you would like to label them. I didn't go there to buy my clothing however sexy or revealing it was. I went there to buy pornography. And I went there late at night. Although I was a porn addict, the shame that surrounds this addiction and it can be classified in some as an addiction, is huge. So that's why the after hour activity. When I worked for DeJ'Vu all of, or most of the experiences that were harmful in nature, the deviant type activity, the grabbing, the drug abuse, the people that came in to harm happened after the bars closed. There is absolutely no reason why these businesses need to stay open 24 hours a day. You have an opportunity today, ladies and gentlemen of the Commission to make a tremendous difference. You have the privilege to minimize the adviser secondary effects to our community. We, the citizens of Spokane believe that you want the best for us. We believe that you want a partner for the good of the community. We have to ask ourselves what kind of city do we want to live. What kind of a city do we want to hand over to our children? What kind of businesses do we want to invite into our community? What are we planning for in our future? Does pornography do good to our citizens and for our community? Or does it cause harmful effects? Not only to the community but to the

individuals involved. If we don't do something to regulate these sexually oriented businesses today, the porn promoters are going to set the standard for us. And ladies and gentlemen we will not like the outcome, I guarantee it. The public health and safety rests in your hands. Thank you very much."

KAREN DAVIS, 6012 N. Cochran said she came to show her support. She believes the previous speakers have said it all and she hopes the Plan Commission is listening. Ms. Walker has done her homework. Ms. Davis said she wished the ordinance could be stronger. She supports the ordinance and wishes it could be implemented immediately.

MERILEE MOSER, N. 4716 Calispel, said she is a concerned citizen who carries very much about the issues being discussed today. She lives really close to where the first Erotique Boutique went in. When these laws first came on 10 years ago, this is before the big internet revolution. That's only happened the last five or six years and she feels the law is obsolete. Many people generate enough business just using the computer and the internet, she feels on that basis they don't have justification to be in the city. She'd like to see lawyers research this and her own feelings is they should address some state legislature to get the law amended. Basically a porn established could be dumped out in a wheat field 90 miles from the city and they could generate as much business. She is not encouraging that but she feels it is an obsolete law and no one is looking at the revolution that has just happening poignantly in even the last three or four years. Mini-malls and strip-malls and a geographic site is almost becoming obsolete. She encourages the Commission to think about that.

BRUCE WAKEMAN, 7616 E. Baldwin Ave., said he has been carrying around in the last few weeks a sign saying "I worship Christ not filth." He said he is getting great public support. He said bad company does corrupt good morals, and there are standards of right and wrong. God has set those standards. If the community wants to keep unity, morality and going by God's standard and showing we are people that can be trusted with one another, and that we will abide by those things that are good and will help build trust among people. When he was at the place in Hillyard, he saw a young woman waiting after her appointment at the dentist office who was afraid. Children are afraid throughout the city. What is lacking is the legislative record, so today the Commission has a chance to make some legislative record and say they do care and don't be concerned about the cost in law suits.

JOANNE MCCANN, 2211 E. 35th, said she strongly support the amended ordinance however she asked the Commission to consider the six month amortization period.

PAUL UNGER, 3328 W. 2nd Ave., said he was appalled at what he has heard regarding the hardships of two decent businessmen in the community. No one has

mentioned the pornography connection in the Yates case. It seems Spokane is becoming the poster child for pornography related crimes. He said he would encourage the City to shorten the amortization period and limit the hours of operation.

MARILYN LAWSON, 4917 E. 17th Ct., asked why the city is trying to zone sexually oriented businesses away from day care, parks, schools and residences. The answer is easy, its children, children, children and families. She said she would give the Commission a picture of the victims. Boys and girls that have lost their innocence by viewing pornography at an early age. Children used for sexual of fathers, stepfathers, and men they trusted; young men exposed to a false image of sexuality; men who can't shop using pornography because they are trapped in a secret life of addiction to pornography; women of men pre-occupied with pornography and the sex industry; women who are being treated with disrespect and sexually abused; young women trapped in an industry that exploits them and uses them as mere sex objects; neighbors that have increased crime and decreased property values because of the proliferation of pornography in their communities; society that has become desensitized to the prurient nature of sexuality; lastly, the very people that own or manage these stores are caught also. These are real people with real faces. The public is unaware that the skyrocketing number of people who are affected in their own neighborhoods by rape, molestation, disrespect is in most part due to the title wave of pornography and sexually oriented businesses in the community. She urged the Commission to adopt the ordinance with an amortization period of no more than six months.

CINDY OMLIN, 4815 E. Pineglen Lane, Mead, said she took a look at the City Charter to view the Commission's task. According to the Charter the Commission is to support and promote the City's health, convenience, safety, and well-being. She encourages and trusts the Commission to do the right thing. She supports the Commission in helping this be a community that lives with and for one another. She thanked the Commission for their service to the community.

FLOYD CONNOR, 3818 N. Atlantic, said he is right across the street from the book store. He was unaware the store was being established at that site until he saw an 18-wheeler pulling in the alley one night. Later, he went and checked and they were unloading. Two or three nights after that there was carpenters, plumbers, electrician to do whatever inside. There are only five parking areas in that lot. Recently, he saw a truck and a car parking in the alley next to one of the residence's garage. To access the garage, it is necessary to use the alley. There is a lot of noise. People have used the cell phone parking lot even going so far as to park right at their back door and then walked to the book store.

President Stirling closed public testimony and called for discussion or action from the Commission.

Mr. Bray asked Ms. Walker if the Commission can address the hours of operation.

Ms. Walker said they can. No one else has done it yet. Part of the reason that it wasn't included in the Ordinance is because they are already on the cutting edge. The city has already regulated adult arcade facilities to require that they be closed between the hours of 2:00 a.m. and 10:00 a.m. In the County both the arcades and nude dance establishments have those same hours of operation.

Ms. Herold said the state has regulated bars for years. 7-11 stays open all night. He said he finds it odd that it's easy to regulate taverns and bars but we're worried about these places.

Ms. Walker said when she looks at these issues she sometimes tends to be overzealous. In this case she is going slower. She would be happy to prepare some provisions that deal with regulatory issues such as hours of operation. The reason for not including those, when they initially enacted the county's ordinance a years ago it was anticipated there would be some litigation, some very quick litigation (which actually didn't happen) over on the west side. With respect all of the regulatory provisions, part of the problem the city has had in hitting all of the aspects (internet included) is she is spread quite thin in doing all the work that needs to be done in this area. She said if she had the time she would be before the legislature enacting a "harmful to minors" act to protect the state as a whole. She cautioned the Commission that the more provisions they have the more likelihood that they city would be sued. She doesn't have any case law to fall back on. She believes she has a very good legislative record to prove an hours provision.

Ms. Walker said as a community, this community has taken the forefront on a lot of issues in this area, we were the first to do a comprehensive arcade ordinance that is being followed by many cities and counties, not just across the state but across the country.

Mr. Stirling said for the benefit of staff, he would like signage addressed with regard to the existing signage code, to see that it is cross-referenced.

Ms. Walker said it is.

Mr. Stirling said also look at parking standards.

Ms. Walker said it can be included.

Mr. Horobiowski asked if it would mean that all six businesses would be non-conforming and all six would have to relocate.

Ms. Walker said yes. The amortization provision supersedes or replaces the original grandfathering in provision.

Mr. Horobiowski asked about the mention of an amortization period of 90 days in Seattle.

Ms. Walker said that the courts have reviewed the amortization periods as small as 30 days. Several of the cases Ms. Lancaster mentioned, she doesn't recall, she said they are probably lower court decisions as opposed to appellate court decisions, probably in the federal circuits. She is familiar with all of the cases that deal with retail use establishments. None that she could find dealt with less than a one year amortization period.

Ms. Dahlstrom said she would ask Ms. Walker to provide the Commission a summary about the pros and cons of six months, ninety days or one year, also with the hours of operation recommendation so that when they deliberate they can use that information to pass onto City Council so they don't have to go back on square one.

BILL KELLEY, said ask for clarification. The questions about hours of operation, signage and parking, as a legal strategy would it be better that they not be addressed in the ordinance but rather followed up in other municipal ordinances and this ordinance stay, except for the amortization period, stay as Ms. Walker crafted it.

Ms. Walker said with respect to the parking issue she is leaving that to other individuals. With respect to the sign issue Mike Piccolo has looked at that quite definitively. She has looked at it with respect to adult entertainment businesses and doesn't believe the city is in a sound position from a constitutional standpoint to do something different for these businesses. She said she will meet with Mr. Piccolo to make sure the city is doing everything it can with regard to off-site and on-site signage requirements.

M/S P. Meyer, R. Herold, to hold open written testimony for one week (December 6, 2000) , and set deliberation and decision making for two weeks (December 13, 2000). **Carried unanimously.**

2. COMMISSION WORKSHOP ON DRAFT COMPREHENSIVE PLAN

A. Review and consideration of final edits to draft Land Use Policies

KEN PELTON, City Planner, said he would like to review just a few items from the Land Use Chapter.

3.2

Mr. Pelton directed the Commission's attention to the fifth paragraph under the Discussion section.

DECLARATION OF PATRICIA CONNOLLY WALKER

I am a Special Deputy Prosecuting Attorney for Spokane County and an Assistant City Attorney for the City of Spokane. For the last nine years I have been tasked with handling the adult entertainment issues for the City of Spokane. Since September of 1996 I have also handled the adult entertainment issues for Spokane County. I am over the age of eighteen, am competent to testify, and have personal knowledge of the matters contained herein.

During the last nine years I have been involved in the prosecution of various adult entertainment facilities in the City and County of Spokane. It has come to my attention on numerous occasions that many adult retail use establishments will begin operation as traditional book stores and then add, without proper permitting or licensing, adult arcade booths. In addition, throughout the time that I have handled the adult entertainment issues for the City and County of Spokane the City and County have received numerous citizen complaints regarding the adverse secondary effects of adult retail use establishments in the communities in which they locate. Citizens have related finding discarded sexual paraphernalia around these adult retail use establishments, a high incidence of prostitution around these facilities, finding doors to the facilities open on hot days allowing minors to view the interior of the facility thereby being exposed to adult entertainment material, a decline in property values and difficulty marketing property which is in close proximity to adult retail use facilities, and complaints from business owners, customers and employees about having to park near, pass by or do business with a facility that is located near a retail use establishment.

1. Exhibit A is an explicit copy of a VHS video box that was found by a citizen in their yard behind the Erotique Boutique at 54 E. Wellesley in the City of Spokane on June 6, 1994. The video box was given to then Councilmember Joel Crosby who delivered it to my office.

2. Exhibit B is a copy of an article that appeared in the Spokesman Review Newspaper on January 7, 1999 detailing the opening of an adult retail use in the City of Spokane.

3. Exhibit C is a copy of testimony by Brooke Plastino before the City Council on November 24, 1998 indicating her concerns over the Hollywood Erotic Boutique and Video store at 4811 N. Market.

4. Exhibit D is a compilation of complaints by citizens in the Hillyard are of the City of Spokane regarding their concerns about having an adult retail use establishment locate in their community.

5. Exhibit E is an article which appeared in the Spokesman Review Newspaper on April 29, 1999 regarding the opening of Hollywood Erotic boutique at 9611 E. Sprague in Spokane County.

I DECLARE UNDER THE PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IT TRUE AND CORRECT.

DATED this 21st day of June, 1999 at Spokane, Washington.

Patricia Connolly Walker

6-6-94

Joel here's the material the neighbors found in their yard behind the Erotic Boutique on E. 54 Wellesley. I would also like to say how I didn't enjoy the guy that came out of the Erotic Boutique with a pair of glasses that had a penis for to cover his nose and then drives down the road laughing with his girl friend.

These are things that people with any morals at all should not have to put up with.

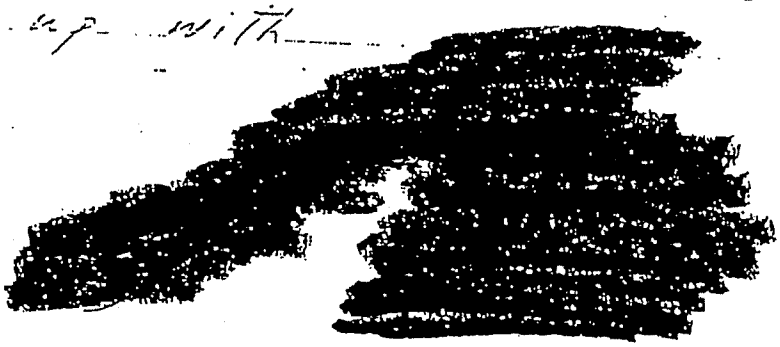
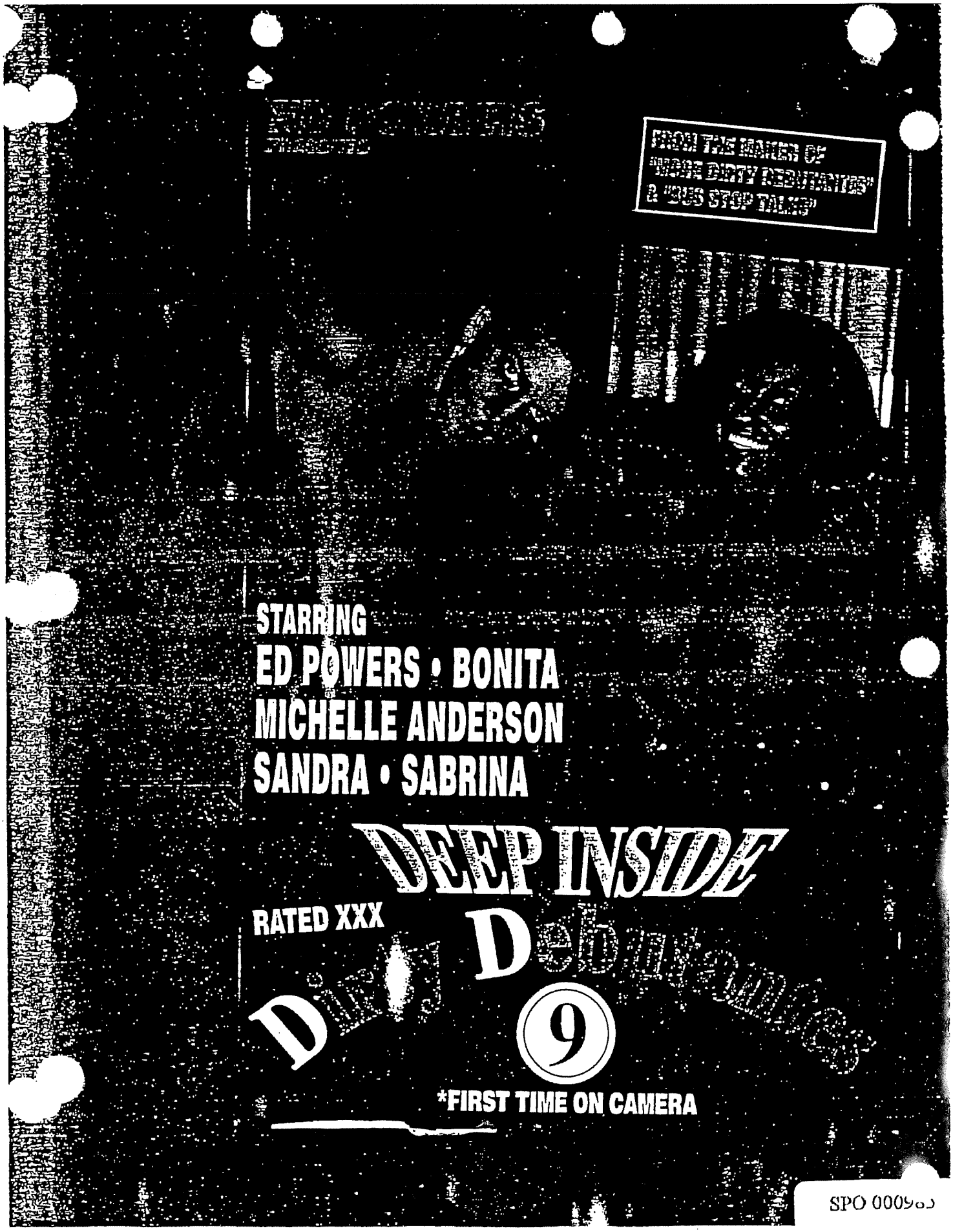


Exhibit A

0780

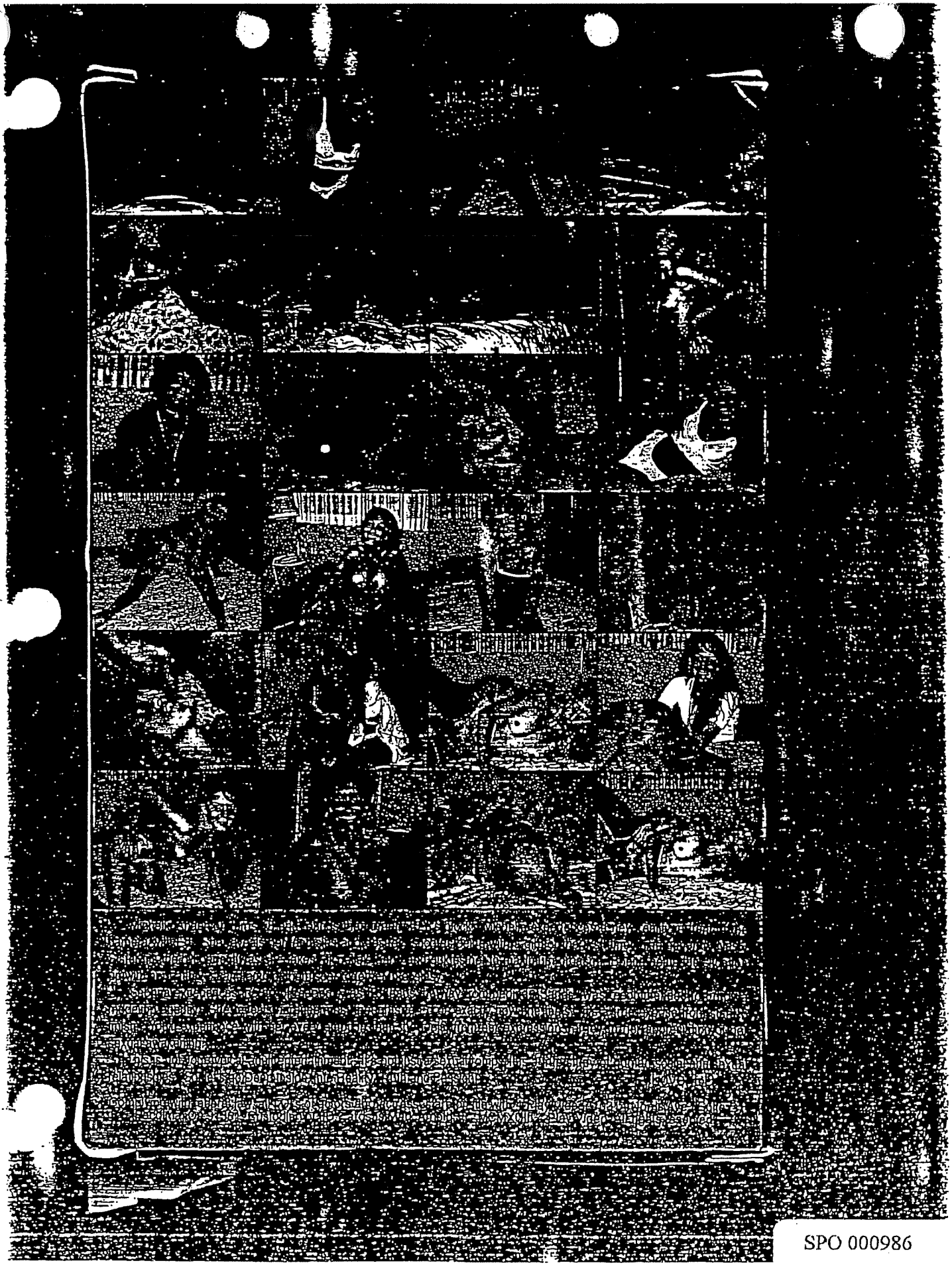
SPO 000982

2-403



SPO 000908

2-404



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SPO 000987

2-406

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SPO 000962

2-407

7/24/96

Mayor Talbott and esteemed Council Members,

My name is Brooke Plastino and I come before you tonight as both a Hillyard business owner and as a concerned and upset citizen and parent. I'm here to speak out against the Hollywood Erotique Boutique which recently moved into our neighborhood at 4811 N. Market.

My wife and I own Accent Frames. We chose to move our business from the Northwest part of town to Hillyard because we didn't wish to continue doing business in an area with an increasing drug and gang problem. Hillyard has become a nationally known and respected antique district and we felt that our custom frame shop and art gallery augmented that image without being competitive to the existing businesses. We felt that out presence in Hillyard augmented that image and perhaps our presence would encourage an arts and cultural component in the neighborhood.

As you know, not too many years ago Hillyard was one of this city's most economically depressed neighborhoods. It's reputation was that of a tough little town predominately filled with taverns and second hand junk shops. Many, including our Mayor, did not feel safe in Hillyard - day or night.

The business community and residents have worked long and hard to reverse that impression and have revitalized both the downtown area and the neighborhood. The junk shops are now antique markets and are known coast to coast for their quality. The bar scene is now down to three taverns and two hard liquor establishments, one of which is the local VFW post. The shopping public has at long last returned and the stigma of Hillyard's previous reputation has, in large part, been replaced.There is a strong movement afoot to have the business district nominated to the National Register of Historic Places. We are trying to turn Hillyard into a respectable, historically significant end destination for Spokane residents, visitors and tourists.

The addition of a porno shop, located prominently between family business, ie. Hillyard's only law offices and the Hillyard Dental Clinic, that sells products with little if any social redeeming value is contra productive to the vision we have formulated for our community. There is no place in that vision for the drugs and prostitution this type of business invariably brings into a neighborhood!

We have a fourteen year old daughter who must spend much of her time in Hillyard because our shops location. I do not want her exposed to the type of individuals who frequent porno shops or those who ply their trade on the surrounding street corners. I do not want any possibility of her being exposed to Spokane's serial killer, who up to now has had no apparent reason to visit Hillyard.

I believe in free enterprise, but all business is not the same! A porn shop located between family patronized businesses is not appropriate! It serves to undermine and devaluate the existing businesses. If allowed to remain it sends a message to the public that Hillyard actually is the seamy little den of iniquity it's previous reputation implied, and the respectability of other businesses in the area is just a facade.

We do not want a porn shop in our midst. If allowed to remain you will see the end of Hillyard's renaissance. Hillyard will again decline. Decline into a blight upon Spokane, full of crime, prostitution and drugs. Please don't let that happen.

Thank you

[redacted]

Exhibit C

SPO 000091

07

2-408

CODE ENFORCEMENT COMPLAINT FORM

CODE ENFORCEMENT
MUNICIPAL BUILDING/BOX 165
808 WEST SPOKANE FALLS BLVD
SPOKANE WA 99201-3333
(509) 625-6083

PLEASE COMPLETE ALL APPLICABLE INFORMATION AND RETURN TO THE ABOVE ADDRESS. PROVIDE AS many RELEVANT DETAILS AS POSSIBLE INCLUDING SPECIFIC ADDRESSES, LICENSE PLATE NUMBERS, ETC.

YOU MUST SIGN YOUR COMPLAINT BEFORE THE CODE ENFORCEMENT OFFICE CAN INVESTIGATE THE MATTER, UNLESS A LIFE THREATENING ISSUE EXISTS OR IF IT IS OTHERWISE DEEMED APPROPRIATE TO ACT.

ONE PROPERTY PER COMPLAINT FORM, PLEASE. entered

VIOLATION INFORMATION:

ADDRESS OF PROPERTY BEING COMPLAINED ABOUT: 4811 (4801?) N. Market
Spokane Wa 99207

PROPERTY OWNER (IF KNOWN) _____

NAME OF RESIDENT: Hollywood Adult Store PHONE NUMBER: _____

SUMMARY OF COMPLAINT: Store in violation — within Radius of 250 ft of Residential area
Erotic material found on our property

(If necessary use back of complaint form.)
HOW LONG HAS VIOLATION EXISTED? 3 or 4 Weeks

COMPLAINANT INFORMATION: (REQUIRED)

YOUR NAME: Hillyard Dental Clinic Dr Joseph Astevino

YOUR ADDRESS: 4817 N Market Spokane Wa 99207

HOME PHONE NUMBER: [redacted] WORK PHONE NUMBER: 467-7300

CONFIDENTIALITY PREFERENCE - DISCLOSURE OF INFORMATION REVEALING YOUR IDENTITY WILL DEPEND ON APPLICATION OF THE PUBLIC DISCLOSURE LAW, CHAPTER 42.17 RCW, OTHER APPLICABLE STATUTES AND WHETHER THE COMPLAINT IS CRIMINALLY PROSECUTED. WITH THAT UNDERSTANDING, PLEASE PUT YOUR INITIALS IN THE SPACE THAT INDICATES WHETHER OR NOT YOU DESIRE THAT INFORMATION REVEALING YOUR IDENTITY BE DISCLOSED. FAILURE TO SELECT DISCLOSURE OR NON-DISCLOSURE WILL RESULT IN THAT INFORMATION BEING SUBJECT TO DISCLOSURE.

RECEIVED
DEC 01 1998

EA DO NOT DISCLOSE _____ YOU MAY DISCLOSE
INITIAL INITIAL

SIGNATURE: [signature] DATE: 11-30-98

COMPLAIN.SIG(10-30-96) Exhibit D

0755

SPO 000992

2-409

Hillyard Dental Clinic

Drs. Curalli, Kunkel, Asterino & Mueller

December 10, 1998

Patty Walker
1115 W. Broadway
Spokane, Wa. 99260

Mrs. Walker:

As to our conversation regarding the Hollywood Adult BookStore at 4811 N. Market, we have the following concerns.

We have been established here sine 1954. We have patients from all walks of life, many children, 30 to 40 a day. There has been numerous complaints regarding the bookstore. We feel in the long run this will have a negative financial impact on us.

We have a $75,000 monthly salary, which I feel is important to this community, drawing people to stores etc. in the area.

Dr. Curalli and myself will be selling our practices in the next year or so. This book store will have a negative impact on something we have built over 40 years.

Aside from the residential areas and the growth of new development on Frances and revitalization of Hillyard, we feel these considerations must be taken into account.

Sincerely,

Joseph Asterino D.D.S

CC: Larry Lanning
Code Enforcement

P.O. Box 6282 • N. 4817 Market • Spokane, Washington 99207 • (509) 489-2300

SPO 000993

0789

2-410

CODE ENFORCEMENT COMPLAINT FORM

CODE ENFORCEMENT
MUNICIPAL BUILDING/BOX 165
808 WEST SPOKANE FALLS BLVD
SPOKANE WA 99201-3333
(509) 625-6083

Office Folder

PLEASE COMPLETE ALL APPLICABLE INFORMATION AND RETURN TO THE ABOVE ADDRESS. PROVIDE AS MANY RELEVANT DETAILS AS POSSIBLE INCLUDING SPECIFIC ADDRESSES, LICENSE PLATE NUMBERS, ETC.

YOU MUST SIGN YOUR COMPLAINT BEFORE THE CODE ENFORCEMENT OFFICE CAN INVESTIGATE THE MATTER, UNLESS A LIFE THREATENING ISSUE EXISTS OR IF IT IS OTHERWISE DEEMED APPROPRIATE TO ACT.

ONE PROPERTY PER COMPLAINT FORM, PLEASE.

VIOLATION INFORMATION:

ADDRESS OF PROPERTY BEING COMPLAINED ABOUT: 4811 N. Market
Hollywood Botique + Video

PROPERTY OWNER (IF KNOWN) ____

NAME OF RESIDENT: ____ PHONE NUMBER: ____

SUMMARY OF COMPLAINT: I object to having this kind of business the same neighborhood that I do business in

(If necessary use back of complaint form.)
HOW LONG HAS VIOLATION EXISTED? Between 2 days and 10 days

COMPLAINANT INFORMATION: (REQUIRED)

YOUR NAME: Susan Bergman

YOUR ADDRESS: [redacted]

HOME PHONE NUMBER: [redacted] WORK PHONE NUMBER: 487-1183

CONFIDENTIALITY PREFERENCE - DISCLOSURE OF INFORMATION REVEALING YOUR IDENTITY WILL DEPEND ON APPLICATION OF THE PUBLIC DISCLOSURE LAW, CHAPTER 42.17 RCW, OTHER APPLICABLE STATUTES AND WHETHER THE COMPLAINT IS CRIMINALLY PROSECUTED. WITH THAT UNDERSTANDING, PLEASE PUT YOUR INITIALS IN THE SPACE THAT INDICATES WHETHER OR NOT YOU DESIRE THAT INFORMATION REVEALING YOUR IDENTITY BE DISCLOSED. FAILURE TO SELECT DISCLOSURE OR NON-DISCLOSURE WILL RESULT IN THAT INFORMATION BEING SUBJECT TO DISCLOSURE.

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INITIAL INITIAL

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SPO 000994

SIGNATURE: Susan D Bergman DATE: 11-16-98

COMPLAIN ??? (10-30-96)

2-411

CODE ENFORCEMENT COMPLAINT FORM

CODE ENFORCEMENT
MUNICIPAL BUILDING/BOX 165
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SPOKANE WA 99201-3333
(509) 625-6083

CODE ENFORCEMENT

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ONE PROPERTY PER COMPLAINT FORM, PLEASE.

VIOLATION INFORMATION:

ADDRESS OF PROPERTY BEING COMPLAINED ABOUT: 4811 N Market Hillyard
Too close To Regal grade School + Shaw Middle School

PROPERTY OWNER (IF KNOWN) _____

NAME OF RESIDENT: HollyWood Erotique Boutique PHONE NUMBER: 484-1730

SUMMARY OF COMPLAINT: Hillyard does not want this kind of Business on Market, Will bring in Sex offenders ect (Kids walk by There to Poo also object ~~to~~ being close To Regal School + Shaw Schoo

(If necessary use back of complaint form.)

HOW LONG HAS VIOLATION EXISTED? new just opened.

COMPLAINANT INFORMATION: (REQUIRED)

YOUR NAME: Dorothy Roberts

YOUR ADDRESS: [redacted]

HOME PHONE NUMBER: [redacted] WORK PHONE NUMBER: 482-3433

CONFIDENTIALITY PREFERENCE - DISCLOSURE OF INFORMATION REVEALING YOUR IDENTITY WILL DEPEND ON APPLICATION OF THE PUBLIC DISCLOSURE LAW, CHAPTER 42.17 RCW, OTHER APPLICABLE STATUTES AND WHETHER THE COMPLAINT IS CRIMINALLY PROSECUTED. WITH THAT UNDERSTANDING, PLEASE PUT YOUR INITIALS IN THE SPACE THAT INDICATES WHETHER OR NOT YOU DESIRE THAT INFORMATION REVEALING YOUR IDENTITY BE DISCLOSED. FAILURE TO SELECT DISCLOSURE OR NON-DISCLOSURE WILL RESULT IN THAT INFORMATION BEING SUBJECT TO DISCLOSURE.

DR DO NOT DISCLOSE _____ YOU MAY DISCLOSE
INITIAL INITIAL

SIGNATURE: Dorothy Roberts DATE: 11-20th-98

COMPLAIN.SIG (10-30-96)

0791

SPO 000995

2-412

CODE ENFORCEMENT COMPLAINT FORM

CODE ENFORCEMENT
MUNICIPAL BUILDING/BOX 165
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SPOKANE WA 99201-3333
(509) 625-6083

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ONE PROPERTY PER COMPLAINT FORM, PLEASE.

VIOLATION INFORMATION:

ADDRESS OF PROPERTY BEING COMPLAINED ABOUT: 4811 N Market

PROPERTY OWNER (IF KNOWN) [redacted] Hollywood

NAME OF RESIDENT: Estrella Bravo PHONE NUMBER: 484-1730

SUMMARY OF COMPLAINT: We dont need a sex shop in the neighborhood There is many kids I have to walk by every nite to Bum's dirty

(If necessary use back of complaint form.)

HOW LONG HAS VIOLATION EXISTED? month

COMPLAINANT INFORMATION: (REQUIRED)

YOUR NAME: Shirley Anderson

YOUR ADDRESS: [redacted]

HOME PHONE NUMBER: [redacted] WORK PHONE NUMBER: 495-7726

CONFIDENTIALITY PREFERENCE - DISCLOSURE OF INFORMATION REVEALING YOUR IDENTITY WILL DEPEND ON APPLICATION OF THE PUBLIC DISCLOSURE LAW, CHAPTER 42.17 RCW, OTHER APPLICABLE STATUTES AND WHETHER THE COMPLAINT IS CRIMINALLY PROSECUTED. WITH THAT UNDERSTANDING, PLEASE PUT YOUR INITIALS IN THE SPACE THAT INDICATES WHETHER OR NOT YOU DESIRE THAT INFORMATION REVEALING YOUR IDENTITY BE DISCLOSED. FAILURE TO SELECT DISCLOSURE OR NON-DISCLOSURE WILL RESULT IN THAT INFORMATION BEING SUBJECT TO DISCLOSURE.

_____ DO NOT DISCLOSE (INITIAL) _____ YOU MAY DISCLOSE (INITIAL)

SIGNATURE: Shirley Anderson DATE: 11-23-98

:\COMPLAIN.SIG(10-30-96)

079.

SPO 000996

2-413

CODE ENFORCEMENT COMPLAINT FORM

CODE ENFORCEMENT
MUNICIPAL BUILDING/BOX 165
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SPOKANE WA 99201-3333
(509) 625-6083

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ONE PROPERTY PER COMPLAINT FORM, PLEASE.

VIOLATION INFORMATION:

ADDRESS OF PROPERTY BEING COMPLAINED ABOUT: 8811 N. Market

PROPERTY OWNER (IF KNOWN) _____

NAME OF RESIDENT: Hollywood Erotic ~~PHONE~~ NUMBER: 484-7730

SUMMARY OF COMPLAINT: Don't like the idea of the type of people it will attract to our area. Make Potential customers nervous.

(If necessary use back of complaint form.)

HOW LONG HAS VIOLATION EXISTED? 3 wks

COMPLAINANT INFORMATION: (REQUIRED)

YOUR NAME: Kim P. Brown

YOUR ADDRESS: [redacted]

HOME PHONE NUMBER: [redacted] WORK PHONE NUMBER: 484-7886

CONFIDENTIALITY PREFERENCE - DISCLOSURE OF INFORMATION REVEALING YOUR IDENTITY WILL DEPEND ON APPLICATION OF THE PUBLIC DISCLOSURE LAW, CHAPTER 42.17 RCW, OTHER APPLICABLE STATUTES AND WHETHER THE COMPLAINT IS CRIMINALLY PROSECUTED. WITH THAT UNDERSTANDING, PLEASE PUT YOUR INITIALS IN THE SPACE THAT INDICATES WHETHER OR NOT YOU DESIRE THAT INFORMATION REVEALING YOUR IDENTITY BE DISCLOSED. FAILURE TO SELECT DISCLOSURE OR NON-DISCLOSURE WILL RESULT IN THAT INFORMATION BEING SUBJECT TO DISCLOSURE.

KPB DO NOT DISCLOSE _____ YOU MAY DISCLOSE
INITIAL INITIAL

SIGNATURE: Kim P. Brown DATE: 11/23/98

(COMPLAIN.SIG(10-30-96)

0793

SPO 000997

2-414

CODE ENFORCEMENT COMPLAINT FORM

CODE ENFORCEMENT
MUNICIPAL BUILDING/BOX 165
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SPOKANE WA 99201-3333
(509) 625-6083

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ONE PROPERTY PER COMPLAINT FORM, PLEASE.

VIOLATION INFORMATION:

ADDRESS OF PROPERTY BEING COMPLAINED ABOUT: 4811 N Market

PROPERTY OWNER (IF KNOWN) _____

NAME OF RESIDENT: HollyWood Erotique Boutique PHONE NUMBER: 484-1730

SUMMARY OF COMPLAINT: own - the selling of sex + [redacted] and general degrading of women with destroy attempts at restoring Hillyard and our neighborhood.

(If necessary use back of complaint form.)

HOW LONG HAS VIOLATION EXISTED? ± 2 Weeks

COMPLAINANT INFORMATION: (REQUIRED)

YOUR NAME: Terry White

YOUR ADDRESS: [redacted]

HOME PHONE NUMBER: [redacted] WORK PHONE NUMBER: 489-6313

CONFIDENTIALITY PREFERENCE - DISCLOSURE OF INFORMATION REVEALING YOUR IDENTITY WILL DEPEND ON APPLICATION OF THE PUBLIC DISCLOSURE LAW, CHAPTER 42.17 RCW, OTHER APPLICABLE STATUTES AND WHETHER THE COMPLAINT IS CRIMINALLY PROSECUTED. WITH THAT UNDERSTANDING, PLEASE PUT YOUR INITIALS IN THE SPACE THAT INDICATES WHETHER OR NOT YOU DESIRE THAT INFORMATION REVEALING YOUR IDENTITY BE DISCLOSED. FAILURE TO SELECT DISCLOSURE OR NON-DISCLOSURE WILL RESULT IN THAT INFORMATION BEING SUBJECT TO DISCLOSURE.

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SIGNATURE: Terry White DATE: 11/23/98

\COMPLAIN.SIG(10-30-96)

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SPO 000998

2-415

CODE ENFORCEMENT COMPLAINT FORM

CODE ENFORCEMENT
MUNICIPAL BUILDING/BOX 165
808 WEST SPOKANE FALLS BLVD
SPOKANE WA 99201-3333
(509) 625-6083

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ONE PROPERTY PER COMPLAINT FORM, PLEASE.

VIOLATION INFORMATION:

ADDRESS OF PROPERTY BEING COMPLAINED ABOUT: 4811 N MARKET

PROPERTY OWNER (IF KNOWN) _____

NAME OF RESIDENT: HollyWood Erotique PHONE NUMBER: 484-1730
Boutique

SUMMARY OF COMPLAINT: Hyard Spent years cleaning up Reputation & we are still working Toward an Historic, upbeat Business/Residential District. A 24 Hour Porno Shop would set us back YEARS - We don't want it!!

(If necessary use back of complaint form.)

HOW LONG HAS VIOLATION EXISTED? 3 weeks (Nov 1 - To Present)

COMPLAINANT INFORMATION: (REQUIRED)

YOUR NAME: Brooke & Vicki Plastino DBA Accent Frames

YOUR ADDRESS: [redacted]

HOME PHONE NUMBER [redacted] WORK PHONE NUMBER: (509) 482-6072

CONFIDENTIALITY PREFERENCE - DISCLOSURE OF INFORMATION REVEALING YOUR IDENTITY WILL DEPEND ON APPLICATION OF THE PUBLIC DISCLOSURE LAW, CHAPTER 42.17 RCW, OTHER APPLICABLE STATUTES AND WHETHER THE COMPLAINT IS CRIMINALLY PROSECUTED. WITH THAT UNDERSTANDING, PLEASE PUT YOUR INITIALS IN THE SPACE THAT INDICATES WHETHER OR NOT YOU DESIRE THAT INFORMATION REVEALING YOUR IDENTITY BE DISCLOSED. FAILURE TO SELECT DISCLOSURE OR NON-DISCLOSURE WILL BE CONSTRUED IN THAT INFORMATION BEING SUBJECT TO DISCLOSURE.

_____ DO NOT DISCLOSE VP BP YOU MAY DISCLOSE
INITIAL INITIAL

SIGNATURE: Vicki L Plastino Brooke S Plastino DATE: 11-23-98

\COMPLAIN.SIG(10-30-96)

0795

SPO 000999

2416

CODE ENFORCEMENT COMPLAINT FORM

CODE ENFORCEMENT
MUNICIPAL BUILDING/BOX 165
808 WEST SPOKANE FALLS BLVD
SPOKANE WA 99201-3333
(509) 625-6083

PLEASE COMPLETE ALL APPLICABLE INFORMATION AND RETURN TO THE ABOVE ADDRESS. PROVIDE AS MANY RELEVANT DETAILS AS POSSIBLE INCLUDING SPECIFIC ADDRESSES, LICENSE PLATE NUMBERS, ETC.

YOU MUST SIGN YOUR COMPLAINT BEFORE THE CODE ENFORCEMENT OFFICE CAN INVESTIGATE THE MATTER, UNLESS A LIFE THREATENING ISSUE EXISTS OR IF IT IS OTHERWISE DEEMED APPROPRIATE TO ACT.

ONE PROPERTY PER COMPLAINT FORM, PLEASE.

VIOLATION INFORMATION:

ADDRESS OF PROPERTY BEING COMPLAINED ABOUT: 4811 N. Market

PROPERTY OWNER (IF KNOWN) _____

NAME OF RESIDENT: Hollywood Erotique Boutique PHONE NUMBER: 484-1730

SUMMARY OF COMPLAINT: Having a 24-Hour Porno Shop is not the image Hillyard Shopping District needs. All Merchants have been working very hard for years to change the image of

(If necessary use back of complaint form.)

HOW LONG HAS VIOLATION EXISTED? 3 weeks (Nov 1st)

COMPLAINANT INFORMATION: (REQUIRED)

YOUR NAME: Collectors Showcase

YOUR ADDRESS: [redacted]

HOME PHONE NUMBER [redacted] WORK PHONE NUMBER: 509-487-7112

CONFIDENTIALITY PREFERENCE - DISCLOSURE OF INFORMATION REVEALING YOUR IDENTITY WILL DEPEND ON APPLICATION OF THE PUBLIC DISCLOSURE LAW, CHAPTER 42.17 RCW, OTHER APPLICABLE STATUTES AND WHETHER THE COMPLAINT IS CRIMINALLY PROSECUTED. WITH THAT UNDERSTANDING, PLEASE PUT YOUR INITIALS IN THE SPACE THAT INDICATES WHETHER OR NOT YOU DESIRE THAT INFORMATION REVEALING YOUR IDENTITY BE DISCLOSED. FAILURE TO SELECT DISCLOSURE OR NON-DISCLOSURE WILL RESULT IN THAT INFORMATION BEING SUBJECT TO DISCLOSURE.

_____ DO NOT DISCLOSE _____ MD _____ YOU MAY DISCLOSE
INITIAL INITIAL

SIGNATURE: Maureen Cullen DATE: 11-23-98

COMPLAIN.SIG(10-30-96)

079

SPO 001000

2-417

SUMMARY OF COMPLAINT (CONTINUED)

Hillyard being a place of crime and taverns. We have come a long way, & this is something we do not need in Neighborhood.

DECLARATION OF LONDI K. LINDELL

1. I am the City Attorney for the City of Federal Way. I am over the age of eighteen, am competent to testify, and have personal knowledge of the matters contained herein.

2. The attached explicit photographs (Exhibit "A") are from a magazine that was found by Bob Evans, the City's Private Investigator, at 9:15 a.m on July 15, 1998. The magazine was found discarded in the parking lot of an Adult Retail Establishment (the Castle Superstore located at 8802 N. Black Canyon Hwy, Phoenix, AZ.)

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

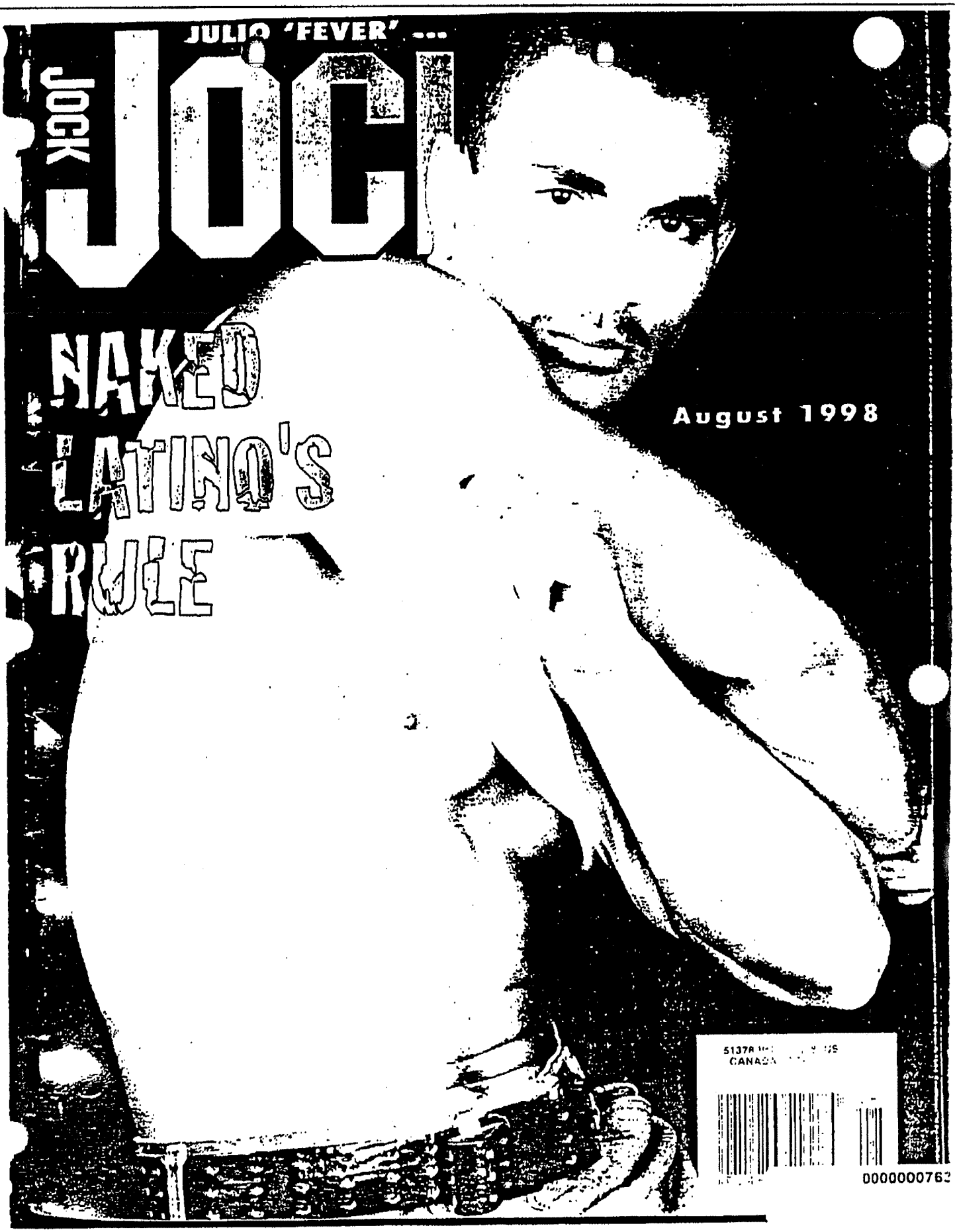
DATED this 11 day of January, 1999. at Federal Way, Washington.

Londi K. Lindell

0000000762

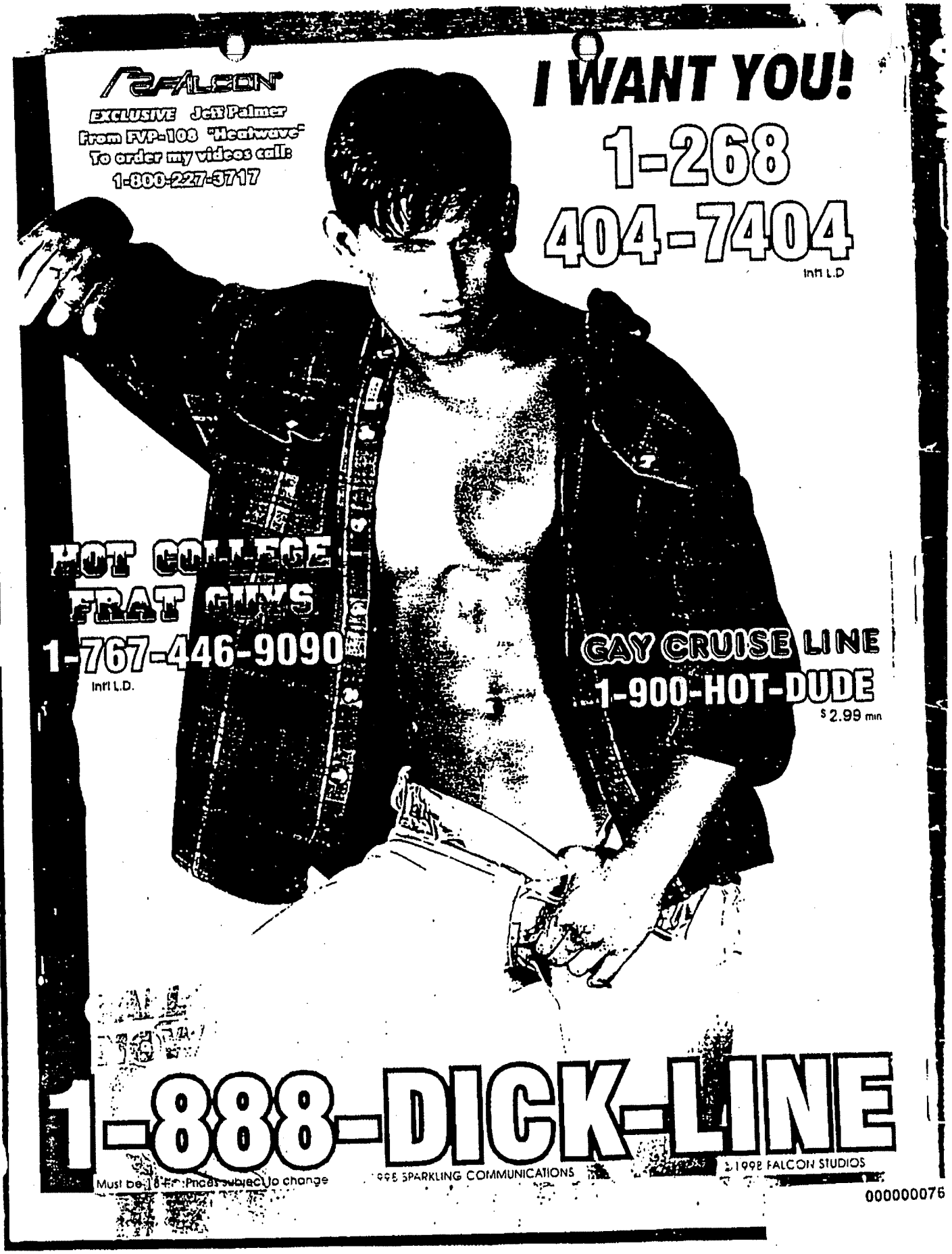
SPO 000964

2-419



SPO 000965

2-420



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2-421

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SPO 000967

2-422

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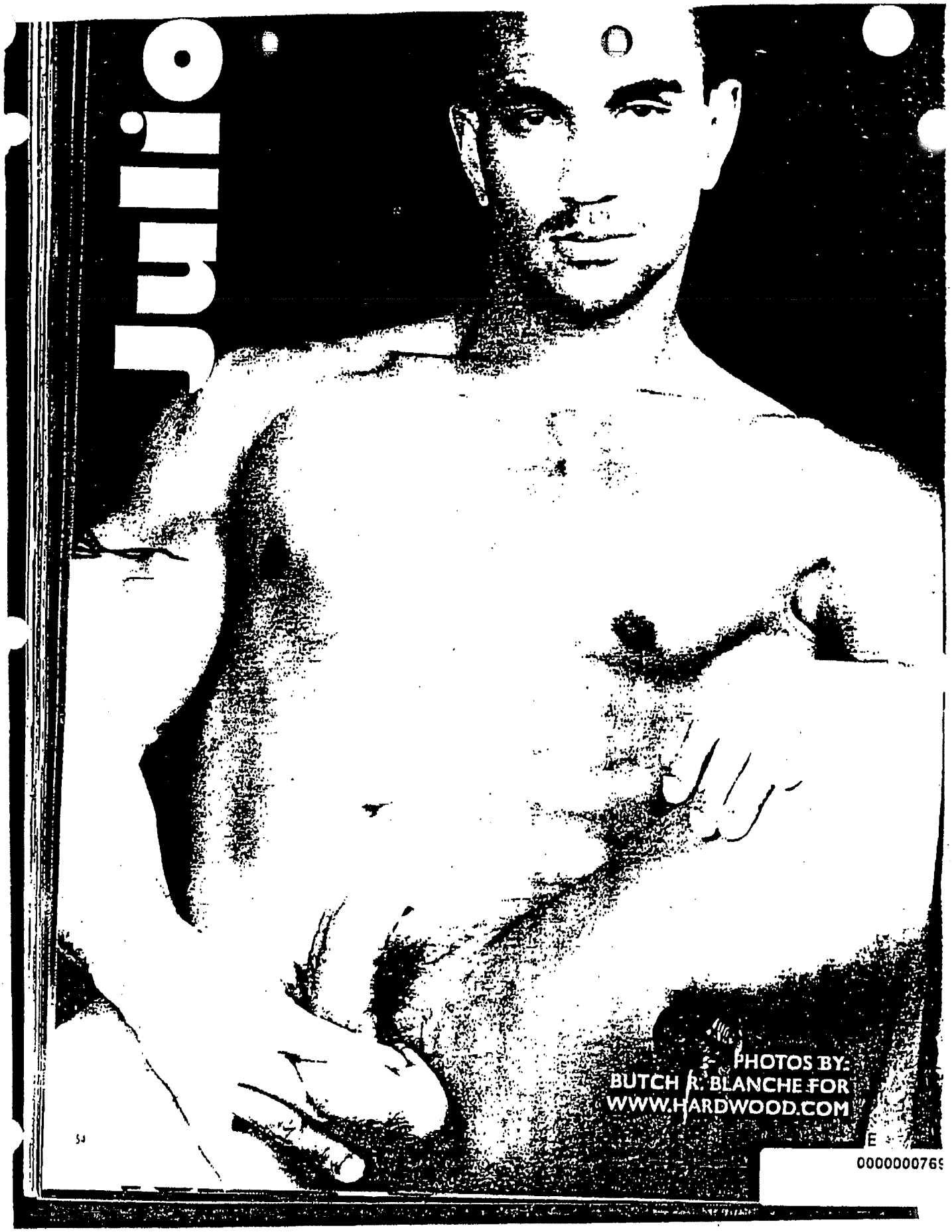
2-423

SPO 000969

2-424

SPO 000970

2-425



SPO 000971

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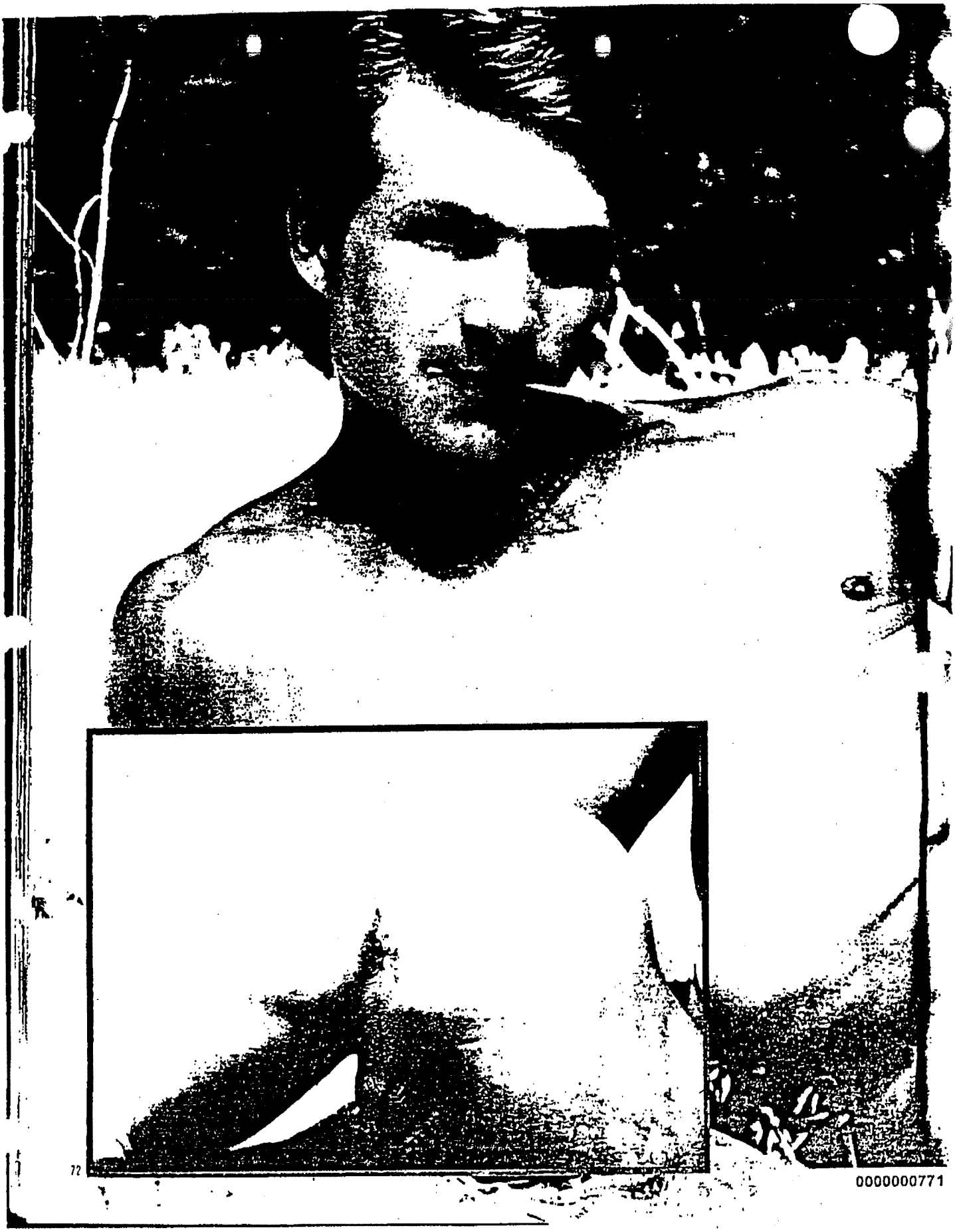
SPO 000972

2-427



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SPO 000974

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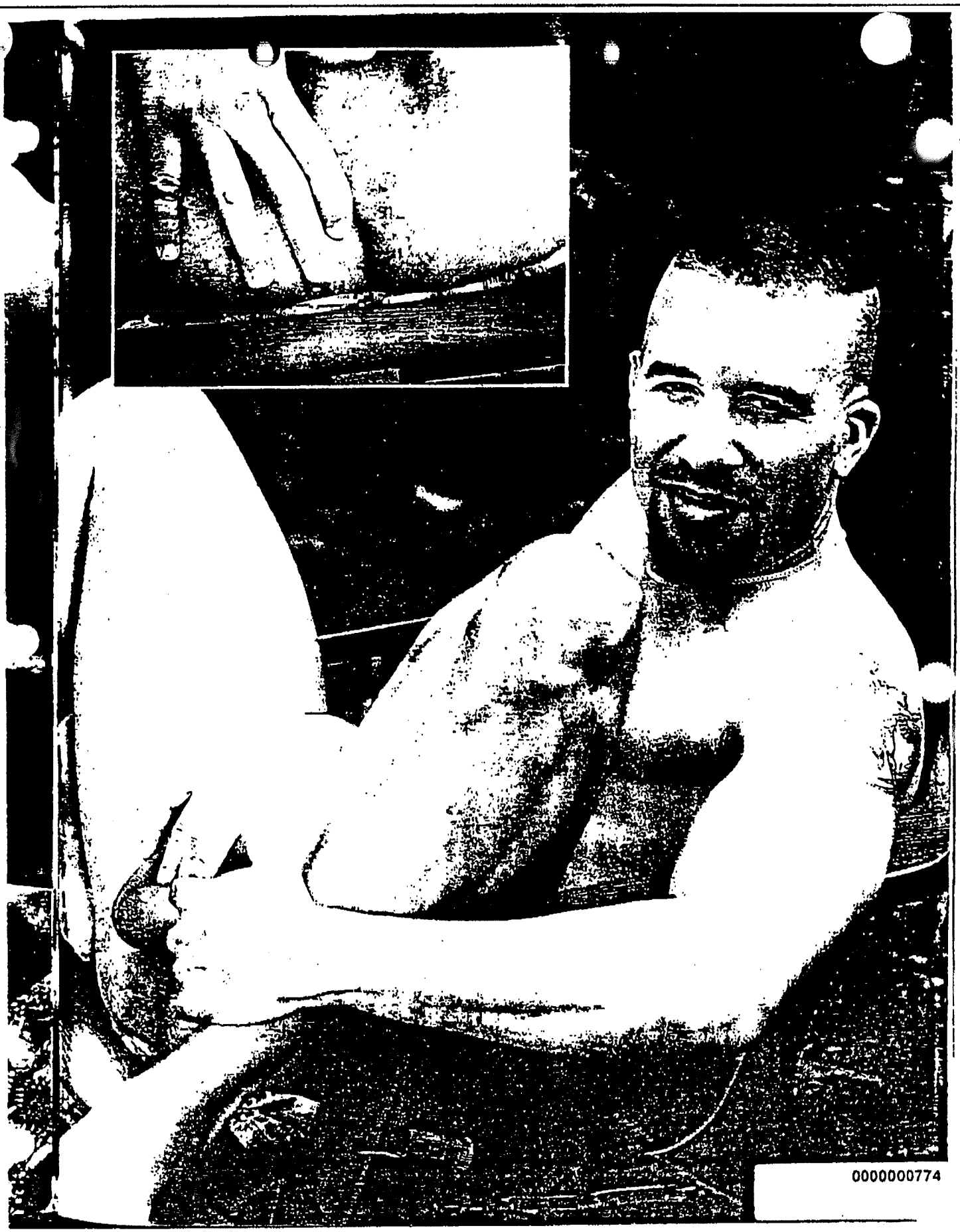

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SPO 000975

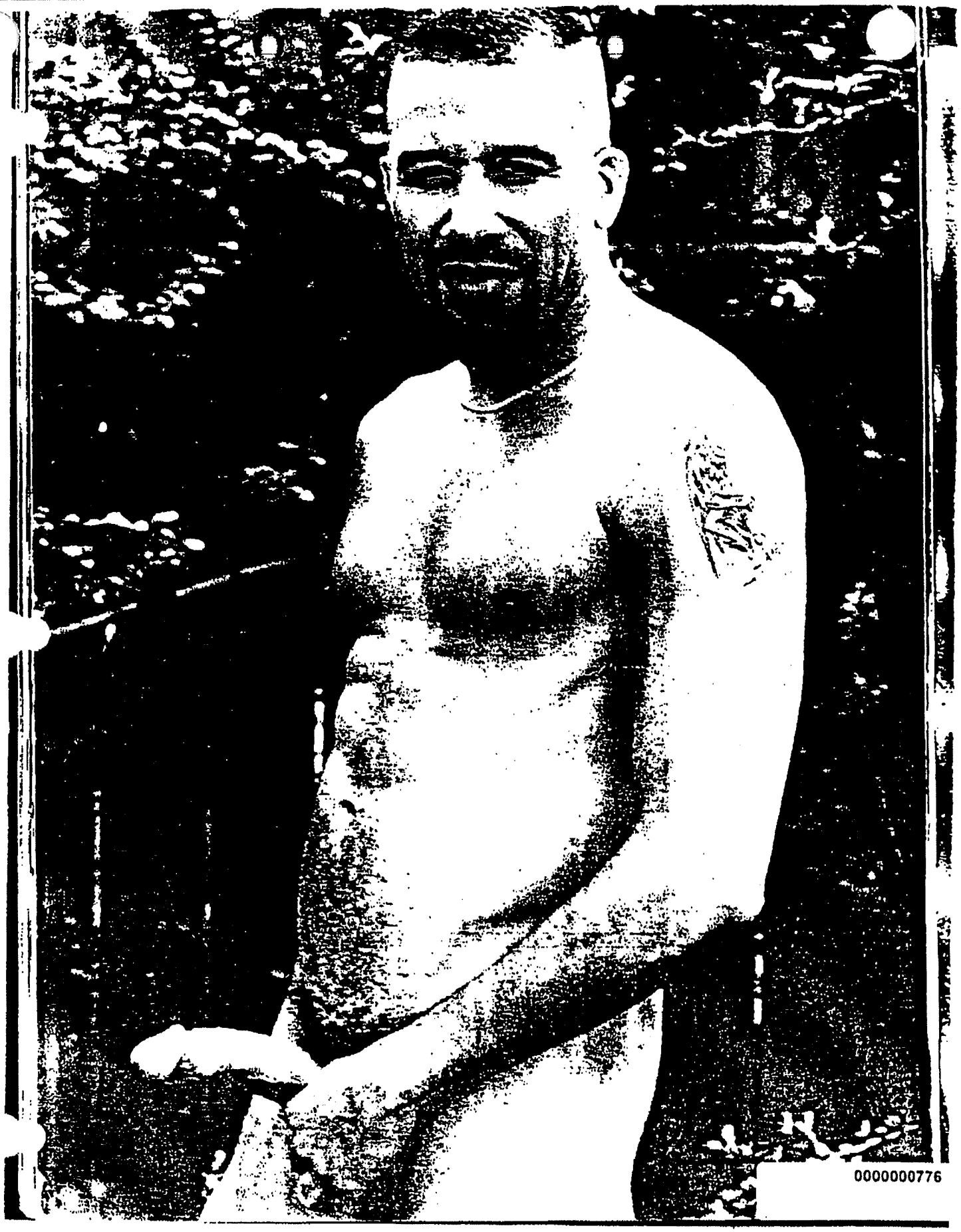
2-430


000000077

0000000775

SPO 000977

2-432



SPO 000978

2-433

Deep in the heart of the Amazon Jungle, somewhere near the border of Brazil and Peru, a group of Brazilian paratroopers on a training mission have lost their way. But they soon discover a tropical paradise of carnal pleasures. 16 of the hottest men in South America and the world await you on this unforgettable adventure!

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Toll Free 1-800-918-9130

Send to BEL AMI, PHOTO & VIDEO
484-B Washington St., # 342 Monterey, CA 93940

Name__________ Address__________

City/State/Zip__________

Payment: ☐ Money order ☐ Visa MC ☐ Check (must be made payable to BEL AMI

Credit Card # __________ Expiration date __________

Telephone # (Required for check orders) (___)__________

Authorized Signature __________

Signature__________ Date_

ORDERS LACKING SIGNATURE WILL BE RETURNED NO OVERSEAS

000000077

SPO 000979

2-434

State of Washington
County of King
ss

I, Marilyn Petersen, hereby declare, under penalty of perjury under the laws of the State of Washington:

1. I am the City Clerk for the City of Renton and have held that position since 1990.

2. On July 20, 1998, Phillip Beckley appeared before the City Council at a regularly scheduled City Council meeting and submitted the following exhibits.

3. The following are true and correct copies and photographs of the exhibits submitted:

Exhibit A: Video cassette found in the parking lot of a video store which is located across the street from a school.

Exhibit B: Video wrappers found in the parking lot of a video store which is located across the street from a school, found in the morning of a school day.

Exhibit C: Same as Exhibit B.

Exhibit D: Same as Exhibit B.

DATED this 22nd day of DECEMBER, 1998.

Marilyn Petersen

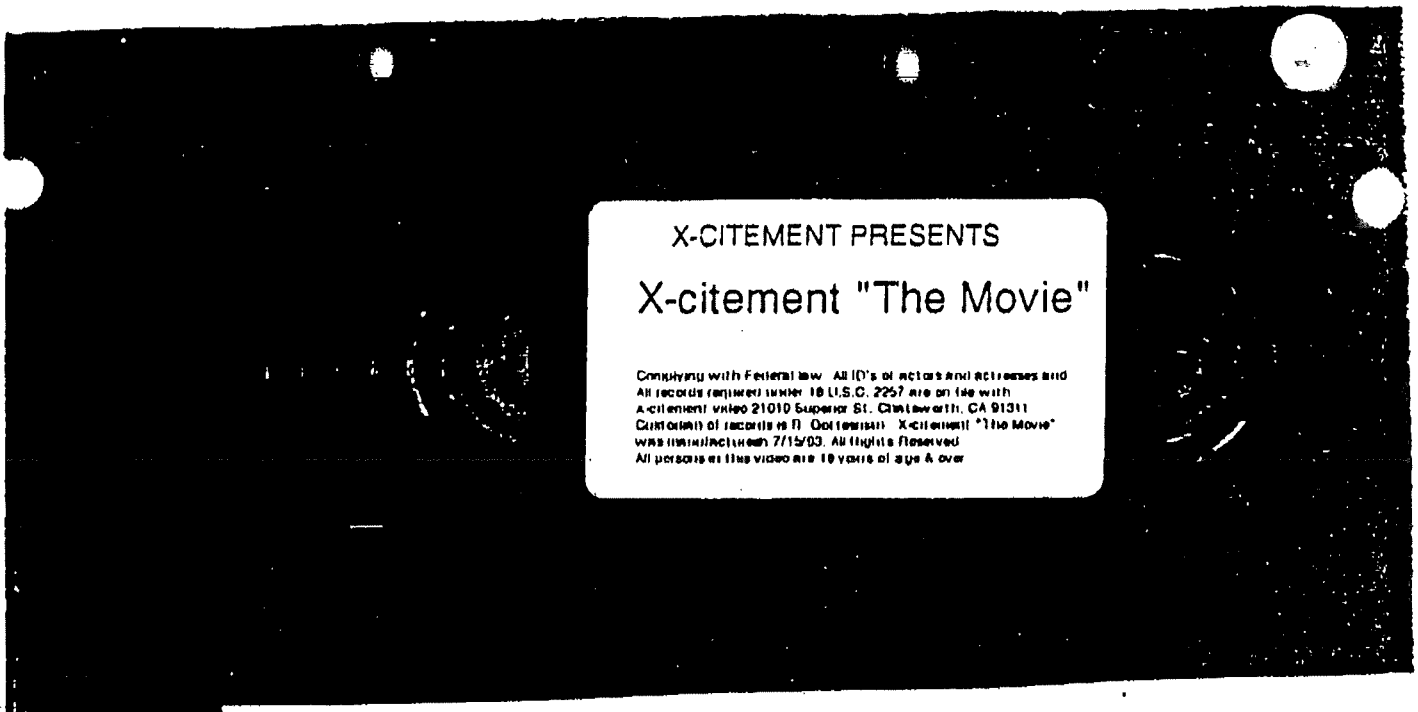
0000000757

SPO 000958

ORIGINAL

WARREN BARBER
DEAN & FONTES, P.S.
ATTORNEYS AT LAW
100 SOUTH SECOND STREET • POST OFFICE BOX 626
RENTON, WASHINGTON 98057
PHONE (425) 255-0670 • FAX (425) 255-1474

2-435



VIDEO FOUND

IN PARKING LOT IN FRONT OF ADULTS ONLY IN HARRINGTON SQUARE BY TWO 12 YEAR OLD BOYS. THE BOYS TURNED THE VIDEO OVER TO THE PICKETERS ON SHIFT WHO HAD BEEN OBSERVING THEIR DISCOVERY.

7/03

0000000758

SPO 000959

2-436

0000000759

SPO 000960

2-437

0000000760

SPO 000961

2-438

SUMMARY OF REVIEW AND CONCLUSIONS REGARDING THE CITY OF ST. CLOUD'S REGULATION OF ADULT USE BUSINESSES

PREPARED BY:
JOHN W. SHARDLOW, AICP
PRESIDENT AND DIRECTOR OF PLANNING
DAHLGREN, SHARDLOW, AND UBAN INC.

December, 1994

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I. Introduction

This firm has been retained to conduct an independent review of various ordinances adopted by the City of St. Cloud for the purpose of regulating adult uses and sexually oriented businesses in that community. We have been asked to evaluate both the content and effect of these ordinances, but also the process that the City followed in developing these regulations.

To complete this assignment we contacted the Planning Advisory Service of the American Planning Association and requested copies of all of the studies and ordinances that the APA had on file related to the regulation of adult uses. We also reviewed our own files and contacted numerous planning departments and planners throughout the State of Minnesota to identify all of the available examples of local ordinances established to regulate adult uses and the studies of adverse secondary effects that supported the regulation of adult uses.

We also received a copy of the report published by the Working Task Force established by the Minnesota State Attorney General's office in 1989. This report includes a summary of the issues surrounding the regulation of adult uses, and provides guidance to communities that seek to establish zoning ordinances and other regulations to avoid the adverse secondary effects associated with adult uses.

In addition to assembling and reviewing numerous studies and ordinances, we also attempted to identify and gather copies of all of the court cases related to local adult use ordinances. Our purpose in completing this initial research was to identify the necessary components of a local program to regulate adult uses. We wanted to understand the limits of a local governments authority to regulate these uses. Our objective was to establish a model process that communities should follow in developing and enforcing regulations to control adult oriented businesses.

The next step in our research was to gather and review the minutes of meetings, staff correspondense, planning reports, and other public records related to meetings at which the City of St. Cloud considered adult use ordinances. When we had completed our research regarding the regulation of adult uses generally, and understood the required procedures and the legal limitations to the regulation of these uses, we compared the St. Cloud ordinance and process against this model.

Although there are many important elements that are discussed regarding the St. Cloud regulations and the process that the City followed in developing them, certainly one of the most important questions was to determine if the St. Cloud ordinances provide reasonable opportunities for adult uses to locate within that community. Therefore, the next segment of this study included a map of the available sites for the establishment of an adult use business, under the St. Cloud ordinances. In the completion of this research we collaborated with a local real estate broker. He was responsible for determining the availability of the various properties

identified in this research. A summary of that research is attached to this report.

Our conclusion following this analysis is that there are numerous sites available for the establishment of an adult use business, consistent with the St. Cloud Adult Use Ordinances. Also, there have been other sites available on the market during the amortization period for the A,B, & C facility that have since been purchased or leased for other uses. Furthermore, from our work on the St. Cloud Comprehensive Plan we understand that the City of St. Cloud is but a part of a much larger metropolitan area, consisting of four other cities and five townships. There are extensive opportunities within the same market area for the location of adult oriented businesses.

The final section of this report consists of an analysis and refutation of the assumptions and conclusions contained in a planning review commissioned by the owners of adult use establishments in St. Cloud. This report, titled, City of St. Cloud Minnesota Adult Use Regulations was written by R. Bruce McLaughlin, AICP and has been submitted as testimony on behalf of the Adult Bookstore & Cinema (A,B, and C) and seeks to invalidate the St. Cloud ordinances.

II. Description of a Model Process for the Establishment of Adult Use Ordinances

Background

The First Amendment Right to free speech prohibits cities from enacting an ordinance that would ban all forms of adult uses or regulate the content of adult material. Cities do, however, have the right to use zoning regulations limit or restrict the adverse secondary effects associated with adult use businesses.

A city may control regulate the effects of a sexually oriented business, without regulating the content of speech protected by the First Amendment, by drafting an ordinance that is aimed at controlling the adverse secondary effects of adult use businesses. Such regulation must be content neutral in its time, place and manner and must further a local government interest in protecting the health, safety and welfare of its citizens.

The Court ruled, in *United States v. O'Brien*, 391 U.S.367, 377, 88 S.Ct. 1673. 1679 (1968), that for an ordinance to be content neutral in time, place and manner a city must act within the constitutional power of the government. It must further a substantial government interest which is unrelated to the suppression of free expression and the incidental restriction on the First Amendment must not be greater than is essential to further that government interest. The U.S. Court of Appeals, 11th Circuit applied a four part analysis to determine whether an ordinance is content neutral in time, place and manner. The following considerations have since guided numerous court decisions.

a.) Whether the type of adult use is protected by the first Amendment.

b.) Whether the ordinance advances a substantial government interest

c.) Whether the interest to be protected is unrelated to the suppression of free expression.

d.) Whether the incidental restriction on free expression is narrowly tailored to advance that interest and allows for reasonable avenues of communication.

Zoning

Zoning is an important and effective tool used by local governmental units to implement land use planning. It is also one of the few controls local communities have over the establishment and location of adult entertainment facilities and the potential adverse secondary effects that may be associated with them. A zoning ordinance, when content-neutral, may regulate the time place and manner in which adult material is presented without expressly violating the First Amendment.

Adverse Secondary Effects

The authority of local governments to enact zoning regulations is one of the primary means by which a city may preserve and protect the public welfare. A city may place locational restrictions or limitations on sexually oriented businesses to keep the adverse secondary effects of these uses from degrading the quality of life in the community.

These effects, resulting from a proximate relationship to an adult use establishment, have been documented in studies conducted by cities across the county. The courts have reasoned that a local government does not have to experience negative effects in order to adopt a proactive ordinance. Local officials may rely on studies, reports, or findings generated by other cities if they reasonably believe the findings are relevant to their own situations. This "reasonable belief", the courts have held, must be documented by the city. *City of Renton v. Playtime Theaters Inc.*, 427 U.S 50, 96 S.Ct.926 (1986)

In the case of *Holmberg v. City of Ramsey.* 12F.3d 140 (8th Cir. 1993), the court upheld the city council's conclusion that if adult uses were not regulated, the secondary effects would occur. This conclusion was based on the recommendation of the city planning commission, whose reliance upon studies conducted by other cities met the court's standard of "reasonable belief". (see page II - 8 for a representative list of studies on adult uses and adverse secondary effects)

Definitions

Defining what constitutes an adult use establishment has been historically troublesome when an ordinance is challenged in the courts. The courts have ruled that a definition must enable planners, city officials and the public to distinguish between similar but not identical uses. Therefore, the ordinance must first define the characteristics of a particular adult use, which may be similar to other uses, and then must qualify the definition so as to distinguish it from uses which are not identical.

Many cities have adopted the wording or a variation of the wording from the Detroit ordinance, upheld in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976), which qualifies its definitions with the phrase "which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to 'specified sexual activities' or 'specified anatomical areas". This type of qualifying statement, subsequent to *Young*, has been ruled confusing or vague and resulted in the ordinance being overturned by the courts.

In reaction to these decisions, some communities have attempted to quantify their definitions. The use of numbers or percentages to determine what is to be considered an adult use, the courts have ruled, must be justified. The ordinance would have to show how a number or percentage could be determined and the city would have to show that the same number or percentage could be reached by two people when applied to the same use.

Recently cities have begun to rely on their own state obscenity statutes which typically prohibit the distribution of pornography to minors. An ordinance, based on the statute, can qualify a certain use as an adult use when it must exclude any minor by reason of age. Thus when an establishment is found to be off limits to minors it concurrently becomes, by definition, subject to regulation by zoning.

Spacing and Distancing Requirements

There are two forms of locational restrictions and limitations that an adult use ordinance may impose to combat the adverse secondary effects. The first regulating method creates an adult entertainment district, concentrating all adult uses into one area. This district, established by means of a special overlay zone, serves two purposes: (1) to concentrate similar adult uses into one small area and (2) to prevent the spread of these uses and their associated adverse secondary effects to other parts of the city.

The second and most common is the dispersal method, originally drafted by the city of Detroit. This regulating method places linear restrictions between adult entertainment establishments and more sensitive uses such as residential districts, churches, schools, parks, daycare centers and nursing care facilities. The dispersal method also subjects certain defined uses from concentrating in one area, in order to insure that such uses and their effects will not contribute to the blighting or downgrading of the surrounding neighborhood.

Linear restrictions require a city to institute spacing standards. These standards typically dictate a specified distance to be maintained between certain uses and residentially-zoned land or between the same or similar uses. These spacing standards, when used as a means to control the adverse secondary effects of adult use businesses, should be based on the each community's own planning analysis. (see page II - 10 for an representative list of spacing standards from across the country) The following list, (*Spaced Out Zoning*, Gerald Luedtke, Planning and Zoning News, 1989),

presents a means, whereby, a city may justify its adoption of spacing standards:

a. The prevention of blight and urban deterioration, (particularly with respect to residential neighborhoods and commercial shopping centers).

b. Preventing deleterious effects on future community economic development potential.

c. Preventing negative effects on environmental and personal health.

d. Prevention of social disorganization and crime.

e. Prevention of negative impacts on the community tax base.

f. Prevention of negative effects on accepted standards of community aesthetics.

Although the dispersal method seeks to avoid a concentration of adult uses in one area, a city may specify, through zoning, certain districts where adult use establishments may operate. These districts, together with spacing standards or alone, must be in line with the cities objective of curbing the adverse secondary effects. They may not be used to deny an adult use business a reasonable opportunity to open or operate.

Amortization

At the time an ordinance, which regulates the secondary effects of an adult use is adopted, an existing adult use establishment may become nonconforming. When allowed by state statute, amortization can require the cessation of a nonconforming use, within a specified period of time, so long as the adult business is not denied access to new locations that meet the requirements of the new ordinance. The courts have ruled that for an amortization provision to be valid it must allow a reasonable, (determined by balancing the public gain against the private loss), amount of time for the owner to recoup his or her investment and it must not deny the public reasonable access to such entertainment.

Reasonable Avenues of Communication

Although the adverse secondary effects of an adult use business may be regulated through zoning, a city may not effectively deny an adult business the opportunity to open and operate. The courts have ruled zoning ordinances invalid when, through the albeit legitimate establishment of districts permitting adult businesses and spacing standards, there arises an actual or practical unavailability of alternative sites due to insuperable physical, legal, or economic barriers to the operation or development of an adult business.

The Ninth Circuit Court stated that the economics of site location is a valid inquiry, so long as th economic analysis focuses on whether a site is part of the relevant real estate market. The criteria

used by the court to determine commercial viability is: 1)When it is reasonable to believe that a particular site will become available for a commercial enterprise, 2) sites in industrial or manufacturing zones are reasonably accessible to the general public, have a proper infrastructure of sidewalks roads and lighting and are suitable for some type of commercial enterprise, and 3) commercially zoned locations are part of the real estate market. The Eighth Circuit went on to say that an adult business left to fend for itself in the real estate market on an equal footing with others does not violate the first amendment.

Recommendations

1. Communities should substantiate the need, rationale and factual basis for regulating the secondary adverse effects of adult use businesses.

2. City officials must document their intent to further a government interest in controlling the adverse secondary effects of adult use businesses.

3. Communities should document reports from the community regarding the deleterious effects of a proximate relationship to an adult business.

4. Planning officials may substantiate local problems by relying on studies, reports or findings completed by other communities.

5. City officials should document their reliance on studies conducted by other communities to substantiate or extrapolate the need to regulate the adverse adverse effects associated with adult use businesses.

6. City officials should analyze and document the reasonableness and necessity of each regulatory aspect of a proposed ordinance.

7. City officials must determine that the ordinance provides reasonable opportunities for adult businesses to open and operate within the community.

ADULT USE STUDIES

1. **Minneapolis City Planning Department Report**
   Zoning Code Text Amendment Analysis
   August 29, 1990

2. **City of Falcon Heights**
   Report Related to Adult Uses
   February 28, 1994

3. **New Hanover County Planning Department**
   Regulation of Adult Entertainment Establishments in New Hanover County
   July, 1989

4. **Manatee County, Florida County Planning and Development Department**
   Adult Entertainment Business Study
   June, 1987

5. **State of Minnesota**
   Report of the Attorney General's Working Group on the Regulation of Sexually-Oriented Businesses
   June 6, 1989

6. **City of Brooklyn Park**
   Staff Reports/Study on Adult Use Entertainment
   February 24, 1992

7. **Department of Justice Canada**
   The Impact of Pornography: A Decade of Literature
   1984

8. **City of Lakeville**
   Zoning Ordinance Revision Adult Uses - Part One
   July 6, 1993

9. **City of Lakeville**
   Zoning Ordinance Revision Adult Uses - Part Two
   January 13, 1994

10. **Rochester/Olmsted Consolidated Planning Department and Office of the Rochester City Attorney**
Adult Entertainment Perspectives
1988

11. **Division of Planning, Department of Planning and Economic Development, City of St. Paul**
Adult Entertainment - A 40-Acre Study
1987

12. **Division of Planning, Department of Planning and Economic Development, City of St. Paul**
Adult Entertainment - Supplement to the 1987 Zoning Study

13. **City of Phoenix**
Relation of Criminal Activity and Adult Businesses
May, 1979

14. **Indianapolis, IN**
Adult Entertainment Businesses in Indianapolis
1984

15. **Adams County, CO**
Adams County Nude Entertainment Study, prepared by the Sherriff's Department
1987

SPACING STANDARDS

City	Residential	Adult Use	On or More of the Following: Daycare, Church, Park, School, Playground, etc.	Other
Islip, NY	500'	½ Mile	500'	
San Bernadino, CA	1,000'	2,000'	1,000'	
Wyoming, MI	500'	1,000'	500'	
Peoria, IL	700'	500'	500'	
Duluth, MN	250'		400'	
Minneapolis, MN	1,000'	1 per block face	500'	
Fargo, ND	1,200'		1,200'	Main Avenue 300' R.O.W.
St. Paul, MN	100'	300'		
Palm Beach City, FL	500'	2,000'	500 TO 1,500'	
Ramsey, MN	750'	1,000'	1,000'	
St. Louis Park, MN	500'	1,000'	1,000'	
Rochester, MN	750'	750'	750'	
Manatte City, FL	500'	1,000'	2,000 TO 2,500'	
Monticello, MN	700'	400'	700'	
Marion City, IN	500'		500'	
Whittier, CA	500'	1,000'	1,000'	
Champlin, MN	500'	500'	500'	

III. Summary of the St. Cloud Process to Establish an Adult Use Ordinance

Background

The City of St. Cloud began a process in 1978 to amend its zoning code to include an ordinance that would regulate adult bookstores and adult motion picture theaters, thereby limiting or restricting the associated adverse secondary effects. This action was initiated in response to community complaints of illicit behavior and unsanitary conditions at an adult bookstore located on T.H. 10.

A draft ordinance was prepared by city staff, subsequent to an investigation conducted by the health department. It provided definitions applicable to adult uses, created an adult use and service establishment district, and specified spacing standards. It was presented by the City Council at a public hearing. Public testimony opposed the ordinance and it was defeated. The adult bookstore continued its operation at the same location.

In 1982 the City Council held a public hearing on an ordinance pertaining to the unlawful display to minors of indecent publications, pictures, or articles. Public opinion favored the ordinance and it was passed unanimously. A motion was made that suggested a copy of the ordinance be displayed where books or magazines are sold. The motion passed unanimously.

Process

A letter to the editor was published by the *St. Cloud State University Chronicle* in 1991 describing the illicit behavior occurring at the adult bookstore located on T.H. 10, (the same bookstore that was investigated in 1978). During the same period the city was receiving numerous complaints from citizens and business owners. The City decided to prepare an ordinance, similar to the adult use ordinance adopted by the City of Minneapolis, to control the adverse secondary effects associated with the adult bookstore and other adult uses. In response, the City Council proposed an amendment to the ordinance relating to nuisances. This amendment would add a section entitled "High Risk Sexual Conduct" which would regulate adult bookstores and theaters where high risk sexual conduct *was* alleged to have occurred.

In August, 1991, the city attorney drafted an amendment to the nuisance ordinance, at the request of the city council, that would regulate adult uses. City staff together with the City Attorney reviewed studies conducted by other cities that document the adverse secondary effects associated with adult uses. These studies and/or memoranda that discussed the pertinent facts and findings were also reviewed by City Council prior to adopting the ordinance. According to information provided to us by the City of St. Cloud, the following studies were among those reviewed.

- *Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses*
  St. Paul Minnesota
  1989

- *Adult Entertainment, 1987, A 40 Acre Study*
  Prepared by the division of planning
  Department of Planning and Economic Development
  St Paul, Minnesota

- *Study of the Effects of the Concentration of Adult Entertainment Establishments in Los Angeles*
  Department of City Planning
  Los Angeles, California
  1977

- *Adams County Nude Entertainment Study*
  Prepared by the Adams County Sheriff's Department
  Adams County Colorado
  1987

The draft ordinance provided definitions applicable to adult uses, taken verbatim from the American Planning Association's *Survey of Definitions*; it designated Light Industrial, Heavy Industrial and Highway Commercial as zoning districts that would allow an adult bookstore or adult theater as a permitted use; it provided 6.15% of the City as area appropriately zoned for adult uses; and specified spacing standards consistent with standards previously set for other uses regulated in the St. Cloud ordinance. Correspondence between the Planning Commission and the City Attorney document the City's desire to draft an ordinance that is consistent with the recent court decisions regarding the regulation of adult uses.

The city council considered the ordinance at a public hearing in August 1991. Public testimony was favorable and the ordinance was passed unanimously. The ordinance was subsequently amended to exclude Highway Commercial as a zoning district that would permit an adult use. The exclusion, it was determined, would still allow adequate opportunity for an adult use business to open and operate in the city. A two year amortization clause, similar to the Minneapolis ordinance, was added to deal with adult use businesses which under the new ordinance would become a nonconforming use.

The final step in the process was to add clarifying amendments to the ordinance. Section 4, is titled "The Purpose and Intent of Adult use Zoning Regulations". This section addresses the City's concern for the health safety and welfare of the community and outlines the actions taken

by the City to curb the adverse secondary effects associated with adult use businesses.

Conclusion

A review of the St. Cloud process to draft an adult use ordinance illustrates the City's intent to regulate the adverse secondary effects associated with an adult use business rather than to regulate the content of adult material protected by the 1st Amendment. The model process was based on the court's ruling in *United States v. O'Brien* which states that an ordinance must be content neutral in time, place and manner. The following is a comparison of the St. Cloud process with the model process presented in the previous section of this report.

Substantial Government Interest

The model process begins by documenting a substantial government interest to protect the health, safety and welfare of its citizens as it relates to the adverse secondary effects associated with adult use businesses. This can be accomplished in one of two ways. The City may rely on studies conducted by others, or may rely on its own evidence of adverse secondary effects.

The City of St. Cloud began documenting, in 1978, an increase in reported crimes and/or nuisances directly related to the bookstore on T.H. 10. Police reports and public testimony describe high risk sexual behavior and unsanitary conditions at this location. The City continued to document reports of crimes, nuisances and concerns regarding the adult bookstore as evidence of the adverse secondary effects associated with adult uses. Studies of adverse secondary effects, conducted by other cities, were also reviewed by the City Attorney, Planning Department and City Council.

Correspondence between the St. Cloud City Attorney, the Planning Commission, the Planning Department and the City Council document the City's belief that the adoption of an adult use ordinance would help the City control the increase in nuisances and crime in the area surrounding the adult bookstore. This ordinance, they felt, should be based on the facts and findings presented in the studies of adult uses and their associated adverse secondary effects, the ordinances from other cities which have been upheld by the courts, and police reports and public testimony regarding the illicit behavior associated with the adult bookstore.

Definitions

The model process defines adult uses in terms of the characteristics which may make it similar to other uses and qualifies the definition so as to distinguish it from uses which are not identical. The St. Cloud Ordinance defines the characteristics of adult uses which may be similar to other uses in a manner identical to the model process.

The two differ in the way each qualifies the definition. The City of St. Cloud relied on the statement:

"...that are characterized by an emphasis on the depiction or description of specified sexual activities or specified anatomical areas."

Although this qualifying statement has been upheld by the courts, the recent trend is to consider this wording "vague". The courts have reasoned that this type of qualifying statement leaves to much room for personal judgement. The model process adopted a qualifying statement based on the State Obscenity Statute. The use of an objective age based qualifying statement avoids the potential for confusion found in the subjective phrase"...characterized by an emphasis on..."

Spacing and Distancing Requirements

The model Process describes two forms of locational restrictions that an adult ordinance may impose to combat the adverse secondary effects associated with an adult use business. The City of St. Cloud chose the dispersal method with specified zoning districts. This method requires the creation of spacing standards and the delineation of specified areas of the city in which an adult use business can open and operate.

The standards set by the St. Cloud ordinance, 1320' between adult uses and 350' between adult uses and sensitive areas, are in line with the standards set by other communities. The standard set for the distance between two adult uses is similar to the distance required between other regulated uses of an identical nature. The standard set for the distance between an adult use and land uses that are considered "sensitive" is 350'. This standard is identical to the standard the city imposes on amusement centers. It also corresponds to the distance that requires notification prior to any change in the land use.

The model process suggests a planning analysis be completed documenting actual negative effects or illustrating a reasonable belief that the negative effects would occur in a proximate relationship to an adult use. Although the City of St. Cloud did not justify their spacing standards on a documented belief that negative effects would occur within the standards chosen, they did base their decision on the ordinances adopted by other communities and the State Attorney General's study.

It is important to remember that the City started to prepare its adult use ordinance immediately after completing its review of high risk sexual activities. Through that process both high risk sexual activities and other adverse secondary effect directly related to the Adult Bookstore & Cinema were thoroughly documented.

Amortization

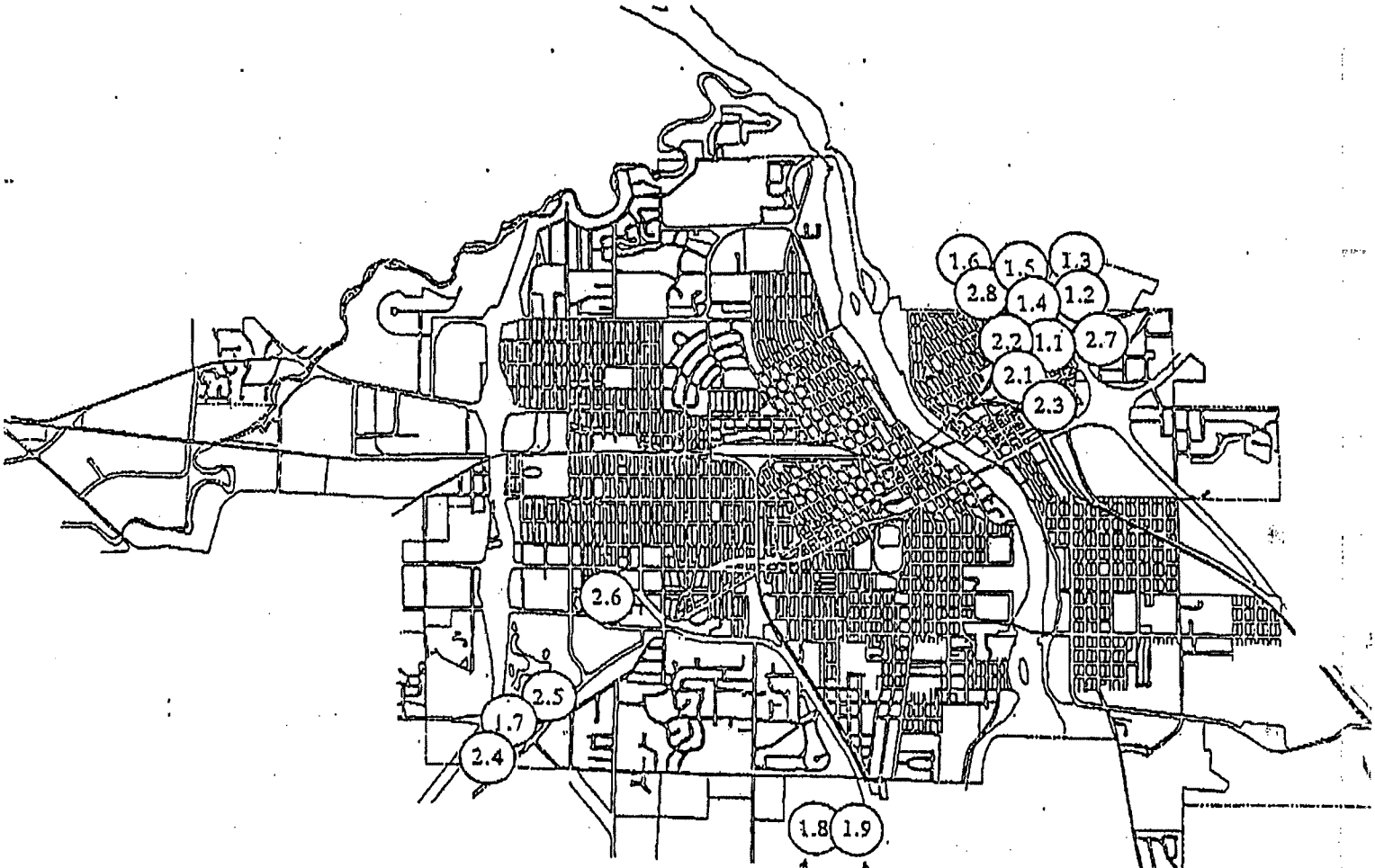
The model process reflects the courts' decisions that amortization is valid when the owner is given a reasonable opportunity to first recoup his or her investment and secondly to relocate with in the city. The City of St. Cloud added an amortization amendment that allows two years for a nonconforming use to cease operation. Based on ordinances, which have been upheld by the courts, the 2 year time frame combined with reasonable access to other areas of the city in which adult uses are permitted, appears to be a valid approach to regulate adult uses.

Reasonable Avenues of Communication

The model process does not specify a percentage of the city's total land area that must be open to the establishment of adult uses, instead it focuses on the city's obligation to provide for reasonable avenues of communication. The courts have reasoned that land with physical characteristics which hinder development or legal characteristics that exclude adult business may not be considered "available" for constitutional purposes. Recent court decisions have looked at potential sites for adult uses in terms of the relevant real estate market, as a test to determine if the city is providing a reasonable avenue of communication or effectively trying to ban adult uses.

The City of St. Cloud approached this issue of providing alternative sites by first looking at the amount of aggregate land that would permit adult uses. This amount was estimated to be 3.35 % of the city. The actual amount of land which, would not be hindered by physical and/or legal restrictions, and is part of the relevant real estate market is less then the original 3.35%. However, examination of the market for adult uses in St. Cloud combined with the number of businesses that would be required to relocate reveals the city meeting its obligation to provide reasonable avenues of communication. A complete analysis of available sites for the establishment of adult use businesses follows this section.

LOCATIONS OF AVAILABLE SITES FOR ADULT USE ESTABLISHMENTS



1.1	415 Franklin Avenue N.E.
1.2	580 North Highway 10
1.3	700 North Highway 10
1.4	625 Apollo Avenue N.E.
1.5	745 8th Street N.E.
1.6	777 Lincoln Avenue N.E.
1.7	3720 18th Street South
1.8	1203 33rd Street South
1.9	1059 33rd Street South
2.1	229 Lincoln Avenue N.E.
2.2	235 Lincoln Avenue N.E.
2.3	607 1st Street S.E.
2.4	West St. Germain
2.5	West St. Germain
2.6	2925 1st Street South
2.7	250 North Highway 10
2.8	Apollo Avenue N.E.

2-456

Summary Review of McLaughlin Report

In addition to the research described above, we have also been provided with a copy of a report prepared by R. Bruce McLaughlin, AICP, which presents his review, analysis, and opinions regarding the St. Cloud Adult Use Regulations. The following is a summary of our review of Mr. McLaughlin's report.

Mr. McLaughlin states that his report sets out to accomplish four objectives:

1. to determine if the City of St. Cloud Adult Use Zoning Regulations are, on their face, a valid exercise of the City's police power, or if they are facially arbitrary and capricious and unrelated to the legitimate exercise of the police power;

2. to determine if the City of St. Cloud Adult Use Zoning Regulations, as applied to one particular site (Adult Bookstore & Cinema, 631 U.S. Highway 10 South), are a valid exercise of the City's police power, or if, as applied to the subject site, they are arbitrary and capricious and unrelated to the valid exercise of the police power;

3. to review, consider and determine the amount of land legally permissible in the City of St. Cloud for Adult Uses in accordance with applicable St. Cloud Zoning requirements and with all other applicable Land Development Regulations; and to present this data as a determination of the number of sites potentially available; as well as a gross acreage and as a percentage of the entire City;

4. to determine if, based on the previous three analysis, the City of St. Cloud Adult Use regulations appear to comply with the Constitutional requirements for such regualtions.

To accomplish these objectives he presents a review of portions of relevant State Statute, sections of the St. Cloud Comprehensive Plan, its Zoning Ordinance and other reports and documents. Mr. McLauglin concludes in his report that not only did St. Cloud fail to identify any adverse secondary uses associated with the subject adult use establishment, but further that through his own independent analysis, he has concluded that not a single one of the many studies that have been prepared to document the adverse secondary effects of adult uses are "statistically or scientifically valid".

It follows logically therefore, that he goes on to conclude that any ordinance that is justified based upon findings and conclusions about adverse secondary effects is also invalid. In preparing his report, Mr. McLaughlin chose to include extensive, photocopied sections from State statute, the 1993 St. Cloud Comprehensive Plan, and City ordinances. In my opinion, extensive portions of the copied documents are of virtually no relevance to the central issues in this case.

Both I and members of my staff have completed a line by line review of the McLaughlin report and I would be happy to comment on specific examples of the numerous mistakes in interpretation and unsupported conclusions that we noted in our review. However, in the interest of brevity, I believe that when one wades through all of the padding, Mr. McLaughlin's report advances four principal conclusions. I strongly disagree with all four of these conclusions.

Again, as previously noted, his first principle conclusion is that there are no adverse secondary effects associated with adult use businesses. In support of this conclusion he states that his own independent analysis has determined that not one of the studies prepared throughout the country, documenting the adverse secondary effects of adult uses, are scientifically or statistically valid.

The studies prepared to document adverse secondary effects of adult uses vary significantly, both with respect to the nature of the uses involved and to the methodologies applied. While I would agree that several of the studies that I reviewed could be improved upon from an esoteric professional perspective, I believe that the fact that there are adverse secondary effects associated with adult uses has been irrefutably established. More significantly, courts throughout the United States, including the United States Supreme Court have concluded that many of these studies have adequately documented the adverse secondary effects associated with adult uses. Numerous cases that I have reviewed have concluded that the regulation of adult uses supports a substantial public interest. All of these ordinances are supported by studies completed either by that community, or other communities.

I personally have had extensive involvement with the neighborhoods surrounding the 40 acre study completed by the City of St. Paul. I served as the project manager for the University Avenue Corridor Study and worked very closely with six neighborhood groups and business organizations along the corridor. Among these groups were the three neighborhood groups and businesses most involved with and affected by the concentration of adult uses that used to be located at the intersection of Dale Street and University Avenue.

I observed the conditions in this neighborhood first hand and heard extensive testimony from property owners, teachers, clergy, and business owners about the adverse effects of these adult uses. It is easy for Mr. McLaughlin to sit down in Indian Rocks Florida and conclude that nobody would discard sexually explicit materials in a surrounding neighborhood, because this material is expensive. In fact, I heard of numerous situations in which small children walking home from school found very explicit materials. I also heard from people who owned property adjacent to these uses who told of finding similar material discarded on their property. I also heard testimony about street prostitution, cruising "johns", and discarded prophylactics, as well as neighborhood residents encountering people in the alley and on their property engaged in various sexual acts.

A related conclusion that Mr. McLaughlin makes is that since there are no adverse secondary effects in existence surrounding the Adult Bookstore and Cinema, the St. Cloud ordinance is specifically unjustified. He also advances his own standard for the establishment of an adult use ordinance. That standard is that the community has to identify actual adverse secondary effects before they can regulate adult uses. From my reading of the case law this is clearly not what the courts are saying. Rather, I believe it is generally accepted that communities can rely on the documentatin of adverse secondary efects in other communities in advancing their ordinances.

More importantly, from my review of the public record, including affidavits, minutes, police records and many other documents provided to me by the City of St. Cloud, I believe that the adverse secondary effects surrounding this specific establishment were extensively documented. Furthermore, despite McLaughlin's statements to the contrary, the City Council reviewed this and other relevant studies before it adopted the adult use ordinances.

The third conclusion that Mr. McLaughlin advances is that adult oriented businesses are fundamentally commercial in nature and they, therefore, belong in commercial zoning districts. Inherent in this conclusion is the predicate conclusion that there are no adverse secondary effects, or any other characteristics associated with these uses that distinguish them from other commercial uses. In fact, studies have clearly established why adult uses need to be regulated more stringently than general commercial uses.

Mr. McLauglin's fourth conclusion is the most serious. Here he states that there are an unreasonably limited number of sites available for adult use businesses, after applying the St. Cloud ordinance. I do not know if he failed to measure correctly, or misinterpreted the ordinance, or exactly what the problem is here. The bottom line is that we know there are numerous sites that meet the ordinance that are available on the market. There are others that were available during the amortization period for Adult Bookstore & Cinema that have since been sold. Please refer to the section of this report that identifies all of the sites available for the establishment of adult uses in St. Cloud, under the current ordinance. It is also relevant to point out that the City of St. Cloud is only a part of a much larger metropolitan area and that area includes many more available sites within the same market area.

In summary, Mr. McLaughlin advances basically four principal conclusions in his report. I disagree with all four of his conclusions, including most importantly his conclusion that the ordinance results in too few available sites for adult use businesses. There are definately adverse secondary effects associated with adult use businesses. Adverse secondary effects associated with the Adult Bookstore & Cinema are significant, and they have been well documented. The St. Cloud City Council had this information and more available to it when they adopted their adult use ordinance.

LITTLETON POLICE DEPARTMENT
INCLUSIVE CASE REPORT

Case 20040

Page 1

n Date/Time: 9/2/2004 7:59:02 PM Report Title: KIDNAPPING

Occur. Location: 6502 S BROADWAY Apt: ___ City: LITTLETON State: CO

Category OFFENSE

Location Type PARKING LOT/GARAGE

Business CRYSTALS

Off. Code 18-3-302

Off. Code Desc SECOND DEGREE KIDNAPPING

Category PERSON Involvement SUSPECT SSN

First Name Middle Name Last Name UNKNOWN

Person Type

Race WHITE Sex MALE DOB

DL Number/St Name Type LEGAL

Category PERSON Involvement VICTIM SSN

First Name REBECCA Middle Name SUZANNE Last Name MCPHERSON

on Type

Race WHITE Sex FEMALE DOB 8/12/1982

DL Number/St 980721041 CO Name Type LEGAL

H 10058 KEENAN ST HIGHLANDS RANCH CO 80130 Phone (303)263-7778

W STUDENT LITTLETON

Category PERSON Involvement ADDL. PER. SSN

First Name JOE Middle Name Last Name WARD

Person Type POLICE OFFICER

Race Sex DOB

DL Number/St Name Type LEGAL

BUSINESS 2255 W BERRY AVE LITTLETON CO 80165 Phone (303)734-8235

Case Number 04005441 Page 1

Reporting Officer WARD, J Officer In Charge

Date Printed 9/7/2004 Time Printed 11:42:22 Report Review

Referred to Case Status ___ Date Cleared

2-460

LITTLETON POLICE DEPARTMENT
INCLUSIVE CASE REPORT

Case 2004(-1
Page 2

Begin Date/Time: 9/2/2004 7:59:02 PM Report Title: KIDNAPPING
Occur. Location: 6502 S BROADWAY Apt: City: LITTLETON State: CO

Category	PERSON	Involvement	ADDL. PER.	SSN	532964424
First Name	CHRISTINA	Middle Name	LUCILLE	Last Name	ERVIN
Person Type	MENTIONED PERSON				
Race	WHITE	Sex	FEMALE	DOB	12/29/1979
DL Number/St		Name Type	LEGAL		
H	122 S JOLIET ST APT 205 AURORA CO 80111			Phone	(720)404-0926
W	6502 S BROADWAY LITTLETON CO 80120			Phone	(303)347-1576

Category	PERSON	Involvement	SUSPECT	SSN	522432196
First Name	WOODROW	Middle Name	WILSON	Last Name	CARR III
Person Type					
Race	WHITE	Sex	MALE	DOB	8/29/1974
DL Number/St	952340926 CO	Name Type	LEGAL		
HOME	5605 S BANNOCK ST #308 LTN CO 80120			Phone	(000)347-9461

Category	VEHICLE	Vehicle Class	AUTOMOBILE	License	
Year	-1	VIN		Style	
Make	HONDA	Model	ACCORD	Color	MAROON
Lic. Year/St	-1				
Description					

LIT TON PD
SUPPLEMENTAL CASE REPORT # 1

Case 2004005

Page 1

E Date/Time: 9/2/2004 7:59:02 PM Report Title: SUPPLEMENTAL REPORT

Occur. Location: 6502 S BROADWAY Apt: City: LITTLETON State: CO

Category OFFENSE
Location Type PARKING LOT/GARAGE
Business CRYSTALS
Off. Type ASSAULT/HOMICIDE
Off. Code Desc 18-3-302 SECOND DEGREE KIDNAPPING

Category PERSON Person Type SUSPECT SSN
First Name Middle Name Last Name UNKNOWN
Race WHITE Sex MALE DOB
DL Number/St Name Type LEGAL

Category PERSON Person Type VICTIM SSN
F. Name REBECCA Middle Name SUZANNE Last Name MCPHERSON
Race WHITE Sex FEMALE DOB 8/12/1982
DL Number/St 980721041 CO Name Type LEGAL

HOME ADDRESS 10058 KEENAN ST HIGHLANDS RANCH CO 80130 Phone (303)263-7778
WORK ADDRESS STUDENT LITTLETON

Category PERSON Person Type ADDL. PER. SSN
First Name JOE Middle Name Last Name WARD
Race Sex DOB
DL Number/St Name Type LEGAL

BUSINESS 2255 W BERRY AVE LITTLETON CO 80165 Phone (303)734-8235

LIT .TON PD
SUPPLEMENTAL CASE REPORT # 1

Case 2004005

Begin Date/Time: 9/2/2004 7:59:02 PM Report Title: SUPPLEMENTAL REPORT

Occur. Location: 6502 S BROADWAY Apt: City: LITTLETON State: CO

Category	PERSON	Person Type	ADDL. PER.	SSN	532964424
First Name	CHRISTINA	Middle Name	LUCILLE	Last Name	ERVIN
Race	WHITE	Sex	FEMALE	DOB	12/29/1979
DL Number/St		Name Type	LEGAL		

HOME ADDRESS 122 S JOLIET ST APT 205 AURORA CO 80111 Phone (720)404-0926

WORK ADDRESS 6502 S BROADWAY LITTLETON CO 80120 Phone (303)347-1576

Category	PERSON	Person Type	SUSPECT	SSN	522432196
First Name	WOODROW	Middle Name	WILSON	Last Name	CARR III
Race	WHITE	Sex	MALE	DOB	8/29/1974
DL Number/St	952340926 CO	Name Type	LEGAL		

HOME ADDRESS 5605 S BANNOCK ST #308 LTN CO 80120 Phone (000)347-9461

Category	VEHICLE	Vehicle Class	AUTOMOBILE	License	
Year		VIN		Style	
Make	HONDA	Model	ACCORD	Color	MAROON
Lic. Year/St					
Description					

Category NARRATIVE

ASSIGNMENT:

On 090204 at approximately 1959 hrs I responded to an attempted abduction at 6052 S. Broadway.

INVESTIGATION BY OFFICER WARD:

Upon arrival I contacted Rebecca McPherson in the store. Mcpherson, a customer of Crystals, was visibly upset and stated that as she was walking out to her car on the south side of the building, she had been approached by a white male in his thirties.

She stated that the suspect was parked in his vehicle which, when she exited Crystals, was in the lot between two buildings located to the southeast of Crystal's. McPherson described the vehicle he was in as a

LIT TON PD
SUPPLEMENTAL CASE REPORT # 1

Case 2004005[illegible]
Page 3

E Date/Time: 9/2/2004 7:59:02 PM Report Title: SUPPLEMENTAL REPORT
Occur. Location: 6502 S BROADWAY Apt: City: LITTLETON State: CO

dark older model Honda Accord. She stated that as she walked to her car she saw him drive up at a high rate of speed and park directly behind her car in what seemed to be an attempt to block her in. She stated that it appeared to her that he was writing down her license plate number but that when he got out of his car she did not see him put anything down.

She stated that he then approached her as she was opening the driver's side door of her vehicle and stated something like, "You're going home with me" or " I'm taking you to my home." McPherson wasn't sure exactly what was said, but the content was something like what is stated above. She stated at this point she hurriedly opened her car door and sat down in her car. She reported that she immediately closed the door and locked the door. She stated that as she was getting into her car he attempted to grab her. She stated that he lunged at her as she was getting in the car and she was in fear for her life thinking he was going to abduct her. She stated that she then sped off in an attempt to get away from the suspect.

After she left she returned to Crystal's a couple of minutes later to contact the police.

I was then contacted by a Crystal's employee who had his manager on the phone. He handed the phone to me and I then spoke with her (Ervin, Christina) over the phone. Ervin stated to me that they had previously had a problem with a guy named " Woody" who use to work at Crystals. She stated that " Woody" had been arrested in the past for indecent exposure and that she was going to get additional information about him for me and call me on 090304.

Mcpherson was unsure if the suspect got out of the passengers side of the vehicle or the driver's side.

I will follow up with the manager of Crystal's on 090304.

Detective Baca was notified of the attempted abduction.

NEIGHBORHOOD CANVASS:
N/A

PROPERTY/EVIDENCE:
N/A

ATTACHMENTS:
Statement from McPherson.

DISPOSITION: Referred to detective division.

JPWard/0104 090204

LIT .TON PD
SUPPLEMENTAL CASE REPORT # 1

Case 2004005
Page 4

Begin Date/Time: 9/2/2004 7:59:02 PM Report Title: SUPPLEMENTAL REPORT
Occur. Location: 6502 S BROADWAY Apt: City: LITTLETON State: CO

Category **NARRATIVE**

Supplemental Report by Detective D. A. BACA 8402

I was assigned this case on Friday September 3, 2004. I contacted the victim and advised her that I would be investigating her case. She stated that she did not think that she could identify the person who attacked her.

Category **NARRATIVE**

INFORMATION REPORT BY OFFICER WARD:

On 090304 I contacted Christina Ervin who is the manager at Crystal's. She stated that she had a problem with a former employee she named as Woodrow Wilson Carr. She stated that Carr had been observed on about four occasions in the parking lot masturbating and that he was previously in a late model maroon car, possibly a Honda Accord. She stated that he had harassed some of the employee's in the past. I cleared Carr and determined that his physical information matches the description of the suspect described by McPherson in this case. From previous contact records I determined that Carr may reside at 5606 S. Bannock St., # 308. Carr was terminated from Crystal's.

Nothing further at this time.

JPWARD 0104 090304

Case Number 2004005441-1 Page 4
Reporting Officer BACA, D Officer In Charge
Date Printed 9/7/2004 Time Printed 11:42:42 Report Review
Referred to Case Status Date Cleared

2-465

LITTLETON POLICE DEPARTMENT
CASE REPORT

Case 2004[illegible]

Page 1

n Date/Time: 1/27/2004 10:30:00 PM Report Title: INDECENT EXPOSURE

Occur. Location: 6502 S BROADWAY Apt: Clty: ACSO State:

Category	OFFENSE
Location Type	PARKING LOT/GARAGE
Business	CHRISTALS
Off. Code	18-7-302
Off. Code Desc	INDECENT EXPOSURE

Category	PERSON	Involvement	SUSPECT	SSN	
First Name		Middle Name		Last Name	
Person Type					
Race	WHITE	Sex	MALE	DOB	
DL Number/St		Name Type	LEGAL		

Category	PERSON	Involvement	ADDL. PER.	SSN	
First Name	HILARY	Middle Name	NICHOLE	Last Name	HANCOCK
n Type	INVOLVED PARTY				
Race	WHITE	Sex	FEMALE	DOB	11/3/1984
DL Number/St		Name Type	LEGAL		
H	LITTLETON				
W	6502 S BROADWAY LITTLETON CO 80120			Phone	(303)347-1576

Category	PERSON	Involvement	ADDL. PER.	SSN	
First Name	THOMAS	Middle Name		Last Name	HOAK
Person Type	POLICE OFFICER				
Race	WHITE	Sex	MALE	DOB	
DL Number/St	CO	Name Type	LEGAL		
BUSINESS	2255 W BERRY AVE LITTLETON CO 80165			Phone	(303)734-8266

Category	VEHICLE	Vehicle Class	AUTOMOBILE	License	
Year	-1	VIN		Style	
Make	FORD	Model	TEMPO	Color	RED
Lic. Year/St	-1				
ription					

Case Number 04000526 Page 1

Reporting Officer HOAK, T Officer in Charge

Date Printed 2/10/2004 Time Printed 14:00:01 Report Review

Referred to Case Status Date Cleared

2-46 6

LITTLETON POLICE DEPARTMENT
CASE REPORT

Case 20040

Page 2

Begin Date/Time: 1/27/2004 10:30:00 PM Report Title: INDECENT EXPOSURE

Occur. Location: 6502 S BROADWAY Apt: ___ City: ACSO State: ___

LITTLETON POLICE DEPARTMENT
NARRATIVE SHEET FOR CASE 2004000526

Date 2/10/2004

Page 1

INDECENT EXPOSURE **IR REPORT** **HOAK, T**

ASSIGNMENT:

On 1-27-04, at approximately 2230 hours, I was dispatched to Christal's at 6502 S. Broadway reference a party exposing himself to a customer that had occurred nearly 30 minutes prior to call.

INVESTIGATION BY OFFICER HOAK:

I arrived on scene and contacted the clerk on duty, Hilary Nichole Hancock. Hancock stated that a male party, described as a white male, approximately 5'8" in height with dark brown hair and brown eyes, with a goatee, and wearing a complete Brakes Plus uniform including the hat, came into the store, flirted with her, then left. While he was in the parking lot in a red Ford Tempo style vehicle, he approached a female store customer asking her if she "wanted to go with him". At this time, the suspect was completely naked. The female victim then fled from the north side of the store to the south side where she pounded on the south door windows. The suspect apparently left the area after other customers told him to get out of there. None of the customers wanted to get involved and at this point, we have no victiim. The license plate obtained by Hancock did not come back on any known vehicle.

I advised Hancock to contact us promptly if she sees anything or anyone suspicious around her store, to print a copy of the surveillance photo if it shows this suspect (unknown at this time, requires managerial review) and show this to other clerks and provide me with a copy as well, and that we would have additional patrols in the area.

NEIGHBORHOOD CANVASS:

NONE

PROPERTY/EVIDENCE:

NONE

ATTACHMENTS:

NONE

DISPOSITION:

VICTIM DECLINED PROSECUTION, HEAVY PATROL REQUEST.
OFC. HOAK, 2007, 1-28-04.

2-468

City of Oklahoma City
COMMUNITY DEVELOPMENT DEPARTMENT
Planning Division

ADULT ENTERTAINMENT BUSINESSES IN OKLAHOMA CITY

A SURVEY OF REAL ESTATE APPRAISERS

March 3, 1986

The City of Oklahoma City

Community Development
200 N Walker
Oklahoma City, Okla. 73102

February 3, 1986

Dear Oklahoma City Appraiser,

The City of Oklahoma City has recently adopted a new ordinance that will regulate the location of adult entertainment businesses.

Adult entertainment businesses are defined in our ordinance as those which emphasize acts or materials depicting or portraying sexual conduct. These businesses include "Adult Bookstores," clubs with nude dancers, theatres which show sexually explicit movies, etc.

In an effort to more completely analyze the impact of adult businesses on surrounding properties, Planning Division asks for your help in establishing a "best professional opinion" on the matter. As a real estate professional, the opinions you share with us on the enclosed survey forms would be very valuable to us in the development of a local data base for this sensitive land use issue.

Thank you very much for your assistance.

Sincerely,

Carl Friend

Carl Friend
Principal Planner

CF:SK:dar

cc: Pat Downes
H. D. Heiser

2-470
2-472

COMMUNITY DEVELOPMENT DEPARTMENT
Planning Division
CITY OF OKLAHOMA CITY

TO: Professional Real Estate Appraisers

Please help us in this brief Oklahoma City survey. The information provided will help us establish an important data base regarding adult entertainment businesses.

The first four questions relate to the hypothetical situation presented below. The last three questions refer to actual situations in Oklahoma City that you might be aware of.

> A middle income residential neighborhood borders an arterial street that contains various commercial activities serving the neighborhood. There is a building that was vacated by a hardware store and will open shortly as an adult bookstore. There are no other adult bookstores or similar activities in the area. There is no other vacant commercial space presently available in the neighborhood.

Please indicate your answers to questions 1 through 4 in the blanks provided, using the scale A through G.

SCALE:
- A Decrease 20% or more
- B Decrease more than 10% but less than 20%
- C Decrease from 0 to 10%
- D No change in value
- E Increase from 0 to 10%
- F Increase more than 10% but less than 20%
- G Increase 20% or more

1) How would you expect the average values of the RESIDENTIAL property within ONE block of the bookstore to be affected? _____

2) How would you expect the average values of the COMMERCIAL property within ONE block of the bookstore to be affected? _____

3) How would uou expect the average values of RESIDENTIAL property located THREE blocks from the bookstore to be affected? _____

4) How would you expect the average values of COMMERCIAL property located THREE blocks from the bookstore to be affected? _____

5) Are you aware of the existence of adult entertainment businesses in Oklahoma City? _____

6) What is your opinion as to the effect of these businesses on surrounding properties?

_____

_____

_____

7) Specifically, how do you think these businesses affect the surrounding property?

_____

_____

_____

_____

_____

Are you a member of:

MAI ____

ASA ____

SREA ____

other _____

Your name or agency _____

(If you prefer not to give your name, please check here ___)

Thank you for your cooperation. Please return this questionnaire in the postage paid envelope provided for your convenience.

METHODOLOGY

On February 7, 1986, 100 questionnaires were mailed. All real estate appraisers in Oklahoma City listed in the Yellow Pages were included in the survey. As of March 1, 1986, 34 (34%) of the questionnaires had been completed and returned. Real estate appraisers do not receive certification from the State of Oklahoma; however, 26 of the respondents (76%) belonged to a professional organization. The table below summarizes the objective part of the questionnaire. Subjective comments are discussed in a separate section of this report.

SCALE	QUESTIONS			
	1	2	3	4
A Decrease 20% or more	11 (32%)	7 (21%)	4 (12%)	4 (12%)
B Decrease 10% - 20%	8 (24%)	9 (26%)	3 (9%)	3 (9%)
C Decrease 0 - 10%	6 (18%)	10 (29%)	10 (29%)	7 (21%)
D No change in value	9 (26%)	8 (24%)	17 (50%)	20 (59%)

E,F, and G were positive values--not checked by anyone

OKLAHOMA CITY REAL ESTATE APPRAISER SURVEY RESULTS

The 100% survey of real estate appraisers in Oklahoma City produced results that were consistent in virtually all respects with the result of the national survey of appraisers carried out by the city of Indianapolis.

Respondents overwhelmingly (74%) indicated that an adult bookstore would have a negative effect on residential property values in the hypothetical neighborhood described if they were within one block of the premises. 32% felt that this depreciation would be in excess of 20%, wheras 42% foresaw a decrease in value of from 1% to 20%. (Comparative national figures are 78%, 19% and 59% respectively.)

Seventy-six percent (76%) saw a similar decrease in commercial property values within one block of the adult bookstore. As in the national survey, fewer (21%) felt that a devaluation of over 20% would occur. The majority, (55%) saw the depreciation as being in the 1% to 20% range. (Comparative national figures are 69%, 10% and 59% respectively.)

The negative impact fell off sharply when the distance was increased to three blocks. As in the national survey, there appears to be more of a residual effect on residential properties than on commercial properties.

50% of the appraisers felt that a negative impact on residential properties would still obtain at three blocks from the site. Only 12% felt that this impact would be in excess of 20%. The remaining 38% felt that depreciation would be somewhere in the 1% to 20% range. 50% saw no appreciable effect at all at three blocks. (Comparative national figures are 39%, 3% and 61%.)

Commercial property was judged to be negatively impacted at three blocks by 41% of the survey. 59% saw no change in value as a result of the bookstore. (Comparative national figures are 23% and 76% respectively.)

In summary:

- The great majority of appraisers (about 75%) who responded to this survey felt that there is a negative impact on residential and commercial property values within oneblock of an adult bookstore.
- This nagative impact dissipates as the distance from the site increases, so that at three blocks, half of the appraisers felt that there is a negative impact on residential property and less than half felt that there is a negative impact on commercial property.

RESULTS FROM SUBJECTIVE QUESTIONS

Oklahoma City real estate appraisers were also asked for their opinions as to the effect of adult entertainment businesses on surrounding properties. Most of the respondents discussed a variety of negative effects. Only five respondents (14%) said that adult entertainment business had very little effect on surrounding properties. Of these, three appraiser felt that these types of businesses located in commercial areas that were already blighted. All respondents indicated their awareness of the existence of adult entertainment businesses in Oklahoma City; many refered to the 10th and MacArthur location as a prime example of an undesirable cluster situation.

Opinions are summarized below:

Not good: attracts undesirables, threat to residents feeling of safety & security.
- acts as a deterent to home sales
Would you want your home or business next door?
-forces good businesses out
-tends to have a snowball effect
-an immediate transition begins, with the better quality businesses moving out and a lower class business moving in (pawn shops, bingo parlors)
-embarrassment to other businesses and cliental - late hours, parking- trash and debris - vandalism
-children in the area in danger of adverse influence or by actual molestation by perverted people drawn to such establishments
Typical shoppers and residents go elsewhere to shop, and, if they're able to live.
If there is a large concentration of this type of business, there can be a very large loss in property value.

-tends to prevent economic improvement in the area, effects the community as to attracting other businesses

-detrimimental impact on rental rates

AN ANALYSIS OF THE EFFECTS OF SOBs ON THE SURROUNDING NEIGHBORHOODS IN DALLAS, TEXAS

AS OF APRIL 1997

Prepared for:

Ms. Sangeeta Kuruppillai
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City Hall 7BN
Dallas, Texas 75201

Prepared by:

PETER MALIN, MAI

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THE MALIN GROUP

April 29 1997

Ms Sangeeta Kuruppillai
Assistant City Attorney
CITY OF DALLAS
Office of the City Attorney
City Hall 7BN
Dallas, Texas 75201

RE: The analysis of the effects of Sexually Oriented Businesses (SOBs), specifically those which offer or advertise live entertainment and operate as an adult cabaret, on the property values in the surrounding neighborhoods. The findings below update and incorporate the report prepared by The Malin Group dated December 14, 1994.

Dear Ms. Kuruppillai;

In accordance with our engagement letter dated August 2, 1994, as amended on March 21, 1997, we have completed the study referenced above. Below is a summary of our findings and the reasoning behind our conclusions.

CONCLUSIONS

Sexually oriented businesses, specifically those that offer or advertise live entertainment and operate as an adult cabarets, currently exist in the city of Dallas. Many of these businesses are located by themselves away from other SOBs while in some areas of the city they can be found concentrated in one area.

In our December 14, 1994 Report ("The Report"), we found that SOBs have both a real and a perceived negative impact on surrounding properties. In such areas, crime rates are higher and property values are lower and/or the properties take longer to lease or sell. Our study has found that the higher the concentration of these businesses in one locale, the greater their impact on the neighborhood.

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There are two primary ways in which SOBs affect the neighborhood: one is by their presence, including signage and advertising, and the other is by the hours they keep and the type of people they attract.

Their presence influences the public's perception of the neighborhood in which they are located. SOBs "can create 'dead zones' in commercial areas where shoppers do not want to be associated in any way with adult uses, or have their children walk by adult uses"[1] This influence appears to be the same whether the dancers are appearing in a state of nudity or semi-nudity. The public perception is that it is a place to be avoided by families with women and children.

The second major influence is the hours of operation and the type of people which SOBs attract. This appears to lead to higher crime in the area, loitering by unsavory people, including prostitutes, and parking problems which can negatively affect the surrounding businesses. Additionally, there is frequently parking lot noise and disturbances which often turn violent. The SOBs keep late hours which can also become a nuisance to nearby residents.

We studied police calls for service emanating from 10 different SOBs over a four year period from 1993 through 1996 and found that SOBs were a major source of such calls. The seven SOBs along West Northwest Highway near Bachman Lake averaged more than one call to the police everyday. We also studied sex-related arrests for the four year period ending March 1997. The number of sex crime arrests which include rape, prostitution/commercial vice and other sex offenses, was 396 in the area along West Northwest Highway which includes the seven SOBs. This compares to 77 and 133 sex crime arrests respectively in two similar areas along Northwest Highway, the second of which contained two SOBs spaced more than a ½ mile from the other. From this evidence, it appears that there is increased sex crime arrests and disturbances requiring police presence around SOBs and significantly more crime when there is a concentration of SOBs in one area.

We reviewed studies completed in numerous other cities including: Austin, Los Angeles, Indianapolis, New York, and Phoenix on the effects of adult entertainment on the surrounding properties. In addition, we reviewed summaries of similar studies completed in Islip, New York; St. Paul, Minnesota; Whittier, California; Manatee County, Florida and New Hanover County, North Carolina. Finally, we did extensive research regarding the SOBs in Dallas.

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[1] *Adult Entertainment Study*, Department of City Planning, City of New York, 1994, p. 3

All of these localities, after completing their own independent study of the issue, and reviewing the work of the others, decided to enact controls on SOBs which would prohibit them from concentrating in one area in the community and limit the areas in which they could locate to those away from residential, religious, educational and recreational uses.

In most cases, the localities limited SOBs from locating in all but a few zoning districts. They set minimum distances between other SOBs as well as residential, religious, educational and recreational uses. These distances were generally 500 or 1,000 feet. Most localities established amortization periods after the enactment of the ordinance in which SOBs became non-conforming. Generally, local authorities could grandfather certain SOBs through a public hearing process. Most of the clubs that were grandfathered were isolated establishments which advertised discretely and were buffered from residential uses.

In several instances, State and Federal Courts have found that legislation controlling SOBs was constitutional and did not abridge First Amendment rights. As long as the locality provided for a sufficient number of relocation sites, these restrictions were found to be constitutional.

We reviewed these studies to determine whether the other cities used sound principles in reaching their conclusions. After reviewing the studies completed by New York, Phoenix, Indianapolis, Austin and Los Angeles, we determined that their methodology was appropriate and their conclusions were sound. **We have no reason to believe that these findings would be any different in Dallas.**

These studies in the "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."[2]

The other cities' studies, as well as the study that we completed in Dallas, "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-

[2]IBID. p. vii

oriented shopping areas and view the appearance of one (emphasis added) or more of these uses as a deterioration in the quality of urban life."[3]

In Dallas, we interviewed a number of real estate brokers active in an area punctuated by SOBs who reported that SOBs "are perceived to negatively affect nearby property values and decrease market values". Eighty percent of the brokers responding to a NYC 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[4] completed by Indianapolis and a survey completed in Los Angeles of real estate professionals.

"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."[5] This was a major complaint in our interviews in Dallas and the findings of the New York City report as well as the other localities.

We have prepared a video tape to accompany this report that shows typical SOB signage in Dallas. The newer clubs that stand-alone and meet the requirements of Chapter 14 Section 41A of the Dallas zoning code, generally have more discrete on-site signage while those that must compete for customers from nearby or adjacent SOBs have more obvious on-site signage intended to draw the public's attention.

SUMMARY

We found from our study of three Dallas neighborhoods and the findings of numerous other localities, that one isolated SOB has much less direct impact on the neighborhood than a concentration of SOBs. It does, however, impact the properties immediately surrounding it. The more visible it is, the more impact it has.

Concentration Effect

Our study shows that the location of multiple SOBs in one neighborhood can have a major impact on the neighborhood by contributing to crime, driving away

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[3] IBID. p. viii

[4] IBID. p. viii

[5] IBID. p. viii

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family-oriented businesses and impacting the nearby residential neighborhoods When concentrated, SOBs typically compete with one another for customers through larger, more visible signs, and graphic advertising. They tend to be a magnet for certain types of businesses such as pawn shops, gun stores, liquor stores, check cashing storefronts and late-night restaurants.

Impact on Surrounding Properties

The highest and best use of nearby property becomes limited under the principle of conformity as few other tenants wish to be near the SOB-dominated area. Investors and lenders are unwilling to invest in new improvements in these areas and the vacant land sits idle for years. Single-family homes in the area frequently end-up as rentals because the families move away from the SOB-dominated area and it becomes exceedingly difficult to sell such houses.

Attitudinal Impact

As the recent New York City study states: "The experience of urban planners and real estate appraisers indicates that negative perceptions associated with an area can lead to disinvestment in residential neighborhoods and a tendency to shun shopping streets where unsavory activities are occurring, leading to economic decline."[6] The forces that influence real estate value are described as follows: "The market value of real property reflects and is affected by the interplay of basic forces that motivate the activities of human beings. These forces, which produce the variables in real estate market values, may be considered in four major categories: **social ideals and standards** (emphasis added), economic changes and adjustments, governmental controls and regulation, and physical or environmental changes."[7] The attitudinal data in the survey is thus significant even in those instances where the current negative impacts of adult entertainment establishments are difficult to measure.[8]

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[6] IBID, page vi

[7] *The Appraisal of Real Property*, seventh edition, by The American Institute of Real Estate Appraisers, Page 3.

[8] *Adult Entertainment Study*, Department of City Planning, City of New York, 1994, Page vi.

SCOPE OF WORK

Our study was conducted in the following manner.

We reviewed similar studies of adult entertainment completed by five major cities.

As part of our research, we identified a Study Area which included seven SOBs operating as Cabarets (The "Study Area"). We then proceeded to compare and contrast this area with two other areas of Dallas with similar land uses and traffic patterns (the "Control Areas"), one of which did not include any SOBs and one that included two that were a ½ mile apart. These were compared on the basis of sex-crime rates and calls for police over a four year period. Additionally, we interviewed property owners or their real estate brokers and agents who are actively leasing, listing, managing, buying or selling properties in the Study and Control Areas.

We collected and analyzed crime statistics within the Study Area and the two control areas known as Control Area East and West. These crime statistics included the four years ending December 1996. Both the number of sex-crime arrests and number of police calls at the specific SOBs were analyzed (See Exhibit C). The number of sex crime arrests, in the Study Area which includes the concentrations of SOBs was five times higher than the Control Area with no SOBs and nearly three times higher than the Control Area with two isolated SOBs.

We then contacted owners or their real estate representatives at properties in each area that were either trying to sell or lease land or improvements. This interview process included talking to people involved with single family residences, strip shopping centers, community shopping centers, apartments, free standing retail stores, vacant restaurant buildings, vacant autopart stores and vacant commercially zoned land.

We surveyed this group regarding the length of time the property had been on the market, their experience with that property with respect to its pricing and what observations they could offer about trends in the neighborhood. If it was a real estate agent, we asked them to compare this property in this neighborhood to similar properties in other neighborhoods. Finally, we asked these agents if the presence of SOBs in the neighborhood had any impact on their property or the surrounding neighborhood.

The Study Area is a neighborhood located near Bachman Lake on West Northwest Highway, a major gateway to the city where seven SOBs are located. There are three other locations of concentrated SOBs; Greenville Avenue near Lovers Lane; Harry Hines Boulevard near Royal Lane and Spur 342 east of California Crossing where smaller concentrations of SOBs are congregated. We did not study these areas.

Generally, most other live entertainment SOBs are dispersed and located individually throughout many neighborhoods in the city.

The Control Areas, East and West were chosen due to their similar land uses and traffic patterns to those of the Study Area. Control Area West is an area along West Northwest Highway just to the east of the Study Area which does not contain an SOBs. It is located along the same highway as the Study Area and predominately consists of highway commercial and residential uses. Control Area East consists of another part of the same highway, East Northwest Highway. This Control Area however, contains two SOBs one of which, PT's, is at Lawther Lane at the east end of the Control Area and a second SOB, Doll's House, is located at the west end of the Control Area. This area contains both highway commercial and residential uses. The two SOBs are approximately one-half a mile apart but are within 1,000 feet of residential uses.

The boundaries of the three areas were chosen to coincide with the Police Department beats. It is through the beats that crime data is collected and analyzed.

ANALYSIS OF DATA

A summary of other localities' findings regarding SOBs:

DALLAS, TEXAS

Property Owner/Agent Interviews

Between September and November, 1994 The Malin Group interviewed 30 people who were either the owners of commercial property or their agents in the one Study Area and two Control Areas. During March and April 1997, we conducted further interviews with some of the same and many additional owners and agents in the areas.

All of the people interviewed in the Study Area believed that their property values (or those of the owner that they represented) were lower due, in part, to the presence of the seven SOBs operating as Adult Cabarets along West Northwest Highway. This loss of value manifested itself in a variety of ways including: increased operating costs, such as, additional security patrols, burglar alarms, trash cleanup; income property selling at much lower sales prices than comparable properties in similar areas, extreme difficulty leasing in certain shopping centers and a lack of demand for commercial land.

We examined three sales of retail zoned land in the Study Area which sold for but a fraction of what similar properties along the same highway in the Control Area brought. The land sales in the Control Area ranged between $10.00/SF and $12.00/SF while

four sales along the same highway just a mile away in the Study Area sold for prices between $1.20/SF and $7.00/SF respectively.

Two tracts with income-generating retail buildings show similar results. The one in the Study Area sold on a 16.5% capitalization rate (cap rate) while the one in the Control Area sold on a 12.5% cap rate (the higher the rate the lower the value). This difference in rates can be directly attributed to the additional risk factors reflected by the area. The difference between the two yields reflects a 25% drop in property prices near the concentration of SOBs.

In our interviews with real estate professionals, we learned that some properties had been on the market next to or across the street from SOBs for over 10 years. Interest in these sites historically has come from the same small group of users which includes: other SOBs, pawn shops, liquor stores, night clubs, tanning salons, and certain restaurants. These users have found that the SOBs clientele will patronize their businesses; therefore, they tend to congregate near SOBs. We learned that retail space near SOBs is more difficult to lease because the type of tenant who will locate there tends to be limited to those listed above. As a result, these properties take much longer to market. Also, a comparison of lease rates between the Study Area and the Control Area showed lower asking rates near the SOBs operating as adult cabarets.

Most owners and agents that we interviewed who have holdings in either the Study Area or Control Area West believe that should the Study Area be rid of the SOBs, more investment in new restaurant and retail properties would quickly follow. This is due to the high traffic count along Northwest Highway, the density of surrounding developments and the demand generated from the surrounding business and residential neighborhoods. Many others we talked to echoed these sentiments and believed that owners would make significant investments in nearby apartments if the SOBs were gone.

Crime

As part of our comparison of these areas, we collected crime statistics for the Study Area and compared them to the two Control Areas. **We found that sex-related crimes were over five times higher in the Study Area than in Control Area West and nearly three times higher than in Control Area West.** Sex Crimes, as defined by the FBI, include: rape, prostitution/commercial vice and sex offenses. (See Exhibit A attached). The results of this comparison show crime in three similar commercial corridors along Northwest Highway. The Study Area had 398 sex crime arrests during the 50 month period thru March 1997 while Control Area East and West had 133 and 77 respectively. Control Area West is less than a mile from the Study Area along the same highway; yet, it had five times fewer sex crime arrests.

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Location	# of Sex Crime Arrests 1/93 - 3/97
Study Area	366
Control Area East	133
Control Area West	77

These results cannot be solely attributed to the SOBs because of the differences in demographics other factors may be contributing to the crime in the Study Area. However, the data clearly suggests that the SOBs are one of major causes of crime and confirms the results of similar studies in Austin, Los Angeles, Indianapolis, etc. This is true especially with respect to the sex crimes where the same result has been found in nearly all the other localities studied.

Police Calls

We analyzed Dallas Police Department call logs where such calls were made from the SOBs in the three areas (See Exhibit B). A review of these calls from the four year period 1993 thru 1996 shows a repetitive series of complaints coming from these SOBs which includes assaults and unruly behavior both inside and outside of the clubs. The Police Reports show numerous situations where weapons were present and prostitution was occurring. In the Study Area during this four year period, there was more than one call per day for the Dallas Police from these seven locations.

DALLAS - SUMMARY

In all of our interviews in both 1994 and 1997, we found that only one person thought they benefitted from the presence of the SOBs. The SOBs were largely responsible for the Study Area's negative perception by the public and many people interviewed believe that the SOBs are largely responsible for the high crime in the area.

The Control Areas, where crime was lower, were also impacted by the nearby presence of SOBs. The two SOBs reported 275 calls for Police during the last four years. The Control Area with the two SOBs also had significantly more sex crime arrests than the Control Area with no SOBs.

We found that properties in Dallas are negatively impacted by the presence of SOBs. This is more evident when they concentrate in one area, but can be seen elsewhere through the dining and shopping patterns in the neighborhood. We found that crime is significantly higher in the Study Area where seven establishments are located. Contributing to this is competition for customers requiring larger, more obtrusive and

graphically suggestive signage. Little investment in the area is being made because there are a limited number of users who wish to be near such establishments. What investment is occurring requires much higher returns to offset the risks apparent in the neighborhood.

Our findings here in Dallas are reinforced by the numerous studies done in other localities, all showing higher crime in areas where SOBs are concentrated (especially sex crimes). The general negative feelings towards these areas and avoidance of the area by those who live in the surrounding community, both in our study and those from around the country, show how the public perceives such areas. This is reinforced by numerous newspaper articles on the subject, both in Dallas and the other localities and national press. The presence of the SOBs in the Dallas Study Area has resulted in a general disinvestment in the surrounding properties.

Respectfully submitted,

THE MALIN GROUP

Peter Malin, MAI
Managing Director

PM/kn

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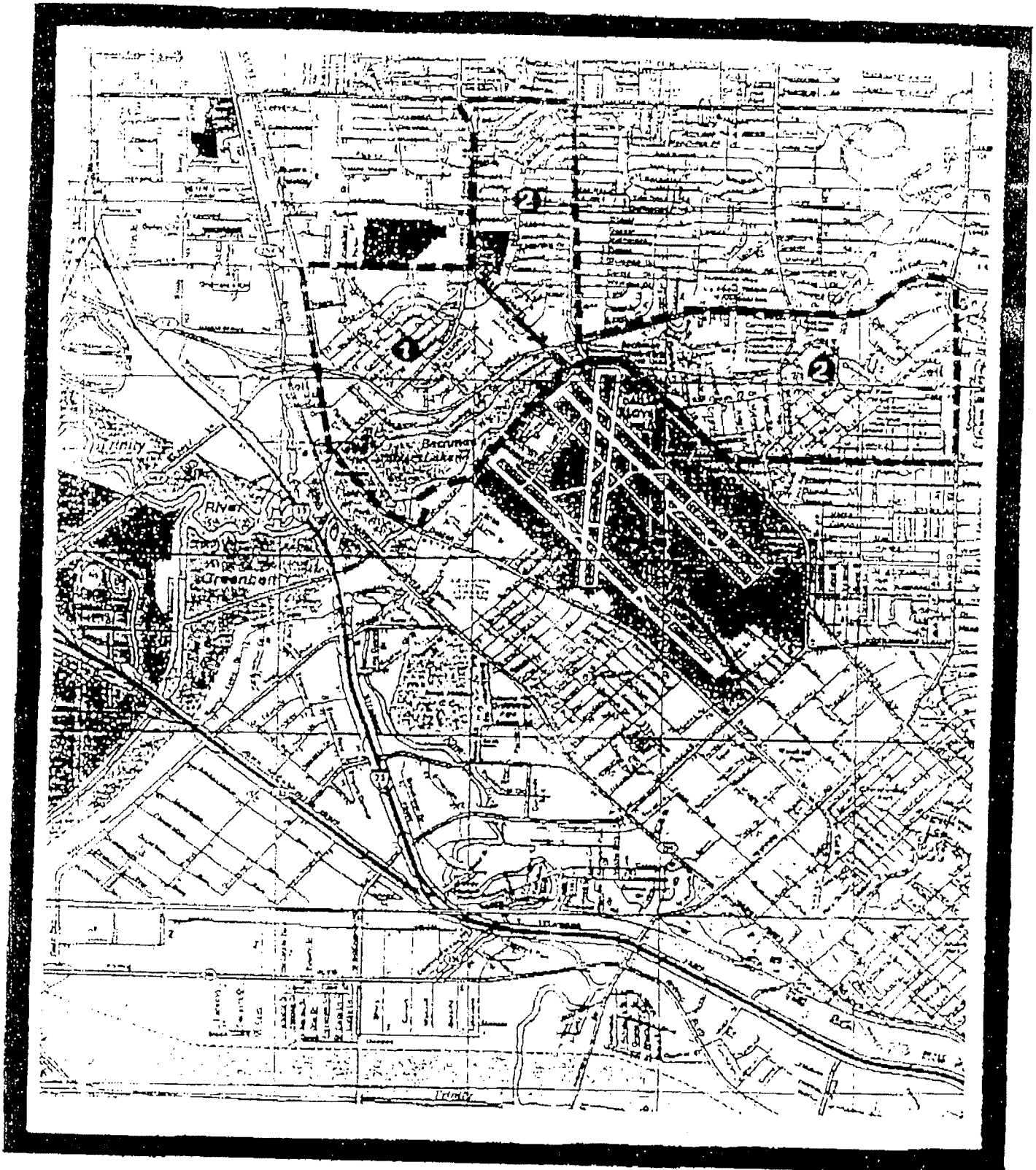

The Malin Group

1. Study Area 2. Control Area– West

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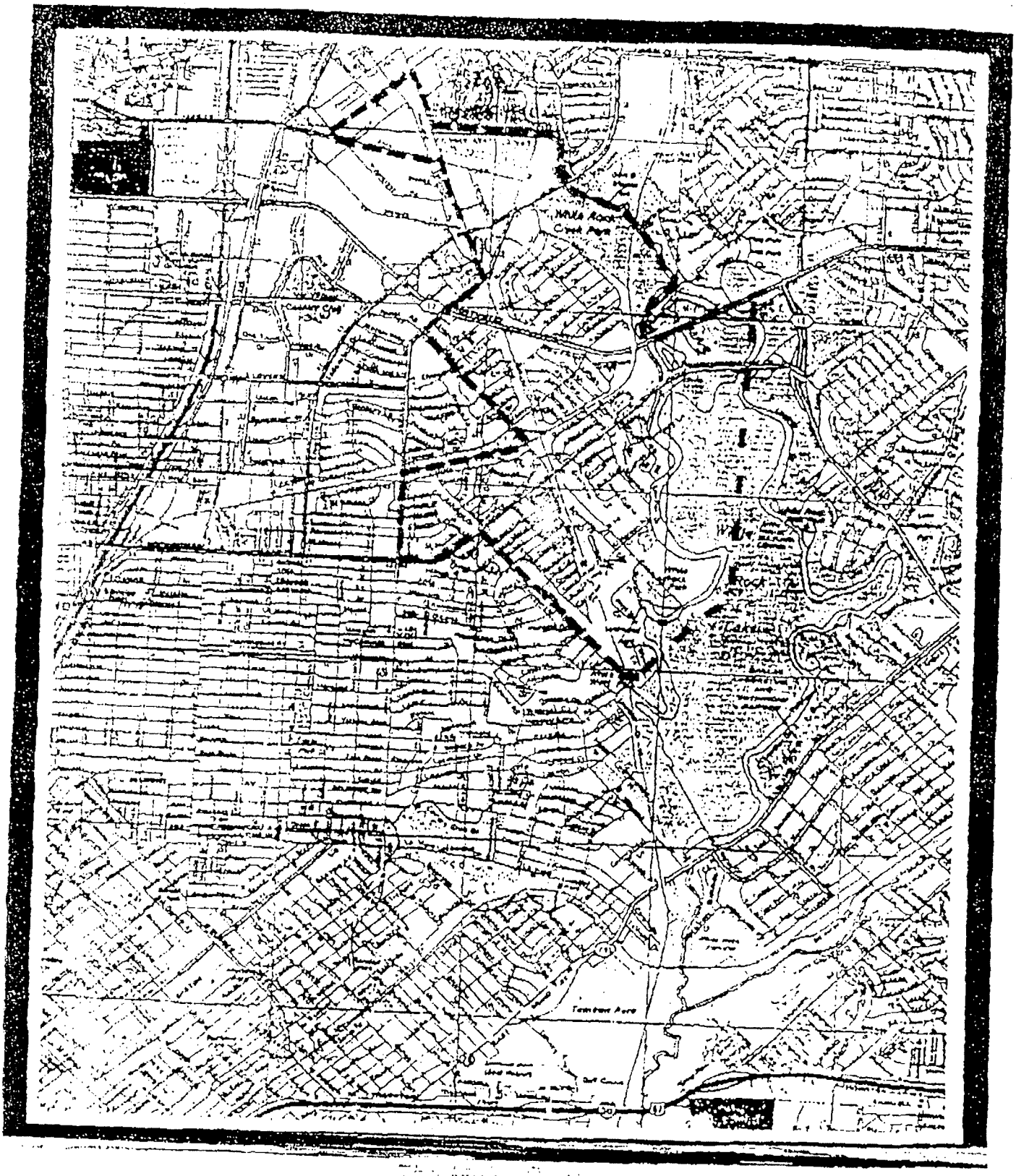

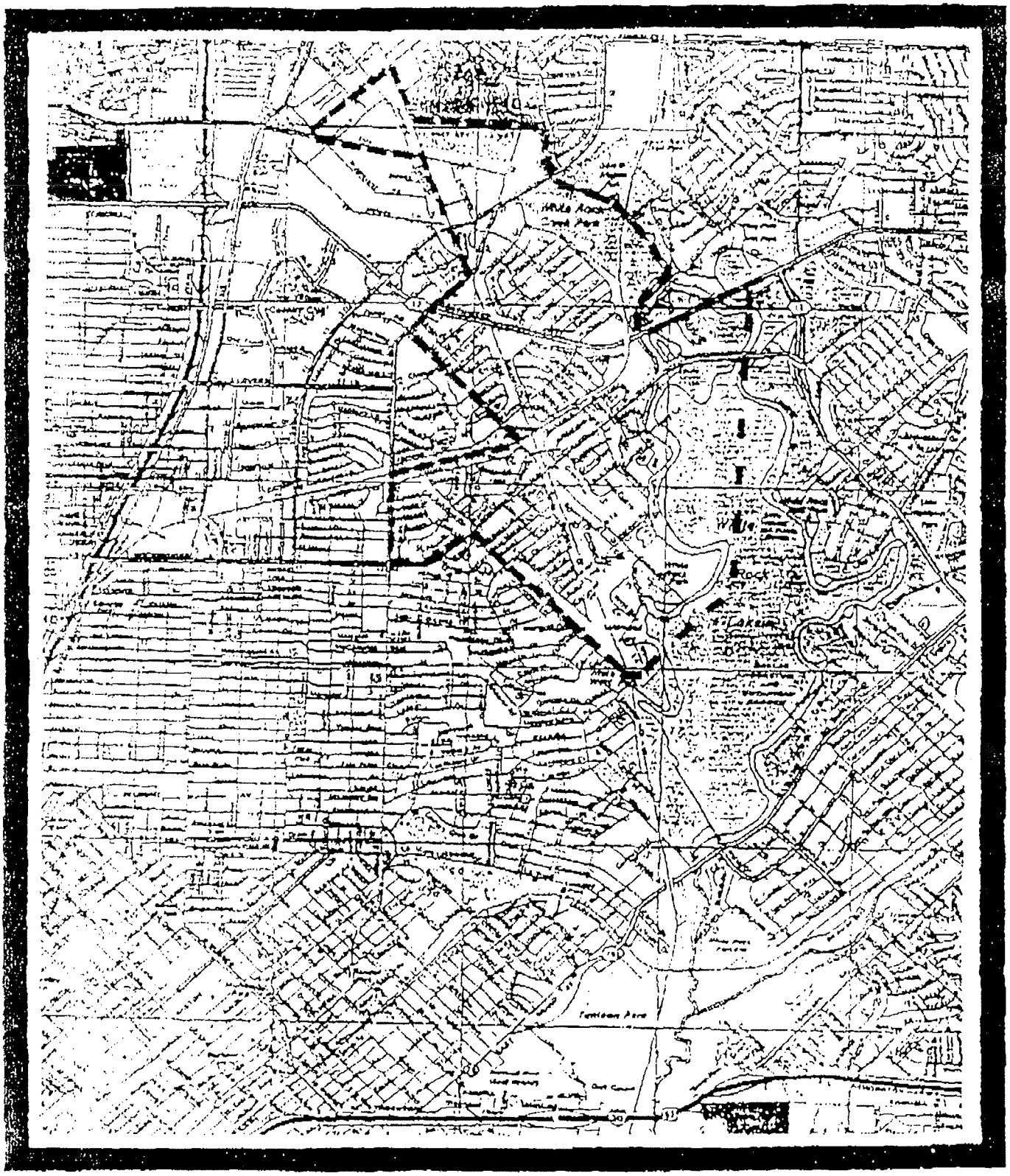

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Control Area– East

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The Malin Group

1. Study Area 2. Control Area- West 3. Control Area-East

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EXHIBITS

EXHIBIT A

Comparison of Sex-Related Arrests for 60 months ending 03/01/97		
Study Area	No. of Sex Crimes[1]	No. of SOBs[2]
Police Beat 536	149	7[3]
Police Beat 537	41	0[4]
Police Beat 538	206	0[4]
Total	396 Sex Crimes	7 SOBs
Control Area-West	No. of Sex Crimes	No. of SOBs
Police Beat 546	[illegible]	0
Police Beat 552	80	0
Total	77 Sex Crimes	0 SOBs
Control Area-East	No. of Sex Crimes	No. of SOBs
Police Beat 215	29	1
Police Beat 244	52	1
Police Beat 241	58	1
Total	133 Sex Crimes	3 SOBs

[1] Sex crimes are defined as Part I and Part II sex crime arrests. These include Rape, Prostitution/Commercial Vice and other Sex Offenses.
[2] These include SOBs as defined in the proposed amendment to Chapter 41A dated 03/10/97.
[3] This is a concentration of SOBs along several blocks of West Northwest Highway.
[4] These beats are immediately adjacent to the seven SOBs in Beat 536.

Source: Dallas Police Department

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06/12/97 [illegible] TX/RX NO.5591 P.016

EXHIBIT B

(Page 1 of 2)

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SUMMARY OF POLICE CALLS FOR SERVICE 01/93 THRU 12/96

Names/Addresses	1993	1994	1995	1996	Total	Avg. Per Year
Chez Pussycat 3217 W Northwest Hwy, Dallas, Texas 75220	43	13	18	13	87	22
Crystal Field 3211 W Northwest Hwy, Dallas, Texas 75220	18	14	11	4	47	12
Baby Dolls Topless Saloon/Deja Vu 3039 W Northwest Hwy, Dallas, Texas 75220	142	165	128	179	614	153
Fantasy Ranch/Diamond's/Billionaire Boys Club 3027 W Northwest Hwy, Dallas, Texas 75220	28	76	64[1]	44[1]	212	53
The Fare West 3021 W Northwest Hwy, Dallas, Texas 75220	109	85	70	73	337	84
Calypso XXI 2828 W Northwest Hwy, Dallas, Texas 75220	35	58	29	53	175	44
Totals for Study Area–Which Includes a concentration of SOBs.					1,472	368

[1] This club was closed for six months during 1995 and 1996 and these totals were annualized.

SUMMARY OF POLICE CALLS FOR SERVICE 01/93 THRU 12/96

Names/Addresses	1993	1994	1995	1996	Total	Avg. Per Year
PT's Gentlemen Club 4875 W Lawther Drive, Dallas, Texas 75220	40	45	21	48	154	39
Doll's House 6509 E Northwest Hwy, Dallas, Texas 75231	0	40	43	38	121	30
Totals for Control Area–Which Includes two isolated SOBs.					275	35

EXHIBIT C

SOBs in the Study and Control Areas
by Type of License

Study Area	
Chez Pussycat	Class A Dance Hall
Crystal Pistol	Class A Dance Hall
Baby Dolls Topless Saloon	Class A Dance Hall
De Ja Vu	Class A Dance Hall
Fantasy Ranch/Diamonds	Class A Dance Hall
The Fare West	Class A Dance Hall
Caligula XXI	SOB-Cabaret*
Control Area East	
P.T.'s	SOB Cabaret
Doll's House	Class A Dance Hall
Control Area West	
None	

*This license was denied and status is pending litigation.

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EXHIBIT B
(Page 2 of 2)

SUMMARY OF POLICE CALLS FOR SERVICE 01/93 THRU 12/96						
Names/Addresses	1993	1994	1995	1996	Total	Avg. Per Year
Million Dollar Saloon 8826 Greenville Avenue, Dallas, Texas 75231	37	15	11	19	82	21

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EXHIBIT D

SOURCES

Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles, Prepared by Los Angeles City Planning Department, June, 1977.

Adult Business Study - Impacts in Late Evening/Early Morning Hours, Prepared by Phoenix Planning Department, June, 1994.

1986 Staff Study in Support of S.O.B. Ordinance. Prepared by the City of Austin, Texas, 1986.

Adult Entertainment Businesses in Indianapolis - An Analysis, Prepared by Department of Metropolitan Development Division of Planning, February, 1984.

Adult Entertainment Study, Prepared by Department of City Planning, City of New York, November, 1994.

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EXHIBIT E

PETER MALIN, MAI
QUALIFICATIONS IN REAL ESTATE
COUNSELING, VALUATION AND EXPERT SERVICES

Peter Malin, a third generation real estate professional, has 19 years experience in the field. His experience ranges from being a Land Use Manager for the nation's largest private landowner (IPCO) to being a founder of Dallas' fourth largest Commercial Real Estate firm.

Today, as Managing Director of **The Malin Group**, he oversees a small group of real estate economists in Dallas, Texas, providing advice and counsel to a national client base. His writings on issues in Real Estate have been published in a wide range of international journals, magazines and newspapers. He is the editor and publisher of a widely recognized newsletter, *Capital and Investment Trends*, reporting on real estate trends in the Texas markets.

For four years Mr. Malin worked for International Paper Company, the nation's largest private landholder, in their development, land management and real estate divisions. He was involved in the valuation of timberlands as well as the development of recreational real estate such as ski areas and waterfront property.

After spending four years as a commercial appraiser in Dallas, Texas, Mr. Malin became the Director of Real Estate Valuation for Laventhol and Horwath in their Dallas office. In this capacity, he directed a national practice which specialized in property valuation and counseling. He received the MAI designation in 1986 from the Appraisal Institute, and has testified in numerous courts during the past eleven years as an expert on real estate values.

Mr. Malin's other experience includes appraisal, market research and counseling on commercial properties throughout the U.S., including:

- Major urban developments including urban land, hotels, office buildings, parking garages and regional malls.
- Major recreational developments including hotels, resorts, conference centers, golf courses and residential communities.
- Special use properties such as computer and telecommunication centers with clean rooms, marinas, NASCAR sanctioned racetracks, airplane hangers and school campuses.

After leaving Laventhol and Horwath, he founded Newmarket Consulting Group and the parent firm, Newmarket Group Southwest, a full service commercial real estate firm.

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While at Newmarket, he established a national practice comprised of valuation, consulting and litigation services performed in over 35 states.

Currently Mr. Malin is licensed and certified as a general appraiser in California, Massachusetts and Texas. He has held appraisal licenses in over 20 states during the past five years. Mr. Malin is also a licensed real estate broker in the state of Texas.

Mr. Malin is a graduate of the Kent School in Kent, Connecticut. He received his Bachelor of Arts degree in American Studies from the University of Denver in 1973. Later, he completed graduate level courses at New York University's Real Estate Institute, followed by study in Real Estate Investments and Taxation at a graduate level at North Texas State University.

In 1988-1990, Mr. Malin developed and hosted the Annual Real Estate Education Conference sponsored by the Appraisal Institute in Dallas. He has lectured on International Appraisal issues and developed and taught the first Appraisal Course on "International Appraising" for the Appraisal Institute. In 1993, he lectured at the 20th World Congress of Fédération Internationale de Géometric as well as the 6th Annual Valuation of Assets in Bankruptcy Conference sponsored by the University of Texas Law School. Mr. Malin continues to lecture on real estate topics for *The Dallas Bar Association* and the *American Society of Appraisers*.

Mr. Malin has been hired as an expert witness in numerous cases involving real estate issues and valuation. He has testified or been admitted as an expert in local, state, and Federal courts in Texas, Florida, Alabama, and Louisiana.

Today, *The Malin Group Real Estate Economists* continues to serve a national client base and provides real estate research, advice and counsel to its clients. Mr. Malin continues to publish timely articles on industry trends in national forums such as *Urban Land Magazine* and *The Mortgage Banker*. He also continues to publish the firm's newsletter, *Capital and Investment Trends* which covers the Texas real estate markets.

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A Methodological Critique of the Linz-Yao Report: Report to the Greensboro City Attorney

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Antonio Ohe, B.A. and Joanne Christopherson, M.A. provided research assistance for this report, including library searches and data management, and analyses.

EXECUTIVE SUMMARY

Analyzing calls-for-service to the Greensboro Police Department between 1999 and 2003, the plaintiffs' experts, Daniel Linz and Mike Yao, conclude:

> "... that there is no support for the City of Greensboro's theory that adult businesses produce adverse secondary effects. The results of our study show that adult businesses are not associated with crime events (p. 3)."

The detailed numerical results supporting this conclusion are scattered over 18 pages of computer output in an appendix of the Linz-Yao Report. When the actual numbers are examined, however, it is clear that Linz and Yao overstated the empirical basis of their strongly-worded conclusion. Put simply, their numbers contradict their words.

Table 1: The Linz-Yao Secondary Effect Estimates

	Controls	Books/Videos		Cabarets	
Crimes against persons	180.1	386.0	146.7%	258.3	143.4%
Crimes against property	1557.6	2455.3	157.6%	2028.7	130.2%
Drug-related crimes	84.7	112.1	132.3%	119.1	140.6%
Sex-related crimes	19.4	27.0	139.1%	29.3	151.0%
Disorderly conduct	121.1	181.3	149.7%	164.9	136.2%
Other minor crimes	596.3	1191.2	199.8%	878.2	147.3%

Table 1 summarizes the Linz-Yao secondary effect estimates. Each row of Table 1 (in green) corresponds to one of six crime-categories. The three shaded groups of columns in Table 1 report the estimated numbers of crimes for three neighborhood-types: those with no adult-oriented businesses ("Controls" in blue); those with adult-oriented bookstores or video arcades ("Books/Videos" in red), and those with adult-oriented cabarets ("Cabarets" in red). Percentages to the right of an effect expresses

the estimated secondary effect as a proportion of the control mean; percentages larger than 100 imply adverse secondary effects. Contrary to their strongly-worded conclusion, Table 1 reveals that *the results reported by Linz and Yao amount to a consistent pattern of adverse secondary effects.*

After correcting for the effects of thirteen neighborhood-level crime risk factors, *e.g.*, Linz and Yao find that, compared to neighborhoods with no adult-oriented businesses, neighborhoods with adult-oriented bookstores and video arcades had, on average, 46.7 percent more crimes against persons (assault, homicide, robbery, and rape); 57.6 percent more property crimes (arson, auto theft, burglary, and theft); 32.3 percent more drug crimes; 39.1 percent more sex crimes; 49.7 percent more disorder crimes; and 99.8 percent more other minor crimes. Secondary effects estimates for neighborhoods with adult-oriented cabarets are similar.

Although the large adverse secondary effects summarized in Table 1 seem to contradict their conclusion, Linz and Yao are able to resolve the apparent contradiction with formal hypothesis tests. Only two of the effect estimates in Table 1 are statistically significant at the .05 level; ten estimates are not statistically significant and, thus, in the opinion of Linz and Yao, *not different than zero*. The two significant effect estimates, in their opinion, are aberrations, not to be trusted. Since twelve statistical analyses yield effect estimates that are either aberrant (in two cases) or not different than zero (in ten cases), Linz and Yao feel confident in their conclusion that "... adult businesses are not associated with crime events." This logic is flawed in two respects, however.

First, the outcome of a hypothesis test is sensitive to the elements of the quasi-

experimental design. The Linz-Yao design is idiosyncratic in many respects, even compared to their prior work. Beginning with the crime indicator (calls-for-service) and ending with the statistical model (six independent multiple regressions), all key elements of the Linz-Yao design favor a null finding. The fact that large adverse secondary effect estimates persist in the presence of so many methodological challenges demonstrates the true strength of the effects.

Second, the several independent hypothesis tests conducted by Linz and Yao ignore the *pattern* of effects. Whereas twelve identically zero effect estimates are expected to yield random runs of small positive and negative numbers, what one sees instead is a run of twelve large, positive numbers. Tested one-by-one, none of the Linz-Yao effect estimates may achieve statistical significance – although two do. But tested jointly, the pattern of effect estimates may be highly significant.

Based on my critical analysis of the Linz-Yao design, including the choice of crime indicators (calls-for-service), choice of impact and control areas (Census Block Groups), choice of statistical model (co-variate adjustment by multiple regression), and choice of hypothesis test (six independent tests), the null finding reported by Linz and Yao underestimates the secondary effects of adult-oriented businesses in Greensboro. The true secondary effect estimates are on the order of those summarized in Table 1 – adverse and substantively large.

Given the constraints of time and resources, an independent study of secondary effects in Greensboro, based on a more conventional design, is unfeasible. Taking the Linz-Yao secondary effect estimates at face value, however, the debate reduces to the

issue of statistical significance. If the pattern of effects in Table 1 is significant, the Linz-Yao conclusion is incorrect. In fact, a joint significance test of all six crime categories yields effect estimates that are statistically significant at the .05 level for crimes against persons and property – the so-called "serious" crimes – across both classes of adult-oriented businesses. *Even accepting their weak design, the analyses by Linz and Yao provide convincing evidence that adult-oriented businesses in Greensboro generate adverse secondary effects.*

Aside from conclusions based on analyses of Greensboro calls-for-service, Linz and Yao review the secondary effects literature used by the City in formulating adult-oriented business regulations. They conclude that:

> ... All of the studies that claim to show adverse secondary effects are lacking in methodological rigor. The studies that have been done either by government agencies or by private individuals that have employed the proper methodological rigor have universally concluded that there are no adverse secondary effects (p. 10).

This characterization of the empirical secondary effects literature is overly negative, in my opinion. Whereas some of the studies cited by the City may be weak, in terms of methodological rigor, others are quite strong. Overall, the Greensboro's adult-oriented business regulations are based on a solid empirical foundation.

I. Introduction

Analyzing a subset of calls-for-service (CFSs) made to the Greensboro Police Department (GPD) between January 1st, 1999 and September 30th, 2003, the plaintiffs' expert witnesses, Daniel Linz and Mike Yao, found that:

> ... The presence of adult cabarets and adult video/bookstores in "neighborhoods" was unrelated to sex crimes in the area. We found that several of an adult video/bookstore were located in high person and property crime incident "neighborhoods." We examined the "neighborhoods" and local areas surrounding the adult video/bookstores (1000 foot radius) further and we found that the adult video/bookstores were not the primary source of crime incidents in these locations.[1]

Based on these findings, Linz and Yao conclude

> ... that there is no support for the City of Greensboro's theory that adult businesses produce adverse secondary effects. The results of our study show that adult businesses are not associated with crime events.[2]

Based on my reading of the Linz-Yao Report; on my reading of the literature cited in the Report; on my analyses of their data and of Uniform Crime Report (UCR) data obtained from the GPD, and on my experience in this field, it is my opinion that the Linz-Yao Report's methodology fails to meet the normally accepted standards of scientific rigor for to meet normally accepted standards for statistical analyses.

In addition to conclusions drawn from empirical findings, Linz and Yao argue that the empirical secondary effects literature consists entirely of studies that find no adverse

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[1] This quotation is found on p. 3 (counting the title sheet as p. 1) of *Evaluating Potential Secondary Effects of Adult Cabarets and Video/Bookstores in Greensboro: A Study of Calls for Service to the Police* by Daniel Linz, Ph.D. and Mike Yao, November 30th, 2003. In the text, I call this "the Linz-Yao Report," or "Linz and Yao." Professor Daniel Linz, the first author of the Linz-Yao Report, has written secondary effect reports with several co-authors. I will use "Linz *et al.*" to refer to reports written with co-authors other than Mike Yao.

[2] Linz and Yao, p. 3.

secondary effects and studies that are too flawed to be taken seriously:

> ... All of the studies that claim to show adverse secondary effects are lacking in methodological rigor. The studies that have been done either by government agencies or by private individuals that have employed the proper methodological rigor have universally concluded that there are no adverse secondary effects.[3]

Based on the perceived consistency of the secondary effects findings, Linz and Yao conclude that the factual predicate for Greensboro Ordinance Chapter 30 is invalid. But in fact, the methodological rigor of secondary effects studies ranges from strong to weak. One study cited by the City used the most rigorous possible design and found substantively large, statistically significant adverse secondary effects.[4] In my opinion, there is an ample factual predicate for Greensboro Ordinance Chapter 30.

To support their contrary argument, Linz and Yao cite two studies by Linz *et al.* that find *salutary* secondary effects:

> Recently, we have conducted independent, reliable, studies using census data and modern analytical techniques to examine whether "adult" entertainment facilities, and particularly exotic dance establishments engender negative secondary effects. Unlike many of the previous reports, these studies do not suffer from the basic methodological flaws that were enumerated in *Paul.* Unfortunately, the City Council of Greensboro did not consider these investigations despite the fact that the reports were available.
>
> These reports describe analyses of calls for service to the police in the City of Fort Wayne, Indiana, and Charlotte, North Carolina. In these studies there is no indication that, overall, crime rates are higher in the areas surrounding adult nightclubs. In fact, the data often show the reverse trend whereby crime incidents are lower in the areas surrounding the adult nightclubs compared to

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[3] Linz and Yao, p. 10.

[4] This is the 1991 Garden Grove, CA study written by me and James W. Meeker: *Final Report to the City of Garden Grove: The Relationship between Crime and Adult Business Operations on Garden Grove Boulevard.*

control locations.[5]

The anomalous findings of *salutary* secondary effects in Fort Wayne and Charlotte reflect many of the same methodological flaws found in the Greensboro analyses. Each of these methodological flaws is sufficient to yield a spurious finding.

I.A What Linz and Yao *Actually* Found

Non-statisticians who read the Linz-Yao Report may miss a relevant fact: *Linz and Yao found substantively large adverse secondary effects associated with adult-oriented businesses (AOBs) in Greensboro.* This fact is easy to miss because it is buried in eighteen pages of computer output and mentioned in the Report's text only in passing. TABLE I below summarizes the results of the Linz-Yao statistical analyses. In Detail,

- Shaded columns of TABLE I correspond to the two major AOB-types: Books\Videos and Cabarets;
- Rows of TABLE I (in green) correspond to six crime categories: Crimes Against Person, Crimes Against Property, Drug-Related Crimes, Sex-Related Crimes, Disorder Types of Offenses, and Other Minor Offenses;
- Columns labeled "Effect" (in red) report secondary effect estimates for an AOB-type and crime category;
- Columns labeled "α" (in red) report the α-error rate for each secondary effect estimate.;

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[5] Linz and Yao, p. 10.

- Columns labeled "Bars" (in blue) report the ratio of the estimated AOB effect to the estimated effect for bars and taverns.

To illustrate the interpretation of TABLE I, consider Crimes Against Person. Reading across the first row, areas of Greensboro Bookstores/Videos and Cabarets have 205.9 and 78.2 more crimes respectively than areas of Greensboro with no AOBs. With 95 percent confidence, the Bookstores/Videos estimate is statistically significant ($\alpha \leq .01$) but the estimate for Cabarets ($\alpha = .11$) is not significant.

TABLE I - SUMMARY OF THE LINZ-YAO FINDINGS*

	Bookstores/Videos			Cabarets		
	Effect	α	Bars	Effect	α	Bars
[a] Crimes Against Person	205.9	.01	6.6	78.2	.11	2.5
[b] Crimes Against Property	897.7	.01	2.3	471.1	.10	1.2
[c] Drug Related Crimes	27.4	.76	3.3	34.4	.58	4.1
[d] Sex Related Crimes	7.6	.63	1.2	9.9	.37	1.6
[e] Disorder Types of Offenses	60.2	.23	2.1	43.8	.21	1.5
[f] Other Minor Offenses	594.9	.09	7.2	281.9	.25	3.4

[a] Linz and Yao, Table 14 [b] Linz and Yao, Table 15 [c] Linz and Yao, Table 16
[d] Linz and Yao, Table 17 [e] Linz and Yao, Table 18 [f] Linz and Yao, Table 19
* *cf.*, Executive Summary, Table 1

The effect estimates in TABLE I show that Linz and Yao found adverse secondary effects for all six categories of crime and both types of AOBs. Only two of the twelve effect estimates in TABLE I are statistically significant, however. By convention, an effect estimate is *not statistically significant* (or *not significantly different than zero*) unless its

associated probability is smaller than .05 – unless $\alpha \leq .05$, *i.e.* By this convention, the only significant effect estimates are for Crimes Against Person and Crimes Against Property in those areas of Greensboro where Bookstores/Videos are located. The other ten effect estimates in TABLE I are not statistically significant and, thus, presumably not different than zero.

Though *statistically* small, the effect estimates in TABLE I are *substantively* large. How large? The columns labeled "Bars" (in blue) to the right of each α-probability are ratios of the effect for AOBs to the effect for bars or taverns that do not feature adult-oriented entertainment.[6] The adverse secondary effects of AOBs are always larger than the adverse secondary effects of bars – as much as five times larger for some categories of crime. Given the well-researched and widely accepted relationship between bars and crime,[7] no matter how *statistically* small the secondary effect estimates TABLE I may be then, they are *substantively* large.

As it turns out, the substantively large adverse secondary effect estimates in TABLE I are statistically large as well – *i.e.*, statistically significant at the $\alpha \leq .05$ level. Readers who are interested only in this bottom line are directed to TABLE IV.2 where the α-error levels for a simultaneous hypothesis test are reported. To understand how Linz and Yao could have missed this bottom line, however, the reader must understand how the statistical power of a hypothesis test is related to the methodological underlying the

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[6] In North Carolina, businesses that serve alcoholic beverages are private clubs. None of the bars or taverns in this contrast feature adult entertainment.

[7] See D.W. Roncek and M.A. Pravatiner. Additional evidence that taverns enhance nearby crime. *Social Science Research*, 1989, 73:185-188.

hypothesis test.

I.B Methodological Flaws in the Linz-Yao Report

Substantively large numbers can be made statistically small – though not *vice versa* – by the use of inappropriate or less than optimal methods. In my opinion, this is what happened in Greensboro. The Linz-Yao methodology is idiosyncratic in many key respects and, in every instance, the idiosyncracies have the effect of transforming substantively large effects into statistically small effects. The shortcomings of the Linz-Yao Report span all three elements of scientific methodology, including (1) the measures of public safety collected for the study; (2) the quasi-experimental design used to interpret the analytic results; and (3) the statistical models used to analyze the public safety measures.

(1) Measurement problems. The most serious flaw by far is the use of calls-for-service (CFSs) to measure public safety risk. There is virtually no precedent in the criminology literature for using CFSs to measure crime or crime risk. A review of national criminology journals over the last three years, *e.g.*, finds no published articles where CFSs are used to measure crime risk. Indeed, secondary effects studies cited by Linz and Yao do not use CFSs to measure crime but, rather, following convention, use Uniform Crime Reports (UCRs) to measure public safety risk.[8] Since the Linz-Yao

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[8] Both the Ft. Wayne study (*Measurement of Negative Secondary Effects Surrounding Exotic Dance Nightclubs in Fort Wayne, Indiana*) and the Charlotte study (*Are Adult Dance Clubs Associated with Increases in Crime in Surrounding Areas? A Secondary Crime Effects Study in Charlotte, North Carolina*) use Uniform Crime Reports (UCRs) to measure crime risk. The confusion of CFSs and UCRs arises because CFSs have been used traditionally in liquor license reviews (see, *e.g.*, *A Study of CFSs to Adult Entertainment Establishments which Serve*

findings and conclusions are couched in terms of "crime events" or "crime incidents," and since CFSs do *not* measure crime, in the worst case, this flaw is sufficient to invalidates *all* of the Report's empirical findings and conclusions. In the best case, the flaw creates a bias in favor of a null finding.

(2) Design problems. The quasi-experimental design used by Linz and Yao in Greensboro, the so-called "static group comparison" design, lacks any before-after contrast. Accordingly, a leading authority on design rates the "static group comparison" as the weakest of all quasi-experiments.[9] Secondary effects studies that compare ambient crime before and after the opening of a new adult-oriented business (AOB) generally yield stronger – more valid – findings. Findings of secondary effects studies based on before-after designs are reviewed at later point. For the present, compared to secondary effect studies based on relatively weak "static group comparisons," the design of the Greensboro study is idiosyncratic in two crucial respects.

The first design idiosyncracy concerns the size of the impact and control areas. In theory, the impact of a criminogenic source – an AOB, *e.g.* – fades exponentially with distance from the source. "Noise" is a good analog. For both noise and crime risk, the farther one moves from the source, the weaker the sound. To accommodate this

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Alcoholic Beverages by Capt. Ron Fuller and Lt. Sue Miller, Fulton County, GA Police Dept., June 13th, 1997). In this or any other context, however, CFSs measure the demand for police service, not crime risk.

[9] See pp.12-13, D.T. Campbell and J.C. Stanley, *Experimental and Quasi-Experimental Designs for Research.* Rand-McNally, 1963. This is the design authority cited by Linz *et al.* in the Fort Wayne and Charlotte reports.

property, researchers often define impacts area as a radius of 250 to 500 feet around a source. In the major component of their study, however, Linz and Yao define the impact areas as *Census Blocks*.[10] Since Census Blocks are neither circular nor small areas, even a large, significant secondary effect would be difficult to detect.

It is no surprise then that Linz and Yao fail to find statistically significant effects in Greensboro. Based on their recent work, however, it is surprising indeed that they would use Census Block areas.[11]

The second design idiosyncracy involves control comparisons. To estimate hypothetical secondary effects, Linz and Yao compare Census Blocks with at least one AOB to Census Blocks with no AOBs. Before making the comparison, however, they "statistically adjust" the impact and control Census Blocks for differences presumed to cause crime. Statistical adjustment is very technical issue, particularly in this context. Without discussing technical details, this aspect of the design represents a departure from their recent work.[12]

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[10] Actually, Census Block *Groups*. Hereafter I say "Census Block" as a short-hand for the technically correct term.

[11] In the Charlotte study, impact areas were defined as a 500-foot circles around AOBs. A 500-foot circle has an area of approximately 785,400 square-feet, about 2.8% of a square-mile. In the Ft. Wayne study, impact areas were defined as 1000-foot circles, approximately 3,141,600 square-feet areas, about 11.3% of a square-mile. In my opinion, a 1000-foot circle is too large an impact area for detection of a secondary effect. This is why I advise planners to build 1000-foot distances into their AOB regulations.

[12] This particular method is not used in either the Ft. Wayne or Charlotte studies. In theory, statistical adjustment of impact-control differences is superior to other methods of control (at least for "static group comparisions"). The availability of data for the adjustment is always a problem, of course.

Both design features represent departures from the conventions of the secondary effects literature and, especially, from their own prior work. In addition to the unknown threats to internal validity posed by the two design idiosyncracies, they raise the specter of "fishing." In the jargon of scientific research, "fishing" refers to the practice of replicating a study several times. With just a few variations in measurements, statistical models, and quasi-experimental designs, a cynical researcher can capitalize on chance to produce any desired result. "Fishing" need not imply dishonesty or cynicism. On the contrary, scientific method recognizes that "fishing" can occur without the researcher's intent or awareness. In experimental research, "fishing" is controlled through explicit design structures, including placebos, blinding, *etc.* In quasi-experimental research, where these structures cannot be used, "fishing" is controlled by means of rigidly enforced design conventions. Departures from convention must be explained and justified. If they are not explained, the critical scientific reader must assume that findings and conclusions are an artifact of "fishing."

(3) Statistical problems. If one ignores the methodological problems posed by the idiosyncratic measure of crime risk and the idiosyncratic design, the manner in which Linz and Yao analyze their data poses yet another serious methodological problem. In prior research, Linz *et al.* have reported null findings – the absence of secondary effects – without reporting the associated probability of error.[13] With two exceptions, Linz and Yao report null findings in Greensboro (TABLE I) but fail to report that probability of error exceeds the conventional level for social science research by a very large factor. The

[13] The probability referred to here is the so-called "Type II" or "false negative" error rate.

unacceptably low statistical power of their null findings is due entirely to methodological idiosyncracies. Given the central question here – whether the adverse secondary effect estimates in TABLE I – questions of statistical power are at the focus of everything that follows.

I.C Outline of this Report

The salient methodological flaw in the Linz-Yao Report is the use of CFSs to measure crime. The correlation between CFSs and conventional measures of crime, such as Uniform Crime Reports (UCRs) is exceptionally weak. In Section II below, I use UCRs and CFSs for the year 2000 to estimate the correlation between CFSs and crime in Greensboro. The statistical reliabilities inferred from the CFS-UCR correlations never exceed .5, suggesting that more than 50 percent of the variance in GPD CFSs is due to factors other than crime – "noise." The consequences of adding "noise" to an indicator are well known. Adding "noise" reduces the statistical size of an effect.

After demonstrating the weak CFS-crime correlation, I discuss related problems with the misuse of CFSs by Linz and Yao. Because the addresses assigned to CFSs record the location of complainants, for example, CFSs cannot be used to analyze "hot spots." The Report's conclusion that the number of CFSs to AOB addresses is lower than the number of CFSs to other nearby addresses, thus, says nothing about the public safety risks of AOBs.

In Section III, I address the quasi-experimental design used by Linz and Yao. In one important respect, their design is unprecedented in the secondary effects literature. Crime risk diminishes exponentially with distance from a criminogenic point-source – an

AOB. Accordingly, secondary studies typically look for secondary effects in the area within 500 feet of the AOB. Since crime risk diminishes exponentially with distance from the criminogenic source, an excessively large impact area can obscure even the largest secondary effect. In prior studies, Linz *et al.* used 500-foot (Charlotte, *e.g.*) and 1000-foot circles (Fort Wayne, *e.g.*) for impact areas. Linz and Yao use irregular polygons (Census Blocks) that are ten to one-hundred times large than any that have been used in secondary effects studies.

Of course, one need not be a statistician to understand the consequences of using excessively large impact areas; it is the equivalent of throwing an needle into a haystack. Other design idiosyncracies raise the problem of "fishing." When a design can be picked from a modest menu of options, the statistical significance of a finding is meaningless. The sheer number of design idiosyncracies in the Linz-Yao Report are sufficient to invalidate the Report's empirical findings.

In Section IV, I discuss the problem of statistical power. Criticizing studies that claim to find adverse secondary effects of AOBs, Linz *et al.* often quote *Daubert*[14] on the importance of "error rates." When Linz *et al.* fail to find adverse secondary effects, on the other hand, or as in this instance, when they conclude that an adverse secondary effect is statistically small – see TABLE I – Linz *et al.* do not report the error rate for the statistical tests underlying their conclusion. Calculating the error rates in Section IV, I demonstrate that their conclusions lack the requisite validity that would make them admissible under *Daubert.*

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[14] Daubert v Merrell Dow Pharmaceuticals 509 US 579 (1993).

In the concluding Section V, I review some of the literature used by Greensboro in the AOB ordinance process. At least one of the studies used by Greensboro meets the highest standard of validity. I also review two studies by Linz *et al.* that the City did not rely on in formulating its AOB ordinances. Contrary to the opinion of Linz and Yao, both studies have serious methodological shortcomings – many of which are found in their Greensboro study.

II. Measurement Problems in the Linz-Yao Report

Measurement is the *sine qua non* of science. Phenomena that cannot be measured cannot be studied scientifically. The adequacy of a measurement is summed up in the properties of *reliability* and *validity*.[15] To illustrate reliability, Linz and Yao counted 2,445 CFSs to addresses within 1000 feet of "Elm Street Video and News."[16] If another researcher counted the number of CFSs, the recount would probably not yield the same number because even simple counts vary randomly.[17] If the count-recount difference is reasonably small and random, however, the measurement is reliable and adequate for scientific research.

Reliability is probably not an important issue. I assume that the Greensboro data used by Linz and Yao are adequately reliable. Validity is a very different issue, however.

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[15] For definitions, see H.M. Blalock's *Measurement and Conceptualization in the Social Sciences* (Sage, 1982). See also *Quasi-Experimentation: Design and Analysis Issues for Field Settings* by T.D. Cook and D.T. Campbell (Houghton-Mifflin, 1979).

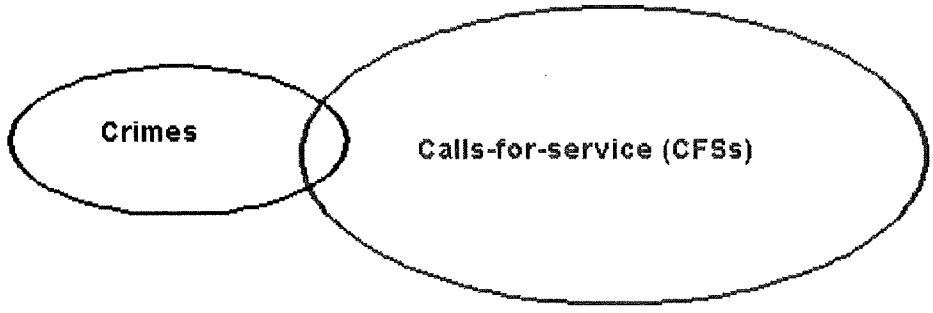
[16] Linz and Yao, Table 23, p. 20.

[17] In his classic *On the accuracy of economic observations, 2nd Edition* (Princeton: Princeton University Press, 1965), Nobel laureate O. Morgenstern expressed this idea as "*Incipit numerare, incipit errare!*." Begin to count, begin to make mistakes!

The property of validity is associated with *non*random measurement errors. Nonrandom measurement errors consist of differences between the concrete items that one measures and the abstract concepts that these items intend to represent. The relationship between abstract intelligence and concrete IQ is often used to illustrate the property of validity. Although a person's IQ and intelligence are not identical, they are hopefully similar; and if so, IQ is a valid measure of intelligence. If the difference is large, on the other hand, then IQ is not a valid measure of intelligence.

In this instance, of course, we are interested in measuring the hypothetical *crime risk* of an AOB. Whatever measure is used, its validity will depend on how well it tracks crime risk over time and space. Contrary to the conventions established in criminology in the secondary effects literature, particularly the recent work of Linz *et al.*, Linz and Yao use police CFSs to measure crime. This idiosyncratic choice of measures has no precedent and *per se* invalidates their conclusions.

FIGURE II.1 - RELATIONSHIP BETWEEN CRIMES AND CALLS-FOR-SERVICE (CFSS)



II.A. CFSs Are *Not* Synonymous with Crime

Throughout their Report, Linz and Yao speak of "CFSs" and "crimes" as if these

two terms were synonymous. In fact, however, while CFSs and "crimes" (or crime-like incidents) are correlated, the correlation is quite weak. This fact, widely known among criminologists, is depicted in FIGURE II. In any modern jurisdiction, CFSs to the police department outnumber crimes reported to the police by a large factor. This well known fact is represented by the relative areas of CFSs (in red) and crimes (in blue). The overlap between CFSs and crimes represents their correlation.

As depicted in FIGURE II, most of the crimes (or crime- like incidents) that come to the attention of the police are *not* initiated by CFSs from victims and witnesses. The police become aware of most crimes through routine patrolling; through directed (or proactive) patrolling; and through specialized unit activity. On the other hand, most of the citizens who call the police – thereby initiating a CFS – are not crime victims or witnesses; most CFSs not initiated by crimes (or crime- like incidents). Examples include duplicated or unfounded CFSs; CFSs that have no apparent basis; and CFSs that precipitated by false alarms.[18]

To investigate the scope of this problem for the Greensboro study, Uniform Crime Reports (UCRs) and CFSs for the same crimes were compared for the period beginning

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[18] Of the 32,168 CFSs in 2000 that involved serious crimes, 19,974 (or 70.6 percent) were initiated by electronic alarms. More than 98 percent of all alarm-initiated CFSs in the year 2000 turned out to be false alarms – no crime, *i.e.* Since each of these CFSs resulted in a report, Linz and Yao included them in the analysis even though there was no crime involved. If 2000 is a typical year, one-in-three of the CFSs analyzed by Linz and Yao was a false alarm!

January 1, 2000 and ending December 31, 2000.[19] The five columns of TABLE IIA report the UCR category, total CFSs for that category, CFSs that resulted in an arrest or report (in red), UCRs (in blue), and the ratio of red CFSs to UCRs.

TABLE II.1 - GREENSBORO CFSS AND UCRS IN 2000

	Total CFSs	CFSs w/rpt	UCRs	CFS : UCR
Total Serious Crimes	**32,168**	28,304	**15,492**	1.83 : 1.00
Total Personal Crimes	**3,311**	6,864	**1,867**	3.68 : 1.00
Total Property Crimes	**26,920**	21,440	**13,625**	1.57 : 1.00
Assault	**2275**	991	**816**	1.21 : 1.00
Arson	**0**	0	**73**	1.00 : 49.0
Auto Theft	**1801**	1308	**1308**	1.00 : 1.00
Burglary	**22230**	17841	**3020**	5.91 : 1.00
Homicide	**0**	0	**20**	1.00 : 41.0
Larceny	**2889**	2291	**9224**	1.00 : 4.03
Rape	**159**	124	**121**	1.02 : 1.00
Robbery	**3152**	2317	**910**	2.55 : 1.00

Considering total serious crimes, CFSs appear to overstate Greensboro's crime risk by a factor of 83 percent. When total crimes are broken down into personal and property crimes, the overstatement persists. When total crimes are broken down into the eight UCR categories, however, a range of biases become apparent. As reported in the right-hand column of TABLE IIA, while CFSs overstate the risk for some crimes – burglary, robbery, *etc.* – CFSs understate the risk for other crimes – arson, larceny, *etc.* Bias in the CFS-crime relationship is not a simple multiplicative factor then. For some

[19] Part I UCR data were obtained from the GPD. The Part I (or serious) UCR categories are arson, assault, auto theft, burglary, homicide, larceny, rape, and robbery.

crimes, it is a *true* bias. A more important problem, however, is that for most crimes, CFSs appear to add random measurement error to the relationship.

II.B. CFS-Crime Correlations and Reliabilities

To estimate the correlation between CFSs and crime, BY-co-ordinates were selected at random from the CFSs and UCRs published by the GPD for 2000. Circles with radii of 500-feet were drawn around the BY-co-ordinates. The number of CFSs and UCRs inside the circles were counted and correlations were estimated from the counts. The results, reported in TABLE II.2, show that the correlations between UCR counts (in blue) and CFS counts (in red) are lower than what would ordinarily be expected or demanded from an indicator.

TABLE II.2 - CFS-UCR CORRELATIONS, ESTIMATED FROM 500-FOOT CIRCLES

	AssIt	Rob	Rape	Pers	Auto	Burg	Theft	Prop
Assault	.325	.122	.121	.300	.059	.123	-.006	.041
Robbery	.122	.674	-.019	.394	.257	.521	.250	.365
Rape	.054	-.109	.074	-.011	-.028	-.065	-.077	-.077
Personal	.236	.534	.062	.444	.212	.431		.273
Auto Theft	.081	.504	.114	.326	.637	.721	.519	.648
Burglary	.196	.332	.190	.325	.361	.541	.327	.433
Theft	.056	.518	.124	.317	.615	.703	.563	.670
Property	.065	.524	.129	.327	.624	.717	.566	.678
Reliability	**.106**	**.454**	**.071**	**.197**	**.406**	**.293**	**.317**	**.460**

The last row of TABLE II.2 list the squared correlation coefficients, or raw reliabilities, for each of the CFS categories. Reliabilities are interpreted geometrically as

the intersection of the crime-CFS Venn diagrams in FIGURE II.1. The overlap between UCR assaults and assault CFSs (r^2 =.106) is interpreted to mean that the degree of overlap (or common variance) between the two indicators is 10.6 percent of the total. From the other perspective, 89.4 percent of the total variance in the two indicators is *unique* and, thus, has nothing to do with crime.

TABLE II.2 raises two questions. First, compared to data in other social science fields, how "good" are these reliabilities? Second, what are the practical consequences of using a low-reliability crime indicator? On the first question, reliabilities smaller than .75 are unacceptable for most social science applications. Since the median reliability in TABLE II.2 is approximately .305, testimony based on CFSs might be inadmissible under the *Daubert* standard. On the second question, the practical consequences of using a low-reliability crime indicator are well known. Adding measurement error in the outcome (or dependent) variable does *not* bias the effect estimate – substantively large effects persist in the face of measurement error – but *does* bias tests of significant in favor of the null finding.[20] As a practical matter, in other words, CFSs make substantively large effects statistically small.

II.C. CFS Addresses Are *Not* Crime Locations

Since CFSs are only weakly correlated with crime, using CFSs to measure crime risk is *per se* a fatal flaw. Even ignoring this threshold problem, however, it is nearly impossible to infer even the grossest spatial distribution of crime risk from CFS

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[20] See, *e.g.*, Blalock's *Measurement and Conceptualization in the Social Sciences* (Sage, 1982).

addresses. The problem is most obvious when Linz and Yao analyze "hotspot" addresses within each Census Block:

> ...the adult bookstores are a negligible source of property crime events and do not appear to be the source of person crime events at all. The bookstores never rise above the 16th ranked address for property crime events (9 events) and are as low as the 205th rank (2 events) or cannot be ranked because there are zero crime events in their immediate vicinity.[21]

The fallacy in this reasoning is that the address recorded on a CFS is not necessarily the location of the precipitating incident. On the contrary, the CFS address tells the patrol unit where to find the caller. If X calls the GPD to complain about a disturbance at Y's house, in a majority of cases, the *CFS* goes to X's address. By the Linz-Yao logic, however, the "crime event" occurred at X's address.

If the proprietor of an business is familiar with this geo-coding convention, CFSs can be manipulated to make the business look more or less in need of police service or regulation. To build a case for more police services, the proprietor can complain to the police about problems that might otherwise be handled informally. Or to hide a public safety hazard, on the other hand, the proprietor can handle many problems informally, thereby recording fewer CFSs and making the business seem safer than it actually is. This is why criminologists do not use CFSs for "hotspot" analyses.[22]

II.D. Summary

Given its nominal purpose– to determine whether AOBs are criminogenic – the

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[21] Linz and Yao, p. 31.

[22] For another reason, see "Uniform Crime Reports as organizational outcomes." (*Social Problems*, 1982, 29:361-372.). This article describes how a simple personnel change in an urban police department resulted in a thirty percent reduction in CFSs.

Linz-Yao Report should have analyzed crimes, not raw CFSs. The vast criminology literature has not even one precedent for using raw CFSs to measure crime. Criminologists invariably measure crime with UCRs or sample surveys of victims.[23] The smaller, unpublished secondary effects literature has also typically used UCRs or analogous crime statistics.[24] This is not to say that CFSs are not a useful statistic. On the contrary, all urban police departments, including the GPD, collect these data for use in budgeting.[25] But no police department uses CFSs to measure crime or public safety. Criminologists and police departments alike use *crime* to measure *crime*.

A final point, worth noting in this summary, is that the geo-codes on GPD records are too crude to be used for many purposes, including purposes intended by Linz and Yao. Finding two substantively large and statistically significant adverse secondary effects, *e.g.* – see TABLE I – Linz and Yao rely on analyses of "hotspot" addresses to discredit their own finding:

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[23] See, e.g., *Measuring Crime* (D.L. MacKenzie, P.J. Baunach, and R.R. Roberg, State University of New York Press, 1990). The criminological literature is consistent on this point. A search of four national criminology journals (*Justice Quarterly*, *Criminology*, *Criminal Law and Criminology*, and *Journal of Quantitative Criminology*) for the last three years found not one study that used *CFS*s to measure crime.

[24] This includes studies conducted by Linz *et al.*, particularly the two studies cited in the Linz-Yao Report (*Measurement of Negative Secondary Effects Surrounding Exotic Dance Nightclubs in Fort Wayne, Indiana*; and *Are Adult Dance Clubs Associated with Increases in Crime in Surrounding Areas? A Secondary Crime Effects Study in Charlotte, North Carolina*). The Fort Wayne study uses UCR arrests; the Charlotte study uses UCR crimes.

[25] These valid uses of *CFS*s are discussed in undergraduate policing texts. See, *e.g.*, *Police Administration* by O.W. Wilson and R. McLaren (McGraw-Hill, 1978); *Police and Society* by R.R. Roberg, J. Crank and J. Kuykendall, (Wadsworth, 1999) or *Police Administration* by C. Swanson, L. Territo, and R. Taylor (Macmillan, 1993). All of these texts make the same points that I have made about CFSs.

> The bookstores never rise above the 16th ranked address for property crime events (9 events) and are as low as the 205th rank (2 events) or cannot be ranked because there are zero crime events in their immediate vicinity. For crimes against person events the findings are even more striking — there is only one such event among the eight 1000 foot areas surrounding the video/bookstores.

But in virtually all cases, GPD "hotspot" addresses are spurious. In any year, *e.g.*, one Greensboro address accounts for two to three percent of all serious crime reported to the GPD. The address (2400 Van Story) belongs to the Four Seasons Mall. Other are made into "hotspots" by chronically malfunctioning electronic alarms. Of the 148,155 property crime CFSs analyzed by Linz and Yao, 67,530 (45.6 percent) were precipitated by burglar alarms, mostly false. Due to many similar problems, analyses of "hotspot" address in the Linz-Yao Report are not to be taken seriously.

III. Design Flaws in the Linz-Yao Study

"Design" refers generally to the set of methods, or methodology, used to collect, analyze, and interpret data. One aspect of the Linz-Yao design, the use of CFSs to measure crime risk, has already been critiqued. Measurement is the *sine qua non* of valid inference. Because CFSs are *not* an acceptable crime risk measure, inferences about crime drawn from CFSs are invalid. If Linz and Yao were to replicate the Greensboro study using UCR crimes (*vs.* CFSs), however, there would still be three fundamental problems with their design:

- Lack of before-after contrasts;
- Excessively large impact areas;
- Inadequate controls.

Any of these three shortcomings would be sufficient to invalidate the findings of a secondary effects study. Though not obvious, moreover, all three shortcomings favor a null finding. To the extent that these shortcomings represent departures from designs used in the prior work of Linz *et al.*, furthermore, they raise the specter of "fishing."

III.A Before-After Contrasts

The quasi-experimental design used by Linz and Yao in the Greensboro study is a simple variation of the so-called "static group comparison."[26] Using a variation of the standard notation, this design is diagramed as

Impact Area	.	*X*	$\text{Crime}_{\text{Impact}}$
Control Area	.	.	$\text{Crime}_{\text{Control}}$

The *X* in this diagram represents the presence of an AOB in the impact area – but not in the control area. The hypothetical secondary effect is estimated as the difference of the two crime measures. *I.e.*,

$$\text{Secondary Effect} = \text{Crime}_{\text{Impact}} - \text{Crime}_{\text{Control}}$$

If the impact and control areas are identical in every respect except the presence of an AOB, the secondary effect estimate is valid. If the two areas differ in any relevant way, on the other hand, the secondary effect estimate is invalid.

The "static group comparison" design is strengthened considerably when a before-after contrast is added. Using the same notation,

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[26] Linz *et al.* cite a work by Campbell and Stanley, *Experimental and Quasi-Experimental Designs for Research*, as their authority on quasi-experimental design; *cf.* footnote #10 above. To maintain consistency, I use the same authority. In my opinion, Linz *et al.* have misread Campbell and Stanley.

Impact Area	$Crime_{Impact,\ Before}$	X	$Crime_{Impact,\ After}$
Control Area	$Crime_{Control,\ Before}$	.	$Crime_{Control,\ After}$

The hypothetical secondary effect is now estimated as the before-after difference in the impact area. *I.e.*,

$$\text{Secondary Effect} = Crime_{Impact,\ After} - Crime_{Impact,\ Before}$$

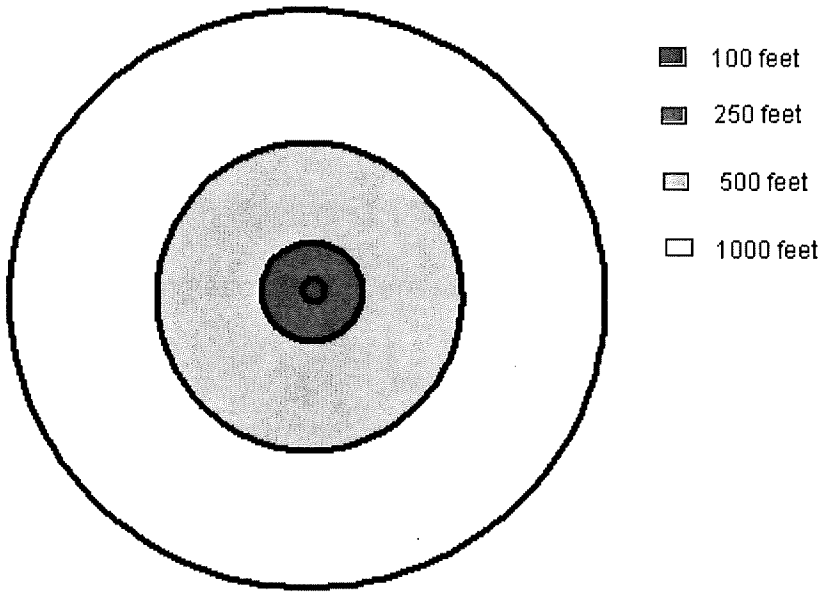
The analogous difference for the control area serves as a benchmark for assessing the validity and significance of the secondary effect. In the before-after design, crime in the impact and control areas is compared to crime in the areas prior to the opening of an AOB in the impact area.

The superiority of the before-design over the "static group comparison" design lies in the nature of their control comparisons. Over short time periods, say one or two years, impact and control areas are likely to remain stable in relevant ways. If the stability assumption holds, before-after differences are immune to the garden variety validity threats that plague static impact-control differences. If change scores are standardized – as percent changes, *e.g.*, or standard Normal scores – before-after secondary effect estimates are relatively robust to minor differences between impact and control areas.

Whether the stability assumption holds or not, however, or whether change scores can be easily standardized, before-after designs are inherently stronger than "static group comparison" designs. I will expand on this theoretical point shortly. In subsequent sections, I will report the results of several secondary effect studies that use before-after designs. For the most part, the validity of these studies cannot be

challenged. And at least one of these studies served as the empirical basis for Greensboro's AOB ordinance.

FIGURE III.1 - THEORETICAL DISTRIBUTION OF CRIME AROUND ITS SOURCE



III.B Impact Areas in the Linz-Yao Study

Measuring a secondary effect is complicated by the fact that crime is a statistically rare event. Over the last two centuries, criminologists have observed that the temporal and spatial distributions of crime follow simple mathematical laws.[27] When

[27] Motivated by the problem of describing the distribution of crime among Paris neighbor-hoods, the French mathematician S.D. Poisson (1781-1840) discovered a probability distribution that bears his name. See, *e.g.*, F. Haight, *Handbook of the Poisson Distribution* (John Wiley and Sons, New York 1967) for not only the history but, also, for technical details. Briefly, a Poisson distribution has two parameters, λ and p. For a fixed period of time – say, one year – in a given place, the individual's risk of criminal victimization is λ. If p individuals live in the place that year, the product λp is the annual crime rate. According to Poisson theory, the waiting-time (or distance) between crimes follows an exponential distribution with mean λp. The exponential distribution is of waiting times is the important point.

crime is "generated" at a fixed site, the density of crimes around the site diminish exponentially with distance from the site. This is represented conceptually (though not to a mathematically precise scale) by concentric circles in FIGURE III.1. In this depiction, the impact of the criminogenic source or "hotspot" is most intense within 100 feet of the source. Though less intense, the impact is still noticeable within 250 feet of the "hotspot." At 500 feet, the effect is still detectable with an adequately powerful design and statistical model. At 1000 feet, however, the effect exists but is no longer detectable with typical designs and models.

"Noise" is a good analog to criminogenic impacts. Whereas a loud party is easily detected by neighbors on the same block or across the street, residents two blocks away will not notice the noise unless they listen carefully.[28] Four blocks away, exotic sound detection equipment may be needed to detect the noise. The analog to sound detection equipment in secondary effects research is statistical power. This technical topic is discussed in detail at a later point. For present purposes, it is sufficient to note that problems of inadequate statistical power can be resolved by design – i.e., by defining the impact and control areas as 250-foot or 500-foot circles.

The use of existing Census Block areas for the impact and control areas constitutes a major flaw in the design of the Greensboro study. For the design of secondary effect studies, Census Block areas pose two problems. First, Census Blocks

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[28] City blocks in the older urban areas of Greensboro are approximately 250 feet long. In the newer suburban areas, city blocks are approximately 1000 feet long. Though approximate, these distances are a good rule-of-thumb for interpreting secondary effects.

are not circular areas centered on an AOB. If the AOB is located near the border of a Census Block then, its hypothetical impact may contaminate neighboring blocks. Otherwise, if the AOB is not near the center of the block, its hypothetical impact may not permeate the entire area of the block, creating "control" islands in the block. A more serious problem is that Census Blocks are often larger than the optimal size for impact and control areas.

TABLE III.1 - GREENSBORO CENSUS BLOCKS

Area	Mean	Range	Mean/Ideal	AOBs	Controls
≤ 0.2 km^2	.1524	.07 - .2	2.1	0	17
≤ 0.5 km^2	.3388	.21 - .5	4.6	7	53
≤ 1.0 km^2	.6873	.52 - .99	9.4	8	29
≤ 2.0 km^2	1.5050	1.07 - 2	20.6	5	11
≤ 5.0 km^2	2.9910	2.05 - 4.23	41.0	0	20
≥ 5.0 km^2	9.1143	5.06 - 19.24	124.9	4	19

TABLE III.1 reports the areas and statuses (impact *vs.* control) of the 173 Greensboro Census Blocks used by Linz and Yao.[29] To put these areas in context, the ideal 500-foot circular impact area is approximately 7.3 percent of a square kilometer. The fourth column of TABLE III.1 (in red) gives the ratio of the ideal impact area to the mean area of the Census Blocks. In the best case, where Census Blocks range from .21 to .5 km^2, 4.6 ideal impact areas would fit inside one Census Block. In the worst

[29] TABLE III.1 was generated from a file named "greensboro blk grp 11-26-03.sav" that Linz and Yao sent to the defendants on December 8th, 2003. There are several uncertainties about the file. Non-hierarchical regressions, estimated with SPSS, are reported in an Appendix. Area units (the variable "area") in this file are unlabeled. TABLE III.1 assumes that the units are square kilometers. One could ordinarily resolve these uncertainties through the Census Bureau website. Unfortunately, the Census website was down in the second week of December, 2003.

case, Census Blocks are 124.9 times larger than the ideal. Even in the best case, the impact areas are so vast that they could hide even the largest secondary effect.[30]

III.C Statistical Control in the Linz-Yao Study

The Achilles heel of the "static group comparison" design is the requirement that impact and control areas be virtually identical on all relevant risk factors. When identical impact and control areas are unavailable, impact-control differences can be adjusted by statistical means – in theory, *i.e.* In practice, unfortunately, the covariates required for statistical adjustment are available only for arbitrarily defined areas, such as Census Tracts, Blocks, *etc.*, in decennial years. Since most criminological theories operate on specific spatio-temporal scales – see Figure III.1, e.g. – these data are not ideally suited to criminological research.

Nevertheless, the availability of Block-level decennial Census data was a major factor in the decision by Linz and Yao to use Census Blocks for the impact and control areas:

> Variables that have been investigated and have been found to be most important as predictors of crime activity include measures of racial composition (number of African Americans and racial heterogeneity), family structure (as measured by number of single-parent households, female headed households, or householders with children), economic composition (as measured family income), and the presence of motivated offenders, primarily males between the ages of 18 and 25 (see, e.g., Miethe & Meier, 1994).[31]

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[30] The "dirty little secret" of social science research is that anyone with a modest research background can design a study that guarantees a null finding. The second most widely quoted sentence in Isaac Newton's *Principia Mathematica* is "*Negativa non Probanda.*" In this present context, Newton's observation can be paraphrased as "Finding nothing proves nothing."

[31] Linz and Yao, p. 20.

But in fact, the co-variation of these variables with CFSs has little basis in theory or fact. With respect to criminological theory, crime rates for macro-level social units – cities, counties, *etc.* – do appear to co-vary with demographics. But there is no theoretical reason to expect the same covariation in Greensboro, however, or to expect the same covariation for all CFS-types.

Some of the more technical aspects of this issue will be discussed in Section IV below. For present purposes, however, two broader, conceptual aspects of the Linz-Yao statistical adjustment warrant comments here. First, the regression models used by Linz and Yao to statistically adjust differences among Greensboro's Census Blocks use of *areal rates* as both outcome and explanatory variables. To illustrate, all of the Linz-Yao regression equations have the general form,

$$\text{CRIMES / AREA} = \alpha + \beta\ \text{POPULATION / AREA}$$

where CRIMES, AREA, and POPULATION are defined respectively as the number of CFSs (over the period, 1999-2003), the surface area (in km^2) of a Census Block, and population (in 2000) of a Census Block; and where α and β are regression weights.

One minor problem with these equations is that "CFSs per square kilometer" has no relevant interpretation.[32] Because a Census Block's area appears on both the left- and right-hand sides of their regression equations, however, Linz and Yao inject spurious covariance into their models. Concerning model "fit," Linz and Yao claim:

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[32] For personal crimes – assault, homicide, *etc.* – the unit of risk is the individual. The conventional rate is, thus, "CFSs per population." Since area is *not* the unit of risk – except in some bizarre crime like "land theft" – there is no precedent in the criminological literature for a rate like "CFSs per unit of area." I can think of no reason why Linz and Yao would define a rate of this sort.

> In the final analysis we are able to account for crime events in Greensboro (crimes against person, property crimes, sex crimes, drug-related crime and general disorder incidents) with a moderate to high level of accuracy (explaining from 30 to 60 percent of the variability in crime events across block groups, depending upon the type of crime event).[33]

While technically correct, much of this "accuracy" is due to the unorthodox use of areal rates on both sides of the equation. In exchange for this accuracy, unfortunately, Linz and Yao sacrifice statistical power in their hypothesis tests, particularly those tests that relate to cabaret-type AOBs.[34]

The second conceptual problem, put simply, is that Linz and Yao include too many adjustment variables in their regression models. Although each of the variables included in the models is justified by criminological theory, according to Linz and Yao, many of the explanatory variables have statistically insignificant weight in the regression models. The practical consequences of including statistically insignificant explanatory variables in a multiple regression equation are well known and, given the central issue here, not at all surprising. Each incremental adjustment sacrifices statistical power; an adjustment by a insignificant variable is a pure waste.

III.D The Specter of "Fishing" in the Greensboro Study

In scientific research, "fishing" describes the practice of conducting a study with several slightly different variations. Just a few measures, models, and designs, will produce the entire spectrum of findings – positive, null, and negative. The scientific

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[33] Linz and Yao, p. 2.

[34] Because the cabarets are concentrated in the larger Census Blocks. The statistical power problem is discussed in Section IV below.

community controls "fishing" through design conventions. Design conventions serve, first, to enhance the comparability of research findings. A more important function in this instance, however, is to minimize "fishing" opportunities. Although researchers can depart from convention when necessary, significant departures must be explained and justified. Otherwise, the critical scientific reader assumes that the findings and conclusions are an artifact of "fishing."[35]

TABLE III.2 - DESIGNS OF THREE RECENT SECONDARY EFFECT STUDIES

	Greensboro	Fort Wayne	Charlotte
Crime Measure	*CFSs*	UCR Arrests	UCR Crimes
Impact area	Census Blocks with AOBs	1000-foot radius around AOB	500- and 1000-foot radii around AOBs
Control area	Census Blocks without AOBs	1000-foot circle in a non-contiguous "matched" area	500- and 1000-foot radii around other businesses
Covariates	Demographics	None	Crime rates

The potential for "fishing" in the Greensboro study is demonstrated by comparing the designs of three recent secondary effects studies by Linz *et al.*: the Greensboro study, the Fort Wayne study, and the Charlotte study. Although these three studies were completed over two-year period by the same research teams, lead by Professor

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[35] See pp. 42-3 in *Quasi-experimentation: Design and Analysis Issues for Field Settings* by T.D. Cook and D.T. Campbell (Chicago: Rand-McNally, 1979) for a discussion of "Fishing and the error rate problem.." Note further that *Daubert* addresses this issue implicitly in its discussion of "the known or potential rate of error."

Linz, the basic designs vary radically. TABLE III.2 summarizes some of the obvious design differences.

Although all three of these studies were conducted during the same period by the same investigators, the design differences are striking. These include:

- Three different crime measures (*CFS*s, UCR arrests, and UCR crimes);
- Three different definitions of the impact areas (Census Blocks, 1000-foot radii, and 500-foot radii); and
- Three different types of controls (statistically adjusted Census Blocks strips, "matched" circles, and other businesses).

Considering only these three design elements, there are at least (3x3x3=) 27 different ways to conduct a secondary effects study. With this many "bites of the apple," finding a result to support any position becomes a near certainty.

Although "fishing" artifacts are not easily calculated,[36] the problem should be intuitively clear. No evidence suggests that the findings and conclusions of the Linz-Yao Report are the product of a "fishing" expedition. Given the controversial nature of the findings and conclusions, on the other hand, as well as the pattern of departures from design convention listed in TABLE III.2, healthy skepticism is in order.

IV. Statistical Power in the Linz-Yao Report

Each of the measurement and design problems discussed in Sections II and III

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[36] "Fishing" biases the research by inflating the false-positive and false-negative error rates. Error rates in the next section. Because the many possible design variations are not independent, however, the degree of bias is difficult to calculate.

above has the same result: making a substantively large effect statistically small. In light of these threshold problems, each of which is sufficient to invalidate the empirical findings, a critique of statistical power in the Linz-Yao Report might be moot. The issue of statistical power lies at the very heart of the secondary effects debate, however, and in light of TABLE I, at the heart of the Linz-Yao Report's findings.

IV.A Science and Decision Errors

Since every hypothesis must be *either* true *or* false, statisticians deal with two distinct types of decision error: "false positives" and "false negatives."[37] This logical dichotomy is not an accurate description of empirical hypothesis testing, unfortunately. Linz and Yao organize their analyses as a logical dichotomy. If the null hypothesis

H_0: Crime rates in impact and control areas are equal.

is rejected, Linz and Yao will conclude, to a nominal level of statistical confidence, that the alternative hypothesis

H_A: Crime rates in impact and control areas are *not* equal.

is true. In pure logic, of course, if H_0 is true, then H_A must be false (and vice versa). In the empirical realm, however, every hypothesis test has three possible outcomes – a trichotomy!

The jury trial depicted in FIGURE IV is a useful analog. An AOB stands accused of posing an ambient crime risk. After hearing the evidence, the jury convicts, acquits, or hangs. When the jury hangs, there was no decision and, hence, no error. If the jury

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

convicts or acquits, on the other hand, there is always a small probability that the jury convicted an innocent AOB or acquitted a guilty AOB.

FIGURE IV - TWO TYPES OF DECISION ERROR

	But in Reality, the Defendant is ...	
	Guilty	Not Guilty
The Jury Convicts	95% Confidence	5% False Positives
The Jury Hangs	?	?
The Jury Acquits	20% False Negatives	80% Power

In real-world courtrooms, the probability of false verdicts is unknown. Courts enforce strict procedural rules to minimize the probability but we can only guess at the size of an error. In science, on the other hand, we know the *exact* probability of an error. Scientists accomplish this by adopting rigid definitions of certainty. To convict, the jury must have 95 percent certainty in the guilty verdict. This 95 percent level of certainty is called statistical "confidence." To acquit, the jury must have 80 percent certainty in the not-guilty verdict. This 80 percent level of certainty is called statistical "power." The two correct decisions are painted blue in FIGURE IV.

To ground the 95 percent confidence and 80 percent power levels in concrete meaning, the definitions are tied to a theoretical process of replication. In theory, if the case were tried again and again, in the case of a conviction, 95 percent of the juries would return the same guilty verdict; in the case of an acquittal, 80 percent would return the same not-guilty verdict.

The nominal levels of confidence and power imply that five percent of all convictions are false-positive errors and 20 percent of all acquittals are false-negative errors. The incorrect decisions are painted red in FIGURE IV. Errors are never a good thing but at least scientists know the error rates. Error rates can be set higher to make justice more certain, of course, but the level of certainty required for conviction is always set higher than the level required for acquittal.[38]

IV.B TABLE I Revisited

In Section I above, I commented on the discrepancy between the numerical results of the Linz-Yao analyses and their prose description of the numerical results. Whereas the numbers amounted to substantively large adverse secondary effects, the text portrayed these numbers as supporting the null hypothesis – or using the jury trial analogy, of acquitting the AOBs:

> From these analyses we are able to reliably conclude that once we control for variables known to be related to crime there is not a relationship between the presence of an adult cabaret or video bookstore in a

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[38] The most comprehensive authority on statistical power is Chapter 22 of *The Advanced Theory of Statistics, Vol. 2, 4th Ed.* by M. Kendall and A. Stuart (Charles Griffin, 1979). J. Cohen's *Statistical Power Analysis for the Behavioral Sciences, 2nd Ed.* (L.E. Erlebaum Associates, 1988) and M. Lipsey's *Design Sensitivity: Statistical Power for Experimental Research.* (Sage Publications, 1990) are better known. Cohen (pp. 3-4) and Lipsey (pp. 38-40) set the conventional false-positive and false-negative rates at .05 and .2. The rates can be set lower, of course, but the ratio of false-positives to false-negatives is always 4:1, implying that false-positives are "four times worse than" false-negatives. The 4:1 convention, which dates back at least to 1928 (J. Neyman and E. Pearson, "On the use and interpretation of certain test criteria for purposes of statistical inference." *Biometrika,* 1928, 20A:175-240), reflects a view that science should be conservative. In this instance, *e.g.*, the 4:1 convention works in favor of the plaintiffs.

neighborhood and crime events.[39]

Accepting the hypothesis – or acquitting – assumes the false-positive rate associated with the secondary effect estimates are no higher than the nominal .2 level. Since Linz and Yao did not report false-positive rates for their hypotheses, I calculated them.

TABLE IV.1 - ERROR RATES FOR THE LINZ-YAO REGRESSION ANALYSES

	Books/Videos			Cabarets		
	Effect	α	β	**Effect**	α	β
Crimes Against Person	**205.9**	**.01**	**.04**	**78.2**	**.11**	**.58**
Crimes Against Property	**897.7**	**.01**	**.08**	**471.1**	**.10**	**.63**
Drug Related Crimes	**27.4**	**.76**	**.88**	**34.4**	**.58**	**.92**
Sex Related Crimes	**7.6**	**.63**	**.83**	**9.9**	**.37**	**.86**
Disorder Types of Offenses	**60.2**	**.23**	**.46**	**43.8**	**.21**	**.76**
Other Minor Offenses	**594.9**	**.09**	**.27**	**281.9**	**.25**	**.76**

α: false positive rate; β: false-negative rate

The effect estimates in TABLE IV.1 are taken directly from the Linz-Yao Report (Tables 14-19). The consistently large, positive estimates are interpreted as adverse secondary effects. The blue numbers immediately to the right of the estimates are the false-positive or α-error rates reported by Linz and Yao. Linz and Yao used these rates to test null hypotheses. Since ten of the twelve rates are larger than .05, Linz and Yao accepted the null hypotheses in ten cases – ten acquittals, in other words.[40] Last but not least, immediately to the right of false-positive rates, in red, are the false-negative or

[39] Linz and Yao, p. 32

[40] Using analyses of CFS addresses, Linz and Yao concluded that the two estimates with α-error are rates smaller than .05 were aberrations.

β-error rates for the effect estimates.[41]

By convention, false-negative rates in the social, behavioral, and biological sciences must be $\beta \leq .2$ before a null hypothesis can be accepted. But the false-positive rates in TABLE IV.1 range from .27 (for Other Minor Offenses in areas of Greensboro with Books/Videos AOBs) to .92 (for Drug Related Crimes in areas with Cabaret AOBs). These false-negative rates are much too large to be ignored. Failure to report false-negative rates as high as these challenges the threshold credibility of the Report. But even granting Linz and Yao the benefit of the doubt, these false-negative rates are much too high to warrant accepting even one null hypothesis. The record is not twelve acquittals, as Linz and Yao argue, but rather, two convictions and ten hung juries.[42]

IV.C Summary

In purely substantive terms, the secondary effect estimates in TABLE IV.1 are large enough to worry any urban police department. How can numbers be substantively large but, yet, statistically small? The numbers are made smaller by a series of design choices that have the effect of reducing statistical power. Unfortunate design choices begin with the use of CFSs – a "noisy" measure of crime at best – and end with an idiosyncratic statistical adjustment by multiple regression.

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[41] These rates were estimated with PASS (J. Hintze, NCSS and PASS, Number Cruncher Statistical System, Kayesville, UT, 2001. www.ncss.com). All estimates assume $\alpha=.05$ and that variables were entered in the exact order reported in Tables 14-19 of the Linz-Yao Report.

[42] But in fact, all twelve effect estimates in TABLE IV are positive. The probability of twelve independent analyses yielding twelve positive estimates, significant or not, would be infinitessimally small – unless the numbers being estimated were positive (*vs.* zero). I address this issue explicitly in the next section.

Given the constraints of time and resources, some of these unfortunate design choices can be addressed only in terms of strong mathematical or statistical theory. The problem of multiple independent hypothesis tests, on the other hand, can be rectified. The α-error rates reported by Linz and Yao, summarized in TABLE IV.1, assume among other things, that the six crime categories are independent. Of course, this assumption is incorrect. Greensboro's "high-crime" neighborhoods are likely to have high rates of all types of crime. As a consequence, the α-error rates reported by Linz and Yao lack the conventional nominal interpretation – they are wrong, *i.e.*

TABLE IV.2 - SIGNIFICANCE TESTS FROM "SEEMINGLY UNRELATED REGRESSIONS"

	Books/Videos		Cabarets	
	Effect	α	Effect	α
Crimes against person	220.8	.001	88.7	.048
Crimes against property	1027.5	.004	411.3	.089
Drug-related crimes	66.34	.312	16.7	.723
Sex-related crimes	21.9	.070	7.8	.351
Disorderly conduct	69.2	.081	34.1	.226
Other minor crimes	837.5	.002	205.0	.302

Significant at α<.05 **Significant at α<.10**

TABLE IV.2 reports secondary effect estimates and α-error rates for the six Linz-Yao regression equations. The difference between these numbers and the numbers reported by Linz and Yao (in TABLE IV.1, *e.g.*) is that the numbers in TABLE IV.2 were estimated under the assumption that the six crime categories are correlated across Census Blocks. The results of this regression, reported in the Appendix, support this assumption. Beyond that obvious point, however, the α-error rates in TABLE IV.2 show

that, in terms of crimes against the person – assault, homicide, rape, and robbery – both categories of AOBs have substantively large and statistically significant adverse secondary effects.

V. The Linz-Yao Literature Review

In reviewing the literature that the City of Greensboro relied on in writing its AOB ordinances, Linz and Yao conclude that there is a consistent relationship between the methodological rigor of a study and it findings:

> All of the studies that claim to show adverse secondary effects are lacking in methodological rigor. The studies that have been done either by government agencies or by private individuals that have employed the proper methodological rigor have universally concluded that there are no adverse secondary effects.[43]

In addition to relying on literature that they characterize as methodologically unsound, Linz and Yao faulted the City for ignoring the work of Linz *et al.* in Fort Wayne and Charlotte:

> Recently, we have conducted independent, reliable, studies using census data and modern analytical techniques to examine whether "adult" entertainment facilities, and particularly exotic dance establishments engender negative secondary effects. Unlike many of the previous reports, these studies do not suffer from the basic methodological flaws that were enumerated in *Paul*. Unfortunately, the City Council of Greensboro did not consider these investigations despite the fact that the reports were available.[44]

On these two grounds, Linz and Yao conclude that the City's AOB ordinance had no legitimate factual predicate:

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[43] Linz and Yao, p. 10.

[44] Linz and Yao, p. 10.

> Consequently, the City of Greensboro had no reasonable basis for enacting the adult ordinance based on the information before it.[45]

In my opinion, Linz and Yao overstate both grounds. First, while the broader secondary effect literature includes studies that lack scientific rigor, it also includes studies that satisfy reasonable standards of validity. These more rigorous studies figured prominently in the Greensboro's AOB ordinance process. Second, contrary to the characterization of Linz and Yao, the Fort Wayne and Charlotte studies by Linz *et al.* suffer from many of the same problems cited in the preceding sections.

V.A The 1991 Garden Grove Study

In the early 1990s, James W. Meeker and I conducted a series of secondary effect studies in the city of Garden Grove, CA. These studies found large, significant crime-related secondary effects associated with AOBs on one of the city's main streets. Although CFSs were available, as criminologists, we were aware of the problems with these data and chose to use UCRs instead. Our understanding of crime "hotspots" lead us to define impact and control areas as 250-foot and 500-foot radii around the AOBs. To avoid the validity problems associated with "static group comparison" designs, we used a simple before-after quasi-experimental design. Finally, as a comparison standard, or control, we used other Garden Grove AOBs. Summarizing the Garden Grove studies:

- Crime measure: UCRs
- Impact and control areas: 250-foot and 500-foot radii around AOBs

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[45] Linz and Yao, p. 14.

- Design: Before-after quasi-experiment
- Controls: Other AOBs in the same neighborhood

In terms of its scientific rigor, the Garden Grove study is the most comprehensive, authoritative study in the secondary effects literature. Nevertheless, Linz and Yao fault the Garden Grove study on several grounds:

> The Garden Grove study fails to use the proper control comparisons. The study attempted to examine the effects of expansion of an adult business. It employed an average of adult businesses that did not expand as a control without attempting to determine if these businesses matched the test business in terms of demographics or other neighborhood features related to crime. Consistently, the authors do not find effects for "Type II" crimes, which include sex crimes. Identical effects are found for alcohol serving establishments that do not feature adult entertainment as those effects found for adult entertainment facilities. Finally, since business expansion was the focus of the study, a failure to examine the effects of other business expansions on crime rate due to increased customer traffic renders the study difficult to interpret.[46]

None of the grounds cited by Linz and Yao are correct. Because the impact and control AOBS were in the same Census Block, *e.g.*, their demographics were identical. Part II (not "Type II") UCRs were included in the study and Part II impacts were found. Finally, business expansion was not the "focus of the study," although several AOB expansions were investigated. Linz and Yao could not have read the Garden Grove report carefully.

Figure V.1 reports a typical result of the Garden Grove study. In March, 1986, an AOB called the "Bijou" opened for business. Compared to the year before, Part I violent UCRs (assault, homicide, rape, robbery), Part I property UCRs (arson, auto theft, burglary, and theft), and Part II UCRs (including "victimless" crimes) rose significantly in

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[46] Linz and Yao, p. 9.

the 500-foot impact area. The one-year before-after differences for the impact area are plotted as red bars in FIGURE V.1. During the same period, Part I and Part II UCRs at control areas – other AOBs – remained constant. The one-year before-after differences for the control, plotted as blue bars in FIGURE V.1, are nearly invisible – zero, *i.e.*

FIGURE V.1 - CRIME BEFORE AND AFTER AN AOB OPENS

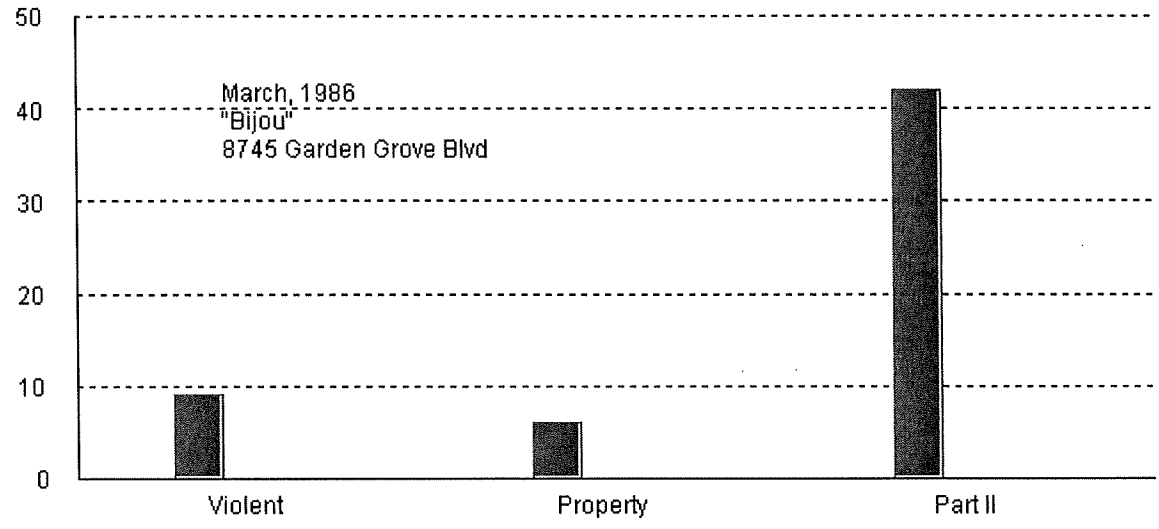
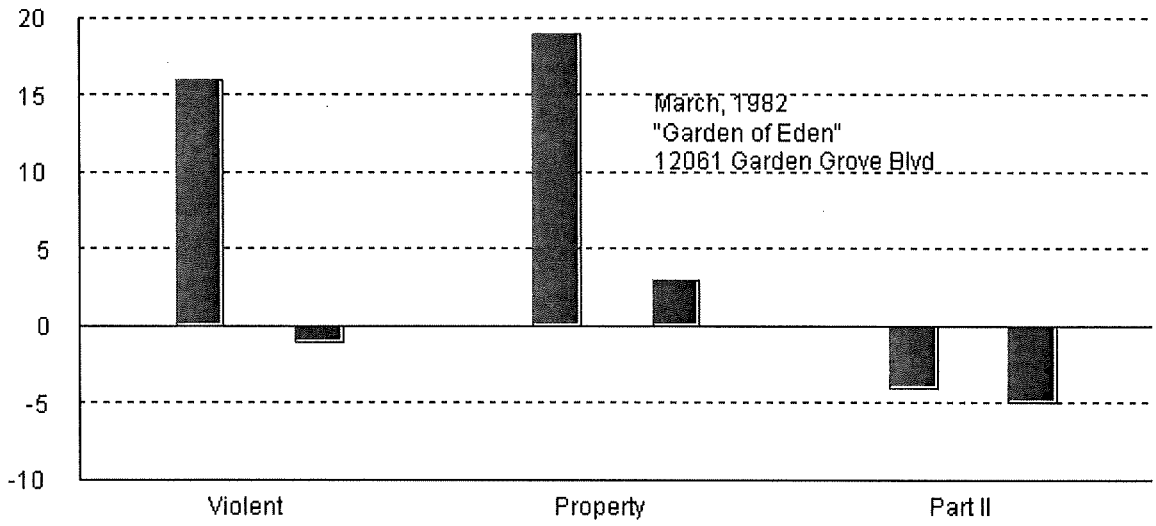


FIGURE V.2 reports result for the expansion of an existing AOB. In March, 1982, an existing AOB tripled its size by acquiring adjacent store fronts. Compared to the year before expansion, Part I UCRs rose sharply in the impact area but not in the control area. Part II UCRs declined in both areas. This unitary decline in Part II UCRs may explain the Linz-Yao comment about "Type II" crime. Because Part II UCRs, which include the so-call victimless crimes, are heavily influence by enforcement policy, their

use as secondary effect indicators is problematic.[47]

FIGURE V.2 - CRIME BEFORE AND AFTER AN AOB EXPANDS



In addition to the findings reported in FIGURE V.1-2, the Garden Grove study investigated the relationship between alcoholic beverage serving businesses and AOBs and the effects of architectural retrofits designed to mitigate adverse secondary effects. Since neither issue is relevant to Greensboro, those components of the study need not be reported here. The important point, in my opinion, is the straightforward interpretation supported by before-after designs. Contrasting crime risk after an AOB opens (or expands) to crime at the same address before the AOB opens (or expands)

[47] When a police department hires more homicide detectives, the homicide rate does not rise precipitously. Hiring more vice officers will generally lead to more vice arrests, however. The same principle holds for narcotics, traffic, and other Part II UCR crimes. This is the salient difference between Part I and Part II UCRs.

leaves little doubt about the nature of the relationship.

V.B The Fort Wayne and Charlotte Studies

The Fort Wayne and Charlotte studies, in contrast, are made difficult to interpret on several grounds. First, instead of using before-after designs, both studies used weak "static group comparison" designs. Second, both studies relied on controversial, non-intuitive control strategies. In Charlotte, *e.g.*, Linz *et al.* compared eight AOBs to two fast-food restaurants (a KFC and a McDonald's) and a mini-mart. In Fort Wayne, Linz *et al.* compared UCRs in a 1000-foot radius around and AOB to UCRs in a "matched" 1000-foot circle. A larger problem, however, is that both studies found large, significant *salutary* secondary effects in AOB areas. These salutary secondary effects extended to all three dimensions:

- Crime was *lower* in AOB areas, compared to control areas.
- Real estate values were higher in AOB areas, compared to control areas. And in Charlotte,
- Residents of AOB areas were happier than residents of control areas.

These effects were so unexpected, so counter-intuitive, and so large, that Linz *et al.* had to speculate on the underlying mechanism. First, according to Linz *et al.*, AOB owners take proactive steps to protect customers.

> The extensive management of the parking lots adjoining the exotic dance nightclubs, in many cases including guards in the parking lots, valet parking and other control mechanisms, reduces the possibility of disputes in the surrounding area. In addition, unlike other liquor serving establishments (bars and taverns), disputes in the areas surrounding

> these exotic dance clubs between men regarding unwanted attention by other males to dates or partners are minimal due to the fact that the majority of patrons attend the clubs without female partners. Further, security measures inside the clubs reduce the potential for skirmishes among customers.[48]
>
> ... the establishments themselves have evolved more closely into businesses – establishments with management attention to profitability and continuity of existence. To meet these objectives, it is essential that the management and/or owners of the clubs provide their customers with some assurance of safety. Accordingly, adult nightclubs, including those in Charlotte, typically have better lighting in their parking lots and better security surveillance than is standard for non adult-nightclub business establishments.[49]

If this explanation is correct, it would appear that AOB regulations aimed at public safety – lighting, security guards, *etc.* – have a legitimate basis. More generally, according to Linz *et al.*, broader regulation of AOBs has been effective, at least in Charlotte:

> As noted in the introduction to this paper, adult nightclubs have been subjected to over two decades of municipal zoning restrictions across the country and they usually must comply with many other regulations as well.[50]

These rationales pose a dilemma for Linz *et al.* If AOBs have the miraculous salutary effects claimed by Linz *et al.*, it is because the regulation of AOBs has been effective. But on the other hand, if the salutary effects are an artifact of design idiosyncracies, AOBs are in need of regulation.

The second horn of the dilemma is more plausible. Except that neither the Fort

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[48] p. 18., Daniel Linz and Bryant Paul, "Measurement of Negative Secondary Effects Surrounding Exotic Dance Nightclubs in Fort Wayne, Indiana." February 13, 2001.

[49] Land, K.C., Williams, J.R., and M.E. Ezell. *Are adult Dance Clubs Associated with Increases in Crime in Surrounding Areas?* p. 31-2.

[50] p. 31-32 of the Charlotte study.

Wayne or Charlotte studies used CFSs, they suffer from the same methodological flaws found in the Greensboro study.[51] TABLE III.2 above lists the salient elements of design in Fort Wayne and Charlotte. Although the two studies were conducted during the same period by the same people, the differences in design are striking. In every study, Linz *et al.* select design elements from a cafeteria of options. Because no two Linz *et al.* designs are even roughly comparable, the credibility of their findings are haunted by the specter of "fishing."

VI. Conclusion

Although the Linz-Yao Report was commissioned by the plaintiffs, the Report's findings contradict the plaintiffs' claim that Greensboro's AOBs pose no crime-related secondary effects. In fact, as reported in TABLES I and IV.1 above, the large adverse secondary effects span both classes of AOBs and six categories of crime. As reported in TABLE IV.2, moreover, the substantively large effects for four serious crimes against persons – assault, homicide, rape, and robbery – are also statistically significant at the nominal $\alpha \leq .05$ level for both classes of AOBs. The relative magnitude of secondary effects reported by Linz and Yao warrant special emphasis. As shown in TABLE I, the secondary effects of AOBs in Greensboro range from 120 to 720 percent higher than the analogous crime effects for bars and taverns.

To conclude that neighborhoods with and without AOBs have statistically similar

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[51] On p. 11, Linz and Yao seem to claim the Fort Wayne study used CFSs: "The number of calls to the police from 1997-2000 in the areas surrounding the exotic dance nightclubs was compared to the number of calls found in the matched comparison areas." But in fact, the Fort Wayne study used UCRs cleared-by-arrest (vs. all UCRs as was used in Charlotte).

crime rates – a null finding, *i.e.* – Linz and Yao had to overcome a formidable obstacle; two of their twelve secondary effect estimates were statistically significant at the nominal $\alpha \leq .05$ level. Linz and Yao urged the reader not to take these effects seriously because there were relatively few CFSs to AOB addresses. This argument ignores the fact that CFS addresses are not the locations of crime sites, of course, and attempts, subtly, to redefine the terms of debate.[52]

Having dealt with the two statistically significant effect to their satisfaction, Linz and Yao turn their attention to the ten remaining effects. Because these ten estimates are *not* statistically significant, according to Linz and Yao, no matter how substantively large they may be, they must treated *as if* they were zero. And if they are zero, Linz and Yao argue, the difference between neighborhoods with and without AOBs is zero – no difference, in other words.

The flaw in this argument is statistical power. To reject a null hypothesis, as Linz and Yao urge, false-negative error rates for the hypothesis test must be no larger than 20 percent (*i.e.*, $\beta \leq 2$). As reported in TABLE IV.1, of course, none of the Linz-Yao false-negative rates come even close to the conventional level required for social, behavioral, and biological science research.

The unacceptably low statistical power in the Linz-Yao hypothesis tests is a function methodological flaws, of course, spanning measurement, design, and analysis. All of these idiosyncracies have the effect of weakening the statistical foundation of the

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[52] The adverse secondary effects of AOBs are *ambient*. As depicted in FIGURE III.1, they radiate outward, diminishing exponentially with distance. Linz and Yao attempt to re-define the secondary effect as something that is necessarily limited the immediate premises or address.

hypothesis tests, making it more difficult to detect an adverse effect. That the adverse secondary effects persisted in the face of so many methodological challenges hints at how strong the adverse secondary effects in Greensboro really are.

Nevertheless, at least one of the methodological flaws in the Linz-Yao analyses can be addressed after the fact. The α-error rates reported by Linz and Yao assume that the six categories of crime are independent when, as a matter of empirical fact, they are highly correlated. TABLE IV.2 reports a set of α-error rates that take the correlations into account. When the inter-crime correlations are assumed, the large adverse effects for violent crimes achieve statistical significance at the nominal $\alpha \leq .05$ level for the two classes of AOBs. This ends the debate.

Finally, the opinions of Linz and Yao on the methodological rigor of the secondary effects literature used by Greensboro to formulate adult-oriented business regulations are at least overstated. *Some* of the methodological criticisms raised by Linz and Yao about *some* of the studies cited by the City are reasonable; but *other* criticisms about *other* studies are unreasonable and, apparently, incorrect. Some of the studies used by Greensboro are based on sound methodologies; and these studies document a mix of adverse secondary effects associated with AOBs. Taken as a body, this literature constitutes a solid empirical foundation for AOB regulations. In my opinion then, Linz and Yao are wrong. The City had an ample factual predicate for its regulations.

APPENDIX

1. Descriptive statistics for six dependent (outcome) variables and 13 independent (explanatory) variables used by Linz and Yao. All statistics were generated by SPSS from the file "greensboro blk grp 11-26-03.sav" emailed to the defendants by Mike Yao.

Var Label	Var Name	Min	Max	Mean	Std. Deviation
Crime: Person	PER_DENS	.00	1153.33	196.8618	234.20536
Crime: Property	PRO_DENS	.00	8900.00	1635.7824	1469.06826
Crime: Drug	DRG_DENS	.00	1577.27	89.0940	225.89693
Crime: Sex	SEX_DENS	.00	261.90	20.6177	37.25911
Crime: Disorderly	DIS_DENS	.00	883.33	127.0375	168.53584
Crime: Other	OTH_DENS	.00	6877.27	646.2676	1038.36874
Population Density	POP_DENS	114.66	13571.43	2599.0934	2022.21626
14-24 Year Olds	AGE15_24	34.00	2977.00	267.6185	340.57068
Median Age	MEDIAN_A	16.5	53.7	35.445	6.8148
Non-whites	NONWHITE	3.00	3494.00	716.9827	659.54439
Fem household w/children	HH_FEMC	0	411	54.54	52.323
Non-family households	HH_NONFA	20	1473	258.83	212.888
In-household unmarried	INHH_NON	5	481	101.88	86.972
Renter occupied household	OCCHU_RE	13	1659	272.65	274.734
Vacant housing	HU_VACAN	4	300	48.29	44.337
Owner vacancy rate	OWNER_VA	.0	14.3	2.022	2.1833
Private clubs (alcohol)	GBNC_BAR	0	11	.37	1.057
AOBs: Books/Videos	GBNC_BKS	0	2	.05	.237
AOBs: Cabarets	GBNC_CLB	0	2	.09	.328

2. Regression models estimated with SPSS from "greensboro blk grp 11-26-03.sav."

A. Summary Statistics for Six Models

Outcome Variable	R	R^2	Adj R^2	SE	F	df
Crime: Personal	.716	.512	.472	170.11259	12.848	13,159
Crime: Property	.798	.637	.607	920.77204	21.449	13,159
Crime: Drug	.637	.407	.358	181.05700	8.365	13,159
Crime: Sex	.563	.317	.261	32.02594	5.677	13,159
Crime: Disorder	.791	.625	.594	107.35378	20.378	13,159
Crime: Other	.708	.501	.461	762.54190	12.303	13,159

B. Parameter Estimates for Six Models

	B	Std. Error	Beta	t	Sig
Crime: Person	262.474	119.183		2.202	.029
Population Density	5.554E-02	.008	.480	6.799	.000
15-24 Year Olds	-.236	.055	-.343	-4.268	.000
Median Age	-4.579	2.836	-.133	-1.615	.108
Non-whites	1.417E-02	.041	.040	.342	.733
Fem household w/children	.370	.519	.083	.712	.477
Non-family households	-.405	.202	-.368	-2.002	.047
In-household unmarried	-.104	.341	-.039	-.305	.761
Renter occupied household	.283	.170	.333	1.666	.098
Vacant housing	-.490	.563	-.093	-.870	.385
Owner vacancy rate	9.273	6.786	.086	1.367	.174
Private clubs (alcohol)	31.179	14.811	.141	2.105	.037
AOBs: Books/Videos	204.593	73.334	.207	2.790	.006
AOBs: Cabarets	79.035	47.496	.111	1.664	.098

	B	Std. Error	Beta	t	Sig
Crime: Property	1766.936	645.106		2.739	.007
Population Density	.419	.044	.577	9.471	.000
15-24 Year Olds	-1.725	.299	-.400	-5.762	.000
Median Age	-27.329	15.350	-.127	-1.780	.077
Non-whites	.433	.224	.194	1.929	.056
Fem household w/children	-5.730	2.811	-.204	-2.039	.043
Non-family households	-2.128	1.096	-.308	-1.942	.054
In-household unmarried	.725	1.847	.043	.392	.695
Renter occupied household	1.832	.921	.343	1.989	.048
Vacant housing	-2.145	3.046	-.065	-.704	.482
Owner vacancy rate	34.942	36.730	.052	.951	.343
Private clubs (alcohol)	390.320	80.170	.281	4.869	.000
AOBs: Books/Videos	954.246	396.938	.154	2.404	.017
AOBs: Cabarets	376.245	257.080	.084	1.464	.145

	B	Std. Error	Beta	t	Sig
Crime: Drugs	243.139	126.851		1.917	.057
Population Density	4.290E-02	.009	.384	4.933	.000
15-24 Year Olds	-.147	.059	-.221	-2.495	.014
Median Age	-5.992	3.018	-.181	-1.985	.049
Non-whites	-3.742E-02	.044	-.109	-.849	.397
Fem household w/children	1.685	.553	.390	3.048	.003
Non-family households	-.247	.215	-.232	-1.144	.254
In-household unmarried	-.963	.363	-.371	-2.652	.009
Renter occupied household	.250	.181	.304	1.381	.169
Vacant housing	1.312E-02	.599	.003	.022	.983
Owner vacancy rate	3.616	7.222	.035	.501	.617
Private clubs (alcohol)	7.204	15.764	.034	.457	.648
AOBs: Books/Videos	50.556	78.052	.053	.648	.518
AOBs: Cabarets	20.495	50.551	.030	.405	.686

	B	Std. Error	Beta	t	Sig
Crime: Sex	6.335	22.438		.282	.778
Population Density	8.623E-03	.002	.468	5.607	.000
15-24 Year Olds	-3.074E-02	.010	-.281	-2.953	.004
Median Age	-8.626E-02	.534	-.016	-.162	.872
Non-whites	9.428E-03	.008	.167	1.209	.229
Fem household w/children	-8.778E-02	.098	-.123	-.898	.371
Non-family households	-4.395E-02	.038	-.251	-1.153	.251
In-household unmarried	-3.905E-02	.064	-.091	-.608	.544
Renter occupied household	2.228E-02	.032	.164	.696	.488
Vacant housing	7.252E-02	.106	.086	.685	.495
Owner vacancy rate	1.573	1.278	.092	1.231	.220
Private clubs (alcohol)	6.981	2.788	.198	2.504	.013
AOBs: Books/Videos	7.730	13.806	.049	.560	.576
AOBs: Cabarets	9.059	8.942	.080	1.013	.313

	B	Std. Error	Beta	t	Sig
Crime: Disorder	236.652	75.214		3.146	.002
Population Density	4.747E-02	.005	.570	9.207	.000
15-24 Year Olds	-.154	.035	-.312	-4.423	.000
Median Age	-5.890	1.790	-.238	-3.291	.001
Non-whites	-2.950E-02	.026	-.115	-1.128	.261
Fem household w/children	.430	.328	.133	1.311	.192
Non-family households	-.290	.128	-.367	-2.274	.024
In-household unmarried	.510	.215	.263	2.367	.019
Renter occupied household	9.926E-02	.107	.162	.924	.357
Vacant housing	-.179	.355	-.047	-.503	.616
Owner vacancy rate	1.529	4.282	.020	.357	.721
Private clubs (alcohol)	27.870	9.347	.175	2.982	.003
AOBs: Books/Videos	66.218	46.279	.093	1.431	.154
AOBs: Cabarets	33.995	29.973	.066	1.134	.258

	B	Std. Error	Beta	t	Sig
Crime: Other	1450.149	534.247		2.714	.007
Population Density	.236	.037	.460	6.457	.000
15-24 Year Olds	-.981	.248	-.322	-3.957	.000
Median Age	-32.081	12.712	-.211	-2.524	.013
Non-whites	-7.424E-03	.186	-.005	-.040	.968
Fem household w/children	4.579	2.328	.231	1.967	.051
Non-family households	-1.635	.908	-.335	-1.801	.074
In-household unmarried	-3.086	1.530	-.259	-2.017	.045
Renter occupied household	1.349	.763	.357	1.768	.079
Vacant housing	-.238	2.522	-.010	-.094	.925
Owner vacancy rate	19.261	30.418	.040	.633	.528
Private clubs (alcohol)	81.963	66.393	.083	1.235	.219
AOBs: Books/Videos	645.549	328.726	.147	1.964	.051
AOBs: Cabarets	204.534	212.902	.065	.961	.338

C. Parameter Estimates for Six-Equation Model. Parameters were estimated with the Stata 8 SUREG routine from "greensboro blk grp 11-26-03.sav."

Equation		Obs	Parms	RMSE	"R-sq"	chi2	P
1.	per_dens	173	8	165.7808	0.4960	169.74	0.0000
2.	pro_dens	173	10	892.2249	0.6290	308.84	0.0000
3.	drg_dens	173	7	175.9497	0.3898	119.37	0.0000
4.	sex_dens	173	5	31.64325	0.2745	63.86	0.0000
5.	dis_dens	173	8	104.6981	0.6118	287.57	0.0000
6.	oth_dens	173	9	744.327	0.4832	193.60	0.0000

1. per_dens

	Coef.	Std. Err.	z	P>|z|	[95% Conf.	Interval]
pop_dens	.0583978	.007305	7.99	0.000	.0440803	.0727154
age15_24	-.2567067	.0444481	-5.78	0.000	-.3438234	-.16959
median_a	-5.213533	2.296833	-2.27	0.023	-9.715243	-.7118229
hh_nonfa	-.3614153	.123571	-2.92	0.003	-.60361	-.1192206
occhu_re	.2351458	.0966512	2.43	0.015	.0457129	.4245787
gbnc_bar	23.88785	10.27709	2.32	0.020	3.745121	44.03058
gbnc_bks	220.7782	63.91651	3.45	0.001	95.50411	346.0522
gbnc_clb	88.73834	44.8434	1.98	0.048	.8468936	176.6298
_cons	300.7545	95.42885	3.15	0.002	113.7174	487.7916

2. pro_dens

	Coef.	Std. Err.	z	P>|z|	[95% Conf.	Interval]
pop_dens	.4332474	.0397826	10.89	0.000	.3552749	.51122
age15_24	-1.845983	.2598476	-7.10	0.000	-2.355275	-1.336691
median_a	-32.90447	12.85666	-2.56	0.010	-58.10306	-7.705876
nonwhite	.4246629	.1454843	2.92	0.004	.1395189	.709807
hh_femc	-7.76403	1.777136	-4.37	0.000	-11.24715	-4.280906
hh_nonfa	-1.657183	.7851411	-2.11	0.035	-3.196031	-.1183348
occhu_re	1.71995	.6753602	2.55	0.011	.3962684	3.043632
gbnc_bar	340.2704	58.94667	5.77	0.000	224.737	455.8037
gbnc_bks	1027.469	353.2097	2.91	0.004	335.191	1719.748
gbnc_clb	411.2909	242.0976	1.70	0.089	-63.21155	885.7934
_cons	2037.614	536.4461	3.80	0.000	986.1989	3089.029

3. drg_dens

	Coef.	Std. Err.	z	P>|z|	[95% Conf.	Interval]
pop_dens	.0452171	.0076608	5.90	0.000	.0302022	.0602321
age15_24	-.1919905	.0463141	-4.15	0.000	-.2827646	-.1012165
median_a	-6.907077	2.394045	-2.89	0.004	-11.59932	-2.214836
hh_femc	1.400736	.2308506	6.07	0.000	.9482775	1.853195
inhh_non	-.7488683	.1661038	-4.51	0.000	-1.074426	-.4233108
gbnc_bks	66.34121	65.56554	1.01	0.312	-62.16489	194.8473
gbnc_clb	16.75276	47.19064	0.36	0.723	-75.7392	109.2447
_cons	263.0482	105.2732	2.50	0.012	56.71663	469.3798

4. sex_dens

	Coef.	Std. Err.	z	P>|z|	[95% Conf.	Interval]
pop_dens	.0090135	.0012701	7.10	0.000	.0065241	.0115029
age15_24	-.0310079	.0077629	-3.99	0.000	-.0462228	-.0157929
gbnc_bar	4.199698	2.047474	2.05	0.040	.1867219	8.212674
gbnc_bks	21.943	12.12063	1.81	0.070	-1.813004	45.699
gbnc_clb	7.841639	8.411152	0.93	0.351	-8.643916	24.32719
_cons	2.195358	4.159126	0.53	0.598	-5.95638	10.3471

5. dis_dens|

	Coef.	Std. Err.	z	P>|z|	[95% Conf.	Interval]
pop_dens	.0495055	.0045935	10.78	0.000	.0405023	.0585087
age15_24	-.1883981	.0278271	-6.77	0.000	-.2429382	-.1338581
median_a	-6.734602	1.441599	-4.67	0.000	-9.560084	-3.90912
hh_nonfa	-.1552782	.0538132	-2.89	0.004	-.2607502	-.0498062
inhh_non	.502001	.1362557	3.68	0.000	.2349448	.7690572
gbnc_bar	19.13064	5.260491	3.64	0.000	8.820268	29.44101
gbnc_bks	69.20503	39.71134	1.74	0.081	-8.627768	147.0378
gbnc_clb	34.13895	28.22523	1.21	0.226	-21.18149	89.4594
_cons	263.1086	61.50757	4.28	0.000	142.556	383.6612

6. oth_dens

	Coef.	Std. Err.	z	P>|z|	[95% Conf.	Interval]
pop_dens	.2487034	.0319462	7.79	0.000	.18609	.3113168
age15_24	-1.108898	.1933126	-5.74	0.000	-1.487784	-.7300124
median_a	-34.49121	9.209862	-3.75	0.000	-52.54221	-16.44021
hh_femc	3.917426	.7792158	5.03	0.000	2.390191	5.444661
hh_nonfa	-.6974107	.3322596	-2.10	0.036	-1.348628	-.0461938
inhh_non	-2.265352	.7496765	-3.02	0.003	-3.734691	-.7960132
occhu_re	.5386552	.2699186	2.00	0.046	.0096245	1.067686
gbnc_bks	837.5213	276.1655	3.03	0.002	296.247	1378.796
gbnc_clb	204.9952	198.4869	1.03	0.302	-184.032	594.0224
_cons	1512.252	399.746	3.78	0.000	728.7647	2295.74

A Report On Zoning And Other Methods Of Regulating Adult Entertainment In Amarillo

September 12, 1977

PLANNING DEPARTMENT
CITY OF AMARILLO, TEXAS

A REPORT ON ZONING AND OTHER METHODS OF REGULATING ADULT ENTERTAINMENT IN AMARILLO

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September 12, 1977

PREFACE

This report presents the findings of the Amarillo Planning Department regarding the adult entertainment industry within the confines of the Amarillo City Limits. These findings analyze the land use effects of adult entertainment businesses and alternatives for their regulation. Adult entertainment businesses are those that customarily are not open to the general public by the exclusion of minors by reason of age.

Presently, the only authority available to a city for regulating adult businesse is the city's power to zone and license. These methods of control have been sanction by the Young v American Mini Theaters, Inc. case.

The determination of what is or is not obscene is to be made by a jury on a case by case basis in accordance with the test described in the Marvin Miller v State of California decision. The criminal offenses for dealing in obscenity, proscribed by the Texas Penal Code, are the exclusive province of the State, and the city may not invade this area by seeking to define obscenity or provide rebuff for its sale, display or distribution.

A REPORT ON ZONING AND OTHER METHODS OF REGULATING ADULT ENTERTAINMENT IN AMARILLO

INTRODUCTION

This report on the current extent of pornography in Amarillo was initiated upon the request of the Amarillo Planning and Zoning Commission April 25, 1977. Accompanying the request was the desire for information concerning the possible zoning control of all businesses catering to adults only. For the purpose of this report, adult-only businesses have not been limited to those that display pornographic material, but include bars, lounges, and any other business type which restricts entry, sale or viewing based upon a minimum age.

This study is an attempt to briefly explore the national problem of adult-only businesses with a major emphasis on those which deal in pornographic material. The Amarillo situation was analyzed in relation to the extent of the national growth of the adult-only industry and the extent and limitations to which the City can con' through land use mechanisms, the proliferation of the industry outlets.
No city ordinance regulating any type of adult business is included within this report and none will be drafted until discussion has occurred on the various options available for the control of adult businesses.

In any consideration of whether or not to control and restrict adult-only outlets within the municipal jurisdiction, the following should be reviewed:

1. To prohibit these uses to locate anywhere in the municipality, three points must be considered:

   A. The Courts have generally invalidated legislation which attempts to prohibit a particular use altogether from a municipality.

   B. Prohibiting the location of any pornographic use in the city could be contested on the grounds that it provides an individual engaged in such practice no means of livelihood within the City.

   C. Such legislation could also be contested on the grounds that it infringes upon the right of freedom of speech.

2. If these uses are to be allowed and restricted within the municipality, the City must decide where such uses are to be located.[1]

METHOD OF ANALYSIS

In the preparation of this report, several data sources were employed. Current weekly national news magazines were searched for references to the problems of major urban areas relative to this topic. Several individual cities known to be exploring methods of controlling the growth of the adult-only industry were contacted and adopted City Ordinances were reviewed. The American Society of Planning Officials provided advance information from an unreleased publication on Adult Entertainment which has since been published (copy included for your review). Several recent Supreme Court decisions were reviewed in order to determine the general mood of the law as handed down.[2]

This information was synthesized into a form which details the national limitations placed upon a state and city in the land use control of adult-only businesses. The Texas obscenity law was then reviewed in order to determine the limitations of legislative regulation of adult-only businesses and the extent to which Amarillo, as a city, may regulate the industry through land use and licensing mechanisms.

DEFINITIONS

Obscenity is defined by the Supreme Court in the following exerpts from Marvin Miller v State of California:

1. "Obscene material is not protected by the First Amendment, Roth v United States, 354, U.S. 476, 77 S. Ct. 1307, 1L. Ed. 2d 1498, reaffirmed. A work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and taken as a whole, does not have serious literary, artistic, political, or scientific value."

2. "The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, Roth, Supra, at 489, 77 S. Ct. at 1311; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If a state obscenity law is thus limited, First Amendment values are adequately protected by ultimate independent appellate review of constitutional claims when necessary."

3. "The jury may measure the essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the forum community, and need not employ a 'national standard'."

As stated above the basic guideline for determining what is obscene is through an evaluation of the material utilizing the forum community standard. In Smith v United States, 97 S. Ct. 1756 (1977) the Court amplified its consideration of the community standard when it stated that community standards are required to be applied by the jury in accordance with its understanding of the tolerance of the average person in the community. The result being that the jury has the discretion to determine what appeals to the prurient interests and what is patently offensive in its community. "State law cannot define the contemporary community standards for appeal to the prurient interest and patent offensiveness that under Miller v California are applied in determining whether or not material is obscene . . . Though state legislatures are not completely foreclosed from setting substantive limitations for obscenity cases, they cannot declare what community standards shall be . . . " [Smith v United States (1759)]

The conduct regulated by the Texas Legislature is defined in the Texas Penal Code Subchapter 43B, "Obscenity". The following is that portion of Chapter 43 which regulates the sale, distribution and display of obscene material:

43.21. Definitions .

In this subchapter:

(1) "Obscene" means having as a whole a dominant theme that:

(A) appeals to the prurient interest of the average person applying contemporary community standards;
(B) depicts or describes sexual conduct in a patently offensive way; and
(C) lacks serious literary, artistic, political, or scientific value.

(2) "Material" means a book, magazine, newspaper, or other printed or written material; a picture, drawing, photograph, motion picture, or other pictorial representation; a play, dance, or performance; a statue or other figure; a recording, transcription, or mechanical, chemical, or electrical reproduction; or other article, equipment or machine.

(3) "Prurient interest" means an interest in sexual conduct that goes substantially beyond customary limits of candor in description or representation of such conduct. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

(4) "Distribute" means to transfer possession, whether with or without consideration.

(5) "Commercially distribute" means to transfer possession for valuable consideration.

(6) "Sexual conduct" means:
(A) any contact between any part of the genitals of one person and the mouth or anus of another person;
(B) any contact between the female sex organ and the male sex organ;
(C) any contact between a person's mouth or genitals and the anus or genitals of an animal or fowl; or
(D) patently offensive representations of masturbation or excretory functions.[3]

43.22. Obscene Display of Distribution

(a) A person commits an offense if he intentionally or knowingly displays or distributes an obscene photograph, drawing, or similar visual representation or other obscene material and is reckless about whether a person is present who will be offended or alarmed by the display or distribution.

(b) An offense under this section is a Class C misdemeanor.

43.23. Commercial Obscenity

(a) A person commits an offense if, knowing the content of the material:
(1) he sells, commercially distributes, commercially exhibits, or possesses for sale, commercial distribution, or commercial exhibition any obscene material;
(2) he presents or directs an obscene play, dance, or performance or participates in that portion of the play, dance, or performance that makes it obscene; or
(3) he hires, employs, or otherwise uses a person under the age of 17 years to achieve any of the purposes set out in Subdivisions (1) and (2) of this subsection.

(b) It is an affirmative defense to prosecution under this section that the obscene material was possessed by a person having scientific, educational, governmental, or other similar justification.

(c) An offense under this section is a Class B misdemeanor unless committed under Subsection (a)(3) of this section, in which event it is a Class A misdemeanor.

43.24. Sale, Distribution, or Display of Harmful Material to Minor

(a) For purposes of this section;-

(1) "Minor" means an individual younger than 17 years.
(2) "Harmful material" means material whose dominant theme taken as a whole:
(A) appeals to the prurient interest of a minor, in sex, nudity, or excretion;
(B) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and
(C) is utterly without redeeming social value for minors.

(b) A person commits an offense if, knowing that the material is harmful:
(1) and knowing the person is a minor, he sells, distributes, exhibits, or possesses for sale, distribution, or exhibition to a minor harmful material;
(2) he displays harmful material and is reckless about whether a minor is present who will be offended or alarmed by the display; or
(3) he hires, employes, or uses a minor to do or accomplish or assist in doing or accomplishing any of the acts prohibited in Subsection (b)(1) of (b)(2) of this section.

(c) It is a defense to prosecution under this section that:
(1) the sale, distribution, or exhibition was by a person having scientific, educational, governmental, or other similar justification; or
(2) the sale, distribution, or exhibition was to a minor who was accompanied by a consenting parent, guardian, or spouse.

(d) An offense under this section is a Class A misdemeanor unless it is committed under Subsection (b)(3) of this section in which event it is a felony of the third degree.[4]

The preceding has outlined the substantive limitations of that which can be found obscene in the State of Texas. The enforcement of those sections of the State Penal Code applying to obscene material is left to the discretion of the District and County Attorneys.

The remainder of this report will concern the controls that the City may impose to regulate the adult-only industry through land use controls, licensing, and measures to assure that minors will not be allowed to purchase or view the display of pornographic material in commercial businesses.

THE NATIONAL PROBLEM/CITIES

Urban areas across the nation are beginning a crackdown on the growth of se oriented businesses. Recent public outcries and national exposes have been forcing new evaluations of existing pornography law. This renewed attack on pornography is

partially founded upon the Supreme Court decision in Young v American Mini Theater. This decision, affirming the City of Detroit's police power ability to zone adult entertainment, redefined the standards the community can use to appraise that material which is found to be adult entertainment and protected by the 1st and 14th Amendments of the U. S. Constitution. The following exerpt from Young v American Mini Theaters makes clear the Supreme Court view of adult entertainment and zoning:

> Though the First Amendment protects communication in the area of adult motion pictures from suppression, the State may legitimately use the content of such pictures as the basis for placing theaters exhibiting them in a different classification from other motion picture theaters for zoning purposes. The City's interest in the present and future character of its neighborhoods adequately support the limitation imposed . . . on the place where adult films may be exhibited.

As a result of Young v American Mini Theaters, several cities have initiated zoning ordinances similar to Detroit's to control the proliferation of sex industry outlets into incompatible areas of city development. Kansas City, Missouri and Atlanta, Georgia, are examples of cities recently implementing zoning ordinances to control the adult entertainment industry. These cities have accepted the fact that there is a large market for adult entertainment. By implementing and enforcing a zoning ordinance to control site location choices to those sites meeting certain minimum requirements, these cities have sanctioned the adult entertainment industry. However, this sanction does not entail a condonation of commercial sex activities outside the control of land use planning activities.

The problems with the proliferation of adult businesses in major urban areas are growing, not only in the volume of outlets, but also in new types of adult businesses Cities that have attempted to use zoning ordinances to define explicitly each controlled adult entertainment business have found that the ordinances are subject to constant update as the adult entertainment industry implements new techniques for the dissemination of its product. The following list illustrates some of the

kinds of pornographic adult businesses that could have a blighting effect upon a neighborhood if allowed to grow uncontrolled. The list also points to the problem of attempting to define each new adult business.

Pornographic Adult Businesses

Adult bookstores
Adult mini motion picture theater (peep shows)
Adult motion picture theaters
Artists body painting studios
Eating places with adult entertainment
Exotic photo studios
Lounges and bars, topless
Lounges and bars, bottomless
Massage parlor
Nude theater
Nude wrestling parlor

As cities strengthen laws dealing with certain listed businesses, new businesses providing the same or similar services have been invented by the industry. For example, in Birmingham, laws governing massage parlors were tightened forcing most to close.[5] As a result, shoeshine shops, where you can lie down while getting your shoes shined and providing the same service as the massage parlor, were opened. The City was then forced to adopt another ordinance requiring that a person could not lie down to get a shoeshine. Similar situations occurred in Boston when massage parlors were under attack. A quick metamorphosis was made of adult entertainment businesses under the guise of sensitivity training parlors, nude wrestling studios and exotic photography centers. These later generation businesses were clearly not massage parlors, even though similar services were offered, and were not subject to the massage parlor ordinances.

Two distinctly different zoning techniques have been used to regulate the adult entertainment industry. They are:

1. The Boston, Massachusetts approach. In 1974 Boston was the first city in the nation to put its official stamp on the adult-entertainment zone. Boston created a special zoning category for adult bookstores, peep

shows, x-rated movies and strip joints. This zone was a special overlay district applying to only seven acres of the City's space. The overlay zone had two main purposes: (A) The City wanted to concentrate similar adult entertainment uses into a single small area; and (B) the City wanted to prevent the spread of these uses to other areas of the City.

The district approach has certain advantages over a case by case zoning approach. Specific district boundaries are set and development standards are established. These two items when taken together reduce greatly the administrative cost when compared to a case by case conditional or specific use permit requirement. The limited confines of the district boundary reduces the potential for new development. The district approach also reduces the opportunity for arbitrary and subjective decisions.

The overlay district offers the potential to evaluate the total public service impact of adult uses. The concentration in a single area allows for the review of relative cost and revenues to the City. Police costs will certainly be higher, as will related traffic and parking costs. These costs though can be determined. Permits can be required and the fees for these can reflect the true costs to the community.

2. The Detroit, Michigan approach. In 1972 Detroit implemented an ordinance designed primarily to prevent the development of additional "skid-rows". It was found that concentrations of various straight and pornographic uses were generally determinates of the deterioration of surrounding areas.

   Detroit has two objectives: (A) to separate typical "skid-row" uses from each other; and (B) to keep these same uses separate from residential areas. These objectives lead to a single policy of dispersing "skid-row" uses and spreading them throughout the commercial and industrial areas of the City.

   After "skid-row" uses had been determined, defined and subjected to a conditional permit process, they were allowed in only certain zones of the City and then only in sites meeting certain requirements.

These two techniques and adaptations to them are the only methods currently being used to control the location of adult entertainment activities. The Supreme Court in Young v American Mini Theaters has upheld the approach that Detroit has implemented. No test has yet been made of the Boston method of controlling the spread of adult businesses. Recently the Boston "Combat Zone" (the seven acre overlay district) has obtained some notoriety as being a failure, with social and administrative costs exceeding a tolerable level.

Both Detroit and Boston have chosen land use controls as their primary method of regulating adult businesses. Both use coincidentally a licensing regulation.

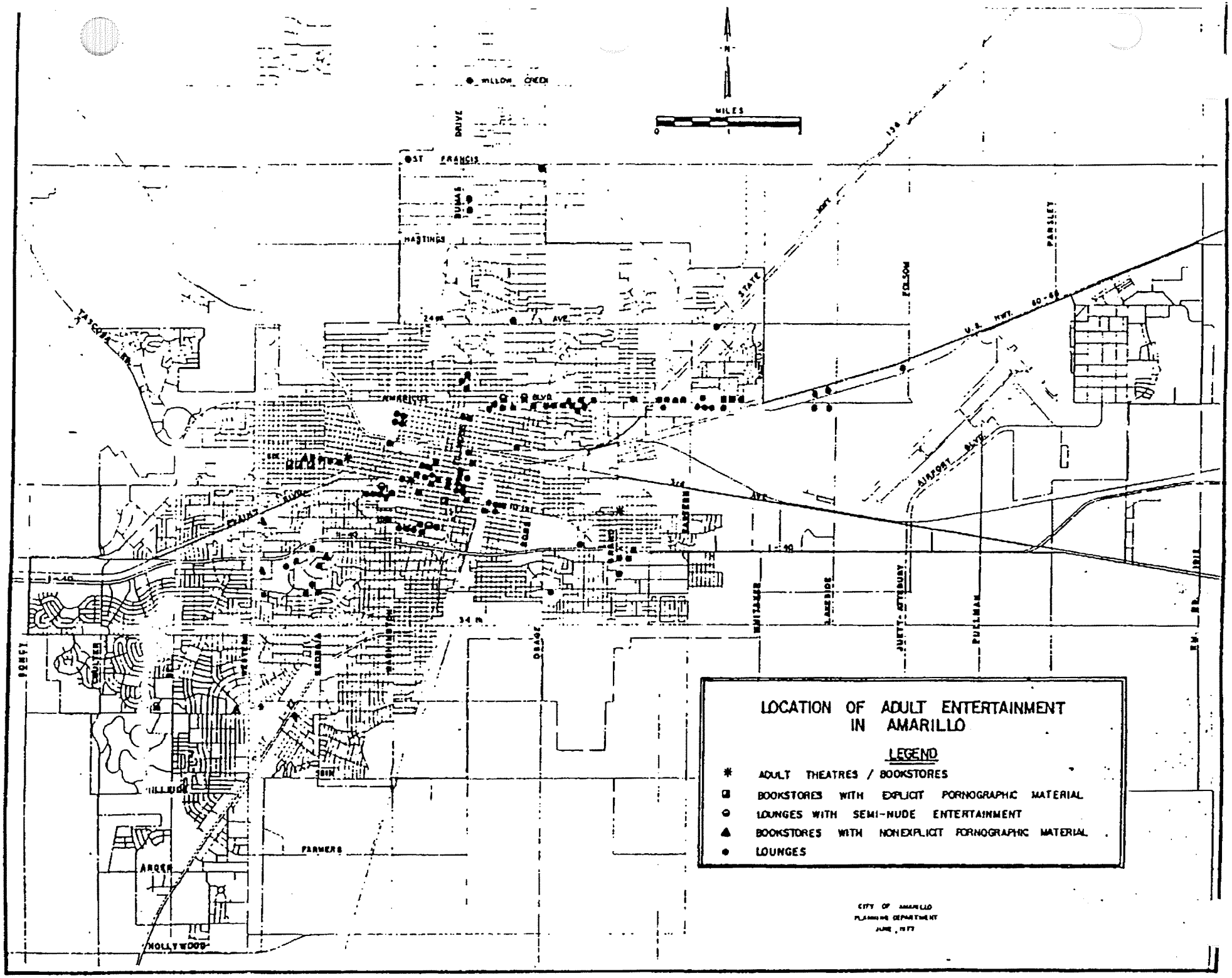
Other cities such as Santa Maria, California, have chosen licensing as their primary approach to regulating adult businesses. Licensing approaches have been adopted in order to maintain certain minimum standards at places of adult entertainment. The licensing mechanism is designed to regulate entertainment businesses which also provide food, alcoholic beverages or exhibition of the human body. Licensing outlines required performance standards and sets fees and required deposits as guarantees of compliance with the standard.

ADULT ENTERTAINMENT IN AMARILLO

Several businesses in Amarillo cater either wholly or partially to the adult-only market. The attached map, LOCATION OF ADULT ENTERTAINMENT IN AMARILLO, illustrates the general location of the majority of businesses whose activities include catering to the adult-only market. As the attached map indicates, adult businesses in Amarillo have generally tended to congregate into several areas in a strip fashion along major thoroughfares.

The Amarillo Police Department in a statistical analysis of street crimes (rape, robbery, all assaults, theft from persons, auto burglary, driving under the influence, public intoxication, vandalism and illegal weapons) found that the incidence of street crimes was significantly greater around the concentrations of adult-only businesses than the overall City average. The Police Department went further in their analysis and noted that these street crimes were 2-1/2 times the City average in the immediate vicinity of alcohol only adult businesses, and 1-1/2 times the City average immediately surrounding businesses featuring alcohol and semi-nude entertainment. In reviewing these facts relative to crime in the vicinity of adult businesses, the reader should be aware that adult-only establishments, especially alcohol only lounges, have tended to concentrate in several areas while lounges featuring semi-nude entertainment are fewer in number and have tended to somewhat isolate themselves from other adult-only establishments.

2-568
2-569
~~2-569~~


LOCATION OF ADULT ENTERTAINMENT
IN AMARILLO
LEGEND
ADULT THEATRES / BOOKSTORES
BOOKSTORES WITH EXPLICIT PORNOGRAPHIC MATERIAL
LOUNGES WITH SEMI-NUDE ENTERTAINMENT
BOOKSTORES WITH NONEXPLICIT PORNOGRAPHIC MATERIAL
LOUNGES
MILES
WILLOW CREEK DRIVE
ST FRANCIS
HASTINGS
AMARILLO BLVD
I-40
34th AVE
AIRPORT BLVD
FOLSOM
PARSLEY
WHITTENBURG
LAKESIDE
QUETT-ATTEBURY
PULLMAN
FOREST
ARDEN
HOLLYWOOD
FARMERS
CITY OF AMARILLO
PLANNING DEPARTMENT
JUNE, 1977

2 576 569

Outlets for adult-only material in the City include several book stores, drug stores, grocery stores, etc., with sections of books and magazines featuring nudi and nonexplicit sexual activity. Pornographic publications featuring nudity with explicit sexual activity, are available within the City in only seven known locations, three being adult theaters with books, magazines, novelties and peep shows. These are dispersed lineally across the CBD and its fringe. There are also four book stores that devote space to publications featuring pornography with explicit sexual activity. No attempt has been made to locate all activities featuring minimal amounts of pornographic publications.

As can be discerned from this overview of the extent of pornography distribution within the City, our current problem is not great. However, the following paraphrased statement concerning Mason City, Iowa, illustrates the potential for growth of the adult entertainment industry.

> Between 1963 and 1964 go-go dancers gradually began to appear in the lounges and bars of the town. By 1965 the dancers were topless. In 1973 the City received an application for its first adult moviehouse license. The license was refused (probably by an arbitrary and subjective decision). The applicant filed a judicial appeal and won the case forcing the City to grant the license. In 1973 an adult book store opened, complete with sex novelties and movies. Also in 1973 a popular lounge hired totally nude dancers. Four competitors soon followed suit. Finally the City gained its first massage parlor.[6]

There is no reason to assume that Amarillo will be exempt from a growth of adult oriented businesses similar to Mason City. The lack of any valid City mechanism to control and regulate the anticipated growth could lead to (a) concentrations of adult entertainment businesses creating a crime incidence condition equal to or greater than the current situation around concentrations of alcohol only businesses, and (b) a proliferation of adult entertainment businesses in and around residential areas and other family or juvenile oriented activities.

POSSIBLE CONTROL MECHANISMS OF ADULT BUSINESSES IN AMARILLO

Adult businesses in Amarillo are comprised of taverns, lounges, lounges with semi-nude entertainment, adult bookstores and adult theaters. Various state and local laws currently regulate to certain extents each of these uses. The Texas Liquor Control Act regulates all businesses selling alcoholic beverages, after local option-approval, through a licensing procedure. These same businesses must also be licensed by the City and must conform to zoning and occupancy requirements. Those businesses that feature semi-nude entertainment are also controlled by Penal Code Section 21.07, 21.08, and 43.23 (Public Lewdness, Indecent Exposure, and Commercial Obscenity) and City Ordinance 13.29 (Operation Regulations; grounds for revocation, violations of Dance Establishments). Purveyors of adult printed and celluloid material are controlled only by Penal Code Sections 43.22, 42.23, and 43.24 and general zoning and occupancy requirements.

While the above state and local ordinances work to regulate portions of the adult entertainment industry, they are at best a piecemeal approach. For example, the enforcement of Chapters 21 and 43B, of the Penal Code through the appropriate court, is generally a slow and tedious process requiring manpower that is not available for this type of low priority victimless crime. The maintenance of the minimum requirements of the Texas Liquor Control Act and the various local laws regulating the sale of alcoholic beverages are only a means to maintain certain standards of operation in taverns, lounges, etc. The general zoning regulations which currently restrict adult businesses are not designed for the particular land use impacts resulting from the adult businesses. These impacts range from late night hours of operation and resulting noise, traffic, lighting, etc., to increases in crime rates immediately surrounding the businesses.

Bypassing the intrinsic limitations of enforcement of the Penal Code, an appro to a more definite control of these businesses is through a strengthening of zoning regulations specifically defined to moderate the land use impact of adult-only

businesses. Coincidentally with the improved zoning regulations, a license and permit mechanism can be implemented. This mechanism can set and require compliance with minimum standards of operation for various adult businesses and recover actual or expected expenses incurred in their enforcement through annual permit fees. These fees can reimburse the City for the added costs of police patrols, improved streets, additional street lighting to reduce accident and crime potential, routine City Department inspection, etc.

These measures would generally be applied to all adult-only businesses. No infringement upon their constitutional rights would result from compliance with a zoning and licensing mechanism designed to minimize the land use and social impacts of adult-only businesses.

Zoning regulations specifically designed to restrict adult-only businesses can serve the following purposes:

1. Assure a land use compatability between the adult use and the surrounding land use.

2. Require that certain minimum density standards for adult uses are maintained.

3. Require the amortized termination of those adult uses not currently meeting either or both of the preceeding zoning purposes.

Licensing adult-only businesses can serve the following purposes:

1. Maintain a record of business, location, owner, etc.

2. Assure that certain performance requirements are met, such as hours of operation, maintenance of employment standards and compliance with all laws governing material sold or displayed by the business.

3. Provide a method by which the City can recoup any expenditures for public services required above the city average exclusive of the licensed business type.

Performance standards can include a provision for administrative revocation of an adult business license for any noncompliance with a performance standard. This revocation of license would not necessarily be supported by any conviction or state criminal charge against the license holder. The basis for the revocation would be for violation of the performance standards as defined explicitly

in the City Code's standards for operations of an adult business. Performance standard would of course be required to vary in content relative to controlled adult business ty

Adult business licenses should not attempt to regulate the land use effect of the use on the neighborhood or community, but should be utilized to assure performance at a certain standard, to maintain an accurate record of business locations, and to provide fees to the City for services above the average. By maintaining a clear distinction between the requirements of a license and the zoning ordinance the entire control mechanism is strengthened.

The preceeding portion of this section has dealt with the regulation of businesses that totally restrict entry, sale, and viewing of products to adults only. Methods to control the ease of view of generally distributed pornographic material are numerous and not detailed explicitly in this report. Briefly though, methods to control the display of this material range from requiring the display to be in separate rooms with an enforceable and enforced restricted admittance, to simply covering the entire publication with an opaque slip cover with the publication's name printed on the cover. The control of the display and sale of pornographic material through a City Ordinance licensing mechanism would work to protect minors from harmful material (Section 43.24) and adults who would be offended by certain displays of pornographic material (Section 43.22) generally available for the public's view.

SUMMARY AND FINDING

The analysis of the impacts of adult-only businesses upon surrounding land uses indicates that these businesses do have effects that can be distinguished from other uses allowed in like zoning districts. The following identifies two causal factors isolated in this preliminary analysis:

1. The Amarillo Police Department's statistical survey of street crime in the vicinity of adult-only business indicates that crime rates are considerably above the City's average immediately surrounding the adult-only businesses analyzed.

2. Concentrations of these adult-only activities have detrimental effects upon surrounding residential and commercial activities. These effects are caused by (a) the noise, lighting and traffic generated by the pedestrian and vehicular traffic frequenting these businesses whose primary hours of operation are from late evening to late night, (b) the increased opportunity for "street crimes" in areas with high pedestrian traffic, and (c) the tendency to avoid areas where adult businesses (especially pornographic) are established. This avoidance and other factors can lead to the deterioration of surrounding commercial and residential activities.

Other cities have noted these effects of adult-only businesses and have attempte remedies to the problem. Boston, Massachusetts, has concentrated all adult uses into a single area of the City. Detroit, Michigan, has dispersed adult uses throughout the city to sites that meet certain minimum land use requirements. Both of these cities have adopted zoning ordinances that restrict location choices of adult book stores, theaters, cabarets, etc. Their ordinances are limited to those activities that definitely do not fall under penal code control. The City of Los Angeles study on adult entertainment includes a consideration for the zoning control of other adult oriented activities including massage parlors, nude modeling studios, adu motels, arcades, etc. Los Angeles has disregarded the question of legitimacy and has suggested zoning those adult businesses as recognized existing land uses.

Detroit has implemented an ordinance which requires that adult entertainment businesses not be located within 500 feet of residentially zoned areas, or within 1000 feet of another regulated use. In Amarillo, adult uses are currently allowed in general retail and all less restrictive zoning districts. If Amarillo adopted an ordinance with space requirements between regulated uses and residential zones similar to that of Detroit, the number of potential sites for adult businesses would be severely limited. This method, limiting severely the potential site choices of adult businesses, would probably not be upheld by the Courts. The limitation of site choices would be caused by the narrow commercial strip developments less than 500 feet wide along most of Amarillo's major throughfares. Also, this app ch would probably tend to concentrate adult activities into the central business district and a few industrial areas.

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RECOMMENDATIONS FOR THE CONTROL OF ADULT-ONLY BUSINESSES IN AMARILLO

If the Planning and Zoning Commission and City Commission should find from the data presented in this report that there exists sufficient need to control adult-only businesses and businesses which display generally circulated pornographic material, the Planning Department would recommend the following:

A. Any zoning ordinance amendments proposed to regulate adult businesses should not attempt to define individual activities but should instead regulate the site location choices of all businesses that restrict sale, display or entry based upon a minimum age, and not consider the legitimacy of the use.

B. The potential site location choices for adult-only uses should be dispersed rather than concentrated. This distance should be measured radially from property line to property line and should be at least 1,000 feet. Requirements designed to maintain the integrity of residential zones and other areas where the there is considerable traffic in juvenile or family oriented activities should be adequate for the purpose but should not be overly restrictive.

C. Should the City develop amendments to the Code of Ordinances designed to control the site location choices of adult entertainment businesses, it may be desirable to specify an amortized termination schedule for any existing adult business which does not meet the minimum site location standards as specified in the Ordinance.

D. Concurrent with any zoning ordinance revisions designed to control adult uses, a permit and license mechanism should also be developed. The minimum operational standards specified by the license will vary according to the type of business to be regulated.

E. Any zoning ordinance amendments concerned with adult businesses should provide provisions to regulate signs and similar forms of advertising.

F. The City Commission should encourage a vigorous enforcement of the State Penal Code to remove illegitimate uses. Especially important is that portion of the

Penal Code which protects minors from all pornographic material. The City should impose specific amendments to the Code of Ordinances requiring busines. publicly displaying generally circulated pornographic material to prohibit minors, by an enforced physical barrier, from viewing or purchasing pornographic material.

If the City Commission, following a recommendation from the Planning and Zoning Commission, finds the necessity to control adult-only businesses and the public display of generally circulated pornographic material, all amendments to the Code of Ordinances should be prepared as a total package and submitted to the Planning and Zoning Commission for preliminary review, before action by the City Commission. The Planning and Zoning Commission review should have the intention of assuring the purpose and continuity of each amendment to the overall goal of regulating these adult businesses and adult material displays.

[1] Zoning for the Pornographic Arts, City Development Department, August, 1976, Kansas City, Missouri

[2] The cases reviewed in depth were:

A. Young v American Mini Theaters, Inc., 96 S. Ct. 2440 (1976). This was the Supreme Court review of the City of Detroit zoning ordinance which regulated (a) the proximity of adult uses to residential zones, (b) the proximity of adult uses to other areas where heavy traffic or concentrations of minors were found and (c) the density of adult businesses. The Court held that a city has the authority to control the location and density of adult entertainment businesses based on its police power right and duty to protect the health, safety and welfare of its citizenry.

B. Miller v California, 93 S. Ct. 2607 (1973). This decision laid down the most recent standard for determining what is obscene. This decision is the basis for the Texas Penal Code Chapter 43, Public Indecency.

C. Smith v United States, 97 S. Ct. 1756 (1977), Paris Adult Theatre I v Slaton, 93 S. Ct. 2629 (1973), and Roth v United States, 77, S. Ct. 1304 (1957). These earlier decisions were reviewed in order to determine the history of restrictions upon 1st Amendment guarantees. This review revealed that in effect the Court is ruling on the controversial problem of obscenity and state community standards determining prurient appeal and patent offensiveness on a case by case basis.

[3] Amended by Act 1975, 64th Leg., p 372, Ch. 163, § 1, eff. September 1, 1975.

[4] Acts 1973, 63rd Leg., p 883, Ch. 399, § 1, eff. January 1, 1974.

[5] U.S. News & World Report, September 13, 1976, p. 76.

[6] Time, April 5, 1976.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ABELINE RETAIL #30, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 02:04-CV-02330-JWL**
	)	
COUNTY OF DICKINSON *et al.*	)	
	)	
Defendant.	)	

EXPERT REPORT OF DENNIS W. RONCEK, Ph.D.

I. Opinions to be expressed: Based on my training and professional experience, on my crime "hotspot" research, and on my review of the facts and materials of this case, I expect to offer the following opinions at a trial.

A. I have read the Rule 26 Report of Dr. Richard McCleary in this case and I concur with his opinions. Specifically

1. *Criminological Theory*: The relevant criminological theory is the so-called "routine activity theory." From the tenets of this theory, sexually-oriented businesses (SOBs) will have crime-related secondary effects because they draw large numbers of potential victims to their addresses. For many reasons, these potential victims are "soft targets" for criminal predators. It is the density of "soft-targets" at the SOB addresses that attracts predatory criminals to the addresses, generating victimization risks in SOB neighborhoods.

2. *Crime Incidents*. Crime-related secondary effects involve three categories of crime: vice crimes, such as prostitution, lewd behavior, drugs, *etc.*;

predatory crimes, such as robbery, assault, auto theft, *etc.*; and crimes of opportunity, such as burglary, theft, and vandalism. These three crime categories include most of the crime incidents that would be classified as Part I ("serious") Uniform Crime Reports (UCRs) and a small subset of Part II UCRs related to vice and opportunity crimes.

a. A strong indicator of crime-related secondary effect is the ambient (or neighborhood) crime rate defined as the ratio crime incidents to a valid measure of the risk of being present in a particular area.

b. Compared to crime incidents, police calls-for-service are a relatively weak indicator of the crime-related secondary effect. When crime incidents are available, calls-for-service are not an acceptable measure of victimization risk.

c. The crime-related secondary effects of SOBs will involve Part II UCRs almost by definition. Part II UCRs can be affected by proactive police activity.

3. *Impact Areas*: Based on the relevant criminological research, crime-related victimization and offending secondary effects are most readily identifiable by statistical techniques within one census block from the source (an SOB in this case). My own research, which includes studies of the crime around public housing (Roncek et al. 1981), high schools (Roncek and Lobosco, 1983), and similar land uses (Roncek and Murray, 2003), confirms the one census block detectability pattern.

a. A profoundly large effect might be detected in extremely large impact areas, but in general, these large impact areas make secondary victimization effects more difficult to estimate, biasing the analysis toward statistical insignificance.

b. If all else is equal, crime-related secondary effects radiate outward from the source in what is called a distance-decay pattern. The expected pattern is heavily dependent on the street network of the local environment, however.

4. *Internal Validity*: With respect to the common threats to internal validity, the strongest possible quasi-experimental design for crime-related secondary effects research employs a before-after contrast with or without a control contrast.

   a. When before-after designs are not possible, crime-related secondary effects research could use"static group comparison" designs that compare areas around SOBs to areas around control businesses. The control businesses must be virtually identical to the SOBs on all variables related to crime risk, however, and this is extremely difficult to achieve in practice, although even such designs have substantial weaknesses.

   b. No matter what quasi-experimental design is used, control businesses are used only for the narrow purpose of ruling out plausible threats to internal validity. In a report submitted in this case, Dr. Daniel

Linz contends that control businesses serve a very different purpose, namely, to demonstrate that the secondary effects of SOBs are larger than the secondary effects of other businesses. The methodological authorities cited by Dr. Linz contradict this view, however. Further, this contention rests on a false assumption. Statistically significant harmful effects are harmful effects regardless of whether they are larger or smaller than those found for other land uses.

5. *Statistical Conclusion Validity*: The conventional Type I and Type II error rates in social science research are .05 and .2 respectively. Type I and Type II error rates are also known as "false-positive" and "false-negative" error rates respectively.

   a. If a secondary effect estimate has a false-positive rate smaller than .05, it is statistically significant. Subject to considerations of internal validity, the estimate leads to the inference that SOBs have secondary effects.

   b. If a secondary effect estimate is not statistically significant, but has a false-negative rate smaller than .2, the estimate leads to the incorrect inference that those SOBs do not have secondary effects.

   c. If the false-positive and false-negative rates exceed .05 and .2 respectively, the estimate supports neither inference.

B. The body of studies relied on by Dickinson County support the conclusion that SOBs

generate crime-related secondary effects. In the report that he submitted in this case, Dr. Linz contends that all of the studies relied on by the County suffer from disqualifying methodological flaws. I disagree with this opinion. While the rigor of the studies relied on by the County span the spectrum of methodological strength, taken as whole, the studies are sufficient to establish the conclusion. Furthermore, many of the methodological flaws cited by Dr. Linz are either irrelevant or incorrect.

1. *Control Comparisons.* Dr. Linz criticizes several of the studies relied on by the County because their control and SOB areas are not comparable. For studies based on before-after designs, Dr. Linz's criticism is simply wrong. For other designs, however, Dr. Linz's criticism is irrelevant. The problem is that Dr. Linz does not specify objective criteria for determining whether differences between SOB and control areas are unacceptable. In the 1979 Phoenix, AZ study, for example, the differences between SOB and control areas do not appear to be statistically significant. Furthermore, the differences are no larger than the analogous differences in Dr. Linz's own studies, particularly the 2001 Ft. Wayne study.

2. *Temporal Stability.* Dr. Linz criticizes several of the studies relied on by the County because they are based on time frames that are too short. Once again, the problem is that objective criteria are not specified. The longer the time frame, of course, the more powerful the design. If a secondary effect estimate is statistically significant, the time frame is generally long

enough. Since the studies that Dr. Linz criticizes on this ground reported statistically significant secondary effects, Dr. Linz's criticism is wrong.

3. *Interpretation.* Dr. Linz contends that the County misinterpreted the results of some studies. While these studies report no secondary effects, at least as Dr. Linz reads the studies, the County interprets the text as reporting a significant secondary effect. In the specific instances that Dr. Linz cites in his report, I arrive at the County's interpretation. Dr. Linz's contention to the contrary is based on selective quotations taken out of context.

C. Dr. Linz criticizes the County for relying on studies that report no novel, empirical results but, instead, report findings from other jurisdictions. If all of the studies considered by the County were reviews, or if the County could not distinguish between reviews and novel, empirical reports, this criticism might be relevant. The County considered a large body of literature, however, that included both reviews and novel, empirical reports. The criticism is irrelevant.

D. Dr. Linz criticizes the County for ignoring studies conducted by Linz and associates, implying that these studies are more rigorous than the studies considered by the County. I have seen no evidence that the County was aware of these studies and chose to ignore them. These studies are relatively recent, of course, most occurring after 2001, and this may explain why they were not considered. Nevertheless, I cannot agree with Dr. Linz's judgement that these studies are inherently more rigorous than the studies considered by the County. In many respects, they are no more rigorous than any other study in the secondary effects

literature. Many of the studies conducted by Dr. Linz and his associates are as weak as or weaker than any of the studies that he criticizes the County for relying upon in support of its contention of the existence of secondary effects.

1. In the Ft. Wayne study conducted by Dr. Linz and Bryant Paul, differences between the SOB and control areas (reported in Tables 1 and 2) are as large or larger than any in the secondary effects literature. The values for the counts of demographic characteristics, which they attribute to census blocks, are so large that they can only be for aggregates of census blocks. Furthermore, the 1000-foot radii used for impact areas is large enough to prevent finding any such effect for comparable land uses which draw individuals to their sites from other locations. A radius of this size can bias the results against finding a statistically significant crime-related public safety risk.

In addition to the serious problems related to impact areas, the Ft. Wayne study used a questionable measure of crime. Instead of using all crime incidents, Dr. Linz and Mr. Paul excluded all crime incidents that were not cleared by arrest. In most large cities, this peculiar rule would exclude the overwhelming majority of "serious" crimes. The exclusion would not be random, furthermore, but would favor the finding of no crime-related secondary effect.

Finally, Dr. Linz and Mr. Paul do not report the means, variances, and covariances that would be needed to calculate false-negative error

rates. Without these data, it is impossible to conclude that the Ft. Wayne finding has any validity.

2. The Charlotte study conducted by Dr. Linz, Bryant Paul, and three others attempts to be more rigorous than the Ft. Wayne study. Impact areas are defined as 500-foot circles (as opposed to 1000-foot circles) centered on 20 SOBs and secondary effects are defined as all "serious" UCR incidents (as opposed to the small fraction cleared by arrest). Despite these changes, the design of the Charlotte study is deficient in crucial ways.

The Charlotte study compared 20 SOB areas to three control areas. By itself, this design imbalance (20:3) generates a bias in favor of the no-effect finding. When the nature of the control businesses is considered, however, are more serious problem emerges. The control businesses in Charlotte were two fast-food restaurants (a McDonald's and a Kentucky Fried Chicken) and a gas station/convenience store. The differences between these controls and the SOBs are obvious.

The design imbalance in the Charlotte design biases the analysis by inflating the false-negative rate of the secondary effect estimate. As a consequence, the finding does not support the inference that there are no secondary effects in Charlotte.

Depending on the street network, a 500-foot radius can have the effect of "cutting off" the corner of the census/city blocks defined by the street network. Such "cutting off" could result in a substantial loss of

number of incidents that were tallied as "measures of crimes." Such losses would dilute or possibly completely conceal harmful secondary effects.

3. The results of a Greensboro, NC study conducted by Dr. Linz and Mike Yao yield secondary effect estimates that are consistent with the findings of the studies considered by the County. The Greensboro result is remarkable because its design is suboptimal in terms of its impact areas (*i.e.*, Census Block Groups which are much too large) and crime measures (*i.e.*, calls-for-service instead of crime incidents). Both design features generate statistical biases against the secondary effect finding. Nevertheless, the results of their analyses demonstrate a secondary effect.

4. In a San Diego study, Dr. Linz and Mr. Paul find that SOB areas have higher levels of raw calls-for-service than control areas, but claim that this effect estimate is not statistically significant. As in the Charlotte study, however, the false-negative rate for this estimate is much too high (approximately .5) to support the no-effect inference that Dr. Linz claims in his report.

The reasons for the unacceptably high false-negative rate in the San Diego study are revealing. Instead of using crime incidents, for example, Dr. Linz and Mr. Paul use raw calls-for-service, for which an overwhelming majority are not likely to be related to crime. The higher variances in these data show up in the false-negative rate.

Another problem in the San Diego design relates to the peculiar definition of the impact and control areas. Instead of using circles (as in Charlotte and Ft. Wayne) or Census Block Groups (as in Greensboro and several other studies) or Census Blocks, Dr. Linz and Mr. Paul use 2000-foot linear strips of addresses. The problem with this definition is that calls-for-service to addresses on cross- or side-streets are excluded. Based on my experience in San Diego, it is clear that many of the streets in the study are well-lit thoroughfares (University, Balboa, El Cajon, *etc.*) which are heavily patrolled by the police. Predatory criminals are more likely to lure victims to side-streets and alleys, which are darker and not as heavily patrolled. Calls to these addresses would be excluded from the linear strip impact areas used in this study.

5. Dr. Linz, Mr. Paul, and Dr. Randy D. Fisher estimate the correlation between the numbers of SOBs and UCR Rapes in Florida counties. Finding that this correlation is not statistically significant, they conclude that SOBs have no crime-related secondary effects. There are two problems with this conclusion.

a. The crimes expected in secondary effects of SOBs (robbery, auto theft, *etc.*) are perpetrated by criminal predators who are largely unknown to their victims. Many, if not most, UCR Rape perpetrators are largely known to their victims, however. In cases where UCR Rape perpetrators are strangers, the crime incidents

often unfold over a vast area. In short, UCR Rapes are not a strong secondary effects indicator

b. To the extent that, women, in general, would not ordinarily be expected to be a large proportion of the customers of SOBs, the numbers and percentages of women who would be potential victims in the environments of these businesses should be smaller than those found in the environments of other businesses. Thus, from the tenets of routine activity theory, crimes for which women are the primary victims should not be particularly frequent in the vicinities of SOBs.

c. The crime-related secondary effects of SOBs are unlikely to cover the entire area of a county. At the level of the county, there are dozens of crime-related characteristics (poverty, unemployment, demographics, *etc.*) that affect the occurrence of crime.

6. When the studies conducted by Dr. Linz and his associates are examined as a body of research, the methodological problems are striking. While conducted by the same researchers during the same period of time, for example, the studies use a bewildering array of crime measures (all UCRs, some UCRs, all calls-for-service, some calls-for-service, *etc.*) with no apparent reason or rationale. Their terminology itself is inconsistent and, quite often, it is misleading or incorrect. Very different indicators (incidents, arrests, calls-for-service, *etc.*) are given the same names. Dr. Linz and his colleagues seem to be unaware of the differences

among these indicators. When analyzing calls-for-service, furthermore, they seem to be unaware of the geocoding conventions. The addresses recorded for calls-for-service to 911 almost always reference the locations from which the call originated, not the locations of the occurrences of the crime incidents.

The research designs used in the studies conducted by Dr. Linz and his colleagues often involved very large areas and very small numbers of cases. This strategy runs counter to the strategy employed in the most widely-accepted studies of urban crime patterns. Most studies examine crime patterns, demographics, and land-use characteristics defined across all the subareas, census blocks, census block groups, census tracts in a jusrisdiction. The focus on the smaller number of areas by Dr. Linz and colleagues falls outside the tradition of research in urban environmental criminology and, thus, would not be considered methodologically sound.

Studies based on smaller numbers of areas, such as those conducted by Dr. Linz and his colleagues, are sometimes used when pragmatic needs prohibit following the tradition in this field. Such work, however, departs from the pattern of published research, especially that found in the leading journals in the field of Criminology. Even when the number of "sites of interest" is small, however, the studies have found negative secondary effects when using all the subareas of a city. Not following this best practice makes it difficult to detect such effects and raises serious questions about the validity of this research.

II. Data and information relied on: The data and information that I relied on to form these opinions consists of documents filed in this case and research reports written by me and others. Specific documents include:

A. The August 27, 2004 report of Daniel Linz, Ph.D., including attachments:

1. Curriculum vitae of Daniel Linz, Ph.D.

2. Paul, B., D. Linz and B.J. Shafer, "Government regulation of 'adult' businesses through zoning and anti-nudity ordinances: de-bunking the legal myth of negative secondary effects." *Communication Law and Policy*, 2001, 6:355-391.

3. October 2, 2001 letter from Elizabeth Groff to Bryant Paul.

4. Paul, B. *Using Crime Mapping to Measure the Negative Secondary Effects of Adult Businesses in Fort Wayne, Indiana: A Quasi-Experimental Methodology.*

5. Linz, D., B. Paul, K.C. Land, M.E. Ezell and J.R. Williams. "An examination of the assumption that adult businesses are associated with crime in surrounding areas: A secondary effects study in Charlotte, North Carolina." *Law and Society Review*, 2004, 38(1):69-104.

6. G.W. McCarthy, H. Renski and D. Linz, *Measuring Secondary Effects Using Spatio-Temporal Estimation of Real Estate Price Appreciation.* May 24, 2001.

7. D. Linz, B. Paul and M. Yao. *Peep Show Establishments, Police Activity, Public Place and Time: A Study of Secondary Effects in San Diego,*

California. No date.

8. R.D. Fisher, D. Linz and B. Paul. *Examining the Link between Sexual Entertainment and Sexual Aggression: The Presence of Adult Businesses and the Prediction of Rape Rates in Florida.* No date.

B. Methodological authorities cited in the August 27, 2004 report of Daniel Linz, Ph.D., including:

1. Babbie, E. *The Practice of Social Research, 8th Ed.* 1998.
2. Campbell, D.T. and J.C. Stanley. *Experimental and Quasi-Experimental Designs for Research.* 1963.

C. Dickinson County Ordinance No. 070804.

D. Studies cited in the legislative record of Ordinance No. 070804, including

1. Phoenix, AZ (1979)
2. Minneapolis, MN (1980)
3. Houston, TX (1983)
4. Indianapolis, IN (1984)
5. Amarillo, TX (1977)
6. Garden Grove, CA (1991)
7. Los Angeles CA, (1977)
8. Whittier, CA (1978)
9. Austin, TX (1986)
10. Seattle, WA (1989)
11. Oklahoma City, OK (1986)

12. Cleveland, OH (1977)

13. Beaumont, TX (1982)

14. MN Attorney General (1989)

E. Other secondary effects studies, including:

1. *Evaluating Potential Secondary Effects of Adult Cabarets and Video/Bookstores in Greensboro: A Study of Calls for Service to the Police.* D. Linz and M. Yao, November 30th, 2003.

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

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

4. Affidavit of R. McCleary, September 10, 2004. New Albany DVD, LLC v. City of New Albany, IN. U.S. District Court for the Southern District of Indiana, New Albany Division (Cause No. 4:04-CV-0052-SEB-WGH).

5. *Crime Risk in the Vicinity of a Sexually-Oriented Business: Report to the Centralia City Attorney.* R. McCleary. Revised February 28th, 2004.

F. The August 27, 2004 report of R. Bruce McLaughlin.

I have also relied on training and experience and on my own research.

III. Exhibits to be used: I expect to use the documents listed at **II** above as exhibits.

IV. Qualifications: I am a Professor of Criminal Justice at the University of Nebraska at Omaha. I hold a Ph.D. in Sociology from the University of Illinois at Urbana-Champaign. By virtue of my background and research interests, I am an expert in

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criminology generally and in the area of environmental criminology particularly. Over the last three decades, my research has focused on quantitative or statistical analyses of urban crime patterns. Combined with my work in spatial analysis through mapping crime locations, my research has been used to develop crime prevention strategies.

The graduate courses that I teach in the Department of Criminal Justice and in the College of Public Affairs and Community Service emphasize applications of sophisticated quantitative or statistical methods to criminology and criminal justice problems.

In addition to my research interests in criminology, spatial statistical modeling, crime mapping, and the like, I have first-hand knowledge of the local area involved in this case. I was a Professor of Sociology at Kansas State University in Manhattan, KS prior to accepting my current appointment.

My curriculum vitae is appended.

V. Compensation: I am being compensated at the rate of $250 per hour. I do not expect the total compensation in this case to exceed $7,500.

VI. Cases in which I have testified or been deposed within the last four years: I have not been deposed or given testimony in the last four years.

I declare under the penalty of perjury that the foregoing is true to the best of my knowledge.

Dennis W. Roncek, Ph.D.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ABELINE RETAIL #30, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 02:04-CV-02330-JWL**
	)	
COUNTY OF DICKINSON *et al.*	)	
	)	
Defendant.	)	

EXPERT REPORT OF Richard McCleary, Ph.D.

I. Opinions to be expressed: At a trial in this matter, based on my training, professional experience, research, and review of the facts and materials of this case, I expect to offer the following opinions:

A. Public safety or crime-related secondary effects of sexually-oriented businesses (SOBs), including the class of businesses defined by Dickinson County Ordinance No. 070804 (hereafter, "Ordinance"), can be established by methods that, while empirical, do not rely on formal, systematic designs. Formal, systematic designs usually include before-after and/or cross-sectional control comparisons.

B. When formal scientific methods are used, inferential validity requires, at a minimum, a "static group comparison" design where crime rates in the vicinity of an SOB are compared to crime rates in the vicinity of one or more comparable control businesses.

1. Uniform Crime Reports (UCRs), collected by local police agencies for the FBI, are an accepted measure of crime risk. Part I UCRs include the serious

"violent" (homicide, robbery, rape, and assault) and "property" crimes (auto theft, larceny, and burglary). The adverse secondary effects of SOBs ordinarily involve robbery, assault, and auto theft.

2. The adverse secondary effects of SOBs also involve Part II UCRs, especially "victimless" crimes (public drunkenness, disorderly conduct, prostitution, *etc.*). Because these crimes are sensitive to policy activity, however, risk estimates from Part II UCR rates may be confounded. Part I UCR rates are a more valid measure of crime-related secondary effects.

C. Although police calls-for-service (CFSs) are traditionally used to evaluate liquor license renewals, CFSs are an invalid measure of crime risk.

1. The shortcomings of CFSs are well known to criminologists and social scientists. CFSs are easily manipulated, *e.g.*; are only weakly correlated with locations and times of crime incidents; are sensitive to minor variations in police policy; provide biased estimates of crime risk; and so forth. The validity implications of these problems are so great and so well known that virtually no published criminological research uses CFSs to measure crime risk.

2. These same problems are also known to underwriters. Actuarial estimates of the crime risk at an insured address are *always* based on crime incidents at the address, *never* on the CFSs to the address.

D. To measure the secondary effect of an SOB, Part I UCR crimes that occur within 500 feet of the address during a fixed period of time are used as crime rate numerators

(*i.e.*, crime incidents per unit of area-time). Crime rates calculated this way can be interpreted as crime risks (*i.e.*, as the probabilities of victimization) in a circle centered on an SOB.

1. While smaller circular areas (*e.g.*, a 250-foot radius around an SOB) are acceptable in principle, smaller circles often exceed the precision of UCR geo-coding systems.

2. Larger circular areas (*e.g.*, a 1000-foot radius around an SOB) tend to "dilute" the estimated effect, biasing it toward zero.

3. The 500-foot rule is dictated by conventional levels of statistical confidence (95 percent) and power (80 percent) for hypothesis tests. Statistical conventions aside, the public safety risks of SOBs extend beyond 500 feet. To manage this risk, communities require that SOBs be 1000-2000 feet from residences (or other sensitive uses). The minimum distance reflects the community's tolerance for public safety risk.

E. After the crime rate around an SOB is estimated, it can be compared to analogous crime rates around control businesses. Secondary effect studies have used three quasi-experimental designs for SOB-control comparison.

1. "Static group comparison" designs compare ambient crime at SOB sites with ambient crime at non-SOB (control) sites.

2. "Pretest-posttest" designs compare ambient crime at sites before and after SOBs move into the sites.

3. "Pretest-posttest control group" designs incorporate before-after contrasts at

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non-SOB (control) sites.

F. According to methodological authorities, the "pretest-posttest control group" design is the strongest and the "static group comparison" design the weakest of the three quasi-experimental designs.

1. The internal validity of a "static group comparison" design assumes that SOBs and non-SOB controls are virtually identical on all ambient crime risk factors, including hours-of-operation, neighborhood demographics, traffic, *etc.*

2. In a "pretest-posttest" design, each SOB site serves as its own control. Assuming moderate temporal stability, ambient crime risk factors will be identical before and after SOBs move into the sites.

3. When adequate controls are unavailable, relevant SOB-control differences can be adjusted statistically. Statistical adjustment is not a certain solution to validity threats associated with "static group comparison" designs, however. To the extent that statistical adjustment requires a set of assumptions, moreover, the validity of statistically adjusted secondary effect estimates is always debatable.

G. After a secondary effect has been estimated, it must be tested. Statistical hypothesis tests involve false-positive and false-negative errors. False-positive errors occur only when the null hypothesis is rejected (*i.e.*, when the evidence shows that SOBs pose a public safety hazard). False-negative errors occur only when the null hypothesis is not rejected (*i.e.*, when the evidence shows that SOBs do not

pose a public safety hazard).

1. False-positive errors are also called "Type I errors" or "α-errors." When the hypothesis test leads to a secondary effect finding, the finding can be a chance artifact. If the secondary effect finding is due to chance, the finding is a false-positive error. The conventional false-positive rate in the social and biomedical sciences is five percent. In contrast, the probability that the secondary effect finding is correct is 95 percent. This probability is called "statistical confidence."

2. False-negative errors are also called "Type II errors" or "β-errors." When the hypothesis test leads to a null finding, this finding can be a chance artifact. If it is, the null finding is a false-negative. The conventional false-negative rate in the social and biomedical sciences is 20 percent. The probability that the null finding is correct is 80 percent and this is called "statistical power."

3. If the false-positive and false negative rates are larger than five and 20 percent respectively, the hypothesis test supports neither the null hypothesis (*i.e.*, no secondary effect) nor the alternative hypothesis (*i.e.*, a secondary effect). The test is inconclusive.

H. When relatively strong before-after designs are feasible, crime-related secondary effects studies find that SOBs, including bookstores or novelty shops, peep shows, as well as SOBs that feature live nude or semi-nude dancing, and simulation exhibitions, pose high crime risks.

1. These risks involve not only Part II UCR crimes, such as prostitution, public drunkenness, and disorderly conduct, but also Part I UCR crimes such as homicide, robbery, assault, and auto theft.

2. Having been observed in a wide range of situations, places, and times, this finding is scientifically robust. In particular, the finding applies not only to SOBs that offer on-premise entertainment (*e.g.*, peep-shows, viewing facilities, or live nude shows) but also to "take-home only" SOBs.

I. The finding that SOBs pose high crime risks confirms modern criminological theory. According to theory, victimization risk is concentrated around a "hotspot" (*e.g.*, an SOB) because of the quantity and quality of people drawn to the "hotspot."

1. *Quantity*: Successful SOBs necessarily attract patrons from wide catchment areas to a local neighborhood. Standard business practices designed to attract more patrons (sales, advertising, "giveaways," etc.) increase the density of potential victims at a site. This makes the site attractive to predatory criminals.

2. *Quality*: SOB patrons travel to distant locations; use aliases; pay in cash; and when victimized, tend not to complain to or seek assistance from the police. The steps that SOB patrons take to maintain their anonymity make them attractive targets for predatory criminals.

J. The crime risk posed by SOBs is inversely proportional to the distance to a bar or tavern. The fact that alcohol aggravates crime risks by a significant factor is, again, a function of both the quantity and quality of customers.

1. *Quantity*: Access to alcohol makes an SOB more attractive, thereby drawing more customers.

2. *Quality*: By lowering personal inhibitions and clouding judgments, alcohol makes SOB patrons more vulnerable to predatory criminals.

K. The crime risks posed by SOBs are not mitigated by inexpensive architectural retrofits. Research finds that walls, speed bumps, outdoor lighting, and other simple retrofits designed to mitigate crime risk do not produce significant mitigation effects.

L. The crime risks posed by SOBs can be mitigated by regulation, including zoning, licensing, and police inspections. The Dickinson County Ordinance is not substantially different than ordinances enacted in other jurisdictions. Based on empirical research and strong theory, there is a reasonable expectation that the Ordinance will mitigate the crime-related secondary effects of SOBs. In addition to the general effects expected due to regulation *per se*, focused effects are expected.

1. Components of the Ordinance that regulate minimum distances to non-SOB sites and/or between SOBs, are expected to minimize crime risk by reducing the density of potential targets.

2. Components of the Ordinance that regulate SOB premises (lighting, booth design, *etc.*) are expected to minimize on-premise crime risk. This is an important concern not only for SOB customers but, also, for police officers.

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M. The factual predicate of the Dickinson County Ordinance includes secondary effects studies conducted in most regions of the U.S. over a 20-year period.

1. The consensus finding of these studies is that, compared to control areas, or in before-after comparisons, SOBs have high ambient crime rates. The crime-related secondary effects documented in these studies cover both Part I and Part II UCR categories.

2. Each of the studies considered in the legislative record, including those cited below in **II.D**, can be criticized on narrow methodological grounds. But these criticisms are not sufficient to invalidate the strong inference, drawn from a diverse body of studies, that SOBs have large, significant crime-related secondary effects.

3. The studies are typical of those relied on by legislative bodies at other times and in other jurisdictions.

N. Dr. Linz takes the opposite view, arguing that the crime-related secondary effects literature can be divided neatly into two categories: studies that find *null* effects (*i.e.*, no adverse secondary effect) and studies whose findings are categorically invalidated by one or more "fatal" methodological flaws. I disagree with Dr. Linz' argument not only as it relates to the specific studies relied on by the County (*i.e.*, the studies listed at **II.D** below) but, also, as it relates generally to secondary effects studies.

1. Dr. Linz' methodological critique of the secondary effect studies relied on by the County appears in his report (**II.A** below). Although Dr. Linz

characterizes the methodological shortcomings of these studies as "fatal," none of the methodological shortcomings that he cites is sufficient to categorically invalidate any study's finding.

2. Since any non-experimental design is imperfect by definition, every quasi-experimental study has methodological shortcomings. To be relevant, the methodological shortcoming must satisfy two conditions:

   a. The shortcoming must be significant; *i.e.*, its effect must *change* the study's finding. If the shortcoming does *not* change the study's finding, a methodological critiques based on the shortcoming is irrelevant.

   b. The shortcoming must *bias* the study's finding in favor of an adverse secondary effect finding. If the shortcoming biases the study in favor of a null finding, or if it favors neither finding, a methodological critiques based on the shortcoming is irrelevant.

3. Dr. Linz' methodological critique presents no evidence to suggest that any shortcomings are significant; or that any of the shortcomings bias the findings of a study in favor of a significant adverse secondary effect finding. The evidence suggests, on the contrary, that the shortcomings cited by Dr. Linz are both small and unbiased.

4. None of the methodological shortcomings cited by Dr. Linz applies to *all* of the studies relied on by the County. The validity of an inference drawn from a body of findings does not depend on the validity of any single

finding. Since the County drew its inference from a *body* of studies, Dr. Linz' argument is irrelevant.

5. Some of the studies relied on by the County do not report original findings but, rather, synthesize the findings of studies conducted in other jurisdictions. Synthetic literature reviews are a common scientific tool. Some of the most prestigious scientific journals publish these reviews for the simple reason that they *are* useful. Although Dr. Linz faults the County for considering literature reviews in the legislative process, the County should not be condemned for trying to learn what other jurisdictions had learned.

6. Dr. Linz faults the County for relying on studies whose findings have been "disavowed" by the study authors. Having read the text in question, it is my opinion that Dr. Linz has misinterpreted the sort of rhetorical qualifications commonly used in reporting social science results.

O. Dr. Linz' methodological critique of the broader secondary effects literature is detailed in an article by Dr. Linz, B. Paul, and B.J. Shafer (*i.e.*, **II.A.2**) that endorses four methodological rules for evaluating the validity of a secondary effects study. Although Dr. Linz implies that his four rules are derived from the four *Daubert* criteria,[1] the derivation is not obvious. Nor do Dr. Linz' four rules have a precedent or authority in the methodological literature. Rather, they were created *ex nihilo* by Dr. Linz for the limited purpose of criticizing the secondary

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[1] *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). The four *Daubert* criteria are (1) falsifiability, (2) known error rates, (3) peer review, and (4) general acceptance in the scientific community.

effects literature. In this limited context, Dr. Linz' four methodological rules have a common sense appeal. When scrutinized, however, they are an arbitrary, incomplete, and contradictory methodological canon.

P. Dr. Linz faults the County for failing to consider studies commissioned by the SOB industry, particularly studies by Linz *et al.* (cited below in **II.A**). The County's failure to notice these studies is due in part to their recency. Nevertheless, had these studies been considered, the studies would have had no material impact on the debate. The findings of industry-commissioned studies are wholly consistent with the broader secondary effects literature.

1. Although Dr. Linz characterizes the findings of the Ft. Wayne study (**II.A.4**) by Linz and Paul as a null finding, numerical details required to evaluate the validity of the finding are not reported. Since the Ft. Wayne design is idiosyncratic in two crucial respects, the missing details represent a serious failure.

a. To measure crime in Fort Wayne, Linz and Paul excluded UCRs that were not cleared by arrest. Since most stranger-on-stranger crimes are never solved, this measure excludes most of the relevant crime from the secondary effect estimate, biasing the analysis in favor of a null finding.

b. To measure the impact of an SOB in Fort Wayne, Linz and Paul counted crimes within 1000 feet of an SOB, resulting in an impact area of 3.142 million square-feet, approximately the size of a large

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shopping center. The use of such a large impact area will dilute any secondary effect, biasing the analysis in favor of a null finding.

2. In the Charlotte study (**II.A.5**), Linz *et al.* count all Part I UCRs (*vs.* the small fraction of UCRs cleared by arrest) reported within 500 feet (*vs.* 1000 feet) of an SOB. Although they find no statistically significant secondary effect, the null finding lacks sufficient statistical power to support the null finding. In the absence of the conventional 80 percent statistical power level, a null finding can*not* be interpreted to mean, as Dr. Linz argues, that SOBs in Charlotte had no crime-related secondary effects.

3. In their San Diego study (**II.A.7**), Dr. Linz and Mr. Paul found that, compared to control areas, areas around SOBs had 15.7 percent more police calls-for-service. Although this substantively large adverse secondary effect was not statistically significant, as in the Charlotte study, the statistical power of their design fell short of the conventional 80 percent level. In a reanalysis of the San Diego data (**II.E.3**), Professor James Meeker and I calculated the power to be approximately the same as a coin-flip.

4. Finding no significant correlation between SOBs and UCR Rapes in Florida counties (**II.A.8**), Linz *et al.* conclude that SOBs have no crime-related secondary effects. County-level SOB-rape correlations are irrelevant for two reasons, however.

   a. Crime-related secondary effects involve primarily stranger-on-stranger

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crime (robbery, burglary, theft, *etc.*). To the extent that rapists and their victims are not strangers, the secondary effects of SOBs are not expected to involve rape incidents.

b. The victimization risk attributable to a criminogenic source can be detected, at best, one or two blocks from the source. This is a negligibly small fraction of the total area of even the smallest Florida county. Searching for the crime-related secondary effect of an SOB at the county-level is roughly analogous to searching for bacteria with strong reading glasses and tweezers.

5. Dr. Linz' report in this case (**II.A**) does not cite a 2003 Greensboro, NC study (**II.E.1**) by Linz and Yao. Although Linz and Yao characterize their analysis of police calls-for-service data as a null finding, a reanalysis of those data (**II.E.2**) demonstrates that the SOBs have large, statistically significant adverse secondary effects.

6. Dr. Linz' report in this case (**II.A**) to an analysis of Toledo, Ohio calls-for-service data that finds no secondary effect. A reanalysis of these data (**II.E.4**) finds a substantively large, statistically significant secondary effect for SOBs.

7. In sum, although Dr. Linz faults the County for not considering secondary effect studies commissioned by the SOB industry, these studies find either large, significant effects (Greensboro, Toledo, *etc.*) or, else, due to low statistical power, are inconclusive (Charlotte, San Diego, *etc.*). Had the

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County considered these studies, contrary to Dr. Linz' claim, the County would have arrived at the same conclusion. The findings of industry-commissioned studies are consistent with the consensus finding of the secondary effects literature.

II. Data and information relied on: The data and information that I relied on to form these opinions consists of documents filed in this case and research reports written by me and others. Specific documents include:

A. The August 27, 2004 report of Daniel Linz, Ph.D., including attachments:

1. Curriculum vitae of Daniel Linz, Ph.D.

2. Paul, B., D. Linz and B.J. Shafer, "Government regulation of 'adult' businesses through zoning and anti-nudity ordinances: de-bunking the legal myth of negative secondary effects." *Communication Law and Policy*, 2001, 6:355-391.

3. October 2, 2001 letter from Elizabeth Groff to Bryant Paul.

4. Paul, B. *Using Crime Mapping to Measure the Negative Secondary Effects of Adult Businesses in Fort Wayne, Indiana: A Quasi-Experimental Methodology.*

5. Linz, D., B. Paul, K.C. Land, M.E. Ezell and J.R. Williams. "An examination of the assumption that adult businesses are associated with crime in surrounding areas: A secondary effects study in Charlotte, North Carolina." *Law and Society Review*, 2004, 38(1):69-104.

6. G.W. McCarthy, H. Renski and D. Linz, *Measuring Secondary Effects Using*

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Spatio-Temporal Estimation of Real Estate Price Appreciation. May 24, 2001.

7. D. Linz, B. Paul and M. Yao. *Peep Show Establishments, Police Activity, Public Place and Time: A Study of Secondary Effects in San Diego, California.* No date.

8. R.D. Fisher, D. Linz and B. Paul. *Examining the Link between Sexual Entertainment and Sexual Aggression: The Presence of Adult Businesses and the Prediction of Rape Rates in Florida.* No date.

B. Methodological authorities cited in the August 27, 2004 report of Daniel Linz, Ph.D., including:

1. Babbie, E. *The Practice of Social Research, 8th Ed.* 1998.

2. Campbell, D.T. and J.C. Stanley. *Experimental and Quasi-Experimental Designs for Research.* 1966.

C. Dickinson County Ordinance No. 070804.

D. Studies cited in the legislative record of Ordinance No. 070804, including

1. Phoenix, AZ (1979)

2. Minneapolis, MN (1980)

3. Houston, TX (1983)

4. Indianapolis, IN (1984)

5. Amarillo, TX (1977)

6. Garden Grove, CA (1991)

7. Los Angeles CA, (1977)

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8. Whittier, CA (1978)

9. Austin, TX (1986)

10. Seattle, WA (1989)

11. Oklahoma City, OK (1986)

12. Cleveland, OH (1977)

13. Beaumont, TX (1982)

14. MN Attorney General (1989)

E. Other secondary effects studies, including:

1. *Evaluating Potential Secondary Effects of Adult Cabarets and Video/Bookstores in Greensboro: A Study of Calls for Service to the Police.* D. Linz and M. Yao, November 30th, 2003.

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

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

4. Affidavit of R. McCleary, September 10, 2004. New Albany DVD, LLC v. City of New Albany, IN. U.S. District Court for the Southern District of Indiana, New Albany Division (Cause No. 4:04-CV-0052-SEB-WGH).

5. *Crime Risk in the Vicinity of a Sexually-Oriented Business: Report to the Centralia City Attorney.* R. McCleary. Revised February 28th, 2004.

F. The August 27, 2004 report of R. Bruce McLaughlin.

In addition to these documents, my opinions are based on my training and experience in this

field.

III. Exhibits to be used: I expect to use the documents listed at **II** above as exhibits.

IV. Qualifications: My curriculum vitae is appended.

V. Compensation: I am being compensated at the rate of $250 per hour for rendering an opinion in this case, exclusive of depositon. I am being compensated at the of $300 per hour for deposition-related tasks. I do not expect the total compensation in this case to exceed $7,500.

VI. Cases in which I have testified or been deposed within the last four years: In the last four years, I have been deposed or given testimony in six cases:

1. Alaska Inter-Tribal Council v. State. Alaska Superior Court, Dillingham Branch.

2. Artistic Entertainment v. City of Warner Robins. U.S. District Court, Middle District of Georgia (97-00195-CV-4-HL-5); U.S. Court of Appeals, Eleventh Circuit (02-10216).

3. Scamp's v. California Alcoholic Beverage Commission (and City of Westminster, CA), Alcoholic Beverage Control Board Administrative Hearing.

4. Mercury Books v. City of San Diego. U.S. District Court, Southern District of California (00-CV2461).

5. Washington Retailtainment, Inc. v. City of Centralia, WA. U.S. District Court, Western District of Washington at Tacoma (C03-5137FDB).

6. Giovani Carandola Ltd., et al. v. Ann Scott Fulton et al. U.S. District Court for the Middle District of North Carolina, Greensboro Division (Case No. 1:01 CV 115).

I declare that the foregoing is true to the best of my knowledge and belief.

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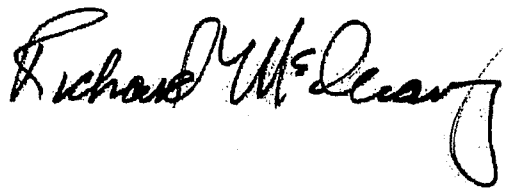

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Curriculum Vitae for
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EDUCATION

Ph.D., Northwestern University, 1977
M.A., Northwestern University, 1975
B.S., University of Wisconsin, 1974

ACADEMIC APPOINTMENTS

University of California-Irvine: Professor of Social Ecology (Criminology, Environmental Health Sciences, Urban and Regional Planning), 1988-Present; Co-ordinator of graduate programs in Epidemiology and Public Health; Director of MRRC Biostatistics Core.

University of Minnesota: Visiting Professor of Public Health (Epidemiology Division), 1998.

University of New Mexico: Associate Professor of Sociology, 1983-1988; Associate Director, New Mexico Statistical Analysis Center 1986-1988.

Human Relations Area Files, Yale University: Senior Research Scientist, 1986-1989.

University of Michigan: Instructor, ICPSR Summer Institute in Quantitative Social Science, 1983-1984.

State University of New York-Albany: Associate Professor of Criminal Justice, 1982-1983.

Arizona State University: Associate Professor of Criminal Justice, 1980-1982; Assistant Professor of Criminal Justice, 1978-1980; Director, Program in Applied Statistics, 1980-1982.

University of Illinois, Chicago: Assistant Professor of Criminal Justice and Sociology, 1977-1978; Lecturer in Criminal Justice, 1976-1977.

MEMBERSHIPS

American Society for Criminology
American Statistical Association
American Evaluation Association

EDITORIAL BOARDS

Behavioral Assessment: Associate Editor, 1980-1984
Evaluation Studies Review Annual: Associate Editor, 1986
J. of Criminal Law and Criminology: Consulting Editor, 1982-Present
J. of Mathematical and Quantitative Criminology: Associate Editor, 2001-Present
J. of Research in Crime and Delinquency: Consulting Editor, 1981-Present
Justice Quarterly: Associate Editor, 1991-Present
Law and Policy Quarterly: Associate Editor, 1978-Present
New Direction for Program Evaluation: Advisory Editor, 1991-Present
Research Methods in Social Relations, 4th Ed.: SPSSI Board of Advisors
Social Pathology: Associate Editor, 1994-Present

COMMUNITY SERVICE

Board of Directors, Prevent Child Abuse - Orange County
Board of Directors, Orange County Youth and Family Services
Technical Advisory Board (HealthLink), Robert Wood Johnson Foundation
Executive Committee, UCI Mental Retardation Research Center
Executive Committee, UC Institute for Brain Aging and Dementia

FINISHED WORK -- Books

Bernard, T.J. and R. McCleary (eds.) *Life Without Parole*. Los Angeles: Roxbury, 1996.

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McCleary, R. and D. McDowall. *Design and Analysis of Time Series Experiments*. New York: Plenum, 1999, forthcoming.

R. McCleary. *Dangerous Men: The Sociology of Parole*. Beverly Hills and London: Sage, 1978, 202 pp.[1] *Second Revised Edition*. New York: Harrow and Heston, 1992.

R. McCleary and R.A. Hay, Jr. *Applied Time Series Analysis for the Social Sciences*. Beverly Hills and London: Sage, 1980, 328 pp.[2]

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[1]Reviewed in *Crime and Delinquency*, 1980, 26, 410-414; and *Urban Life*, 1981, 10: 219-220.

[2]Reviewed in *Contemporary Sociology*, 1981, 10, 818-819; *Quantitative Sociology Newsletter*, 1981, 26, 191-2; *Quality and Quantity*, 1982, 566-7; *Scientometrics*, 1982, 401-3; *Sociology and Social Research*, 1981, 101-2.

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Buckwalter, J.G. A.A. Rizzo, R.McCleary, *et al.*Gender comparisons of cognitive performances among vascular dementia, Alzheimer's disease, and non-demented older adults. *Archives of Neurology*, 1996, 53:436-439.

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REPORT ON THE SECONDARY EFFECTS OF THE CONCENTRATION OF ADULT USE ESTABLISHMENTS IN THE TIMES SQUARE AREA

April 1994

PREPARED BY INSIGHT ASSOCIATES

TIMES SQUARE

BUSINESS IMPROVEMENT DISTRICT

REPORT ON THE SECONDARY EFFECTS OF THE CONCENTRATION OF ADULT USE ESTABLISHMENTS IN THE TIMES SQUARE AREA

April 1994

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EXECUTIVE SUMMARY

BACKGROUND

After a dramatic decline in the number of adult use businesses in Times Square from an all-time high of approximately 140 in the late 1970s to 36 in June, 1993, the business and adjacent residential communities view with concern the increase to 43 in the last few months. The area of concentration of these businesses has shrunk and shifted from Broadway and Seventh Avenue to Eighth Avenue and the western edge of 42nd Street block between Seventh and Eighth Avenues. This summer the City and State will begin condemnation procedures against the remaining private parcels on the northeast corner of 42nd Street and Eighth Avenue. This action will reduce the overall number but displacement onto Eighth Avenue is possible.

Times Square is one of the City's most eclectic and vibrant commercial areas, producing extraordinary economic fuel and firing the imaginations of millions worldwide as the international icon of vitality and vibrancy. Times Square is home to some of the City's major corporations with more than 30 million square feet of office space. The BID represents approximately 400 property owners and 5,000 businesses including giant entertainment companies, international security firms, large law firms, theatrical agents and publishers. Times Square has a daily pedestrian count of 1.5 million people.

It is the capital of legitimate theater for the nation with 37 Broadway theaters and a total of 25,000 seats. These theaters together sell some 8 million tickets annually, pumping $2.3 billion into the New York City economy annually.

Approximately 20 hotels with 12,500 hotel rooms (one-fifth of all hotel rooms in Manhattan) house some five million visitors a year and more than 200 restaurants, the largest concentration in any City neighborhood, serve them and local patrons. The Convention and Visitors' Bureau estimates 20 million tourists come to Times Square annually.

But Times Square is also home for thousands of residents who live within its heart or immediately adjacent to it. The BID alone has six churches within its boundaries. Among the 25,651 people who live in six census tracts which include 42nd to 54th from Sixth to Tenth Avenues, 15.4% are 62 years or older which is similar to Manhattan as a whole and to the two community districts (CB4 and CB5) in which Times Square exists. In 1990 nearly 2,000 children under the age of 14 lived in this area, too. Both old and young are generally circumscribed by their immediate community. The Census data also show that 48% of these residents work within less than half an hour from their homes and walk to work, spending both their

working and off-hours in the Times Square area. This percentage is higher than the percentage for the borough as a whole and is much higher than the percentage of those in the other four boroughs.

Crime has plummeted over the past several years in Times Square with an estimated reduction by 60% on West 42nd Street alone. This reduction came in part from the closing of many adult use establishments on 42nd Street between 7th and 8th Avenues and the close coordination between the NY Police Department and the Times Square BID. The BID with its 40 public safety officers has witnessed an overall reduction of street crime within its boundaries by 19%, comparing 1992 to 1993, including an impressive reduction of 38% in grand larceny from the person. BID statistics also reveal that three card monte games have been reduced by some 57% over the past year.

The most recent Mayor's Sanitation Scorecard rated the sidewalks of Times Square at an impressive 93% thanks in large measure to the BID's 45 sanitation workers. In addition, the BID's homeless outreach team has placed many needy people in shelters and services.

During 1993, the City Council introduced legislation that would restrict the locations of adult uses citywide. This proposed legislation, along with similar bills proposed and enacted in cities across the nation, including Detroit, can only be upheld constitutionally, if it can be supported by documentation of negative secondary effects as well as evidence that the establishments could locate somewhere accessible for their patrons.

The Times Square BID commissioned an objective, fact-finding study to determine the effect, if any, these adult use businesses have on one of the City's most commercially vital areas. In this study, as in other secondary effects studies, researchers combined analysis of available data on property values and incidence of crime together with a demographic and commercial profile of the area to show relationships, if any, between the concentration of adult use establishments and negative impacts on businesses and community life. The study also includes, as allowed by Courts, anecdotal evidence from property owners, businesses and community residents and activists of their perceptions of the impact adult establishments have on their area.

FINDINGS

- All survey respondents acknowledged the improvements in the area and voiced optimism about the future of Times Square even as they bemoaned the increase of adult establishments on Eighth Avenue. Many respondents felt that some adult establishments could exist in the area, but their growing number and their concentration on Eighth Avenue constitute a threat to the commercial prosperity and residential stability achieved in the past few years.

- Although the study was unable to obtain data from before the recent increase in adult establishments and, thus, unable to show if there's been an increase in actual complaints, there were, in fact, 118 complaints made on Eighth Avenue between 45th and 48th compared to 50 on the control blocks on Ninth Avenue between 45th and 48th Streets. In addition, the study reveals a reduction in criminal complaints the further one goes north on Eighth Avenue away from the major concentration of these establishments.

- The rate of increase of total assessed values of the Eighth Avenue study blocks increased by 65% between 1985 and 1993 compared to 91% for the control blocks during the same period. Furthermore, acknowledging the many factors that lead to a property's increased value, including greater rents paid by some adult establishments, an assessment of the study blocks reveal that the rates of increases in assessed value for properties with adult establishments is greater than the increase for properties on the same blockfront without adult establishments.

- Many property owners, businesses, experts and officials provided anecdotal evidence that proximity (defined in various degrees) to adult establishments hurts businesses and property values.

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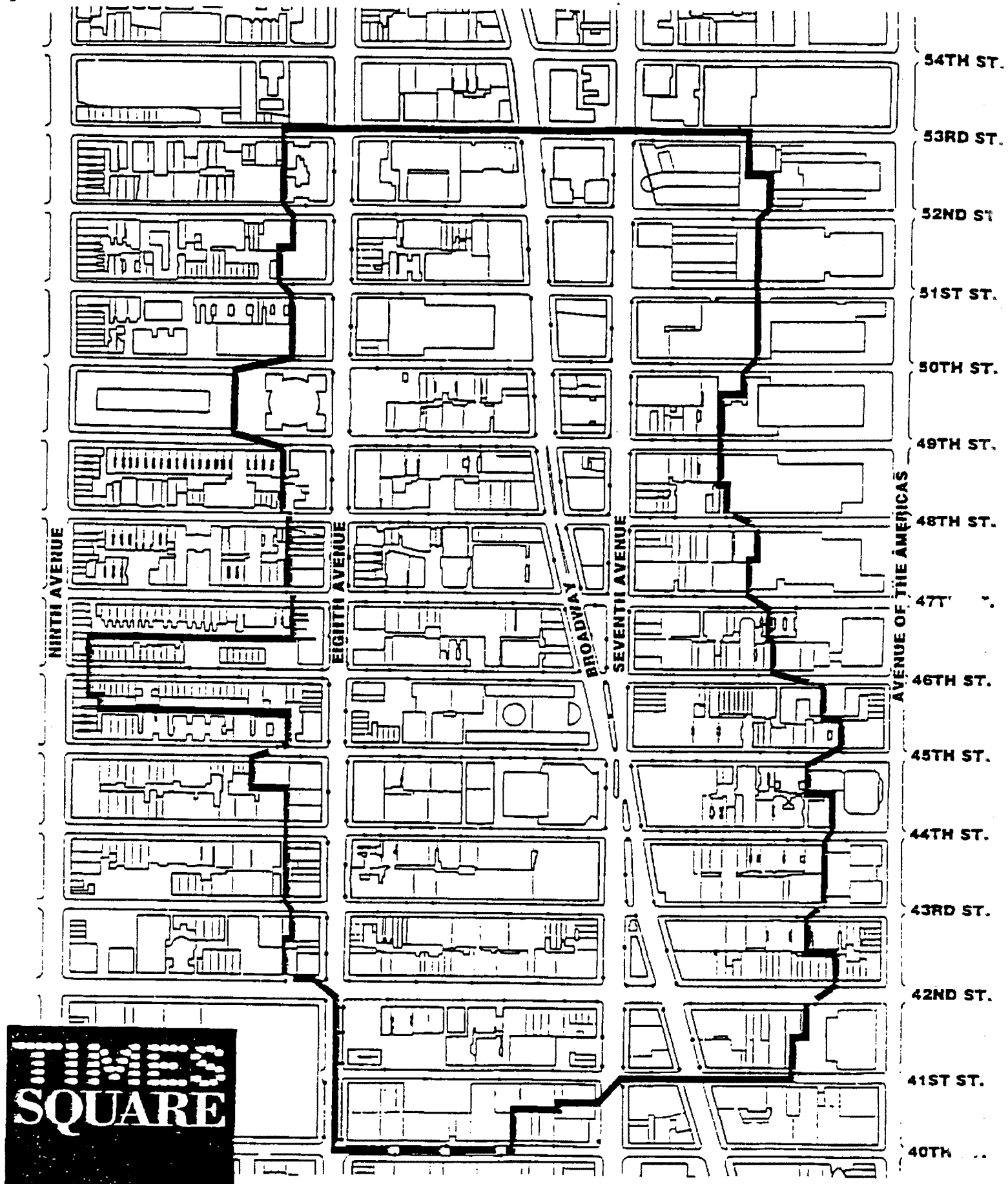

TIMES SQUARE

Business Improvement District

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INTRODUCTION

After a dramatic decline in the number of adult use establishments in the Times Square area in the last eight years, Times Square, like other neighborhoods in the city, has experienced a sudden increase, especially along Eighth Avenue. This recent increase of adult businesses must be seen in the context of the current resurgence of Times Square as New York's premier tourist, entertainment, and commercial center. Member organizations of the BID and other concerned citizens have expressed particular concern about the impacts of a dense concentration of these businesses on the commercial life of the area. Thus, this study was commissioned by the Times Square Business Improvement District.

The Times Square Business Improvement District works to make Times Square clean, safe and friendly. The Times Square BID, working collaboratively with city agencies, community organizations and the many individuals and groups with a shared interest in the vitality of Times Square, provides supplemental security and sanitation services, homeless outreach efforts, tourism assistance and special events and marketing.

The BID extends from 40th to 53rd Streets, just west of Sixth Avenue to the west side of Eighth Avenue. Along 46th Street, it stretches to 9th Avenue. Its over four hundred members represent five thousand businesses and organizations in the Times Square area. Supported by mandatory assessments on local property owners, the BID has an annual budget of $4.6 million. It is an independent not-for-profit organization, with a 46-member Board of Directors representing large property owners, large and small commercial tenants, residential tenants, and social service agencies.

During 1993, legislation was introduced in the City Council that would restrict the placement of adult uses on a city-wide basis. This legislation was spurred in large part by residential neighborhoods that, for the first time, were becoming home to adult establishments.

In the summer of 1993 the BID hired Insight Associates to assess that proposed legislation and its possible impact on Times Square in order to help the BID understand its options and determine an appropriate reaction. That study called attention to wider national experience. Legislation regulating adult uses, in order to pass Constitutional muster and be upheld in the courts, must be backed by documented evidence of secondary effects of such businesses and their concentration.

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The Times Square BID decided to initiate its own secondary effects study, to ensure that the Times Square experience is well-represented in any city-wide debate. The BID again hired Insight Associates, with Ethel Sheffer and Marcie Kesner as principal researchers, in September, 1993.

In the same month, the Mayor of the City of New York ordered the Department of City Planning to undertake a secondary-effects study for the entire city. That study has focused on six neighborhoods in the five boroughs, but not on Times Square. We have continued to exchange data and cooperate with City Planning in the course of our two parallel inquiries (See Appendix: The Department of City Planning Secondary Effects Study).

In addition, the Borough President of Manhattan has established a Task Force on which the BID serves. The Task Force, staffed by her office, has held public hearings and continues to gather information. It will be issuing its own recommendations in the Spring of 1994.

This study, then, seeks to obtain evidence and documentation on the secondary effects, if any, of these adult use businesses in the Times Square Business Improvement District, and of their dense concentrations, especially along 42nd Street and along Eighth Avenue. The BID instructed Insight Associates to follow the models offered by other secondary effects studies. The BID was not seeking an advocacy document, but rather an objective fact-finding study, that would add to the city-wide deliberations and to future attempts to find legal and effective ways to regulate these businesses.

Many people contributed a great deal of time and effort to this work. We want to thank particularly the staff of the Management Information Division of the Department of Finance and of the Crime Analysis Division of the New York Police Department, as well as staff of the Midtown South, Midtown North and Tenth Precincts and the Mayor's Office of Midtown Enforcement. We have not quoted any of our 54 interviewees who work and live in Times Square by name, but we thank them for taking the time from their very busy schedules to participate in our survey. We also are grateful to the many people in the real estate sector, the residents and community leaders in several neighborhoods, and the officials of municipal government in New York and other American cities, who were generous with their time in response to our inquiries.

SUMMARY OF LEGAL ISSUES AND THE EXPERIENCE ELSEWHERE

The concern about the presence of adult businesses in the midst of American cities dates at least from the decades following the Second World War when a recognition of their impact upon surrounding land values and a growing indignation about their effect on communities became widespread. By the early 1990's the regulation of adult use businesses and entertainment establishments had become a serious issue for communities across the United States. This is reflected in a number of studies and public testimony showing a relationship between adult use establishments on the one hand, and declining property values, crime and neighborhood deterioration on the other. It is these "secondary effects" which the Supreme Court and other federal and state courts take into account when ruling on the efforts of communities to regulate these businesses.

The present study is not a legal treatise--though it does review some legal precedents by way of background--but an analysis and documentation of the impacts of a concentration of adult use establishments on the Times Square area.

The major questions on this subject for a court are whether any limitation on adult uses is based on content, or whether it is based on the secondary effects of these uses on the surrounding community. There have been a number of instances in the last years in which federal courts have found adult use zoning restrictions to be acceptable, if they have been motivated by a desire to protect neighborhood quality, as contrasted with an impermissible desire to ban the message purveyed by the adult uses. It appears that courts will accept restrictions if they serve a "substantial government interest", if any statute is narrowly drawn to achieve that end, and if there are "reasonably available alternative avenues of communication". "Substantial government interest" has been defined to include reasonable attempts by municipalities to reduce urban blight and to preserve neighborhood character. "Alternative avenues of communication" requires that there be enough other places in the city for the relocation of these establishments. The availability of such places needs to be shown in court as a matter of fact.

Some cities have employed a variety of regulatory mechanisms. They have created special use zoning districts; they have required that adult uses be located at specified distances from residences, schools, churches, or business and commercial districts; and they have required operators of regulated establishments to obtain licenses or permits. Some illustrations are:

- **Detroit's** adoption of an "anti-skid row" zoning ordinance to disperse and/or bar from designated areas the establishment of a broad array of designated businesses, including adult uses. These restrictions were supported by studies of secondary effects.

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• **Chicago's** requirement that owners or managing agents register and provide specific information related to the nature of their business. Chicago also regulates signs and displays by prohibiting the exterior display of sexual activity and nudity.

• **Renton,** a suburb of Seattle, restricted adult motion picture theatres from locating within 1,000 feet of a residentially zoned area or a house of worship, park, or school. The restrictions were upheld because it was found that approximately five per cent of the city's total land would still remain available for adult uses.

• **Boston's** creation of an Adult Entertainment District on the borders of its downtown center, and has thus concentrated rather than dispersed adult uses. This is a two-block area know as the "Combat Zone".

• **Islip, Long Island's** plan to restrict the location of adult uses to industrial districts, a plan that was upheld by the New York State Court of Appeals.

Zoning has been an especially frequent tool for cities regulating adult uses, since the Supreme Court has held that adult entertainment is a type of land use, like any other, that can be subject to rational scrutiny under equal protection.(Jules B. Gerard, Local Regulation of Adult Businesses, Deerfield, Illinois: Clark Boardman Callaghan, 1992, p.129).

Certain generalizations are seen in the variety of Court rulings in regard to zoning:

• Locational restrictions cannot be so severe as to preclude the present and/or future number of adult uses in a city.

• The more evident and rational the relationship of adult use restrictions to recognized zoning purposes, (e.g. the preservation of neighborhoods, the grouping of compatible uses), the greater the likelihood that the zoning restriction will be upheld.

• The greater the vagueness of a law the more likely it is to be struck down.

• If there is too much administrative discretion a law is likely to be struck down, since government may regulate only with narrow specificity.

Other Secondary Effects Studies

The court decisions supporting and upholding regulatory measures were supported by studies of secondary effects, some of which we summarize below:

Detroit: In Young v. American Mini-Theatres,(427 U.S.1976) the Supreme Court affirmed that cities may use zoning to restrict adult entertainment if adult entertainment is shown to have a harmful impact on neighborhoods. The City of Detroit adopted an anti-Skid Row zoning ordinance in 1962 prohibiting certain businesses, such as pool halls, pawn shops,and in an amended version in 1972, adult bookstores, motion picture theatres, and cabarets, from locating within 1,000 feet of any two other "regulated uses" or within 500 feet of a residentially zoned area. The ordinance sustained in Young **was based on studies by urban planning experts that showed the adverse environmental effects of permitting certain uses to be concentrated in any given area.**

Mt. Ephraim, New Jersey: In the next ten years, there were a number of Supreme Court cases which continued to define the limits of employing zoning as a tool for restricting adult entertainment. Although it was recognized that such restrictions were valid, it was also established in Schad v. Borough of Mt. Ephraim (452 U.S. 61, 1981) (though with a plurality decision because of varying interpretations among the justices) that municipalities may not use zoning to prohibit adult entertainment entirely. The deciding judges stated that the borough **had not offered sufficient evidence** to show the incompatibility of adult uses with other commercial businesses, and also had not provided adequate "alternative avenues of communication" for the location of such businesses.

Renton, Washington: In 1986, the U.S. Supreme Court upheld the Renton, Washington regulations (The City of Renton v. Playtime Theatres (475 U.S.41, 1986), although the city had based its prohibitions upon a study of the secondary effects of adult theatres conducted in neighboring Seattle and other nearby cities. The Supreme Court stated that municipalities could rely on the experiences of other cities. Furthermore, the Court stated that a city must be allowed to experiment with solutions to serious problems and it must be allowed to rely upon the experiences of other municipalities about the deteriorating and blighting effects of adult use establishments.

Los Angeles: In June, 1977, the Los Angeles City Planning Department conducted a study of the effects of adult entertainment establishments in several areas within the city. It found "a link between the concentration of such businesses and increased crime in the Hollywood community" (p.1.) The study also concluded, based on its analysis of percentage changes in the assessed value of commercial and residential property between 1970 and 1976, that there was no direct relationship between adult uses and property value changes. But in response to questionnaires, **it was shown that appraisers, realtors, bankers, businesspeople, and residents all believed that the concentration of adult entertainment establishments has an adverse**

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economic effect on both businesses and residential property in respect to market value, rental value, and rentability/salability.

It was believed that these effects extend even beyond a 1,000 foot radius, and that they are related to the degree of concentration. In addition, there are adverse effects on the quality of life, including neighborhood appearance, littering, and graffiti.

Minneapolis-St. Paul: The Twin Cities have conducted a number of studies over a period of more than ten years. In a 1978 St. Paul study and a 1980 Minneapolis study, statistically significant correlations were seen between location of adult businesses and neighborhood deterioration. It was concluded that adult businesses tend to locate in somewhat deteriorated areas to begin with, but further deterioration follows the arrival of adult businesses.

In these early studies, significantly higher crime rates were associated with an area containing two adult businesses than in an area with only one such business. Significantly lower property value prevailed in an area with three such businesses than in an area with only one.

In 1983, St. Paul examined one neighborhood that had a particularly heavy concentration of adult entertainment establishments. The University-Dale neighborhood had many signs of deterioration and social distress. While these indicators could not be directly attributable to the presence of the adult establishments, it was stated that there was a relationship between the concentrations of certain types of adult entertainment and street prostitution, especially, as well as other crimes. (40-Acre Study, prepared by the St. Paul Department of Planning and Economic Development, p. 19.)

This perception of an unsafe and undesirable neighborhood was documented by a survey conducted by Western State Bank which found its efforts to attract employees and customers being frustrated by people's perceptions of the neighborhood. (Ibid., p.23.)

In a 1987 Memorandum of the St. Paul Planning Department, discussing issues raised during the public review of proposed zoning regulations of adult establishments, it was stated that there is a relationship of prostitution activity to adult entertainment establishments, making for a "sex for sale" image of the neighborhood. The variables affecting the incidence of street prostitution include the character of the neighborhood, the effect of the concentration of adult businesses, and the specific kind of adult businesses associated with other serious land use problems. (Ibid., p.53-54.)

While much of the public testimony and the expert analysis described the negative effects on residential areas, it was also stated that such uses should be prohibited from proximity to commercial areas as well, because the purposes are incompatible. (Ibid., p.60.) If such harmful uses do continue to exist in commercial areas, it was recommended in the study that there be sufficient spacing requirements,

so as to minimize the documented negative effects of clusters of establishments.

In the 1988 Supplement to the 40-Acre Study, the City Planning Staff asserted that there is considerable evidence that multifunctional adult entertainment complexes can be the equivalent of the concentration of many single adult businesses. (Supplement to the 1987 Zoning Study, p. 6.) These multi-uses not only create multiple negative impacts but may also increase the intensity of the negative impacts. (Ibid., p.7.)

In 1989, the Attorney General of Minnesota, Hubert Humphrey, III, issued a Report based upon the study by the state's Working Group on the Regulation of Sexually Oriented Businesses. It recommended a number of zoning and distancing regulations, as well as licensing regulations, while continuing to document the negative effects of such businesses on communities. It recommended that "Communities should document findings of adverse secondary effects of sexually oriented businesses prior to enacting zoning regulations to control these uses so that such regulations can be upheld if challenged in court. (Attorney General's Report, p. 5.)

Indianapolis, Indiana, and Phoenix, Arizona: The Minnesota Attorney General's Working Group summarized these two other studies. In 1983,Indianapolis researched the relationship between adult entertainment and property values at the national level. They took random samples of twenty percent of the national membership of the American Institute of Real Estate Appraisers. Eighty percent of the survey respondents felt that an adult bookstore located in a hypothetical neighborhood would have a negative impact on residential property values of premises located within one block of its site. Seventy-two percent of the respondents felt there would be a detrimental effect on commercial property values within the same one-block radius.

A Phoenix, Arizona Planning Department study, published in 1979, showed arrests for sexual crimes, and locations of adult businesses to be directly related. The study compared three adult use areas with three control areas with no adult use businesses.

Islip, New York: In 1980, the town of Islip, Long Island conducted a study of the impacts of adult bookstores on residential and commercial sections of the town. It focused on the impacts of the location of one particular bookstore, and it surveyed and inventoried the impacts of other adult use enterprises on nearby hamlets, including Bayshore and Brentwood in addition to Islip Terrace and Central Islip. This study also reviewed numerous newspaper articles and letters of complaint, in order to gauge public reaction. Further, it analyzed distances, travel time and other factors to support the town's regulations which confined such uses to industrial zones. This regulation was upheld by the New York State Court of Appeals in Town of Islip v. Caviglia, in 1989. The Court accepted the evidence in the Islip study that the ordinance was designed to reduce the injuries to the neighborhood and that ample space remained elsewhere for the adult uses after the re-zoning.

A BRIEF HISTORY OF ADULT ENTERTAINMENT IN TIMES SQUARE

Times Square has long been known as a place for popular amusements from movies and theatre to flea circuses and video arcades. It has always attracted people of all incomes and tastes. But its history as a place of concentrated sex-related businesses really begins in the late 1960s and 1970s.

The concentration of massage parlors, nude live entertainments, erotic bookstores, X-rated movies, and peep shows increased at that time to such an extent that Times Square began to be called "a sinkhole". (The Daily News, August 14, 1975.)

The resulting crimes, assaults, and other violence made Times Square the highest crime area in the city. The numbers of sex-related businesses in Times Square and its environs reached as high, by some estimates, as 140 in the late 1970s and early 1980s.

In the 1970s the commercial and residential communities united to combat this blight by staging demonstrations and rallies, by sponsoring legislation, and, perhaps most important, by organizing themselves into the Mayor's Midtown Citizens' Committee, and in helping to create the Office of Midtown Enforcement.

The negative image of Times Square created by the increasing concentration of adult entertainment uses, coupled with pessimistic economic indicators, all contributed to a sense of decline on 42nd Street and the surrounding blocks.

In 1977, the City Planning Commission attempted to reduce the existing concentration of adult use businesses and to prevent future concentrations. Stimulated in part by the situation in Times Square, the Commission passed new zoning amendments to disperse such concentrations and to regulate their proximity to residential districts. The adverse economic and social effects produced by these concentrations were documented by findings of higher tax arrears on 42nd Street compared to the rest of midtown, declining sales tax revenue, and increases in criminal activity in Times Square. This zoning attempt failed at the last minute at the Board of Estimate.

But in the early 80s, several factors converged to stimulate a dramatic reduction in adult use establishments on 42nd Street and throughout Times Square. The State declared 42nd Street a "blighted area", and announced its intention to condemn numerous properties, including pornography shops, in order to stage the Urban Development Corporation's 42nd Street Development Project. Although litigation slowed down the project, most of the street has now been condemned and emptied of all uses.

Meanwhile, there was increased police activity throughout the area and the Mayor's Office of Midtown Enforcement coordinated action against illegal businesses including massage parlors. The commencement of the AIDS epidemic had a sobering effect on live sex establishments and many disappeared. And private developers assembled Times Square parcels, removing existing adult uses.

In June 1993 when Insight Associates completed the review for the Times Square BID of City Council legislation there were 36 adult use establishments within the Times Square area, a dramatic decline from the all time high of 140 in the late 70s. In addition, the area of concentration had shrunk and shifted. No longer were sex shops lining Broadway and Seventh Avenue to the same degree, but rather they were beginning to cluster along Eighth Avenue. Now, nine months later, there are 43 adult establishments, with most of the new stores on 42nd Street lying outside of the UDC's project and along Eighth Avenue.

Amidst the refurbishing, upgrading and improvement of a once sorely deteriorated Times Square, there is now new concern about the recent sudden proliferation.

APPROACH AND METHODOLOGY

This study focuses on the Times Square Business Improvement District, but the study concentrates more closely on the areas of adult use business concentration, that is, 42nd Street from Seventh to Eighth Avenues, and Eighth Avenue from 42nd Street to 50th Streets, because more than half of all the District's adult use businesses are located on these blocks.

Following secondary effects studies in other cities, we combined available data on property values and incidence of crime, plus in-person and telephone interviews with a broad range of diverse business and real estate enterprises, including major corporations, smaller retail stores, restaurants, theatres and hotels, as well as with Community Boards, block associations, activists and advocates, churches, schools and social service agencies.

Gathering Data on Assessed Property Values

To measure the possible impact of adult use businesses and the concentration of such businesses in our study blocks, we sought data on the overall and specific changes in assessed valuation of property from the tax period 1985-1986 to the most recent 1993-1994 tax year. This, we felt, would give enough of a spread across real estate cycles. The 1985-1986 data were the earliest computerized data available to us from the Department of Finance records.

The Department of Finance, however, could not provide reliable data on market value, as opposed to assessed valuation. We were able to get, and have used, the actual, not the billable, assessed values. The data contained information on tax block and lot, building class, and street address. We aggregated the actual valuation figures by individual tax lots for Study and Control blockfronts for 1985 and 1986, and for 1993 and 1994. From this we derived the percentage of change between the two benchmark years.

For this part of the study, we narrowed our focus to four Study Blocks: three blocks along Eighth Avenue, from 45th to 48th Street, and the 42nd Street Block between Seventh and Eighth Avenues. As contrasting control blocks where no adult use establishments exist, we chose the equivalent three blocks along Ninth Avenue, and 42nd Street between Eighth and Ninth Avenues. We then compared both the Study and Control blocks' data to similar statistics for all of Manhattan, and for all of New York City, as well as for the BID and the wider Times Square area.

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In choosing Control Blocks, we realized that there is no block like 42nd Street between Seventh and Eighth Avenues--our study block--anywhere. But we felt that by shifting our focus just one block to the west, we would have a block with no adult establishments but with similar uses and traffic patterns (though it does have the Port Authority Bus Terminal on its corner). As controls for our Eighth Avenue Study Blocks, we took the similar parallel blocks on Ninth Avenue, which, although residential, have comparable though not identical land uses and traffic patterns.

Tax arrears data were obtained for the years 1988, 1989, 1992 and 1993, the most recent year available through the New York City MISLAND system. We compared the data for our control and study blocks with aggregated data by census tracts that roughly approximated the boundaries of the Times Square Business Improvement District, and with Manhattan and New York City as a whole as well. No significant or consistent findings were obtained from this exercise.

Gathering Crime Data

Working closely with the Crime Analysis Division of the NYPD, we requested crime data for the Study Blocks of 42nd Street, Seventh to Eighth Avenues, and Eighth Avenue, from 45th through 48th Streets, for a period of one year. This amount of data proved too difficult for the Crime Analysis Division to obtain, and we were ultimately given these data for only a three month time period, from June through August, 1993. The same information was also supplied for our Control Blocks, which, for this subject, were slightly different: instead of the 42nd Street block between Eighth and Ninth Avenues which includes the Port Authority Bus Terminal, the next block west, between Ninth and Tenth Avenues was used.

Selecting the Interviewees

We initially obtained a listing of BID property owners for interview, by taking every fifth name on the BID's 404 owners' list. When an individual or corporation owned several properties, the name was used only once. We also eliminated the owners of adult use establishments (though later we did talk to one owner and operator of a number of such establishments in the area). We also deleted the many 42nd Street properties now owned by the State or City of New York or the New York State Urban Development Corporation. Similarly, we disregarded owners with telephone numbers outside the tri-state area, or those without listed telephone numbers. Banks and hotels were omitted from this first list.

This effort yielded a sample of 37 potential interviewees, of whom 20 were ultimately interviewed. The 20 included some of the largest developers and managers in Times Square and in New York City, with multiple holdings, as well as smaller residential and commercial property owners. It included as well the three major theatre-owning organizations, which control almost all the legitimate Broadway

houses, as well as a major nonprofit theatre. Two major communications companies were on this list.

This group of potential interviewees was then supplemented by selections from a listing of restaurants and hotels of different price levels. We interviewed seven restaurant owners or managers, representing eight restaurants in the Times Square area, including major chains, smaller coffee shops, and well known eateries. Two of these interviewees are also owners of the properties in which their operations stand. We interviewed four hotel owners or operators in three hotels along Eighth Avenue. Five retail establishment owners along Eighth Avenue were also interviewed.

Community group interviews included six churches, three social service agencies (plus one more informal interview with a fourth, serving the homeless), five block associations, the District Manager and Assistant District Manager of Community Boards Four and Five, respectively, and the Co-Chairs of each Board's Public Safety Committee. The principals of two public schools in the area were seen as well. In sum, 53 formal interviews were carried out, plus one less formal discussion with an owner and operator of several porn establishments.

For these interviews, we constructed a Survey Schedule questionnaire, which was modelled to some degree on the one being utilized by the City Planning Department's city-wide study of adult uses underway at the same time.

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TIMES SQUARE: ITS PROMINENCE AND ITS PEOPLE

The Times Square and Clinton communities, which the Business Improvement District encompasses or abuts, are dynamic and diverse neighborhoods. The area is home to some of the city's major corporations and there are more than 30 million square feet of office space. The BID has more than four hundred property owners, representing five thousand businesses in its membership. More than 250,000 employees work at enterprises that range from giant recording companies to international security firms to one-person theatrical agencies. Among the major corporations now making their home in Times Square are Morgan Stanley, Bertelsmann, Viacom, and many more. And of course, Times Square contains the highest concentration of legitimate theatres anywhere in the world, thirty-seven theatres, with as many as 25,000 seats to be filled on each performance day.

Times Square has a daily pedestrian count of 1.5 million persons. There are approximately twenty hotels, with 12,500 hotel rooms, in the Times Square area, one-fifth of all hotel rooms in Manhattan. Twenty million tourists and five million overnight visitors arrive annually. There are more than two hundred restaurants in the Times Square area. It is indeed New York City's center for commerce and the performing arts, business and tourism.

But the area is also a home for thousands of residents who live adjacent to and in the midst of this vibrant midtown commercial core. The area is replete with churches, block associations, civic associations, business organizations and theatre related organizations. The Times Square BID knows--and works with--some 35 social service agencies in the greater Times Square area.

It also has the largest concentration of pornography establishments in the city. The number of such businesses reached a high of about 140 establishments in the 1970s and early 1980s, and declined thereafter to approximately forty. There is some indication that the number has increased somewhat in the Times Square area and on its periphery, particularly on Eighth Avenue, in the past months.

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Demographics and Housing

In order to draw detailed demographic information from the 1990 Census, we aggregated data by the census tracts that most closely approximated the area of the Times Square BID. By using data from six census tracts that cover the area between Sixth and Tenth Avenues to the east and west, and 42nd and 54th Streets to the south and north, we have covered the entire BID, as well as additional blocks. Thus, data from these six tracts, which we will call the *Times Square Neighborhood* to avoid confusion with the Times Square BID, will reflect the demographics within the BID as well as the directly adjacent neighborhood. The map on the following page depicts the census tracts for this section of west midtown. As one can see, the Times Square BID falls within the boundaries of census tracts 119, 121, 125, 127, 131, and 133.

Broadly speaking, the eastern blocks of this area, particularly as one approaches Sixth Avenue, are commercial in character, with stores, restaurants, offices, and other commercial establishments. In comparison, the mid-blocks between Ninth and Tenth Avenues have a higher preponderance of housing; they constitute the eastern edge of the Clinton neighborhood.

Therefore, in reviewing the following census data, the reader must be aware that there will be a larger number of residents and housing units than those who actually reside within the official borders of the Times Square Business Improvement District. For example, our Census data show more than 25,000 residents in these tracts; the BID estimates 5,000 residents within its narrower boundaries. **However, these 20,000 residents are, in fact, part of the Times Square community and view themselves as being affected by the adult use establishments (those along Eighth Avenue in particular).**

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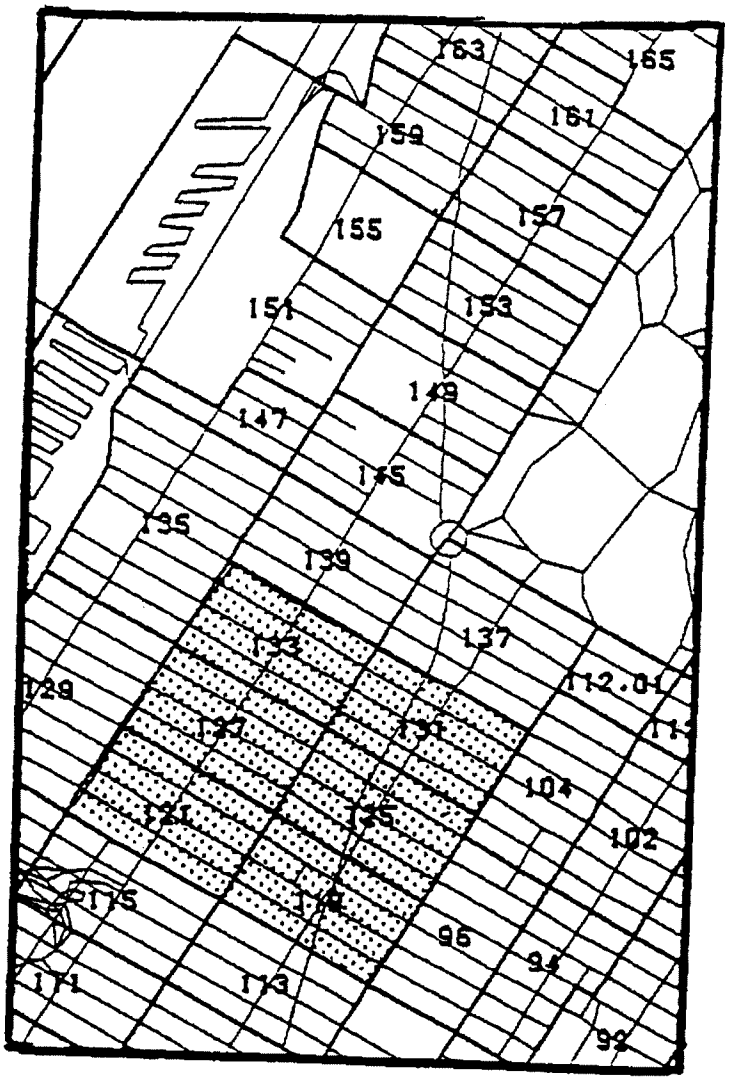
TIMES SQUARE BID
CENSUS TRACTS



Source: New York City Department of City Planning, Computer Information Systems; U.S. Bureau of the Census

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Total Population

In 1990, the total population for the Times Square Neighborhood was 25,651, which was slightly higher than the previous decade. The racial characteristics are depicted below. In general, over half of the population was White (higher than the Manhattan percentage); 11% was Black/Non-Hispanic, and 24% were Hispanic. During the decade from 1980 to 1990, the Hispanic population declined slightly, while the Asian (particularly the non-Chinese Asian) population increased to approximately the same as that of the borough of Manhattan, or 7%.

TABLE I
POPULATION CHARACTERISTICS, 1990
TIMES SQUARE NEIGHBORHOOD*

	1980 Number	1980 %	1990 Number	1990 %
White	14,251	57.9	14,807	57.7
Black, Non-Hispanic	2,252	9.2	2,785	10.9
Hispanic	6,793	27.6	6,099	23.8
Asian	1,117	4.5	1,761	6.9
Other	199	0.8	199	0.8
TOTAL	**24,612**	**100.0**	**25,651**	**100.0**

Source: U.S. Bureau of the Census, 1980 and 1990 Censuses of Population and Housing Characteristics, and Social and Economic Characteristics.

* Despite the image of Times Square as a solely commercial area, it is a place where many people raise their children. In 1990, there were 3,690 families with children under the age of 18 living in the six census tracts.

Housing Units

In 1990, there were over 18,000 housing units in the neighborhood, of which 75% were rental units and 49% were in large buildings of over 50 units. In a borough in which less than 10% of the units were vacant, 20.5% were vacant in Times Square.

The size of housing units within the six census tracts is smaller than elsewhere in the borough. While the median number of rooms per unit is 3 for Manhattan, it is 2.2 for the Times Square Neighborhood and 1 for the one census tract bounded by 42nd and 45th Streets, Sixth to Eighth Avenues.

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In addition to these permanent housing units, there are also a considerable number of hotel rooms in Times Square. The Times Square BID estimates that over 12,500 hotel units are located within its boundaries. The large number of hotel rooms reflects Times Square's importance in the City's tourism industry. The number of tourists constitutes, from one point of view, a large group of potential customers for adult use establishments. **But from another standpoint, as documented in our surveys with hotel operators, restaurateurs, and theatre owners, the concentration of adult use establishments is seen to be offensive to this stream of visitors and travellers.**

Age

The population of the Times Square Neighborhood is similar in percentage of population age 62 and over to that of the borough or of the two Community Districts in which it falls: CD 4 and CD 5. In addition, in 1990 there were close to 2,000 children under the age of 14 living in the Times Square Neighborhood. **Both the elderly and young, whose lives are generally circumscribed by their immediate community, are impacted by the types of businesses and uses that occur in the Times Square area, including the adult use establishments.**

TABLE II
AGE CHARACTERISTICS, 1990
TIMES SQUARE NEIGHBORHOOD

	Time Square	CD4	CD5	Manhattan
TOTAL POP.	25,651	84,431	43,507	1,487,536
% UNDER 14	7.4	8.2	5.2	13.2
% OVER 62	15.4	15.9	15.3	15.9
MEDIAN AGE (years)	36.63	37.2	37.2	35.9

Source: U.S. Bureau of the Census, 1980 and 1990 Censuses of Population and Housing Characteristics, and Social and Economic Characteristics.

Employment Characteristics

Traditionally, a large percentage of Clinton residents have worked in the Times Square area, particularly in the theater and music industries as technicians, actors, and performers. This is borne out by the census data, which show a very high percentage of residents working within less than half an hour of their homes and walking to work. **The percentage of workers in the Times Square Neighborhood who walk to work is higher than the percentage for the borough as a whole and is much higher than the percentage of those in the other four boroughs.**

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In 1990, approximately two-thirds of the population of the Times Square Neighborhood above the age of 16 were employed. The Bureau of the Census estimated that 95% of these workers worked in New York City and 88% worked in Manhattan. This is similar to Manhattan's residents in general, of whom 94% worked in the City and 84% in the borough. Compare this to, for example, the Queens workforce, of which only 40% work in their home borough.

Similarly, while the mean travel time to work for Manhattan residents was 29 minutes (and that of the other four boroughs was approximately 40 minutes), the mean travel time to work for residents in these six census tracts was 23.16 minutes. Of the Times Square residents who travelled to work, 48%, or almost half, walked. Compare this to 29% of the Manhattan workforce and less than 10% in the other boroughs. **Times Square, therefore, has a considerable segment of the population who spend both their working hours and off-time in the Times Square Neighborhood.**

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TIMES SQUARE NEIGHBORHOOD: ITS ZONING AND ITS USES

Zoning

The Times Square neighborhood is zoned for General Central Commercial uses, reflecting the importance of Times Square as a central core for the City and region. These C6 zones vary: while Broadway, Sixth and Seventh Avenues are zoned C6-6 (15 FAR), the midblocks and Eighth Avenue are zoned C6-5 or C6-4, for a lower FAR of 10. Uses permitted in C6 districts typically include all residential uses as well as commercial and wholesale uses.

To the west of Eighth Avenue the predominant zoning is R8, with a C1-5 overlay along 9 Avenue for our control blocks. R8 permits general residential uses of a 4.8-6.0 FAR. C1-5 commercial districts permit local neighborhood commercial uses at an FAR of 2.0.

Special Districts

Special Midtown District

Times Square lies within one special zoning district and directly abuts another. In fact, the eastern boundary of one of these districts and the western boundary of the other meet in the center of Eighth Avenue.

Eighth Avenue can thus be viewed as the transition between two special districts: one encouraging commercial development and the other attempting to preserve a low-scale residential community. That duality is reflected in the opinions of residents and businesses about the status and future of the Eighth Avenue strip.

There are those who view Eighth Avenue as a development corridor, which began to be such with the building of Worldwide Plaza but which remains under-built, with a number of vacant buildings and parking lots. There are others who see the area as one that can and should continue to serve the economic development needs of the theatre and entertainment industries as well as other related needs of the city. Still others think it can and should be enhanced as a residential avenue. **Whatever their perspective, few see the concentration of adult use establishments as being beneficial to either the preservation or the development of the area.**

The area of the Times Square Business Improvement District lies almost entirely within the boundaries of the Special Midtown District (Sect. 81 of the NYC *Zoning Resolution*). Within that, a large proportion of the BID is included within the Theater

Sub-District, and the even more restrictive Theater Sub District Core, which extends from 43rd to 50th Streets, and from 100 feet east of Eighth Avenue to 200 feet wes of Sixth Avenue.

In general, the goals of the Special Midtown District include the strengthening of Midtown's business core, while directing and encouraging development and preserving the "scale and character" of Times Square. Within the overall Special District, the purpose of the Theater Sub-District is to protect the cultural and theatrical and ancillary uses (i.e., shops and restaurants) in Times Square. This sub-district provides additional incentives and controls to encourage preservation of theaters, special development rights transfers, and separate requirements for ground floor uses.

Special Clinton District

Directly to the west of the Midtown Special District--and thus, of the Times Square area--is the Clinton Special District, whose purpose is the preservation of the residential character of the Clinton community (Sect. 96). The west side of Eighth Avenue falls within the Perimeter Area of the Special Clinton District. It is a transition between the tourism area of the Midtown District and the low-rise residential neighborhood immediately to the west, and the manufacturing district further west. Community residents characterize Eighth Avenue as "The Front Door to Clinton".

The Special Clinton District regulations contain provisions regarding demolition of residential buildings and relocation of tenants that are stringent and designed to preserve the neighborhood's residential character.

Our Ninth Avenue control block falls not within the Perimeter Area, but rather in the more restrictive Preservation Area; the one exception is the block on which Worldwide Plaza is located, which is excluded from the Special District. Within the Preservation Area, there are also tough provisions in regard to demolition and relocation of residents.

Land Uses: Control and Study Blocks

In general, the land uses in this neighborhood are diverse and eclectic. We provide a detailed picture of this diversity below.

42nd Street Study Block Land Uses

The present land uses along 42nd Street reflect the general commercial nature of the block. The north side of 42nd Street between Seventh and Eighth Avenues has a significant number of now vacant theaters, awaiting redevelopment through th 42nd Street Development Project. In addition there are clothing, sporting goods, tobacco, and camera stores, as well as delicatessens and a fast food establishment

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on the corner at Eighth Avenue. As one approaches the northeastern corner of the intersection at Eighth Avenue, one can see a concentration of adult use establishments on the still privately owned portion of that block. (The State will soon begin condemnation of these buildings.)

Along the south side of the 42nd Street Study block there are also a number of now-vacant retail establishments and theaters, as well as the Candler office building. Retail establishments that are open along the south side of the Study block include electronics, novelties, sporting goods and shoe stores, as well as one first-run movie theater.

There are approximately six adult use establishments on the north side of the 42nd Street Study Block, and nine adult use establishments on the south side, for a total of 14. (Some of these stores are divided with more than one entrance and level).

42nd Street Control Block

The land uses along the north side of the 42nd Street Control Block between Eighth and Ninth Avenues include the following uses: a bar, two parking lots, a church and its rectory, office supply and gift stores, a deli, an entry to an apartment house, and the entrance to an adult use establishment whose main entrance is on Eighth Avenue.

The south side of the control block is most notable for the Port Authority Bus Terminal, which takes up approximately two-thirds of the blockfront. Additional uses to the west of the Bus Terminal include: a pizzeria, a parking lot, a hotel entry, an appliance servicing establishment, offices, and the US Post Office's Times Square Station.

Other than the side entry to the Eighth Avenue adult use establishment, there are no adult use establishments actually on the control block.

Eighth Avenue Study Block

The Eighth Avenue Study blockfront extends three blocks from 45th to 48th Streets. The mixture of uses is not reflective of the General Commercial Core aspect of the location. Instead, the uses are a mixture of local retail including novelty shops and souvenir stands, as well as delis, drugstores, and liquor stores, parking lots, vacant properties, and restaurants and other eating and drinking establishments. There are some uses which serve the theatre industry to the east; for example, the hardware store between 47th and 48th Street.

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The study blocks are flanked by the Milford Plaza Hotel, between 44th and 45th Streets, the Days Inn between 48th and 49th Streets, and Worldwide Plaza between 49th and 50 Streets. Along this strip of three blocks there are eight adult use establishments: six movie theaters and two video stores.

Ninth Avenue Control Block

The building stock on Ninth Avenue resembles that on the Eighth Avenue study block: predominantly older, two to four-story buildings, often with apartments above the retail places. The uses on Ninth Avenue are more reflective of the area's zoning for local retail uses, with food markets, barbers, locksmiths, fast foods, and florists, for example. Also noteworthy are the numerous restaurants along Ninth Avenue serving primarily locals.

There are no adult use establishments along Ninth Avenue, either in our three-block control blockfront between 45th and 48th Streets, or for the entire stretch from 42nd Street up to 50th Street.

A map of all land uses as of March, 1994 along 42nd Street between Seventh and Ninth Avenue between 42nd and 50th Streets is attached at the end of this report.

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ADULT USE ESTABLISHMENTS AND PROPERTY VALUES

Total Assessed Value

We attempted to compare total assessed value over time, and the rate of change, for our study and control blocks. We analyzed and compared the years 1985-1986 to 1993-1994. In addition, we compared our Study and Control blocks' assessed valuation to that of 1) the aggregated tax blocks falling within the boundaries of the Times Square Business Improvement District; 2) the entire Borough of Manhattan; and 3) the City as a whole. Our findings are summarized in Table III.

The Table shows that the rate of increase of the total actual assessed values of the Eighth Avenue Study Blocks was less than the rate of increase for the Control Blocks along Ninth Avenue on which no adult use establishments are or were located. To a lesser extent, the rate of increase of the actual total assessed value of the 42nd Street Study Block is less than that of the 42nd Street Control Block.

TABLE III
ACTUAL ASSESSED VALUES
CHANGES FROM 1985-1993 FOR SELECTED BLOCKFRONTS

BLOCKS	ACTUAL ASSESSED VALUE 1985-1986 (millions)	ACTUAL ASSESSED VALUE 1993-1994 (millions)	PERCENTAGE CHANGE 1985-1993
8TH AVE. STUDY BLOCKS (45-48 STS.)	11.22	18.55	65
9TH AVE. CONTROL BLOCKS (45-48 STS.)	4.52	8.65	91
42 ST. STUDY BLOCKS (7-8 AVES.)	34.89	51.63	48
42 ST. CONTROL BLOCKS (8-9 AVES.)	88.31	136.65	55
TSBID (ESTIMATED)*	2,034.7	3,252.3	60
MANHATTAN	29,462.7	47,229.4	61
CITYWIDE	53,589.8	81,714.6	52

Sources: NYC Department of Finance; Insight Associates

* The estimated BID total assessed value was determined by adding all 36 tax blocks that fall entirely or partially within the boundaries of the Times Square Business Improvement District.

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Changes on Individual Properties

After determining that the rate of increase of the total actual assessed values of the Eighth Avenue Study Blocks was less than the rate of increase for the Control Blocks, we zeroed in to compare more closely the rates of change for the lots themselves. After detailing each block, property by property, an overall figure for the "social block" or the avenue considered with both its east and west sides, is noted.

The assessed values of the tax lots on the Eighth Avenue Control Blocks were analyzed in terms of proximity to the location of adult use establishments; the purpose of the exercise was to see if there were any patterns regarding the location of establishments and the rates of change.

The findings are shown below. In most cases, the rate of changes for other lots on the blocks were less than those with adult use establishments. Note that the tax lots which have adult use establishments are indicated by bold type.

When there is a decline in the assessed value, and the Department of Finance records indicate no change in the building class or size, we can assume that the property owner had at some point filed for and been granted a reduction in the property's assessed value though a certiorari proceeding.

There may be many reasons for a property's assessed value to have changed at a rate different than those of the rest of the block, or the general area. One cannot automatically assume any one reason, such as the proximity of adult use establishments. For example, the physical condition of the property may have deteriorated, or the property may be at a location undesirable from the point of view of potential retailers.

While it may well be that the concentration of adult use establishments has a generally depressive effect on the adjoining properties, as a statistical matter we do not have sufficient data to prove or disprove this thesis. It may also be that simply the presence of adult use establishments is subjectively viewed by assessors as a factor that necessarily reduces the value of an property. In short, assumptions may influence assessment.

Also included in the lists below are the actual uses--the types of stores or restaurants, for example--for each property along the Eighth Avenue Study blockfronts, from 45th through 48th Streets. We have tried to see if there is any pattern in which uses that one might consider to be more compatible with an adult use reveal a different rate of change in assessed value than other, less compatible uses.

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TABLE IV
BLOCK BY BLOCK CHANGES IN ASSESSED VALUATION ALONG EIGHTH AVENUE STUDY BLOCKS

LOCATION (on Eighth Avenue)	BLOCK/LOT	ADDRESS	LAND USES	% CHANGE IN ASSESSED VALUE (1985/6-1993/4)
8 AVENUE: 45-46 STREET				
West	1036/36	731-727	Pizzeria Grocer/Deli Vacant Deli	50%
West	1036/33	725	Pawn Shop	9%
West	1036/29	712	Photo lab Army/Navy Hair/Nails Restaurant Restaurant	33%
East	1017/61	740	Hotel entrance Liquor Novelty Bar Novelty	136%
East	1017/63	738	Adult Use (Capri)	138%
East	1017/58		Parking lot	61%
East	1017/4	732	Adult Use (Eros I)	166%
East	1017/3	730	Bar	84%
East	1017/2	728	Adult Use (Venus)	94%
East	1017/101	726	Deli	43%
East	1017/1	724	Souvenir/ T-shirts	275%
Social Block Change: 61%				

In the 45th to 46th Street study block, the parcels across the avenue from a concentration of three adult theaters show a rate of increase much lower than the average for the entire blockfront. The parcels on the same (east) side of the street from the theaters tended to show lower rates of increase in assessed value, except for 1017/1, whose owner is listed by the Department of Finance as that of an adult use establishment located at 265 W. 47 St, and 1017/61, which is a mixed use property comprising a hotel with retail uses below.

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TABLE IVa
BLOCK BY BLOCK CHANGES IN ASSESSED VALUATION ALONG EIGHTH AVENUE STUDY BLOCKS

LOCATION (on Eighth Avenue)	BLOCK/LOT	ADDRESS	LAND USES	% CHANGE IN ASSESSED VALUE (1985/6-1993/4)
8 AVENUE: 46-47 STREET				
West	1037/36	767	Restaurant Fast Food	55%
West	1037/35	765	Hotel Entrance	-26%
West	1037/34	763	Adult Video	395%
West	1037/33	741-743	Travel Agency (entrance) Bar Restaurant	199%
West	1037/30	733-39	Pastry shop (formerly adult video) Novelty/Gift Electronics Bar Grocery Adult Video (Pleasure Palace)	125%
East	1018/61	760	Liquor store Pharmacy Deli Restaurant Union office (entrance)	55%
East	1018/3	754	Parking lot	121%
East	1018/1	750	Souvenirs Deli Bar	123%
Social Block Change: 73%				

There are no readily defined patterns for the properties located on the west side of Eighth Avenue on Block 1018. The parcels at 754 and 750 generally appreciated by over 120%, while the remaining parcel increased only by half.

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However, on the west side of Eighth Avenue, on which there are two X-rated videos, located at 763 and 739, the properties not owned by the owner of the video establishments evidenced a lower rate of increase. The assessed value of the property at 765, adjacent to the Adult Video, actually declined by over 25%.

TABLE IVb
BLOCK BY BLOCK CHANGES IN ASSESSED VALUATION ALONG EIGHTH AVENUE STUDY BLOCKS

LOCATION (on Eighth Avenue)	BLOCK/LOT	ADDRESS	LAND USES	% CHANGE IN ASSESSED VALUE (1985/6-1993/4)
8 AVENUE: 47-48 STREET				
West	1038/36	787	Coffee shop Pizzeria	30%
West	1038/35	785	Hardware store	51%
West	1038/34	783	Restaurant	180%
West	1038/33	781	Lighting store	162%
West	**1038/31**	**777**	**Adult Movie (Hollywood Twin)**	120%
West	1038/29	771	Restaurant	136%
East	1019/61	782	Firehouse	48%
East	**1019/63**	**780**	**Adult Use**	59%
East	1019/64	778	Souvenirs	59%
East	**1019/3**	**776**	**Adult Videos**	59%
East	1019/2	772	Vacant, sealed building	107%
East	1019/1	770	Frame store (entrance on 47 St.)	-4%
Social Block Change: 66%				

It is difficult to see a strong pattern on the west side of Eighth Avenue, although the assessed values of the two properties located at 787 and 785 increased by far less than the other four, including 777, which houses the Hollywood Twin, and 771, which is owned by an individual listed as owner of other adult use establishments in the area.

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On the east side of Eighth Avenue, the two adult establishments and the property between them enjoy a common ownership; the three tax lots all increased in assessed value by precisely the same percentage--59%. On that block front there is also a NYC Fire House and an vacant and sealed building that is listed by the Department of Finance in 1993 as City-owned. The one remaining parcel on that block front--a framing store--experienced a decline in assessed valuation for the period.

A similar review of tax lots was not conducted for the other area of concentration, the 42nd St. Control Block. This was because it is felt that the many other trends and government actions along that strip, including public condemnation of the parcels and numerous lawsuits, would further complicate the analysis, and would prove fruitless.

Department of Finance Assumptions

In addition to the detailed analysis described above, we spoke to a high official in the Department of Finance to obtain his expert opinion on the relationships and effects, if any, of adult use establishments on neighboring properties. He stated that "there is no doubt in my mind that they [adult use establishments] adversely affect other properties." Their presence, he indicated, is factored into the locational aspect of the appraisal formula, though, he acknowledged that appraising is not itself an exact science. A commercial building may be obtaining a reasonable rate of return, but if that building were located near an adult use establishment, the assessor would tend to use a higher capitalization rate, which would therefore produce a lower value. The further away a property is from the adult uses, he explained, the lower the effect on its value.

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ADULT USE ESTABLISHMENTS AND CRIMINAL ACTIVITY

General Crime Statistics

Over the past five years, according to the Office of Midtown Enforcement, police statistics show an estimated 54% decrease in crime in the Times Square area. This decrease parallels the decrease in adult use establishments, and although we cannot claim direct causality it is interesting to note that there is both the perception and the reality that Times Square is a safer place than it was years ago. While we were not able to collect crime statistics over a broad range of time, we were able to obtain information from the New York City Police Department for our Study and Control Blocks for a three-month period in 1993.

In addition, data on control blockfronts with no adult use establishments were requested for Ninth Avenue between 45th and 48th Streets, and for 42nd Street between Ninth and Tenth Avenues. The latter was selected as the control block for this purpose, rather than the block between Eighth Avenue and Ninth Avenue that had been used in analyzing property tax data, (see p. 25-30), because it was felt that encompassing the Port Authority Bus Terminal, with its unrelated associated crime statistics, would not provide a meaningful basis of comparison to the study block.

The crime data reports were prepared by the Precincts in which these blockfronts are located: Midtown South, Midtown North, and the Tenth Precinct. The reports generated by these precincts do not include complaints for prostitution or drugs (other than criminal possession of a controlled substance), as these crimes are reported in an incompatible format. (We did, however obtain some information on prostitution activity from other sources, which will be described below.) In addition, certain desired data, such as known locations for drug-dealing, are part of on-going investigations and prosecutions, and thus not available to us. The data we have used reflect the numbers of criminal complaints, not arrests, for known addresses or locations along the block fronts under study.

Actual complaints were listed for a wide range of crime categories, including Grand and Petit Larceny, Grand and Petit Larceny from an Auto; Criminal Possession of Controlled Substance; Criminal Harassment; Assault, Robbery, and Fraudulent Accosting. Each precinct used slightly different categories in preparing its reports for this study, but in general, the major categories were similar. Certain crimes were more prevalent in specific locations. For example, a larger number of complaints of Grand and Petit Larceny from an Auto were noted along Eighth Avenue between 45th and 48th Streets; this may reflect the presence there of parking lots.

Despite the many limitations on these data, there were certain significant patterns that did appear. In general, as seen in Table II, criminal complaints we higher for the 42nd Street study block than for the 42nd Street control block two blocks to the west. During the three month period of July through September, 1993, there were 45 criminal complaints on the Ninth to Tenth Avenue block of 42nd Street, and 88 on the Seventh to Eighth Avenue blockfront. Similarly, there were 118 criminal complaints on Eighth Avenue between 45th and 48th Streets, and only 50 for the same three blocks along Ninth Avenue.

One cannot assert that there is a direct correlation between these statistics and the concentration of adult use establishments on 42nd Street between Seventh and Eighth Avenue, or along Eighth Avenue between 45th and 48th Streets. But there is very definitely a pointed difference in the number of crime complaints between these study blocks and their controls.

It appears that there was a continuing reduction in crimes along Eighth Avenue the further away from 42nd Street, with its concentration of adult use establishments. While there were 135 complaints on Eighth Avenue between 42nd and 43rd Streets, there were only 80 on the block between 44th and 45th Streets. For the three blocks between 45th and 48th Streets, there were a total 118 complaints for the same period. These complaint statistics are summarized in Table V.

TABLE V
CRIMINAL COMPLAINTS FOR SELECTED BLOCKFRONTS
JUNE, JULY & AUGUST 1993

BLOCKFRONT	JUNE	JULY	AUGUST	TOTAL
8 Ave. between 42-43 Sts.	34	45	56	135
8 Ave. between 44-45 Sts.	38	21	21	80
8 Ave. between 45-48 Sts.	40	45	33	118
9 Ave. between 45-48 Sts.	16	13	21	50
42 St. between 7-8 Aves.	29	36	23	88
42 St. between 9-10 Aves.	16	16	13	45

Source: New York City Police Department; Insight Associates

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Criminal Activities: Drugs and Prostitution Arrests

As can be seen in the responses to our survey, one of the most frequently made assertions is that adult use establishments attract criminal activities, particularly drug dealing and prostitution. Working closely with the NYPD Crime Analysis Unit, we attempted to obtain data concerning arrests or complaints for these two types of criminal activities, in order to enhance the criminal complaint data discussed above.

Prostitution and drug complaints are not collected by the precincts in the same way as other criminal complaint data. Drug complaints and drug arrests are not maintained on the precinct level and are considered confidential, due to on-going criminal investigations. Thus, we were not able to obtain data on this type of criminal activity. With the cooperation of the Crime Analysis Unit, however, we were able to obtain information concerning prostitution arrests along Eighth Avenue from 42nd Street to 48th Street.

In a three month period from July through September, 1993, in the Midtown South Precinct, there were 19 arrests made on Eighth Avenue between 42nd and 45th Streets, compared to no arrests on Ninth Avenue between 42nd and 45th Streets. Further north on Eighth Avenue, between 45th and 48th Streets, the Midtown North Precinct reported 9 arrests for prostitution, compared to 14 arrests along Ninth Avenue for the same three blocks during the same three month period. Thus, the heaviest incidence of prostitution arrests occurred in the three block study area of dense concentration of adult use establishments, during this time period. Those findings are summarized in Table VI.

TABLE VI
PROSTITUTION AND RELATED ARRESTS
FOR SELECTED BLOCKFRONTS
JUNE, JULY, & AUGUST 1993

BLOCKFRONT	JUNE	JULY	AUGUST	TOTAL
8 AVENUE (42-45 Streets)	7	7	5	19
9 AVENUE (42-45 Streets)	0	0	0	0
8 AVENUE (45-48 Streets)	7	1	1	9
9 AVENUE (45-48 Streets)	3	10	1*	14

Source: New York City Police Department; Insight Associates

* In addition, there were 7 arrests for Patronizing a Prostitute for this month.

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In addition, we were able to obtain from the Midtown Community Court a list of locations for prostitution arrests appearing before that court for the period from October 12, 1993 through February 28, 1994. The Midtown Community Court sampled 60% of its prostitution arrests for this 4 1/2-month period, looking at the frequency of arrests on Eighth Avenue between 42nd and 48th Streets, as compared to those along Ninth Avenue between the same streets.

The number of prostitution arrests on Eighth Avenue was 20 for that period, compared to 5 for Ninth Avenue. However, higher than that was the number--24--for the area west of Ninth Avenue. This may reflect the well-known concentration of prostitution activity along the westernmost stretches of West Midtown, particularly along Tenth and Eleventh Avenues.

What is interesting, however, is that during this 4 1/2-month period, the location for the majority of prostitution arrests shifted dramatically eastward, from west of Ninth Avenue to Eighth Avenue itself. This change may have been a function of police activity and sweeps or may be related to other factors.

Nevertheless, the more recent level of prostitution activity, while higher in the west, dropped along Ninth Avenue, but increased again along Eighth Ave. This concentration of arrests along Eighth Avenue may be related to presence of adult use establishments along Eighth Avenue, but may also be related to traffic and pedestrian patterns, proximity to the Port Authority Bus Terminal, and proximity to Times Square itself. It should be noted that according to the Midtown Community Court's records, the most frequent locations for prostitution arrests in their sample were in the West 20s along Tenth and Eleventh Avenues and in the upper 50s on Sixth Avenue.

The findings are shown in the following table.

TABLE VIa
PROSTITUTION ARRESTS AT SELECTED LOCATIONS
MIDTOWN COMMUNITY COURT
(60% Sample)

LOCATIONS	10/12/93-12/31/93	1/1/94-2/28/94	TOTAL
8 AVENUE (42-48 Streets)	4	16	20
9 AVENUE (42-48 Streets)	3	2	5
WEST OF 9 AVENUE (42-48 Streets)	21	3	24

Source: Midtown Community Court, 3/4/94

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The Office of Midtown Enforcement, although acknowledging the decline in criminal activity in the Times Square area, continues to deploy surveillance teams to monitor the level of prostitution activity in the area. (Office of Midtown Enforcement 1991-2 Fiscal Year Report).

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INTERVIEW FINDINGS

Previous secondary effects studies have combined survey research and anecdotal reports from community and business interests. Our study did so as well. A total of 54 interviews were conducted between November, 1993, and March, 1994. Three different interview questionnaires were employed: one designed for property owners and business operators, a second intended for local organizations, churches, and schools, and the third for Community Board representatives.

In general, we sought to obtain information on perceptions and experience of the impact in the Times Square area of adult entertainment establishments. More specifically, we tried to elicit detailed observations of the effects of these enterprises on business and daily life. We also attempted to obtain information on the effects of these businesses in geographic terms, i.e., the proximity and distance of adult use establishments and the resulting intensity and/or diminution of impacts.

To provide context, we asked all respondents about their views of what constituted the major problems facing the Times Square area, and the relative importance of pornography and adult use businesses among these problems. The open-ended conversations that followed completion of the formal interview schedule were often most productive. Where possible, the interview results are presented below as quantified measures but in addition, many valuable insights emerge from interview material that is not easily quantified.

Property and Business Owners

Real Estate Owners, Managers, and Corporate Leaders

Our twelve-interview sample in this important category included five of the largest real estate companies or management agencies in the city, with multiple holdings in Times Square and elsewhere. We interviewed one appraiser familiar with the Times Square area, one owner of residential property, and one leasing agent. In addition, we spoke with executives of two important publishing and communications corporate groups.

Most of these respondents have been part of the Times Square scene for decades, and some are relatively recent arrivals. They are all aware of Times Square's history, in all its ups and downs, and some have played roles in this history. Their observations and expertise, however, are focused on the growth of Times Square as a unique conglomerate of entertainment uses, commercial tenants, tourist attractions, and, increasingly, a home for financial and multi-national corporations.

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As our appraiser interviewee stated, we must evaluate how the presence of these adult entertainment uses slows down or reduces rentals and business activity in the long run. That is, it can be said that pornographic uses may attract other businesses and traffic, which brings revenue to the owners of those businesses in the short run. **But there is no way to encourage increased value of commercial properties for a variety of businesses in the long run if they are next door to a concentration of pornography establishments.**

This observation is confirmed by the direct experience of our real estate respondents. Three real estate developers had bought buildings in the Times Square area which housed adult use businesses, and they sought to terminate these leases as quickly as possible. They all asserted that the presence of such stores had a definitely negative effect on office leasing, especially for corporate tenants. **A leading real estate agent described the lower rents and difficult leasing conditions of an office building located on 42nd Street between Seventh and Eighth Avenues.** He also depicted the lower rents on Eighth Avenue as compared to Seventh Avenue for comparable buildings, and cited instances of tenants refusing to renew leases because of the Eighth Avenue location and its atmosphere.

An owner of a smaller residential property on 46th Street said that he believed that the adult use businesses on his corner at Eighth Avenue frighten people away. He had an apartment on the market recently and a prospective applicant who said he wanted to rent it for his daughter and friends turned out to be really interested in using it as a massage parlor. The owner recently advertised office space in his building, but has so far attracted two adult use businesses, while other applicants have been scarce.

The builder and owner of World Wide Plaza spoke of the need to oust a porn theatre one block to the north (which later relocated further south on Eighth Avenue) in order to attract major corporate tenants. While his tenants have long-term leases, and he recognizes that the development of his building was affected by recent downturns in the real estate market having little to do with porn, he nevertheless expressed concern about the new spread of porn uses along Eighth Avenue. In fact, though the block from 50th Street to 51st Street, north of World Wide Plaza, remains vacant because of these larger market trends, he is seeking to encourage the lessee to rent to local retail uses, rather than to adult entertainment businesses. **Members of this development organization stated that they believed that security costs in this building were somewhat higher than those of comparable buildings located in other neighborhoods.** They also were very concerned about the recent increase in adult uses on Eighth Avenue, which they fear is occurring because of the public agency condemnations along 42nd Street, which may well be forcing the porn merchants northward.

All of our respondents said that adjacency of porn establishments has a negative effect on sales and leasing, and that plainly the concentration of establishments affects the overall image of the western edge of Times Square. They describe Eighth Avenue and certain side streets where these stores are located as

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"less hospitable places", and as injurious to the quality of life. One corporate executive said that one of his employees was mugged in front of an adult-entertainment store. A developer and an executive of a corporation both said that adult businesses on the same street, or diagonally across the street from a property have offensive and negative results.

All except one developer said that perhaps there is a way to limit the number of such establishments, and to disperse them. The dissenter said that not even one could be tolerated.

All of our property owners and business representatives--large and small--expressed the view that adult use businesses have a negative effect on the market or rental values of businesses located in their vicinity. It was very clear that negative effect was intensely felt if the adult business was right next door, in the same building, or on the same block. But every respondent also emphasized the negative effects of a concentration of businesses, stating that "Eighth Avenue is a less attractive place to do business" than other avenues in the Times Square area. One representative of a major property owner said that there were more improvements on Ninth Avenue in recent years than on Eighth Avenue, as evidenced in the numbers of new restaurants and small viable retail stores which have opened on that street. In the light of other improvement in the Times Square area, this respondent, too, expressed concern about "the march of porn stores up Eighth Avenue."

A corporate newcomer to the Times Square area expressed great optimism about its future and he said that the confidence was shared by employees and prospective retail tenants, but he also said that the positive trends were clear along Seventh Avenue and Broadway, and certainly less so along Eighth Avenue.

A real estate agent who tries to rent only to "Triple A" tenants said that proximity to adult establishment would be a deterrent to them. If there was an opportunity to rent to, say, a major fast food chain, which <u>might</u> be willing to locate on Eighth Avenue, in such a case, he was sure that concessions or sweeteners would have to be offered in the form of sharing in increased insurance costs, or in offering lower-priced rentals.

On the other hand, new area business and long-term owners both said that there is much improvement in Times Square and that its new identity as a center for corporations, entertainment, and tourism will continue to make it attractive to investment from all over the world. Because of the extraordinary pedestrian traffic, it can and will attract major retailers, and it is important that this trend not be deterred by the concentration of porn theatres, strip clubs, and adult video stores.

Theatre Owners

Interviews were held with high executives of the three major legitimate theatre organizations. All were very emphatic about the deleterious effects of the presence of adult use stores near their theatres and in the neighborhood in general. They stated that these uses "scare away audiences", and were not good for business. One respondent believed that one of his well-equipped and otherwise competitive theatres could not compete for bookings because of its location near 42nd Street's porn strip. That is, he could not obtain rentals for productions, and was forced to create projects of his own to keep the theatre from staying dark.

All three, including the owner of that theatre, mentioned the direct negative effects of the presence of an adult use establishment right next door to the Martin Beck Theatre. Despite the fact that this theatre now houses a musical hit, the owners describe complaints from patrons about the adjacent sex establishment. Complaints were voiced about the "unpleasant" atmosphere on the western edge of the streets on which their theatres were sited, West Forty Fourth Street and West Forty Seventh Street.

One respondent, with a more than twenty year history of theatre operation in the area, was unequivocal in his view that the presence of these establishments hurt business. From the days of massage parlors in the 1970s to the video stores of today and the resurgence of topless dancing establishments, there has been a continuing pattern of deterioration of facades, sidewalks, and blockfronts--a pattern damaging to theatregoing. He believed that low-level drug dealing and prostitution could be linked to the presence of these adult entertainment places, and that the presence of even one such store on a street is negative.

The other two theatre executives believe that the more concentration of porn businesses you have, the more it hurts property values. While they did express concern for free speech considerations, they were all quite critical of the negative effects of the appearance of these stores, which they say contributes to blight.

These exhibitors asserted that Broadway theatre and restaurant patrons are a class of people who are discouraged by the prospect of walking through pornography-filled streets. The respondent from a nonprofit theatre located in Times Square, not immediately near adult use businesses, did not express major problems or complaints related to such places. He recognized, however, that many of his patrons parked their cars west of Eighth Avenue, and that many of his promotions included dining on Restaurant Row, but he cited no specifically perceived negative effects.

The theatre owners stated that the incidence of crime has declined in the Times Square area, and that the area is cleaner and safer, its negative raffish image has improved markedly. But they were concerned about Eighth Avenue, about vacant stores, and about uses such as porn stores that were incompatible with theatregoers.

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Restaurants

We interviewed seven respondents, representing eight variously-priced restaurants and chains in the Times Square area. Two were located on 46th Street's Restaurant Row, two on Eighth Avenue, and three elsewhere in Times Square. One restaurateur was also a building owner.

All of the respondents believed, in general, that the presence of the adult use establishments was not good for their business. One of the owners was not at all affected, he said, by the adult businesses, because the block on which his restaurants were located was free of such uses. But although this restaurant operator had been offered properties on Eighth Avenue as well as on 43rd Street, he said that he would not open restaurants on those sites even if they were free. "My customers want to be entertained, to be in an uplifting environment. My places attract family and friends. I don't want my customers to be put off by the atmosphere."

But the owner of a lower-priced coffee shop on Eighth Avenue who claimed that he sought tourists and local business said that the presence of these businesses made for a "terrible" influence, and that Eighth Avenue was no longer "a very popular area". He said that business is off after 7:30 or 8 at night on this Avenue, compared to business a few years ago.

Another popular restaurant with a substantial core of regular customers who are not bothered by the presence of porn stores said, however, that the restaurant has great difficulty attracting the corporate parties that they have been seeking. They believe that there is a public perception that the area is unsavory, since they have had the experience of attracting potential parties, and then having those potential customers cancel. This manager also expressed concern that tourists may pass her restaurant by because it is sandwiched between pornography establishments.

Three of the restaurant operators described complaints from customers about loitering. The food establishments located on or near Eighth Avenue said that they believed that new porn businesses were relocating from 42nd Street; they also said that the flamboyant advertising of porn stores, even ads seen from across the avenue, had a negative effect on their business.

All these respondents were aware of and complained about drug dealing which they could not directly tie to the adult entertainment ventures, but which they felt were part of the same picture.

Both a small coffee shop owner and the owner of two larger family restaurants expressed their opinion that Times Square remains a promising business growth area and that they intend to stay. But the coffee shop may be forced to move off Eighth Avenue, and would like to unless conditions improve.

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Hotels

The three hotel operators who were part of the interview sample, and the owner of one of the properties--all located along Eighth Avenue--agreed that the dense concentration of adult entertainment venues was a deterrent to their trade.

The owner of a long-standing moderate priced tourist and convention hotel said that there had been a tremendous improvement in conditions in Times Square in the last two or three years. He attributed this to the work of the Police Department and the Times Square Business Improvement District. But this hotel owner continues to have some difficulty attracting airline and corporate business, and the trade shows that it seeks. He described complaints from airline personnel that women among them were verbally assaulted on Eighth Avenue. He said that Times Square is viewed as a "fun area", but that Eighth Avenue is the "seedy side of the district". He also said that he is himself "not a prude", that it is perhaps possible to live with some of these establishments, but that the concentration of them--more than one on every block on Eighth Avenue--is "disgusting and harmful". In sum, this manager of a large hotel said that there is great improvement, but there is still the need to combat sleaze through City action and through pressure on landlords.

An assistant manager of a chain hotel did not see any positive or negative direct effects of porn businesses on his own. But he did observe that prostitution activity seemed to be worse than last year, and he offered the opinion that plainly people do not like to see either that activity or porn establishments when they leave his hotel.

In the interviews with the owner and his lessee of a small hotel franchised by an international chain we heard about the direct effects of porn establishments. Though located on Eighth Avenue, with X-rated movies at the end of the block, they believed that they could attract customers because of their national booking service. But after obtaining their lease, an adult-use store opened right next to the front door of the hotel, and the respondent described many instances of customers having booked rooms through the national office arriving, looking, and cancelling. These customers sometimes took photographs of the adjacent porn store and sent them back to the national booking office. **As a consequence, business is down substantially.** Both owner and manager describe the constant activity of prostitution in front of the porn store and their hotel, and both associate drug dealing and crime with the loiterers attracted to the store.

The owner had the opportunity to acquire and rent the adjacent store. He could have rented to adult use businesses, he said, but refused. He claimed that the adult use is paying a much higher, above market rent than what the previous owner or any non-pornographic business would pay for that space. He also said that "I am certain that there are illegal activities in the back room [of the store]. The rent is too high to be sustained by the sales." Both men expressed concern about a store across the Avenue that had been vacant for a year and a half, and feared it would be rented for adult entertainment use.

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Retailers

The five merchants interviewed had all been in business in the area for many years. Four are family-owned businesses which also own the buildings in which they operate. Three of the businesses are industry wholesalers, destination markets, and local service stores.

Two of the interview respondents saw no particular effects of the presence of adult use establishments on their own specific businesses. Both of these condemned the presence of drug and crack dealers in the vicinity. One of these two said that he knew the manager of a gay movie theatre across the Avenue and considered him a neighbor trying to do business.

Another interviewee felt differently, that conditions brought about by the porn businesses were pretty bad, negatively affecting rents. Though he said he was as concerned about the First Amendment as anyone, and "did not consider myself a saint", he did say that the people who hang out in front of these establishments are unsavory and are involved in petty street crime. He feels that the presence of such stores hurts the perception of Times Square as a place of entertainment and business. He had become optimistic about Times Square's future in the last years, but now found himself worried about the increase in the number of adult use stores on Eighth Avenue, and the consequent security and safety problems. Nevertheless, he plans to continue doing business in the area where his family has been since 1935, and would consider expanding into more space in an industrial or commercial building west of Eighth Avenue.

A liquor store owner said that his real living is from the residential and business trade in the area and he does not welcome the presence of the adult use stores. He is convinced that they are associated with street drug dealing, and claims to have observed known dealers in video stores many times per day. He believes that they frequent these places--which otherwise seem to be doing very little trade--because the video dealers are tied into the crack-selling business. **That owner and a manager of a store owned by a family which has been doing business in Times Square for ninety years expressed great concern about vacant stores, high rents that only the porn operators can afford, and loiterers who interfere with customers.**

Community Residents and Organizations

In the greater Times Square neighborhood there are eight block associations, approximately seven public schools, and about fifteen churches, six of them within the BID boundaries.

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Block Associations

Of eight known block associations in the area west of Eighth Avenue, we interviewed representatives of five. All the respondents described the negative impact of the concentration of adult use businesses for both the residential and commercial communities. They all said that they believed and observed that these uses are negative in their effects because they attract loiterers, drug dealers, prostitutes, and their customers. Four of the block association leaders said that adult use establishments drive out legitimate businesses, and they deplored the recent loss of a stationery store and a drycleaners which had been replaced by adult entertainment businesses.

All five representatives said they had been directly affected by the presence of adult use establishments on their blocks, and indirectly, by the presence of groups of prostitutes who congregate in front of the establishments on Eighth Avenue, and also onto the side streets. They linked this prostitution activity to Eighth Avenue itself, but they acknowledge the presence of prostitution and drug dealing on other avenues to the west. Four of these respondents had made complaints to owners or operators of adult use establishments about their displays and about loitering. One had not. The same four had also complained to the Police, Midtown Enforcement, and the Community Board.

On the question of the scope of the area impacted by an adult use business, four of the respondents believed that the impact was neighborhood-wide, by which they mean that the image of the entire area is tarred: "It erodes the neighborhood's self-esteem." In terms of the impact of any single adult entertainment location, two believed that such impact extends across a street or avenue, and one believed that it extended more than five hundred feet. All respondents commented on the appearance of the stores; some called them aesthetically unpleasing and garish, obtrusive and tawdry, and disturbing to children. Some felt that the appearance of adult movie theatres was somewhat less disturbing than that of other adult businesses, and others complained that the covered, blanked-out windows of adult bookstores were forbidding and repellent.

These community interviewees believe that drugs and drug-related criminal activities constitute the number one issue for neighborhood residents, prostitution activity a close second, and the presence of pornography establishments was rated as third.

Another theme for longer-time residents was the belief that there had been many signs of renewal and community health in the Times Square area in recent years, but that the arrival of new adult use businesses, vacant stores, and resultant increases in drug activity were now posing new threats to community stability. These respondents viewed themselves as part of a working- and middle-class community in Clinton, adjacent to the commercial Times Square, and fighting to preserve the residential character of their home blocks.

Community Boards Four and Five

Community Board Five covers the Times Square area and reaches through most of the BID district to the east side of Eighth Avenue. Board Four covers the west side of Eighth Avenue, the Clinton residential and manufacturing communities to the west, as well as the Chelsea community to the south, where there has also been a recent increase in the presence of adult establishments.

We interviewed the District Manager and the Co-Chair of the Public Safety Committee of Board Four, and the Assistant District Manager and Co-Chair of the Public Safety Committee of Board Five. All four told of an increase in complaints and concern being directed to the Boards over the past two years. For Board Four, many of the complaints focused on the area along Sixth Avenue in Chelsea, as well as on the area just south of the BID boundaries, on Eighth Avenue. There were specific complaints about particular establishments, including the documenting of criminal activity along Sixth Avenue, along Eighth Avenue south of the BID, and at Forty Sixth Street and Eighth Avenue.

In terms of effects, one representative may have summed up the feeling by saying that the presence of these businesses makes "people feel that my neighborhood is no longer my own: people who are apolitical begin to organize against these stores." Another said "the block is taken away from the residents, you can't walk down the street. Other people who use the street to walk or shop cross over or avoid these businesses."

All these respondents described instances of loitering, late-night drinking, and, in the case of some establishments, documented criminal activity. Yet, because these activists also had experience with the negative impacts of non-pornographic bars and discos as well, they did state that perhaps every establishment had to be judged on its own effects on a block or a community. If any of these users could be good neighbors, if they could blend in with the community, then perhaps some could be tolerated. **But they also said that the experience has been that if there is one establishment, then others follow, leading to an unacceptable concentration of adult use stores.** This is what has occurred in Chelsea, and this is the case on Eighth Avenue. When there comes to be "a critical mass" and when the stores are poorly run, the area becomes a point of attraction for all sorts of undesirable activities.

These informants expressed their concern about impacts on their residential communities, but they also saw their interests linked to the prosperity of the theatre community in Times Square, for example, and to the continuing growth of other businesses in Clinton and Chelsea.

Schools

We were able to interview representatives of two public schools in the area, Public School 111, and Park West High School. They decried the proliferation of adult entertainment stores in general, and stated that they did not want young people to grow up assuming that "the sleazy image" provided by these stores is the norm. "Why throw this at children before they are ready?" They also expressed concerns about prostitution and drug dealing in the area, which, together with the presence of the porn stores, contributes to the negative image of the Times Square and Clinton areas. One representative had recently made specific complaints about a nude bar opposite the back of the school building, and had worked with the Community Board to lessen the effects and even, unsuccessfully, to close that bar.

Social Service Organizations

Three interviews were held with 1) the executive director of an organization providing residential and service needs for older citizens, 2) the executive director of a multi-service settlement house, and 3) the executive director of an AIDS project. A fourth, more informal conversation was held with the executive director of an organization serving the homeless.

Two of these respondents observed that the presence of adult entertainment businesses has a negative effect on the area. The settlement house leader said that the families and children she serves try to avoid Eighth Avenue, and the senior service representative believed that their ability to attract viable commercial tenants for their retail rental space was being hurt.

The AIDS organization representative asserted that pornography may be okay for some, but may be linked to drugs and prostitution because there is also commercial sex taking place in and around these establishments. He believes that there is a double standard prevailing, in that not enough is being done to combat drug dealing, prostitution, and the spread of AIDS. Each of these interviewees was concerned about the negative image of Times Square that may be fostered by the presence of the porn businesses and their ancillary activities.

The respondent from the homeless agency described the presence of a scantily dressed woman dancing on the street and distributing flyers for a newly-opened business one block south of the BID boundaries. This new business is on the same block as the outreach ministry of a church, and very close to the two residences for homeless adults run by her organization. She stated that she is working with people who are "trying to get their lives together" and she found the presence of these establishments not helpful. The three executive directors believed that the appearance and exterior displays were "embarrassing", "seamy", and "seemed to be violent".

As to the issues and problems facing the neighborhood and Times Square, all three mentioned drug dealing and prostitution, and two spoke of the negative effects of street crime, even if they were only perceived effects. All three said that Times Square is and should be a place of entertainment and tourism, but that there was a difference between this and sleaze. One person also mentioned that the stalled 42nd Street development and the empty buildings had "deadened" the block. She was also concerned about the decline of neighborhood service stores, needed by seniors and families living in the area.

Religious Organizations

Six church representatives were interviewed, one of whom had been in the area only a few months while the others had been working in the Times Square area for many years. While these people all decried the content of the advertising at adult use businesses, their image of women, and the negative effects of their existence, their true complaints were directed at the ancillary activities or effects that they insist were the inevitable result of the businesses' presence. Each of these members of the clergy spoke about the prevalence of prostitution activity. Many knew who these prostitutes were, and were concerned about the violence they had observed, women being beaten and other violent incidents associated with the selling of sex on the street.

They all stated that the presence of these stores attracted people who, as one put it, "are involved in some sort of scam". That is, the stores attract hangers-on, street people who engage in gambling, drug dealing, as well as groups of men looking for sex, and women, men, and boys selling sex. Three of these interviewees acknowledged that there is also a great deal of prostitution west of Eighth Avenue where there are no adult entertainment spots.

Clergy spoke of themselves and their parishioners being accosted by prostitutes; one described an attempt by a prostitute to pick his pocket as he walked his dog on Eighth Avenue. One church leader believed that people come from all over the world to patronize the pornography establishments in the area, but three others said that they did not believe that tourists came to Times Square for this purpose. Instead, they maintained that it was difficult for tourists to make their way past the sleaze of Eighth Avenue.

These church people, like the community residents, spoke of a feeling that things had been improving in their community until the most recent influx of additional adult entertainment businesses. In some respects they welcomed what they saw as the improved image of Times Square, and praised the work of the BID. But their major issue, above all others, remains the drug problem, and resultant street crime, which they see as the scourge of the entire community.

SOME ADDITIONAL TESTIMONY

During the course of this study, in addition to the interviews that made up the formal survey, we received or had passed along to us from time to time written communications from various individuals who live or work in the Times Square area. Some of these are sampled below:

, Proprietor, - Restaurant:
(March 1, 1994)

I am a new business owner on West 47th Street between Broadway and Eighth Avenues. We opened our doors at on October 7, 1994 [sic, 1993?]. Our restaurant occupies the space of the old Delsomma Restaurant. During these four months we have seen BID's work in the neighborhood evident in the painting of storefront gates, removal of bills posted on abandoned buildings, helpful clean-up crews and ever so accommodating security people. Unfortunately, we have also noticed the opening of four new adult video stores in a two-block stretch between 46th and 48th Streets on Eighth Avenue. While I have never seen any of them with more than two customers inside, the element of underground business they attract is atrocious, namely prostitution, drug dealing and loitering. Since their customers are few they obviously generate their income in some other unobvious manner.

While the owners of the adult video stores have a civil right to earn a living, I am opposed to its impact on the neighborhood and would like to know what I can do to protect the area from similar new business and discourage store owners from operating in the area. Not only does it hurt the area's legitimate businesses but we must remember there are several high schools in the area whose students should not be exposed to these activities.

Thomas K. Duane, Councilmember:
(Letter to the owner of 320 West 45th Street, now occupied by an adult entertainment business, December 23, 1993)

As you may be aware, "Private Eyes" joins the growing list of adult uses (i.e. adult video stores and topless/bottomless dance clubs) in the Clinton neighborhood of Manhattan. Red Zones in other American cities have caused dramatic increases in crime and negatively impacted the local economy. While you may gain short-term economic benefits from renting out your property to an adult use, you also will be creating a negative economic climate for your own property.

You should also be aware that your property is directly across the street from a residentially zoned property filled with families and young children. Moreover, the City Council has been considering legislation which would illegalize adult uses within 500 feet of residentially zoned property. "Private Eyes" would clearly be illegal if such legislation were to pass.

The Block Associations in Clinton have been working long and hard to make their streets safer and drug-free. Renting your property to an adult use such as "Private Eyes" undermines their hard work and significant achievements.

I am aware the Community Board #4 has offered to assist you in identifying a more appropriate use for 320 West 45th Street. I urge you to accept the board's offer. I would be more than happy to provide assistance from my office as well.

The West 45th Street Block Association:
(Letter to Community Board 4, March 4, 1994)

...The "Private Eyes" adult nightclub at 320 W. 45th St. has become a continuous cause of concern and frustration among block residents. Although the club may be in technical compliance with various laws, little by little, Private Eyes has created conditions that cheapen the quiet ambiance of this mostly residential block, adversely affect our quality of life and attract elements (both patrons and non-patrons) who continually disturb the peace.

...

"No Parking" was established on this block several years ago to discourage loitering around parked cars. By allowing (or encouraging) patrons to disregard parking regulations, conditions are created for late night crowds and disturbances.

Indeed, we've noticed a distinct increase in Private Eyes patrons hanging out and milling around parked cars -- late at night usually between 2 and 4 a.m.. These patrons are often inebriated, rowdy and shouting, blowing car horns and in at least one instance they have even tried to overturn a car. A side effect is that car alarms tend to go off frequently.

This late-night congregating in front of the club happens again and again. These people do not live here or have any respect for block residents. And whether by design or happenstance, the club attracts certain non-patrons detrimental to the block. Street prostitution and drug dealing has increased.

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...

Almost every night, Private Eyes has employees handing out advertising flyers on the corner of Eighth Avenue and 45th Street. Although we're cognizant of first amendment rights (which don't necessarily apply to commercial advertising),these pamphleteers tend to block a very busy corner, attract drug dealers and cause litter (from their discarded handouts).

...

We must relate that this is a residential block with approximately 2,000 apartments. This is not a problem of morals, but the presence and behavior of Private Eyes directly and adversely reduces whatever quality is left on this block. From various buildings, we've heard residents complain of being woken up in the middle of the night, others who claim they're afraid to go into their own building if blocked by dealers, crack addicts or other scurrilous characters.

Aside from a few storefront businesses, the Martin Beck Theatre is the only Broadway theatre west of 8th Avenue, bringing onto our block around 2,000 tourists every night and a portion of the $2.3 Billion revenue of the theatre industry. The conditions created by Private Eyes may not directly affect that revenue, but surely tourists are in increased danger and may leave our city with a foul impression.

Ross Graham and Timothy Gay, Chairperson and Committee Chairperson of Community Board #4:

(August 16, 1993)

Re: the building at the northwest corner of 46th St. and 8th Avenue:

Community Board No. 4 understands that the property you own at the above location is being renovated to possibly accommodate a multi-floor adult entertainment center, or, in other words, a "porn palace."

Community Board No. 4 is on record as opposing a concentration of adult entertainment businesses in any specific neighborhood. Store fronts along Eighth Avenue in the 40s are quickly being turned into pornographic video and literature outlets, and several theaters specialize in adult movies and live entertainment.

The "porno palace" appears to be the first proposed multi-level facility of its kind in the neighborhood.

However, you should know that each of the 300 Blocks from West 43rd to West 59th Street is residential. West 45th, 46th (your corner), 47th and 48th Streets are especially residential with active block associations, and West 46th Street, as you know, is Restaurant Row. A number of

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legitimate Broadway, off-Broadway, and off-off-Broadway theaters operate within a few blocks, as well as businesses ranging from major law firms (at Worldwide Plaza) to child care centers. Junior High School 17, with more than 700 children, is located a half a block away, on West 47th Street between 8th and 9th Avenues. In addition, your proposed "porno palace" is within 100 feet of a church.

Community Board No. 4 strongly urges you to reconsider the proposed use of your building.

Rowan Murphy, Assistant Director of Common Ground Community (CGC), operator of The Times Square, an affordable housing program in what was formerly the Times Square Hotel at 25 W. 43 Street:

(Testimony before Manhattan Borough President's hearing, October, 1993)

...CGC acquired The Times Square in March of 1991. At that time, there was one adult use establishment on the south side of W. 43rd Street, across from our building. The block, at that time, had a growing reputation as a "safe corridor," as the result of intensive efforts by the Mayor's Office of Midtown Enforcement, Midtown South, and local businesses to increase community policing and security awareness. In September of '92, two additional adult use establishments opened, the 24-hour "Playpen" and "Malebox" located directly across from our front entrance.

For the 364 individuals who live at The Times Square, and our staff, this concentration of uses has meant a steadily deteriorating quality of life on 43rd Street. Before the Malebox and Playpen opened, tenants could enjoy sitting in the lobby or mezzanine during the evening, strolling to the corner for coffee or lingering on the steps for some fresh air. Now, the street is a gathering place for prostitutes and others involved in illegal activities.

Patrons for the adult use establishments harass and intimidate our elderly tenants, in particular. Patrons use our service entrance as a urinal on a regular basis. Our security staff is hassled when attempting to keep our entrance clear of loiterers from these establishments. The street is now ugly and intimidating at night, discouraging use of the lobby and mezzanine by our tenants and creating noise problems for tenants living at the front of the building overlooking 43rd Street.

The concentration of adult uses on West 43rd Street gives the block a very different appearance and feeling than it had when a single establishment existed there.

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... [T]he density of adult uses, the disruptions they create, and the sordid street activity they attract have been major negative factors for those evaluating our building as a place to live. The majority of the applicants who decline acceptance at our building described their main reason for doing so as concern about the safety and quality of life on the block.

Public Nuisance and Public Health Problems: The Adonis Theatre

In January, 1994, the New York City Department of Health obtained a temporary closing order from the New York State Supreme Court,shutting down the Adonis Theatre, located at 693 Eighth Avenue, near 44th Street. This action was brought under the New York City Administrative Code, the State Sanitary Code and the Penal Law, in order to restrain a public nuisance at the premises and to stop acts of individuals which were detrimental to health and which are considered to be high risk sexual activity. This action was brought as part of the City's continuing effort to help control the spread of the AIDS virus. High risk sexual activities were observed by inspectors on nine visits to the Adonis Theatre over a four month period involving at least 95 individuals. The Court papers stated, "All incidents were seen in open areas. The management of the Adonis Theatre must obviously be aware--or must vigorously shield itself from knowledge--of all this high risk activity that is plainly visible to casual and occasional outside inspectors."

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APPENDIX

The Department of City Planning Secondary Effects Study

The Department of City Planning is currently undertaking a study of secondary impacts of adult use establishments in six other locations in New York City. The Department compares assessed values but for the years 1986/7 and 1992/3. Comparing our findings for our years to their selected years, we found that the trends remained the same, but in somewhat different proportions: the difference between assessed valuation rates of change for 1986/7 and 1992/3 was less for the Eighth Avenue study block and the Ninth Avenue control block than for the years of 1985/6 and 1993/4, and the difference was greater for the "DCP years" of 1986/7 and 1992/3 as compared to our years of 1985/6 and 1993/4. These differences in findings may be related to the selection of different years in the real estate "boom and bust" cycle.

For both sets of data, the increases in assessed valuations occurred at a higher rate on the "control" blocks" on which there were no adult use establishments, than on the "study" blocks, on which there were adult use concentrations. We are not asserting a simple cause-and-effect relationship here. There are too many variables--zoning, market trends, public condemnation proceedings for the 42nd Street Development Project, personal decisions by owners--that may affect assessed values--in addition to the presence of adult uses.

REPORT OF THE ATTORNEY GENERAL'S WORKING GROUP ON THE REGULATION OF SEXUALLY ORIENTED BUSINESSES

June 6, 1989

HUBERT H. HUMPHREY, III
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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

SUMMARY

The Attorney General's Working Group on the Regulation of Sexually Oriented Businesses makes the following recommendations to assist communities in protecting themselves from the adverse effects of sexually oriented businesses. Some or all of

these recommendations may be needed in any given community. Each community must decide for itself the nature of the problems it faces and the proposed solutions which would be most fitting.

1. City and county attorneys' offices in the Twin Cities metropolitan area should designate a prosecutor to pursue obscenity prosecutions and support that prosecutor with specialized training.

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

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

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

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

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

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

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

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

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

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

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

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

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

IMPACTS OF SEXUALLY ORIENTED BUSINESSES

The Working Group reviewed evidence from studies conducted in Minneapolis and St. Paul and in other cities throughout the country. These studies, taken together, provide compelling evidence that sexually oriented businesses are associated with high crime rates and depression of property values. In addition, the Working Group heard testimony that the character of a neighborhood can dramatically change when there is a concentration of sexually oriented businesses adjacent to residential property.

Minneapolis Study

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

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

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

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

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

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

St. Paul

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

1. There is a statistically significant correlation between the location of adult businesses and neighborhood deterioration.

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2. Adult entertainment establishments tend to locate in somewhat deteriorated areas.

3. Additional relative deterioration of an area follows location of an adult business in the area.

4. There is a significantly higher crime rate associated with two such businesses in an area than is associated with only one adult business.

5. Housing values are also significantly lower in an area where there are three adult businesses than they are in an area with only one such business.

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

Indianapolis

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

The Study found the following:

1. The appraisers overwhelmingly (80%) felt that an adult bookstore located in a neighborhood would have a negative impact on residential property values within one block of the site.

2. The real estate experts also overwhelmingly (71%) believed that there would be a detrimental effect on commercial property values within the same one block radius.

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3. This negative impact dissipates as the distance from the site increases, so that most appraisers believed that by three blocks away from an adult bookstore, its impact on property values would be minimal.

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

1. Major crimes, such as criminal homicide, rape, robbery, assault, burglary, and larceny, occurred at a rate that was 23 percent higher in those areas which had sexually oriented businesses.

2. The sex-related crime rate, including rape, indecent exposure, and child molestation, was found to be 77 percent higher in those areas with sexually oriented businesses.

Phoenix

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

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

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

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

Los Angeles

A study released by the Los Angeles Police Department in 1984 supports a relationship between sexually oriented businesses and rising crime rates. This study is less definitive, since it was not designed to use similar areas as a control. The study indicated that there were 11 sexually oriented adult establishments in the Hollywood, California, area in 1969. By 1975, the number had grown to 88. During the same time period, reported incidents of "Part I" crime (i.e., homicide, rape, aggravated assault, robbery, burglary, larceny and vehicle theft) increased 7.6 percent in the Hollywood area while the rest of Los Angeles had a 4.2 percent increase. "Part II" arrests (i.e. forgery, prostitution, narcotics, liquor law violations, and gambling) increased 3.4 percent in the rest of Los Angeles, but 45.4 percent in the Hollywood area.

Concentration of Sexually Oriented Businesses Neighborhood Case Study

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

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

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

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

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

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

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

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and under the present circumstances becomes available to minors even though its sale to minors is prohibited.

Testimony

The Working Group heard testimony that a concentration of sexually oriented businesses has serious impacts upon the surrounding neighborhood. The Working Group heard that pornographic materials are left in adjacent lots. One person reported to the police that he had found 50 pieces of pornographic material in a church parking lot near a sexually oriented business. Neighbors report finding used condoms on their lawns and sidewalks and that sex acts with prostitutes occur on streets and alleys in plain view of families and children. The Working Group heard testimony that arrest rates understate the level of crime associated with sexually oriented businesses. Many robberies and thefts from "johns" and many assaults upon prostitutes are never reported to the police.

Prostitution also results in harassment of neighborhood residents. Young girls on their way to school or young women on their way to work are often propositioned by johns. The Flick theater caters to homosexual trade, and male prostitution has been noted in the area. Neighborhood boys and men are also accosted on the street. A police officer testified that one resident had informed him that he found used condoms in his yard all the time. Both his teenage son and daughter had been solicited on their way to school and to work.

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

> fashion with organized crime either the mafia or some other facet of non-mafia never-the-less highly organized crime.

Id. at 1047-48.

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

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

The Pornography Commission was told by Jimmy Fratianno, described by the Commission as a member of LCN, "that large profits have kept organized crime heavily involved in the obscenity industry." Id. at 1052. Fratianno testified that "95% of the families are involved in one way or another in pornography. . . . It's too big. They just won't let it go." Id. at 1052-53.

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

The Pornography Commission reported that Michael George Thevis, reportedly one of the largest pornographers in the United States during the 1970's was convicted in 1979 of RICO (Racketeer Influenced and Corrupt Organizations) violations including murder, arson and extortion. The Commission also reported examples of other crimes associated with the pornography industry, including prostitution and other sexual

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abuse, narcotics distribution, money laundering and tax violations, copyright violations and fraud. Id. at 1056-65.

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

The California Department of Justice recently reported that:

> California's primacy in the adult videotape industry is of law enforcement concern because the pornography business has been prone to organized crime involvement. Immense profits can be realized through pornography operations, and until recently, making and distributing pornography involved a relatively low risk of prosecution. But more aggressive law enforcement efforts and turmoil within the pornography business has destabilized the smooth flow of easy money for some of its major operations . . . .
>
> As long as control over pornography distribution is contested, and organized crime figures continue their involvement in the business, the pornography industry will remain of interest to law enforcement officials statewide.

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

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

For example, Reuben Sturman, a leading pornography industry figure based in Cleveland, was reported by the FBI in 1978 to have built his empire with the assistance of LCN member DiBernardo. Federal Bureau of Investigation Report Regarding the

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Extent of Organized Crime Involvement in Pornography (1978). Sturman, who reportedly controls half of the $8 billion United States pornography industry, was recently indicted by a federal grand jury in Las Vegas for racketeering violations and by a federal grand jury in Cleveland for income tax evasion and tax fraud. Newsweek, August 8, 1988, p. 3.

Evidence of the vulnerability of sexually oriented businesses to organized crime involvement underscores the importance of criminal prosecution of these businesses when they engage in illegal activities, including distribution of obscenity and support of prostitution. Prosecution can increase the risk and reduce the profit margin of conducting illegal activities. It may also disclose organized crime association with local pornography businesses and increase the costs of criminal enterprise in Minnesota.

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

PROSECUTORIAL AND REGULATORY ALTERNATIVES

The regulation of many sexually oriented businesses, like other businesses dealing in activity with an expressive component, is circumscribed by the First Amendment of the United States Constitution.3/ Nonetheless, the First Amendment does not impose a barrier to the prosecution of obscenity, which is not protected by the First Amendment, or to reasonable regulation of sexually oriented businesses if the

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3/ The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, or to petition the government for a redress of grievances.

The constitutional guarantee of freedom of speech, often the basis for challenges to regulation of sexually oriented businesses, restricts state as well as federal actions. See, e.g., Fiske v. Kansas, 274 U.S. 380, 47 S. Ct. 655 (1927).

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regulation is not designed to suppress the content of expressive activity and is sufficiently tailored to accomplish the regulatory purpose.

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

I. OBSCENITY PROSECUTION

Obscene material is not protected by the First Amendment. Miller v. California, 413 U.S. 15, 93 S. Ct. 2607 (1973). The sale or distribution of obscene material in Minnesota is a criminal offense. The penalty was recently increased to up to one year in jail and a $3,000 fine for a first offense, and up to two years in jail and a $10,000 fine for a second or subsequent offense within five years. Minn. Stat. § 617.241, subd. 3 (1988).4/

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

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

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

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

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

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

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

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

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

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

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

Sears, "How To Lose A Pornography Case," The CDL Reporter (n.d.).

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

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

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successful programs of obscenity prosecution.6/ The Working Group encourages prosecutors to take advantage of increasing training opportunities and other assistance for obscenity prosecutions and to reassess the desirability of increased enforcement. The Working Group is pleased to note that county attorneys and law enforcement groups in Minnesota have recently held forums and seminars on obscenity law enforcement and prosecution. The U.S. Justice Department's National Obscenity Enforcement Unit offers assistance to local prosecutors, including sample pleadings, indictments, search warrants, motions, responses and trial memoranda.7/

RECOMMENDATIONS

1. City and county attorneys' offices in the Twin Cities metropolitan area should designate a prosecutor to pursue obscenity prosecutions and support that prosecutor with specialized training.

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

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

7/ The Address of the National Obscenity Enforcement Unit is U.S. Justice Department, 10th & Pennsylvania Ave. N.W., Room 2216, Washington, D.C. 20530. Its telephone number is 202-633-5780. Assistance is also available from Citizens for Decency through Law, Inc., 2845 E. Camelback Rd., Suite 740, Phoenix, AZ 85016. It is the publisher of "The Preparation and Trial of an Obscenity Case: A Guide for the Prosecuting Attorney." Its telephone number is 602-381-1322. The National Obscenity Law Center, another private organization, is located at 475 Riverside Drive, Suite 236, New York, N.Y. 10115. It publishes an Obscenity Law Bulletin and the "Handbook on the Prosecution of Obscenity Cases." Its telephone number is 212-870-3216.

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

4. Obscenity prosecutions should concentrate on cases that most flagrantly offend community standards.

II. OTHER LEGAL REMEDIES

A. RICO/FORFEITURE

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

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

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

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

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

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

> [F]or the purposes of disposing of this case, we assume without deciding that bookstores and their contents are forfeitable (like other property

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> such as a bank account or yacht) when it is proved that these items are property actually used in, or derived from, a pattern of violations of the state's obscenity laws.

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

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

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

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

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

RECOMMENDATIONS

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

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

B. NUISANCE INJUNCTIONS

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

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

from application of New York State nuisance law designed in part to close places of prostitution).

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

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

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

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

The Court's recent holdings in Sappenfield and Fort Wayne Books, Inc. give no indication that the Court would now look more favorably upon an injunction to close down a facility which sold obscene materials. The Court assumed without deciding that forfeiture of bookstore assets could be constitutional in a RICO case. But, in making this assumption, the Court distinguished forfeiture of assets under RICO from a general restraint on presumptively protected speech. The court approved the reasoning of the Indiana Supreme Court that, "The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather tc disgorge assets acquired through racketeering activity." Fort Wayne Books, Inc. at 4185. The Court assumed that RICO provisions could be upheld on the basis that

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"adding obscenity-law violations to the list of RICO predicate crimes was not a mere ruse to sidestep the First Amendment." Id. Without the relationship to proceeds of crime, a remedy which closed a facility for obscenity violations would be far less likely to withstand constitutional scrutiny.

RECOMMENDATIONS

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

III. ZONING

Zoning ordinances can be adopted to regulate the location of sexually oriented businesses without violating the First Amendment. Such ordinances can be designed to disperse or concentrate sexually oriented businesses, to keep them at designated distances from specific buildings or areas, such as churches, schools and residential neighborhoods or to restrict buildings to a single sexually oriented usage. Because zoning is an important regulatory tool when properly enacted, the Working Group believes a careful explanation of the law and a review of potential problems in drafting zoning ordinances may be helpful to communities considering zoning to regulate sexually oriented businesses.

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A. Supreme Court Decisions

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

In Young, the Court upheld the validity of Detroit ordinances prohibiting the operation of theaters showing sexually explicit "adult movies" within 1,000 feet of any two other adult establishments.9/ The ordinances authorized a waiver of the 1,000-foot restriction if a proposed use would not be contrary to the public interest and/or other factors were satisfied. Young, supra, 427 U.S. at 54 n.7, 96 S.Ct. at 2444 n.7. The ordinances were supported by urban planners and real estate experts who testified that concentration of adult-type establishments "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere." Id. at 55, 96 S.Ct. at 2445. A "myriad" of locations were left available for adult establishments outside the forbidden 1,000-foot distance zone, and no existing establishments were affected. Id. at 71 n.35, 96 S.Ct. at 2453 n.35.

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

8/ The only reported Minnesota court case reviewing an adult entertainment zoning ordinance is City of St. Paul v. Carlone, 418 N.W.2d 129 (Minn. Ct. App. 1988) (upholding facial constitutionality of St. Paul ordinance).

9/ The ordinances also prohibited the location of an adult theaters within 500 feet of a residential area, but this provision was invalidated by the district court, and that decision was not appealed. Young v. American Mini Theaters, Inc., 427 U.S. 50, 52 n.2, 96 S.Ct. 2440, 2444 n.2 (1976).

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

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

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

Perhaps because Justice Stevens' plurality opinion did not offer a clearly articulated standard of review, post-Young courts often applied the O'Brien test advocated by Justice Powell in his concurring opinion. Many ordinances regulating sexually oriented businesses were invalidated under the O'Brien test. See R.M. Stein, Regulation of Adult Businesses Through Zoning After Renton, 18 Pac. L.J. 351, 360 (1987) ("consistently invalidated"); S.A. Bender, Regulating Pornography Through Zoning: Can We 'Clean Up' Honolulu? 8 U. Haw. L. Rev. 75, 105 (1986) (ordinances upheld in only about half the cases).

Applying Young, the Eighth Circuit Court of Appeals invalidated a zoning ordinance adopted by the city of Minneapolis. Alexander v. City of Minneapolis, 698 F.2d 936 (8th Cir. 1983). In Alexander, the challenged ordinance had three major restrictions on sexually oriented businesses: distancing from specified uses, prevention of concentration and amortization. It prohibited a sexually oriented business from operating within 500 feet of districts zoned for residential or office-residences, a church,

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state-licensed day care facility and certain public schools. It forbade an adults-only facility from operating within 500 feet of any other adults-only facility. Finally, the ordinance required existing sexually oriented entertainment establishments to conform to its provisions by moving to a new location, if necessary, within four years.

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

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

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

allows for reasonable avenues of communication," Rehnquist wrote for the Court. Id. at 50, 106 S.Ct. at 930.

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

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here. Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.

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

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

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

> It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

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

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

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

> That [adult theater owners] must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. . . . In our view, the First Amendment requires only that Renton refrain from effectively denying [adult theater owners] a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

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

B. Standards and Need for Legal Zoning

Unlike Young, the Renton case spells out the standards by which zoning of sexually oriented businesses should be tested. Renton and several lower court decisions rendered in its wake suggest that the two most critical areas by which the ordinances will be judged are 1) whether there is evidence that ordinances were enacted to address secondary impacts on the community, and 2) whether there are enough locations still available for sexually oriented businesses so that zoning is not just a pretext to eliminate pornographic speech.10/

10/ Of 11 recent post-Renton adult-entertainment zoning decisions by federal courts, five invalidated ordinances, three upheld ordinances and three ordered a remand to district court for further proceedings. Zoning ordinances were struck in Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1987)(city council failed to offer

(Footnote 10 Continued on Next Page)

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

1. Documentation to Support Zoning Ordinances

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

Since Renton, a number of adult entertainment zoning ordinances have been invalidated for failure of the enacting body to document the need for zoning regulations. Thus, one court invalidated a zoning ordinance because there was "very little, if any, evidence of the secondary effects of adult bookstores . . . before the City Council . . . ."

(Footnote 10 Continued from Previous Page)
evidence suggesting neighborhood decline would result); Tollis, Inc. v. San Bernadino County, 827 F.2d 1329 (9th Cir. 1987) (no evidence presented to legislative body of secondary harmful effects); Ebel v. Corona, 767 F.2d 635 (9th Cir. 1985) (lack of effective alternative locations); 11126 Baltimore Boulevard, Inc. v. Prince George's County of Maryland, 684 F. Supp. 884 (D. Md. 1988) (insufficient evidence of secondary effects presented to legislative body; special exception provisions grant excessive discretionary authority to zoning officials); and Peoples Tags, Inc. v. Jackson County Legislature, 636 F. Supp. 1345 (W.D. Mo. 1986) (improper legislative purpose to prevent continued operation of adult-entertainment establishment). Zoning ordinances were upheld in SDJ, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir. 1988); FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir. 1988); and S & G News, Inc. v. City of Southgate, 638 F.Supp. 1060 (E.D. Mich. 1986), aff'd without published opinion, 819 F.2d 1142 (6th Cir. 1987). Remands were ordered in Christy v. City of Ann Arbor, 824 F.2d 489 (6th Cir. 1987), cert. denied, ___ U.S. ___, 108 S. Ct. 1013 (1988)(remand for determination of excessive restrictions); International Food & Beverage Systems v. City of Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986) (remand for reconsideration in light of Renton, supra; nude bar ordinance), and Walnut Properties, Inc. v. City of Whittier, 808 F.2d 1331 (9th Cir. 1986) (remand, in part, for determination of land availability).

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11126 Baltimore Boulevard, supra, 684 F. Supp. at 895; see also Tollis v. San Bernadino County, 827 F.2d 1329, 1333 (9th Cir. 1987) (ordinance construed to prohit single showing of adult movie in zoned area; invalidated for failure to present evidence of secondary effects of single showing); but see Thames Enterprises v. City of St. Louis, 851 F.2d 199, 201-02 (8th Cir. 1988) (observations by legislator of secondary effects sufficient).

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

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

2. Availability of Locations for Sexually Oriented Businesses

Courts also evaluate whether zoning of sexually oriented businesses is merely a pretext for prohibition by reviewing the alternative locations which remain for a sexually oriented business to operate under the zoning scheme. A municipality must "refrain from effectively denying . . . a reasonable opportunity to open and operate" a sexually oriented business. Renton, supra, 475 U.S. at 54, 106 S. Ct. at 932.

Access may be regarded as unduly restricted if adult entertainment zones are unreasonably small in area or if the number of locations is unreasonably few. There is no set amount of land or number of locations constitutionally required. The Renton

court found that 520 acres of "accessible real estate," including land "criss-crossed by freeways" -- more than five percent of the entire land area in Renton -- was sufficient. 475 U.S. at 53, 106 S.Ct. at 932. The Young court found the availability of "myriad" locations sufficient. 427 U.S. at 72 n.35, 96 S.Ct. at 2453 n.35.

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

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

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

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3. Distance Requirements

Another factor that may be examined by some courts is the distance requirement established by an adult entertainment zoning ordinance. In SDJ, Inc. v. Houston, 837 F.2d 1268 (5th Cir. 1988), the Court was asked to invalidate a 750-foot distancing requirement on the ground that the city had not proved that 750 feet, as opposed to some other distance, was necessary to serve the city's interest.

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

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

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

The experience with multiple-use sexually oriented businesses at the University-Dale intersection suggests that these businesses have a greater potential for causing neighborhood problems than do single-use sexually oriented businesses. Following Renton, it is suggested that lawmakers document the adverse effects which the

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community seeks to prevent by prohibiting multiple-use businesses before enacting this type of ordinance.

4. Requiring Existing Businesses to Comply with New Zoning

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

The Minnesota Supreme Court has explained the theory this way:

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

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

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

As detailed in the first section of this report (pp. 6-15), there are significant secondary impacts upon communities related to the location of sexually oriented businesses. These impacts are intensified when sexually oriented businesses are located in residential areas or near other sensitive uses and when sexually oriented businesses are concentrated near each other or near alcohol oriented businesses. The Working Group believes that evidence from studies such as those described in the first section of this report and anecdotal evidence from neighborhood residents and police

officers should be used to support the need for zoning ordinances which address these problems.

RECOMMENDATIONS

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

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

3. To reduce adverse impacts from concentration of sexually oriented businesses, communities should adopt zoning ordinances which set distance requirements between liquor establishments and sexually oriented businesses and between sexually oriented businesses and should consider restricting sexually oriented businesses to one use per building.

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

IV. LICENSING AND OTHER REGULATIONS

Licensing and other regulations may also be used to reduce the adverse effects of sexually oriented businesses. The critical requirements which communities must keep

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

It is clear that failure to act upon a license application for a sexually oriented business cannot take the place of regulation. Without justification, denial or failure to grant a license is a prior restraint in violation of the First Amendment. Parkway Theater Corporation v. City of Minneapolis, No. 716787, slip. op. (Henn. Co. Dist. Ct., Sept. 24, 1975).

An ordinance providing for license revocation of an adult motion picture theater if the licensee is convicted of an obscenity offense is also likely to be held unconstitutional as a prior restraint of free speech. Alexander v. City of St. Paul, 227 N.W.2d 370 (Minn. 1975). The Alexander court stated:

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

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

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

In Dumas v. City of Dallas, supra, the court reviewed a requirement that a license applicant not have been convicted of certain crimes within a specified period. Five of the enumerated crimes were held to be not sufficiently related to the purpose of the

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adult entertainment licensing ordinance because the city had made no findings on their justification. The invalid enumerated offenses were controlled substances act violations, bribery, robbery, kidnapping and organized criminal activity. The court upheld requirements that the licensee not have been convicted of prostitution and sex-related offenses. Id. at 1074. If a community seeks to require that persons with a history of other crimes be denied licenses, clear findings must first be made which justify denial of licenses on that basis.

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

A number of courts have upheld ordinances requiring that viewing booths in adult theaters be open to discourage illegal and unsanitary sexual activity. See, e.g., Doe v. City of Minneapolis, 693 F. Supp. 774 (D. Minn. 1988).

Licensing provisions and ordinances forbidding massage parlors employees from administering massages to persons of the opposite sex have withstood equal protection and privacy and associational right challenges. See Clampitt v. City of Ft. Wayne, 682 F. Supp. 401, 407-408 (N.D. Ind. 1988) (equal protection); Wigginess, Inc. v. Fruchtman, 482 F. Supp. 681, 689-90 (S.D. N.Y. 1979), aff'd, 628 F.2d 1346 (2d Cir. 1980), cert. denied, 449 U.S. 842, 101 S.Ct. 122. However, some courts have found same-sex massage regulations to be in violation of Title VII of the Civil Rights Act of

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1964. See Stratton v. Drumm, 445 F. Supp. 1305, 1310-11 (D. Conn. 1978); Cianciolo v. Members of City Council, 376 F. Supp. 719, 722-24 (E.D. Tenn. 1974); Joseph v. House, 353 F. Supp. 367, 374-75 (E.D. Va.), aff'd sub nom. Joseph v. Blair, 482 D.2d 575 (4th Cir.), cert. denied, 416 U.S. 955, 94 S. Ct. 1968 (1974). Contra, Aldred v. Duling, 538 F.2d 637 (4th Cir. 1976).

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

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

RECOMMENDATIONS

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

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

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

CONCLUSION

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

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

The Attorney General's Working Group on the Regulation of Sexually Oriented Businesses believes that prosecution, seizure of profits, zoning and regulation of sexually oriented businesses should only be done in keeping with the constitutional

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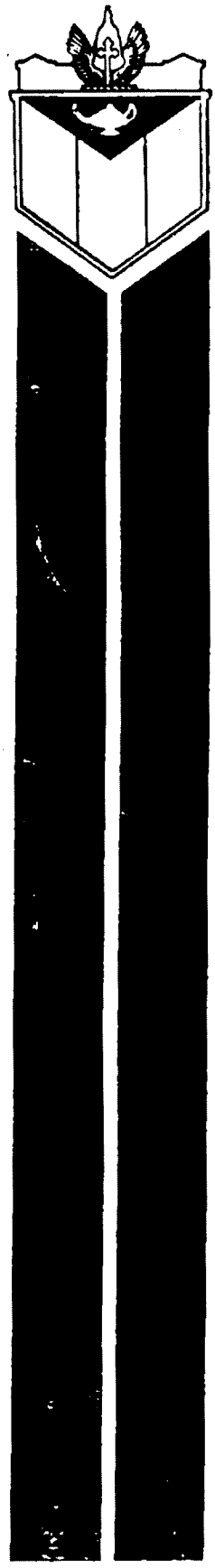
requirements of the First Amendment. Rational regulation can be fashioned to protect both our communities and our constitutional rights.

City of Austin



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REPORT ON ADULT ORIENTED BUSINESSES IN AUSTIN

Prepared By
Office of Land Development Services
May 19, 1986

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This report was prepared by the Special Programs Division of the Office of Land Development Services (OLDS), with assistance from other city agencies.

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SUMMARY

Purpose

This report provides the basis for development of an amendment to the Austin zoning ordinance regulating adult businesses. Austin's current adult business zoning ordinance was permanently enjoined from being enforced in January, 1985 when Taurus Enterprises sued over a "Code Violation Notice", issued by the City. The violation occurred because a bookstore was located within 1000 feet of property zoned and used for residential proposes.

Existing Research and Legal Basis

The first portion of the study examines existing research concerning the impact of adult business on crime rates and property values. Results from these studies contain similar findings - crime rates are higher and property values lower near adult oriented businesses.

Despite the negative impacts, regulation of adult businesses must respect constitutional rights of owners and patrons. Therefore an overview of pertinent legal and constitutional issues is also provided.

Existing Adult Businesses in Austin

Austin has 49 adult oriented businesses, consisting primarily of bookstores, theaters, massage parlors, and topless bars. Generally, these businesses are located in an area between Lamar Boulevard and Interstate Highway 35.

Analysis of the Impacts of Adult Businesses in Austin

An analysis of crime rates was conducted by comparing areas with adult businesses (study areas) to areas without adult businesses (control areas). Both control and study areas are circular in shape with a 1,000 foot radius, contain similar land uses, and are in close proximity to one another. Four study areas were defined: two with single businesses and two with more than one business. Within the study areas, sex-related crimes were found to be from two to nearly five times the city-wide average. Also, sex-related crime rates were found to be 66% higher in study areas with two adult businesses compared to study areas with only one business.

In order to assess the impact of adult businesses on property values, questionnaires were mailed to 120 real estate appraisal and lending firms. Eight-eight percent of those responding indicated a belief that an adult bookstore would decrease residential property values within one block, and 59% felt that residential property values would decrease within three blocks. Respondents based their opinions on several factors. They noted that adult businesses made homes less attractive to families, thus lowering demand and property values. Others stated that the existence of adult businesses leads mortgage underwriters to believe that the neighborhood is in decline, thus making 95% financing difficult.

Trade Area Characteristics

In order to make appropriate recommendations for assignment of adult businesses to specific zoning districts, a study of trade area characteristics was conducted. Three adult businesses - a bookstore, theater and a topless bar - were examined to determine customer addresses by an observation of vehicle license numbers. Of the 81 observations made, only three customers had an address within one mile of an adult business. Nearly half (44%) of all customer addresses were located outside the City of Austin.

Recommendations

Based on the findings of this study, the following recommendations are made:

1. Adult businesses should be limited to highway or regionally - oriented zone districts.

2. Adult businesses should be dispersed to avoid the over concentration of such business.

3. Conditional use permits should be required for adult businesses in certain specified zone districts.

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CHAPTER I
INTRODUCTION

As is the case in many large American cities, Austin has witnessed a rapid rise in the number and type of adult entertainment businesses over the past decade. These businesses present a particular problem due, in part, to the moral implications associated with such enterprises in the minds of many members of the community. In addition, the proliferation and alleged detrimental effects of these businesses upon surrounding neighborhoods have been the focus of community attention for quite some time. This attention has resulted in numerous requests for the City to regulate adult businesses.

The regulation of adult entertainment businesses is a controversial matter. While legal and constitutional bases for municipalities to control the use of land within their jurisdictions in order to protect the "public health, safety, morals, and general welfare of their citizens" has been firmly established, the Supreme Court has upheld the right of adult entertainment businesses to operate in the community by virtue of the First and Fourteenth Amendments of the U.S. Constitution. Resolving conflicts between the legal rights of municipal governments and those of adult business operators and patrons has been a difficult task.

Austin enacted a "Sexually Oriented Commercial Establishments Ordinance" on May 22, 1980. This ordinance prohibites adult businesses from being closer than 1,000 feet from a residential use. On October, 25, 1983, a lawsuit was filed attacking the validity of the Ordinance. The lawsuit was filed after the Building Inspection Department issued a "Code Violation Notice" for an adult bookstore located at 8004 Research Blvd. This violation notice was filed because the bookstore was located within 1,000 feet of property zoned and used for residential purposes. The suit disputed the city's assertion of harm to areas zoned and used for residential purposes.

On January 10, 1985, a trial was held. Because the court was unable to make a factual finding on the validity of the City's assertion, it permanently enjoined the City from enforcing the ordinance at that location. The court did not declare the ordinance unconstitutional. However, because of the precendent set by this action, Austin currently lacks an adult business ordinance that can be effectively enforced. Therefore, it is the purpose of this study to objectively evaluate the impacts of adult entertainment businesses on surrounding neighborhoods and to formulate appropriate regulations based on these findings.

CHAPTER II
SUMMARY OF EXISTING RESEARCH

This chapter presents a brief overview of existing research and regulations written to address adult oriented businesses in various parts of the country. An understanding of the effects of adult oriented businesses on surrounding properties and the legal basis for regulations controling such businesses is critical in developing an ordinance for Austin.

A. ANALYSIS OF EXISTING RESEARCH

Amarillo, Texas

The City of Amarillo's study, A Report on Zoning and Other Methods of Regulating Adult Entertainment Uses in Amarillo, concluded that adult entertainment uses are distinguishable from other businesses in that they have negative impacts on surrounding land uses. The study established a relationship between high crime rates and proximity to adult businesses. Furthermore, the study found that the late operating hours of most adult businesses created special problems to surrounding neighborhoods in the form of noise, glare, and traffic.

Beaumont, Texas

A planning department study done for the Charlton-Pollard Neighborhood in Beaumont, Texas investigated the effect of adult businesses on economic decline and crime. The study concluded that the concentration of adult businesses drove away neighborhood commercial stores and contributed to an increase in crimes such as prostitution, drug use, and muggings.

Indianapolis, Indiana

In February, 1984, the Division of Planning in Indianapolis published a report titled Adult Entertainment Businesses in Indianapolis: An Analysis. This report contained the results of an evaluation of the impact of adult business upon surrounding areas in terms of crime rates and real estate values. The study assessed the impact of adult entertainment businesses on crime rates by researching six areas containing adult businesses and six similar areas containing no adult businesses. A comparison of these areas revealed that sex-related crime rates were 77 percent higher in areas containing adult businesses.

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The second portion of the study evaluated the impact of adult businesses on real estate values by surveying professional real estate appraisers. Two surveys were conducted. The first surveyed opinions of members of the American Institute of Real Estate Appraisers practicing in 22 metropolitan areas similar in size to Indianapolis. The second survey was a 20% random sample of AIREA members drawn at a national level. In the metropolitan area survey, 78% of those surveyed felt that residential property values would decrease if located within one block of an adult business. The national survey generated similar results - 80% of those surveyed felt residential property values would decrease if located within a block of an adult business.

Los Angeles, California

The Department of City Planning for Los Angeles published a report in June, 1977 entitled Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles. An evaluation of the impact of adult businesses on both crime rates and property values was conducted. Crime rates were evaluated by comparing the Hollywood area with the remainder of the city. Hollywood was selected as a study area because of its high concentration of adult businesses. The study focused on the years 1969 to 1975, during which the number of adult businesses increased from 11 to 88 establishments. The study indicated that prostitution arrests in the Hollywood area were 15 times greater than the city average.

Like the Indianapolis report, the Los Angeles study surveyed real estate appraisers to assess the impact of adult businesses on property values. Over 90% of those surveyed felt that the concentration of adult businesses would decrease the market value of private residences located within 1000 feet of the adult business. Eighty-seven percent indicated that the concentration of adult businesses would decrease the market value of business property located in the vicinity of such establishments.

Los Angeles County, California

In April, 1978, the Department of Regional Planning of the County of Los Angeles published a study entitled Adult Entertainment Study and Proposed Zoning Ordinance Amendment. In the study, law enforcement officers were surveyed. Responses from the surveys indicated that areas with a concentration of adult businesses have a higher incidence of public intoxication, theft, assault, disturbing the peace, and sex-related vice. Respondents indicated that nude bars, modeling studios, and massage parlors caused the most individual problems.

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Phoenix, Arizona

The City of Phoenix study investigated the incidence of crime by comparing three study areas containing adult businesses with three control areas without adult businesses. They concluded that crimes were 43 percent higher, violent crimes were 4 percent higher, and sex related crimes were over 500 percent higher in the study areas.

St. Paul Minnesota

The planning department in St. Paul conducted a study entitled Effects on Surrounding Area of Adult Entertainment Businesses. The study found that there was a statistically significant correlation between diminished housing values and crime rates and the location of adult businesses. The study also concluded that there was a stronger correlation with neighborhood deterioration after the establishment of an adult business.

B. LEGAL BASIS

Regulation of adult businesses has taken a variety of forms in cities throughout America. Boston, Massachusetts, for example, has adopted an ordinance that restricts all adult businesses to a single geographic area known as the "Combat Zone". Detroit, Michigan,on the other hand, enacted an ordinance intended to disperse adult businesses. This ordinance, passed in 1972, prohibited adult entertainment businesses within 500 feet of a residential area or within 1000 feet of any two other regulated uses. The term "regulated use" applied to a variety of businesses, including adult theaters, adult bookstores, cabarets, bars, taxi dance halls, and hotels. At this time, only Seattle and Renton, Washington have ordinances similar in nature to the Boston ordinance. However, several cities have adopted regulations similar to those enacted in Detroit, which are aimed at dispersing adult entertainment businesses.

The Detroit ordinance was legally challenged and ultimately upheld by the United States Supreme Court in 1976. This court case, known as Young -v- American Mini Theaters, Inc., now serves as the primary legal precedent regarding the use of zoning powers to regulate adult entertainment business. In Young, the Supreme Court held that "even though the First Amendment protects communication in this area (sexually explicit activities) from total suppression, we hold the State may legitimately use the content of these materials as a basis for placing them in a different classification from other movie theaters"[1].

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1. McClendon, Bruce W.; Zoning for Adults Only, (Zoning news; American Planning Association, August, 1985).

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The plurality opinion for this court case set out three First Amendment criteria that ordinances regulating adult entertainment businesses must satisfy in order to be Constitutionally upheld.

1. Regulations must be motivated not because of a distaste for the speech itself, but by a desire to eliminate its adverse effects.

2. Properly motivated legislation may be unconstitutional if it severey restricts First Amendment rights.

3. A properly motivated ordinance with only a limited impact on free expression may be unconstitutional if the municipality cannot demonstrate an adequate factual basis for its conclusion that the ordinance will accomplish its object of eliminating the adverse effect of adult businesses[2].

The limitations established by these criteria are best illustrated by analysis of the invalidation of Atlanta, Georgia's Adult Entertainment Ordinance[3]. This ordinance prohibited adult entertainment businesses from locating within 1,000 feet of any other such use, within 500 feet of any residential zoning district, or within 500 feet of any church or place used for religious worship. The ordinance also restricted all new adult entertainment businesses to three zoning districts. The Atlanta ordinance further required the amortization of certain existing businesses.

Although factual evidence was presented in support of Atlanta's ordinance, the U.S. Supreme Court found that the ordinance violated the first two criteria cited in Young. The Court first found evidence of an improper motive in enacting the ordinance. Minutes of a zoning review board meeting indicated that the board would help citizens opposed to the conduct of adult businesses to "zone them out of business". At the meeting an assistant city attorney indicated that the proposed ordinance was the "strongest vehicle toward elimination" of these businesses and the city was "hoping for complete eradication" of adult businesses. The court also found that the locational restrictions of the ordinance would significantly reduce and possibly eliminate public access to adult businesses. The court had ruled in Young that "pornography zoning" is constitutional only if "the market for this commodity is essentially unrestrained"[4]. The locational restrictions and amortization requirements in Atlanta were deemed too severe a restriction on the First Amendment rights of adult businesses.

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2. Weinstein, Alan; Regulating Pornography: Recent Legal Trends; (Land Use Law; February, 1982;) p.4

3. Ibid. p.4

4. Ibid. p.4

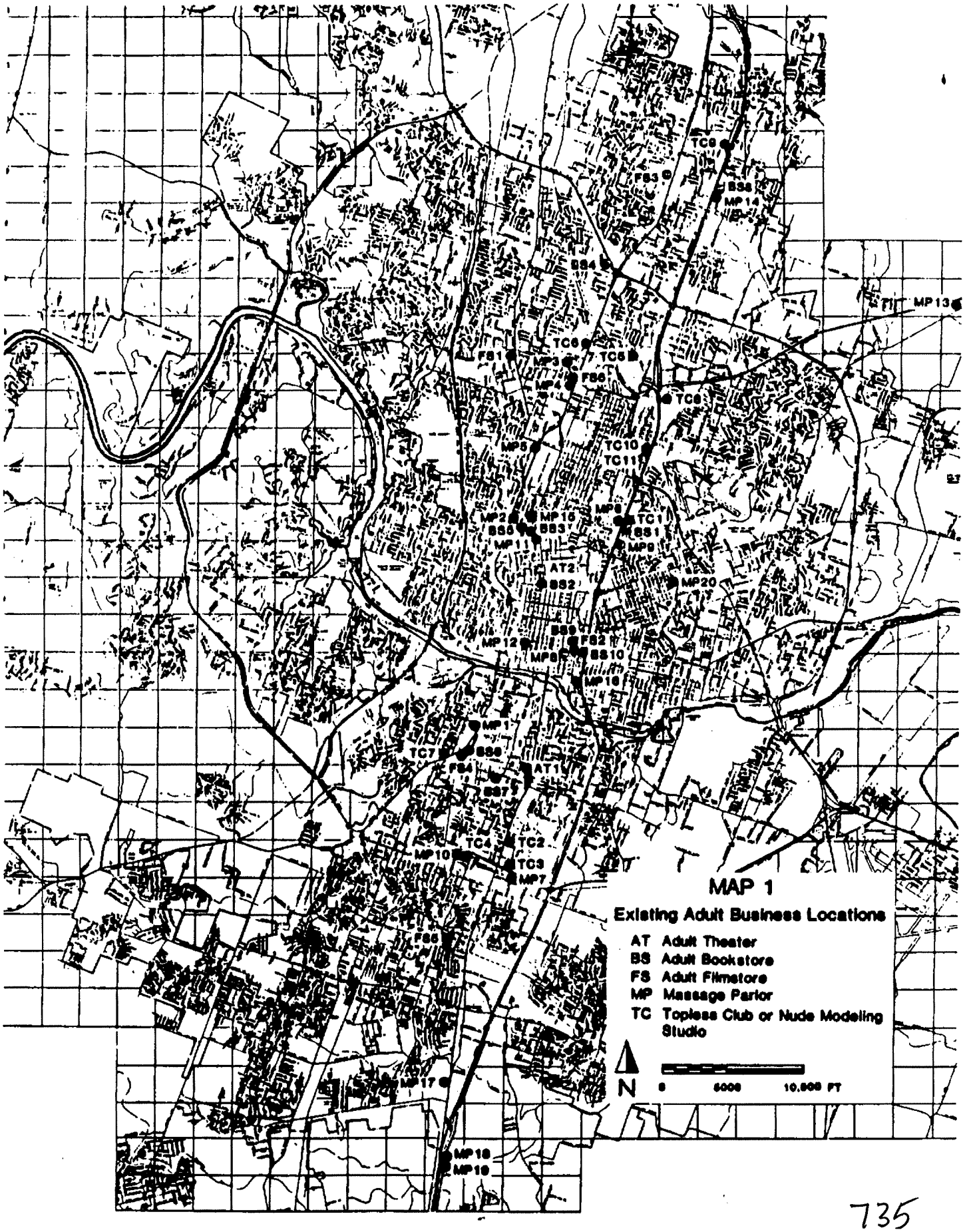
CHAPTER III
ADULT ORIENTED BUSINESSES IN AUSTIN

A. LOCATION OF EXISTING BUSINESS

There were 49 adult-oriented businesses located within the corporate limits of the Austin as of January 1, 1986. These businesses have been grouped into two major types of businesses: Adult Entertainment Businesses and Adult Service Business. Adult Entertainment Businesses consist of adult bookstores, theaters, and film stores. Adult Service Businesses consist of massage parlors, nude modeling studios, and topless/bottomless bars or clubs. Adult Entertainment Businesses must be carefully regulated due to their constitutionally protected status as an expression of free speech.

The classification of these businesses is difficult, particularly in the case of Adult Entertainment Businesses, since many of these are involved in the selling of printed material as well as novelty items, and the showing of peep shows. For the purposes of this study, businesses listed as bookstores include a substantial portion of the business involved in the selling of printed material, but may include the distribution of novelty items, showing of peep shows, and other related forms of adult entertainment. Any business that exhibits adult films on a single screen with 100 seats was classified as an adult theater even through it may offer adult video tapes or films for sale.

Table 1 lists the names and locations of the 49 existing Adult Entertainment businesses in Austin. Map 1 depicts the locations of these in the City of Austin. As shown on this map, 21 of the 49 existing businesses are not located within 1000 feet of another adult business. Of the remaining 28 businesses, there are eight groups of two businesses, one group of three businesses, one group of four businesses, and one group of five businesses. The locational pattern illustrated on Map 1 indicates a propensity for adult businesses to locate along the major north/south roadways or on major east/west roadways between Lamar Blvd and IH35.



MAP 1

Existing Adult Business Locations

- AT Adult Theater
- BS Adult Bookstore
- FS Adult Filmstore
- MP Massage Parlor
- TC Topless Club or Nude Modeling Studio

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Table 1
Existing Adult Businesses
Austin, Texas
January 1, 1986

Adult Entertainment Businesses

Adult Bookstores

1.	Adult Theater	3401-A- North IH35
2.	Mr. Video	1910 Guadalupe St.
3.	River City Newsstand	613 West 29th St.
4.	River City Newsstand	8004 Research Blvd.
5.	Video Barn	615 West 29th St.
6.	Southside News	2053 South Lamar Blvd.
7.	The Pleasure Shop	603 West Oltorf St.
8.	Oasis Adult Book Store	8601 North IH 35
9.	Ms. Video	718 Red River St.
10.	Sixth Street News	706 East 6th St.

Adult Theaters

1.	Cinema West Theater	2130 South Congress Ave.
2.	Texas Adult Theater	2224 Guadalupe St.

Adult Film Stores

1.	Video Barn	5726 Burnet Rd.
2.	Video Barn	708 East 6th St.
3.	Video Barn	9640 North Lamar Blvd.
4.	Video Barn	2055 South Lamar Blvd.
5.	Video Barn	512 West Stassney Lane
6.	Video Etc.	5610 North Lamar Blvd.

Adult Service Businesses

Massage Parlors

1.	Ann's Massage Clinic	1406 South Lamar Blvd.
2.	Body Works, Inc.	2906 San Gabriel St.
3.	Fantastic Oriental Massage	1104 West Koenig Lane
4.	Fantasy Massage	5520 North Lamar Blvd.
5.	I Dream of Jeanie	4406 North Lamar Blvd.
6.	La Femme	3502 North IH 35
7.	Michelle's Massage	403 East Ben White Blvd.
8.	Midnight Cowboy Oriental	313 East 6th St.
9.	Oriental House of Massage	3007 North IH 35
10.	Pandora's	631 West Ben White Blvd.
11.	Relaxation Plus Massage	2716 Guadalupe St.
12.	Relaxation Plus Massage	612 Nueces St.
13.	Satin Spa	6735 U.S. 290 East
14.	Tokyo Spa	9601 North IH 35 #104

15. Vickie's Massage	3004 Guadalupe St.
16. Silk Lady Massage	92 East Ave.
17. New Seoul Korean Massage	8312 South Congress
18. The Casbah	9401-B South IH-35
19. The Chateau	9401-B South IH-35
20. Singletons Massage	1410 Ulit

Topless Clubs and Nude Modeling Studios

1. The Crazy Lady	3701 North IH35
2. The Doll House	3615 South Congress
3. The Red Rose	336 East Ben White Blvd.
4. Honey's	629 West Ben White Blvd.
5. Sugar's	404 Highland Mall Blvd.
6. The Yellow Rose	6528 North Lamar Blvd.
7. Ladies of the Eighties	2304 South Lamar Blvd.
8. Adams Nude Modeling Resort	1023 Reinli St.
9. French Quarter	10600 Middle Fiskville Rd.
10. Burlesque Modeling Studio	4912 North IH35
11. Pearls Place	4814 North IH35

B. EVALUATION OF ADULT BUSINESS IMPACTS

In order to develop appropriate recommendations for regulating adult businesses, it is essential to assess the impact of such businesses on the neighborhoods that surround them. Research conducted in other cities suggests that adult businesses have a detrimental effect on the incidence of crime and property value. This report will assess the impact of adult businesses in Austin by comparing the incidence of crime in areas surrounding adult businesses to similar areas having no adult businesses and by surveying the opinions of real estate professionals concerning the effect of adult businesses on property values. The methodology used in this research is similar to those used in the Indianapolis, Indiana and Los Angeles, California studies. For a more detailed discussion of the methodology and results of these studies, see Appendix A.

Incidence of Crime

Methodology. The effect of adult businesses on the incidence of crime was measured by collecting crime data for areas with adult businesses (Study Areas) and comparing them to similar areas having no adult businesses (Control Areas). This evaluation focuses on three questions. First, is the incidence of crime, particularly sexually related crime, higher in areas surrounding adult business sites than in similar areas without adult business sites? Second, is the incidence of crime, particularly sexually related crime, higher in areas having more than one adult business than in areas having a single adult business? Finally, how does the incidence of crime in these areas compare to crime rates for the City of Austin as a whole?

This study collected data for 45 serious criminal offenses, termed Part 1 Crimes by the Uniform Crime Report, and 21 sexually related criminal offenses. These offenses are detailed in Appendix B. The data collected represents calls to the Austin Police Department from January 1, 1984 through December 31, 1985. Crime rates are expressed as the number of reported incidents per 1000 area residents.

Selection of Study and Control Areas. The selection of appropriate study and control areas was a crucial element in the objective assessment of the impact of adult businesses on the incidence of crime. Study Areas containing adult business sites were carefully selected to be representative of the adult businesses existing in the Austin area.

Four study areas were selected. Study Area One includes two businesses, a modeling studio and a topless club. Study Area Two also includes two businesses, an adult bookstore and an adult oriented film rental store. Study Areas Three and Four contain single businesses, an adult bookstore and topless bar, respectively.

Table 2
Study Area Businesses

Study Area 1	
Burlesque Modeling Studio	4912 N. IH-35
Pearls Place	4814 N. IH-35
Study Area 2	
Southside News	2053 S. Lamar
Video Barn	2055 S. Lamar
Study Area 3	
The Pleasure Shoppe	610 W. Oltorf
Study Area 4	
The Yellow Rose	6528 N. Lamar Blvd

As noted, two of the Study Areas contain one, and the others each contain two, adult businesses. Although two adult businesses does not reflect the highest concentration of adult businesses located in Austin, this level of concentration is more representative of existing locational patterns in the City. Those areas containing more than two adult businesses were examined and found unsuitable for this evaluation.

The highest concentration of adult businesses is located just west of the University of Texas campus along West 29th Street. This area was considered unsuitable because the transient population associated with the University of Texas might unduly influence the results of the evaluation. The concentration of adult businesses existing in the Central Business district was deemed unsuitable for study due to the lack of residential uses in the area. Three adult businesses are located along IH-35 near its intersection with East 38 1/2 Street. This area was not selected because a large portion of the Study Area is occupied by Concordia Lutheran College, and a suitable control area with similar land uses was difficult to define.

In order to draw valid comparisons, the Control Areas were selected according to their proximity and similarity to the Study Areas Four Control Areas were selected for comparison to the four study areas.

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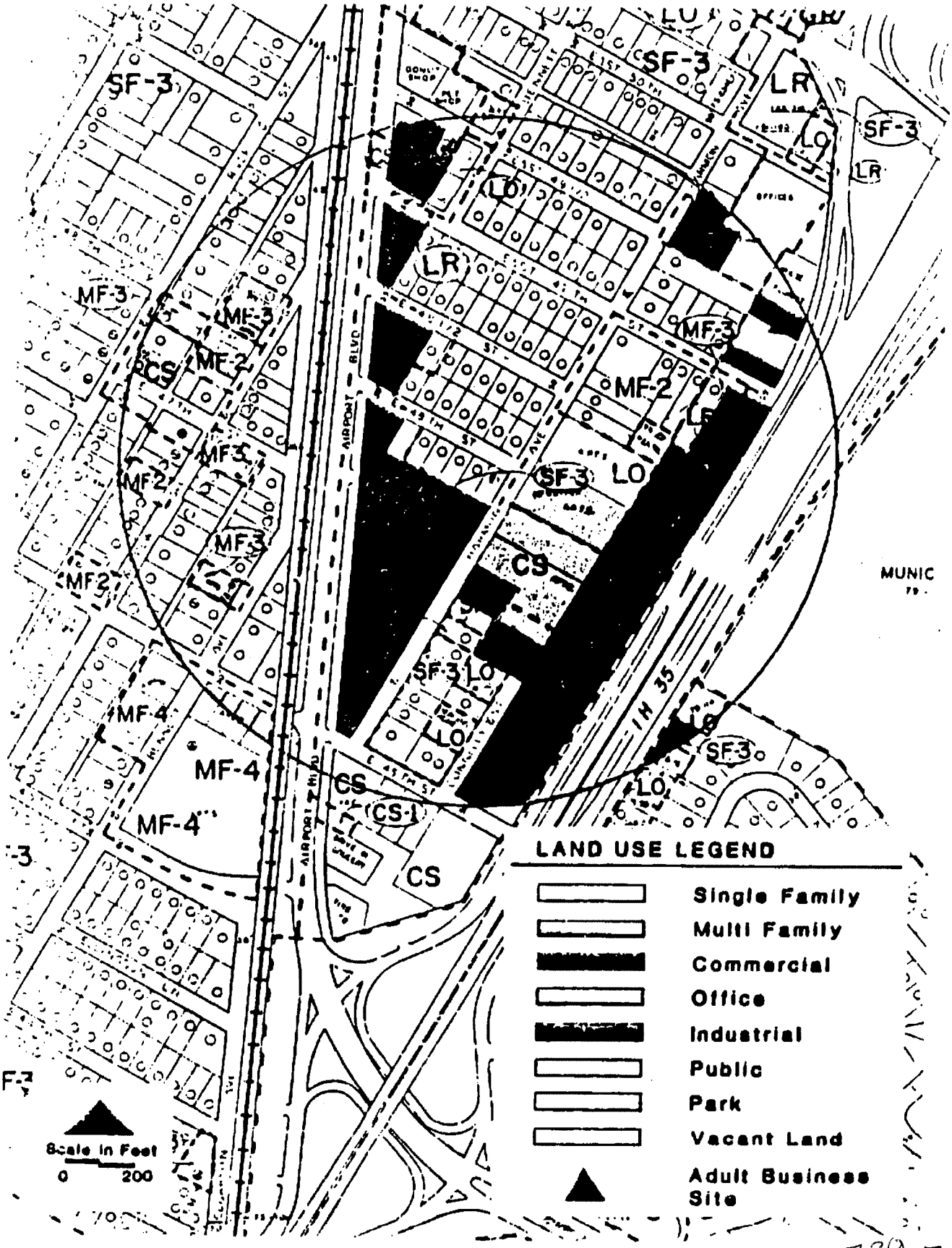
MAP 2
STUDY AREA 1



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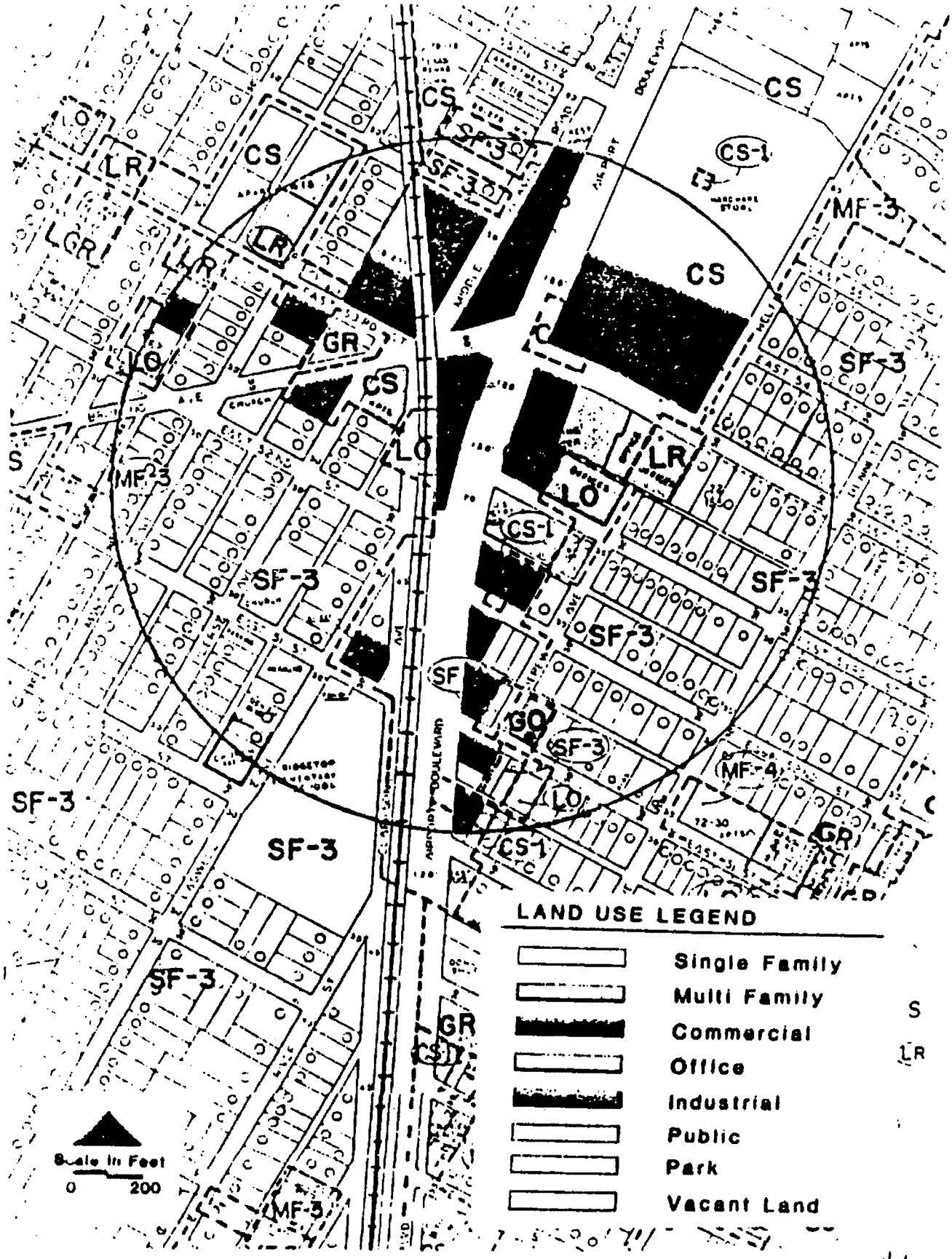
MAP 3
CONTROL AREA 1



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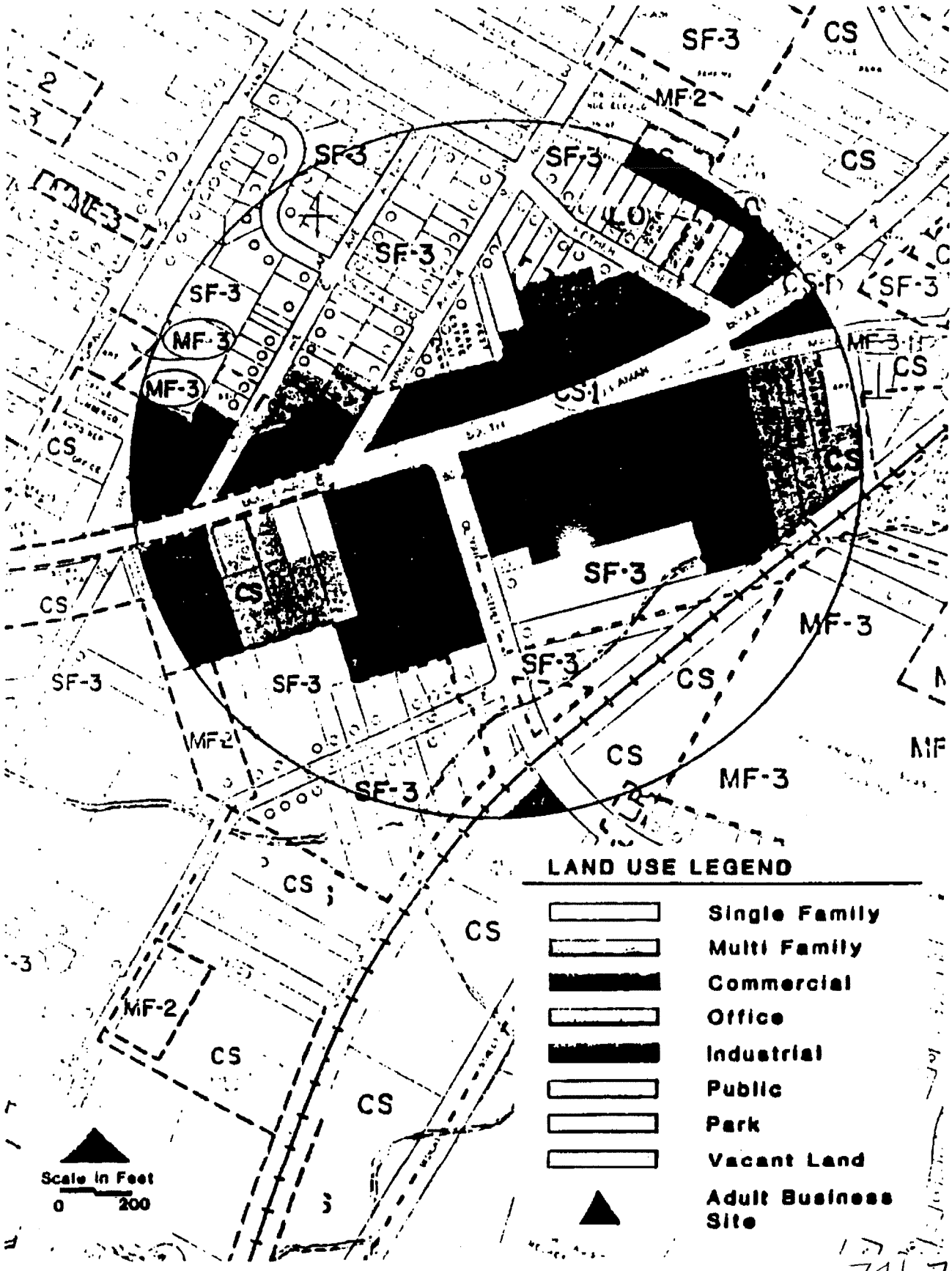
MAP 4
STUDY AREA 2



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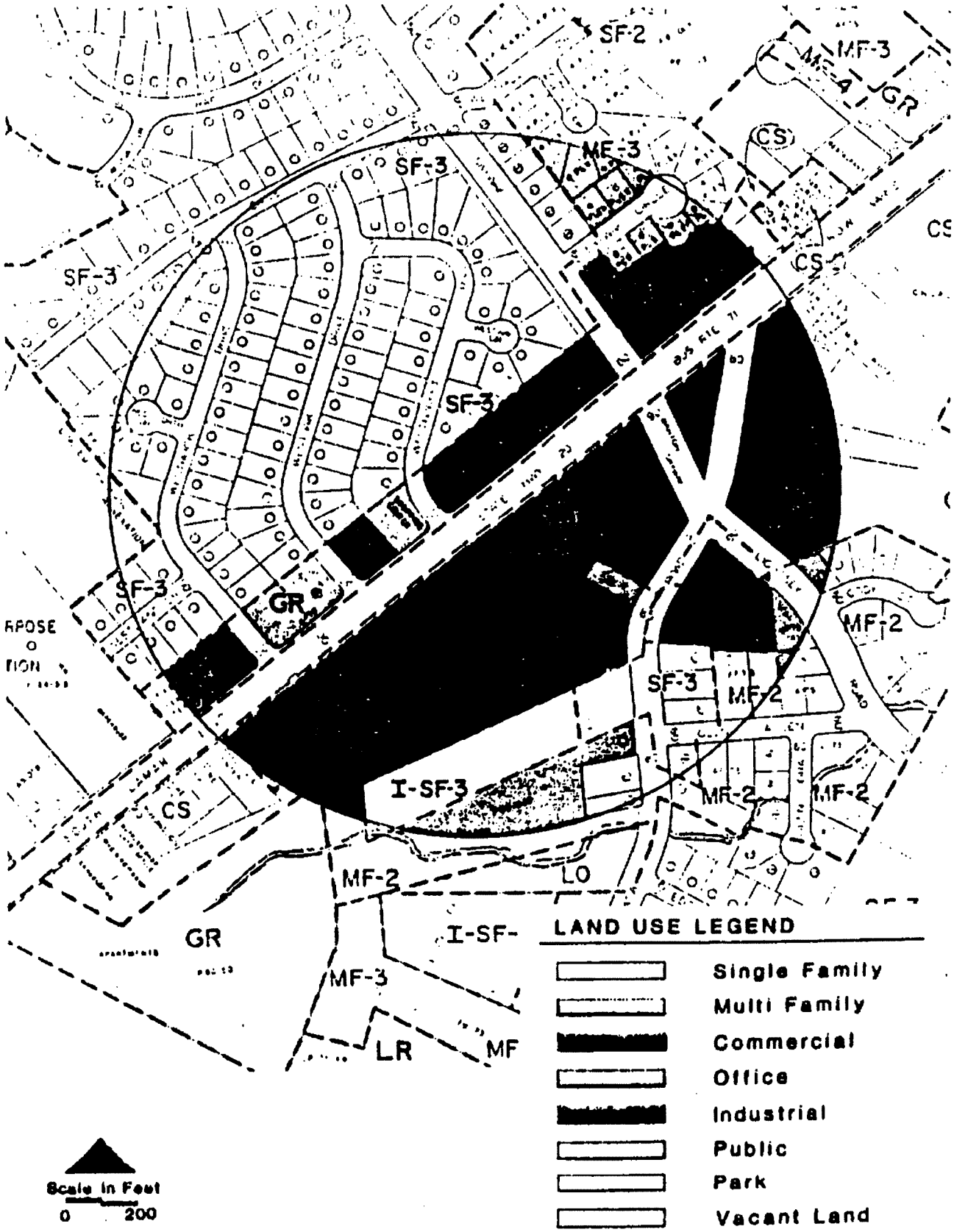
MAP 5
CONTROL AREA 2



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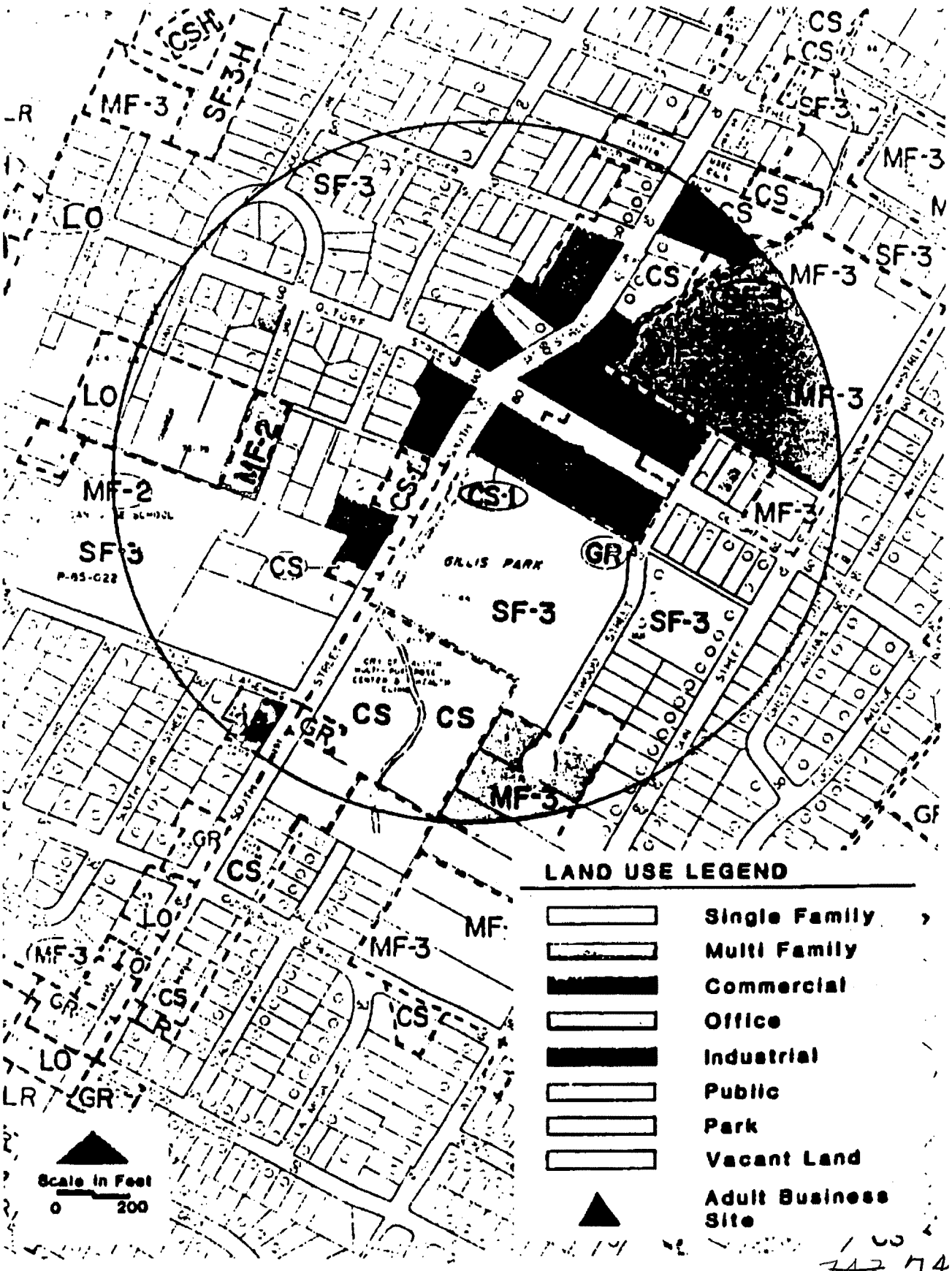
MAP 6
STUDY AREA 3



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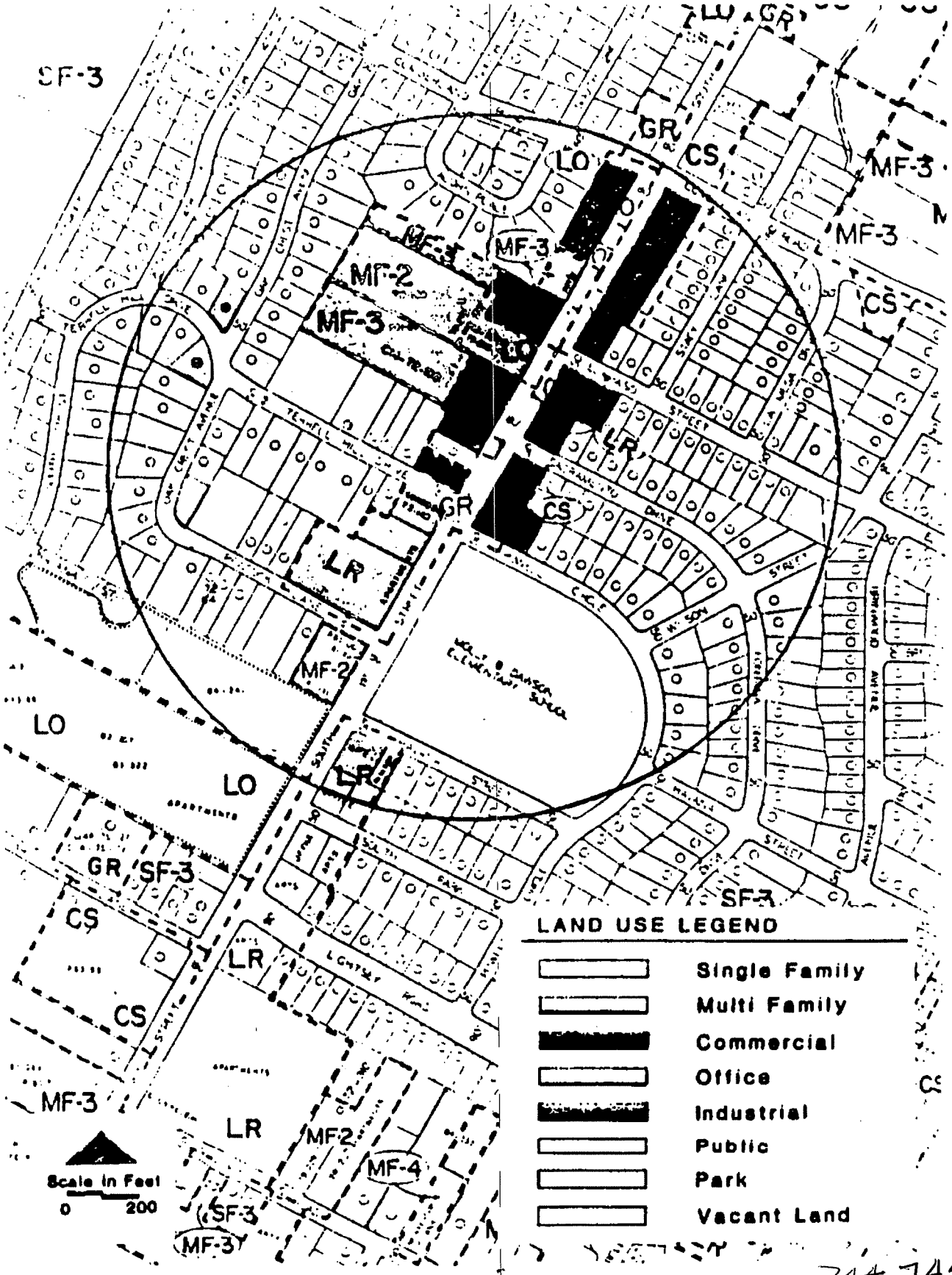
MAP 7
CONTROL AREA 3



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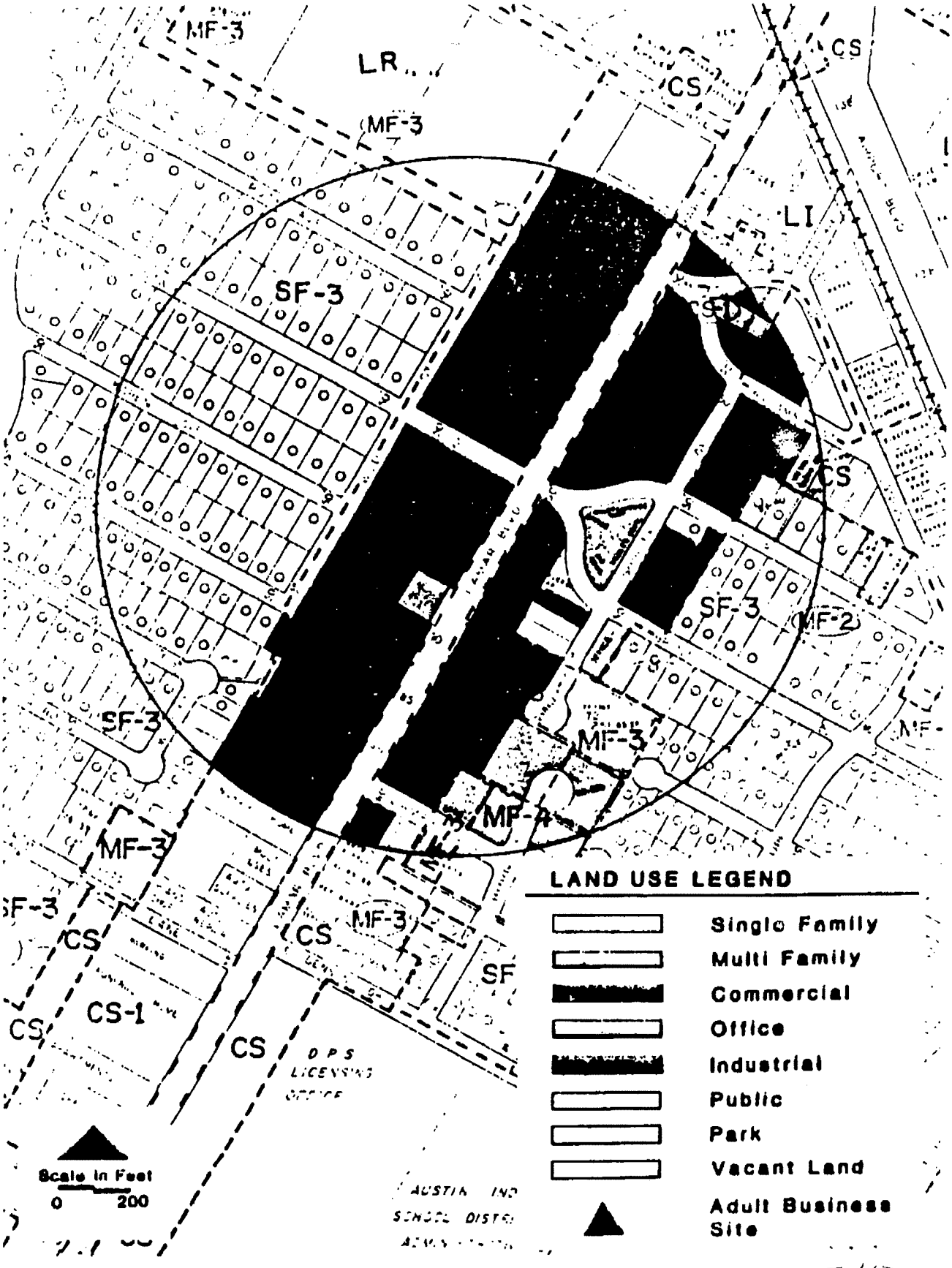
MAP 8
STUDY AREA 4



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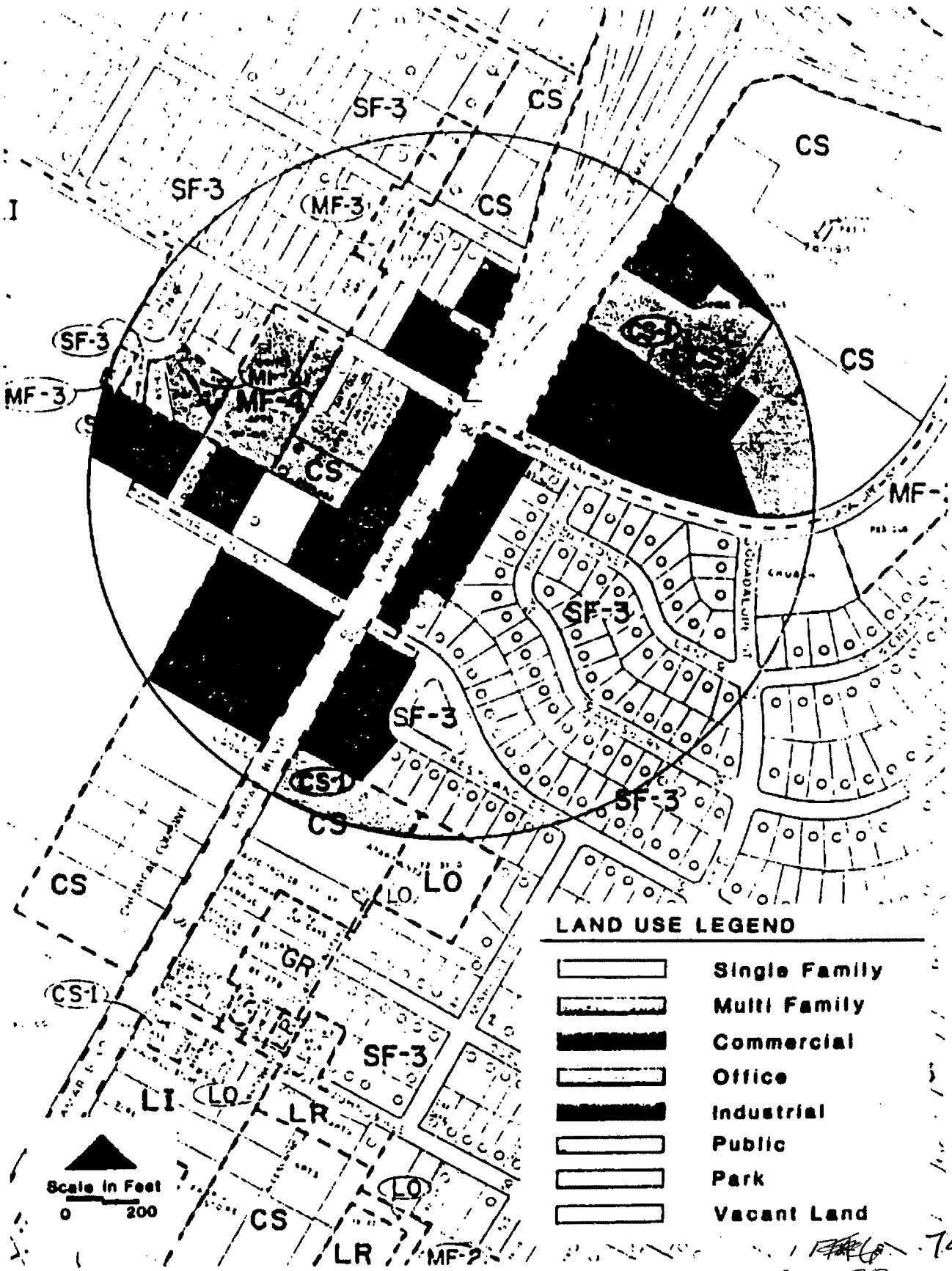
MAP 9
CONTROL AREA 4



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Study and Control Area Characteristics. All of the Study and Control areas were examined to identify similarities. They all are circular in shape with a 1000 foot radius, a size of 72.12 acres, and have similar population and land use characteristics. The population characteristics of each area were analyzed using block data from the 1980 Census of Population and Housing. The results are summarized in Tables 3, 4, 5, and 6. Land use characteristics are summarized in Tables 7, 8, 9 and 10.

Table 3
Area 1
Population Characteristics

Ethnicity	Study	Control
% Anglo	69.8	68.0
% Black	7.9	10.4
% Hispanic	21.5	21.5
% Other	0.8	0.1
Age Composition		
% Under 18	11.0	19.6
% 18 to 64	80.0	72.7
% 65 and over	9.0	7.5
% Owner Occupancy	17.5	25.5

Table 4
Area 2
Population Characteristics

Ethnicity	Study	Control
% Anglo	60.9	75.2
% Black	4.4	6.2
% Hispanic	33.5	18.0
% Other	1.2	0.5
Age Composition		
% Under 18	24.0	20.8
% 18 to 64	62.5	71.2
% 65 and over	13.5	8.0
% Owner Occupancy	34.7	26.7

Table 5
Area 3
Population Characteristics

Ethnicity	Study	Control
% Anglo	17.7	54.8
% Black	17.1	2.4
% Hispanic	64.1	42.8
% Other	6.1	0
Age Composition		
% Under 18	40.1	25.1
% 18 to 64	51.6	69.6
% 65 and over	8.3	5.3
% Owner Occupancy	27.9	48.9

Table 6
Area 4
Population Characteristics

Ethnicity	Study	Control
% Anglo	84.4	72.8
% Black	2.5	2.5
% Hispanic	12.4	19.4
% Other	0.7	5.3
Age Composition		
% Under 18	16.1	23.8
% 18 to 64	69.4	0.5
% 65 and over	14.5	5.7
% Owner Occupancy	38.2	24.8

Table 7
Area 1
Existing Land Use
(in acres)

	Study	Control
Single Family	14.1	18.9
Multi-Family	3.0	1.5
Commercial	11.9	9.7
Office	0.3	2.2
Industrial	–	–
Public	3.9	4.4
Parkland	–	–
Vacant	1.6	0.7
Roads	37.3	34.7

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Table 8
Areas 2
Existing Land Use
(in acres)

	Study	Control
Single Family	22.2	24.6
Multi-Family	1.6	4.7
Commercial	23.2	23.3
Office	0.8	2.0
Industrial	-	-
Public	1.2	-
Parkland	-	-
Vacant	5.1	-
Roads	18.0	17.5

Table 9
Areas 3
Existing Land Use
(in acres)

	Study	Control
Single Family	19.0	34.2
Multi-Family	7.2	9.6
Commercial	7.2	5.6
Office	0.1	0.4
Industrial	-	-
Public	9.3	8.2
Parkland	6.6	-
Vacant	8.0	4.2
Roads	14.7	9.9

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Table 10
Areas 4
Existing Land Use
(in acres)

	Study	Control
Single Family	25.1	22.7
Multi-Family	2.3	4.9
Commercial	26.6	15.8
Office	1.1	5.1
Industrial	-	2.3
Public	-	0.4
Parkland	-	-
Vacant	1.6	3.7
Roads	15.4	17.2

Results

The crime rates calculated for each Study and Control Area and for the city at large are indicated in Table 11.

Table 11
Average Annual Crime Rates
(per 1000 population)

	Part 1 Crime Rate	Sex Related Crime Rate
Study Area 1	181.82	8.72
Control Area 1	320.65	2.17
Study Area 2	552.54	13.56
Control Area 2	96.69	2.48
Study Area 3	128.59	4.97
Control Area 3	69.60	2.37
Study Area 4	185.77	7.91
Control Area 4	133.41	1.84
City of Austin	83.14	2.81
All Control Areas	132.23	2.21

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Analysis of Table 11 reveals a definite pattern concerning sex-related crime rates. Sex related crimes rates in Control Areas are consistently low, ranging from 65% to 88% of the city-wide average. In contrast, sex related crime rates in the Study Areas are substantially higher than the city-wide average, ranging from 177% to 482% higher.

The sex related crime rates for Study Areas 1 and 2, which each contain two adult business sites, are higher than those in Study Areas 3 and 4, which each contain one adult business site. Table 12 consolidates the crime rates for Study Areas 1 and 2 and Study Areas 3 and 4. This analysis indicates that the sex related crime rate in areas having more than one adult business site is 66 percent higher than in areas having only one adult business site.

Table 12
Combined Average Annual Crime Rates

	Part I Crime Rate	Sex Related Crime Rate
Study Areas 1 & 2	281.42	10.02
Control Areas 1 & 2	193.43	2.35
Study Areas 3 & 4	159.70	6.02
Control Areas 3 & 4	97.44	2.21

Real Estate Impacts

Methodology. In an effort to assess the impacts of adult entertainment businesses on property values in Austin, a survey of the opinions of real estate professionals was conducted. A three-part questionnaire was designed to gauge the opinion of real estate appraisers and lenders in the Austin area regarding the effect that an adult entertainment business would have on surrounding property values.

The first part asked respondents to indicate the effect of one adult bookstore on residential and commercial properties located within one block and three blocks of the bookstore. The second part of the survey asked respondents to guage the effect on residential property values within one block for a variety of commercial uses other than an adult bookstore. The third part of the survey asked questions designed to estimate the degree to which property values are affected by adult businesses, and to establish the basis for the appraisers' opinions. A sample questionnaire is included in Appendix D.

Results. The questionnaire was mailed to 120 firms listed in the Southwestern Bell Yellow Pages under "real estate appraisers" and "real estate lenders". The Office of Land Development Services received 54 responses; a response rate of 45 percent. The responses to the questionnaire concerning the effect of adult businesses on property values are tabulated in Table 13. Table 14 summarizes the results of the questionnaire regarding the effect of other commercial uses on property values.

Table 13
The Effect of Adult Businesses on
Property Values in Austin, Texas

	No Change	Decrease 1 to 10%	Decrease 10 to 20%	Decrease 20% or more
Residential Property One Block Radius	12%	31%	26%	31%
Commercial Property One Block Radius	31%	30%	33%	6%
Residential Property Three Block Radius	41%	28%	26%	5%
Commercial Property Three Block Radius	59%	30%	9%	2%

The tabulated responses in Table 13 indicate that a substantial majority (88%) of those surveyed felt that an adult book store would have a negative effect on residential property located within one block. Of these, 31 percent felt that value would decrease by more than 20 percent. A majority (69%) felt that the value of commercial property within one block of the bookstore site would be negatively affected. Only 6 percent felt, however, that the decline in value would be greater than 20 percent.

When the distance from the adult bookstore is increased, the negative impact on property values appears to be less severe. While a majority of respondents (59%) indicated that residential property located three blocks from the bookstore would decline in value, only 5 percent felt the decline would be greater than 20 percent and over 40 percent felt that there would be no change in value at this distance. The majority of respondents (59%) felt that there would be no change in value of commercial property located three blocks from the adult bookstore site.

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Table 14
The Effect of Commercial Businesses on
Residential Property Values in Austin, Texas

	Much Higher	Somewhat Higher	About The Same	Somewhat Lower	Much Lower
Church	2%	16%	58%	24%	--
Pool Hall	--	2%	39%	45%	14%
Welfare Office	--	4%	36%	45%	15%
Neighborhood Tavern	--	9%	38%	34%	21%
Record Store	--	26%	61%	11%	2%
Medical Office	18%	36%	41%	6%	--
Branch Library	21%	40%	33%	6%	--
Drug Rehabilitation	--	2%	22%	48%	28%
Ice Cream Parlor	6%	42%	46%	6%	--
Video Game Parlor	--	16%	53%	31%	--
Adult Video Arcade	--	4%	27%	28%	42%
Topless Bar	--	--	19%	23%	58%
Massage Parlor	--	--	19%	23%	58%
Adult Theater	--	--	23%	21%	56%

The survey also asked respondents to indicate the effect on residential property values if the site was used for something other than an adult bookstore. As indicated in Table 14, the majority felt that property values would be higher if the site were used as a medical office or branch library. They indicated that residential property values would be reduced if the site was used as a pool hall, tavern, welfare office, drug rehabilitation center, or another type of adult entertainment business.

Causes of Property Value Decline. The real estate professionals were asked to describe the effect of adult businesses on property values in general and the basis for their opinions. These questions are important because they help establish why property values are affected by adult businesses.

The respondents based their opinions on several factors. They noted that the type of clientele attracted by adult businesses create concerns among families with children. Several noted that residential properties in close proximity to adult business sites are no longer suitable as homes for families with children. This eliminates a large portion of the market, lowering demand, which in turn decreases the market value of the property. It was also noted that the existence of adult business facilities leads mortgage underwriters to believe that the general neighborhood is in decline. Therefore, they would be less willing to make 90 to 95% financing available for these properties.

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Several respondents indicated that "pride of ownership" has an important influence on property values. When families are encouraged to leave a residential area or discouraged from locating in a particular area due to the existence of an adult business nearby, a transition from a family-oriented, owner-occupied neighborhood to a more transient, renter-occupied neighborhood may result. This trend is reinforced by the reluctance of real estate lenders to make 90 to 95% financing available for residential properties in the area.

With regard to the effect on commercial properties, respondents commented that commercial property values were negatively impacted but to a lesser degree than residential properties. It was also noted that the impact of a single adult entertainment business would be less severe than the impact resulting from a concentration of businesses. Other comments indicated a negative impact on the sales of businesses engaged in neighborhood trade. One respondent commented that adult entertainment businesses tend to drive out residential or commercial uses.

Those respondents who indicated little or no change in property values cited several reasons for their opinions. Several commented that adult businesses locate in areas where property values are already in decline. One comment noted that commercial properties would experience very little effect because most commercial properties are encumbered by long term leases. Another respondent stated that there is no market evidence that values will change.

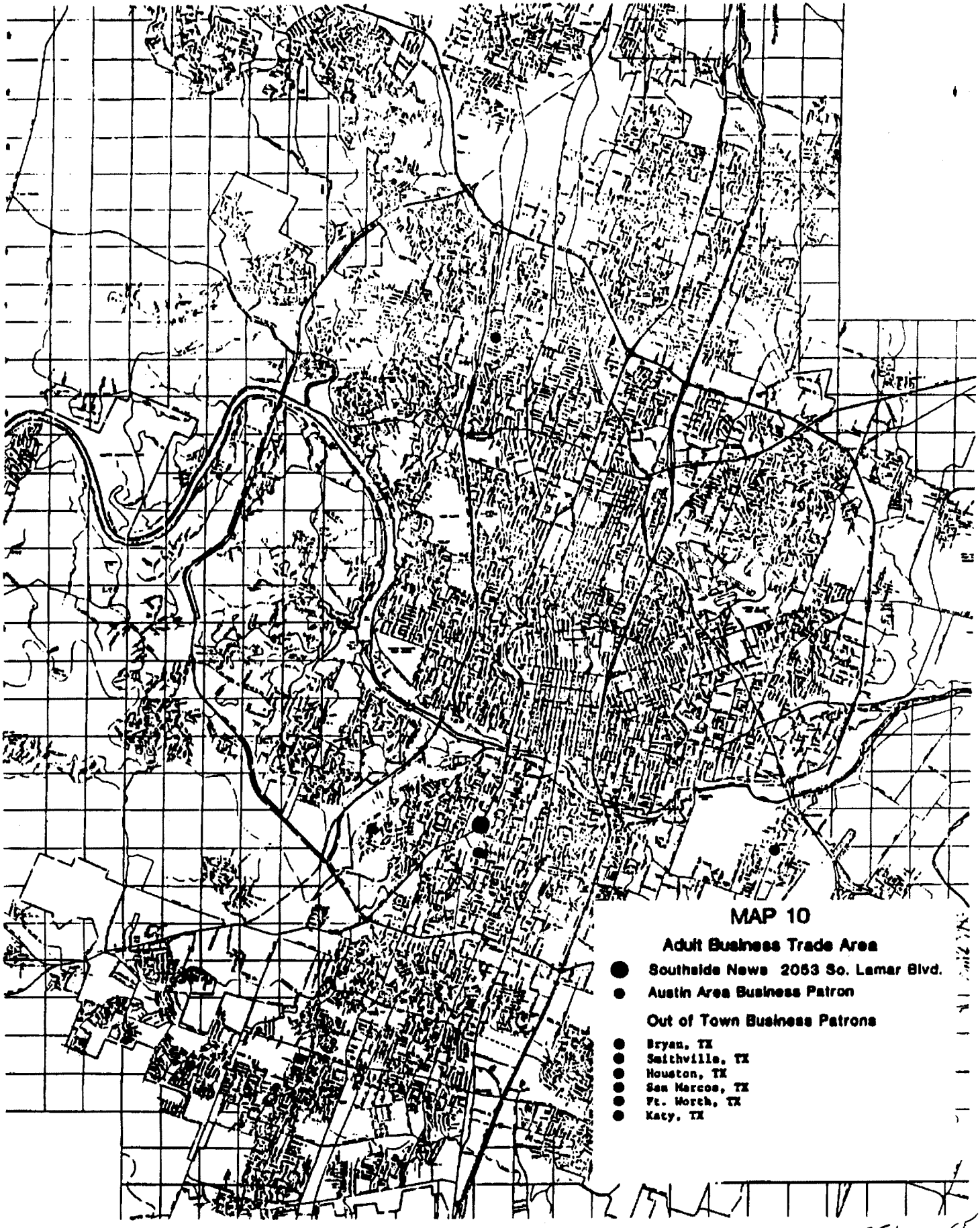
In summary, most appraisers and lenders believe that adult businesses will contribute to a decrease in surrounding property values, particularly residential properties within a one block radius. The appraisers opinions will affect property values because their lending and appraisal policies will, to some extent, determine property value.

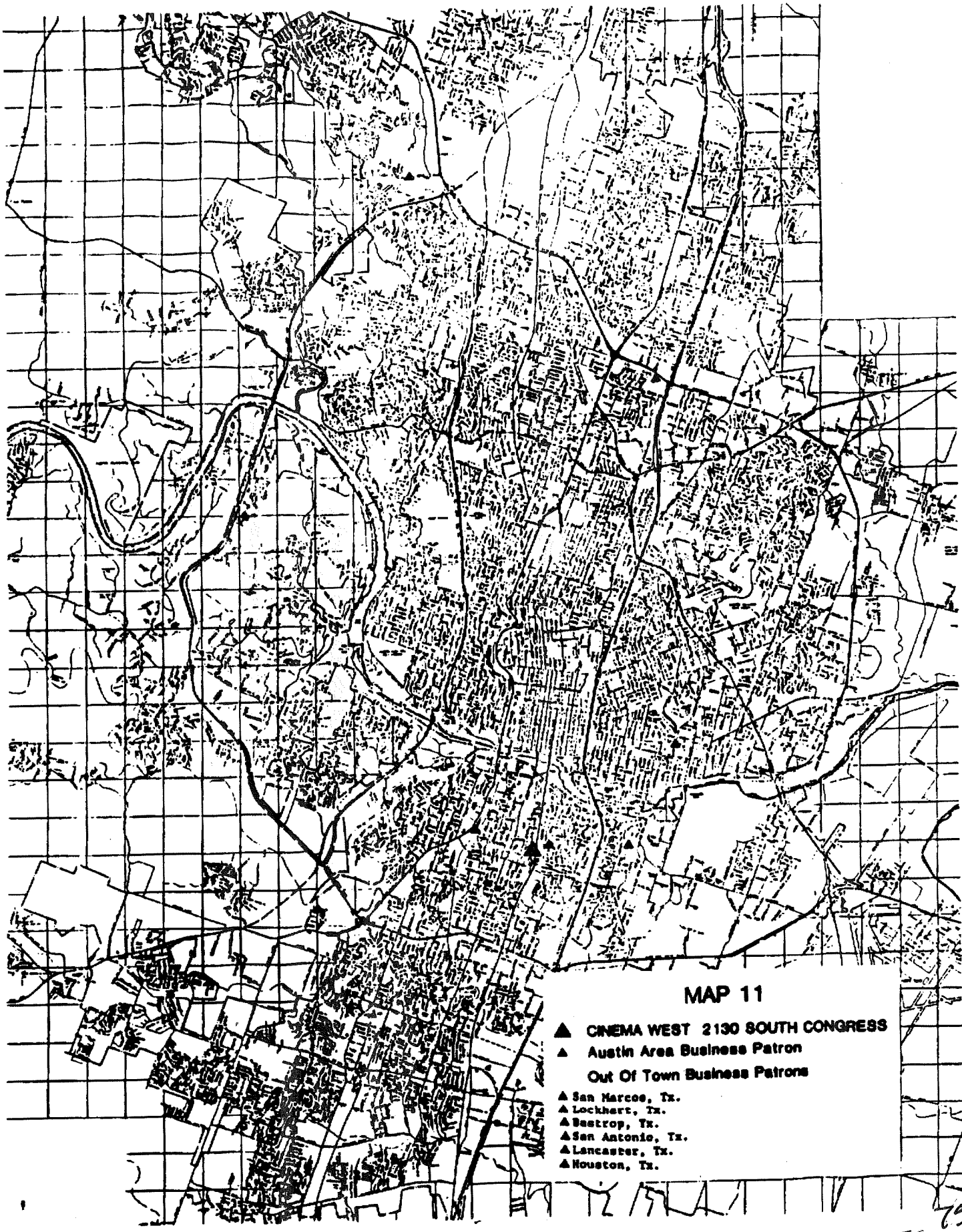
C. TRADE AREA CHARACTERISTICS

The use of zoning authority to regulate the locations of adult businesses implies that these businesses will be limited to certain zoning districts. In order to make appropriate recommendations for assignment of these businesses to specific zoning districts, an understanding of their trade area characteristics is important. Specifically, it is useful to know if a substantial portion of the adult businesses clientele is drawn from the immediate neighborhood or from a larger regional area.

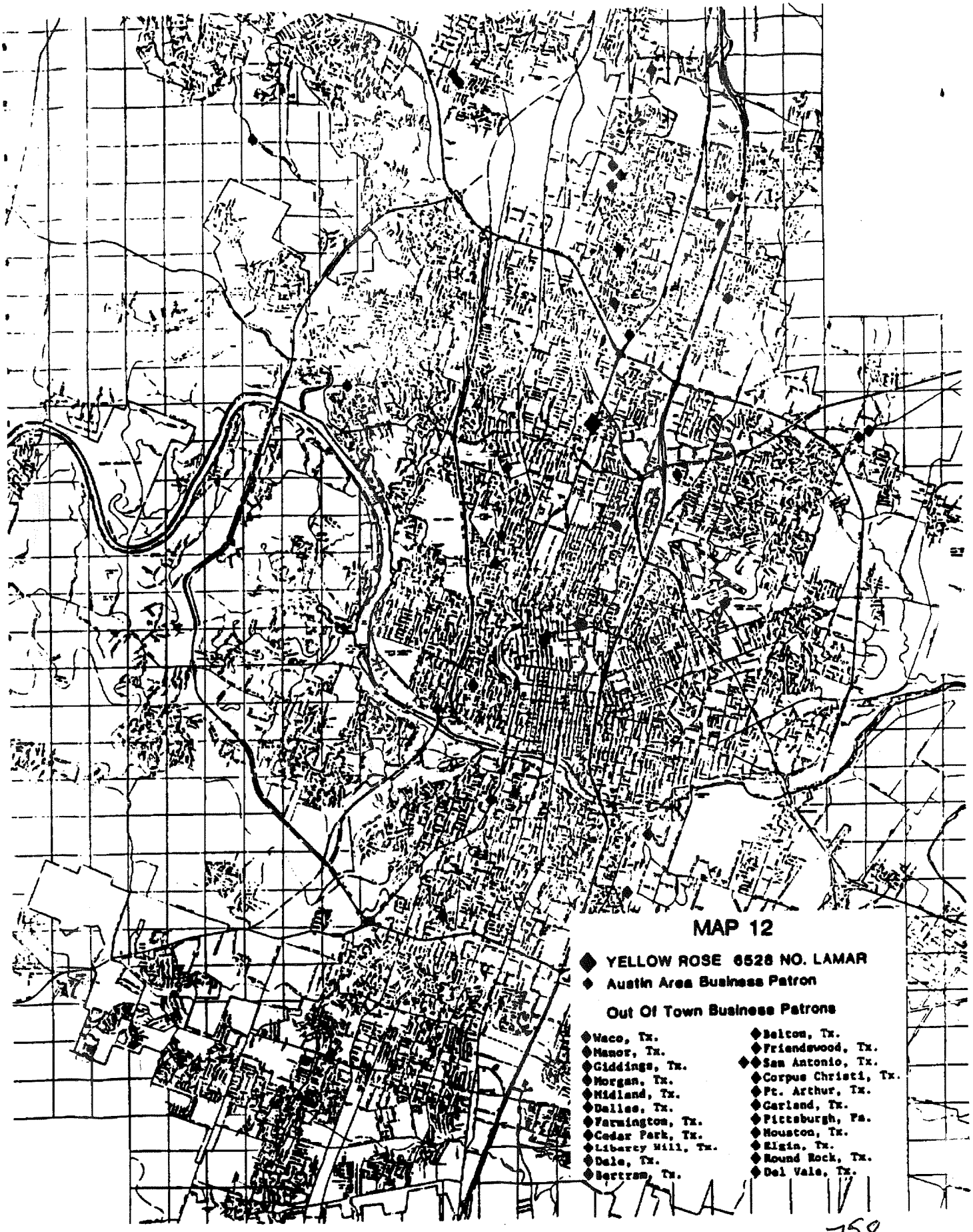
Methodology

In order to establish the extent of an adult business trade area, a method of determining the location of customer residences must be employed. The method selected for this evaluation was the observation of vehicle license numbers. It was assumed that addresses listed on the vehicle registration reflected the location of the customers residence.


MAP 10
Adult Business Trade Area
Southside News 2053 So. Lamar Blvd.
Austin Area Business Patron
Out of Town Business Patrons
Bryan, TX
Smithville, TX
Houston, TX
San Marcos, TX
Ft. Worth, TX
Katy, TX


MAP 11
CINEMA WEST 2130 SOUTH CONGRESS
Austin Area Business Patron
Out Of Town Business Patrons
San Marcos, Tx.
Lockhart, Tx.
Bastrop, Tx.
San Antonio, Tx.
Lancaster, Tx.
Houston, Tx.

2-763 758 756



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Three adult business sites were examined; an adult theater, an adult bookstore, and a topless bar. Due to study constraints, observation of these sites was limited to a single weekend night. It is believed, however, that the results of this examination reflect a reasonably accurate representation of the trade area of each business.

Results

The general location of customer residences was plotted on a map along with the location of the observed adult business. Addresses located outside of the Austin area or not found on the map are listed on the map legend. Maps 10,11, and 12 illustrate the residences of observed customers with respect to the adult business surveyed.

These maps indicate that the location of customers is fairly evenly distributed throughout the City, particularly in the case of the topless club, (Map 12). None of the three businesses observed appear to attract a significant number of customers from the immediate neighborhood. Of the 81 observations made only 3 were located within a one mile radius of the adult business. It should be noted that all of the adult businesses studied had single-family-residential neighborhoods in the immediate vicinity.

Almost half (44 percent) of the observed customers resided outside of the City of Austin. Table 15 summarizes this analysis for each of the adult businesses.

Table 15
Residence of Observed Customers

	Adult Theater	Adult Bookstore	Topless Bar
Within Austin	8	4	34
Outside of Austin	6	7	23
Total	14	11	57

CHAPTER IV
CONCLUSIONS

A. CRIME RATES

The results of this study indicate that there can be significant detrimental impacts on neighborhoods located near adult businesses. An analysis of sex-related crime rates in areas with adult businesses (Study Areas) revealed rates approximately two to five times higher than city-wide averages. Control Areas, which contain no adult businesses but have similar locations and land uses as the Study Areas, were found to have sex related crime rates approximately the same as city-wide rates. Moreover, sex-related crime rates in Study Areas with more than one adult business were found to be 66% higher than Study Areas with one adult business.

B. PROPERTY VALUES

The results of the assessment of the impact of adult businesses on property values suggests that there may be a severe decline in residential property values located within one block of an adult business site. There is an indication, based on the subjective opinions of real estate appraisers and lenders, that the introduction of an adult business into an area adjacent to family-oriented, owner-occupied residential neighborhoods may precipitate a transition to a more transient, renter-occupied neighborhood. The results of the survey of appraisers and lenders closely parallels the results of a similar survey conducted in Los Angeles, California and nationwide surveys conducted by the Division of Planning in Indianapolis, Indiana.

C. TRADE AREA CHARACTERISTICS

The analysis of the trade area characteristics of the adult business sites indicates that these businesses draw a substantial portion of their clientele from outside the immediate area in which they are located, and a sizable percentage of their clientele appear to reside outside the Austin area. From a land use standpoint, these businesses exhibit characteristics similar to other regionally oriented commercial service businesses.

D. RECOMMENDATIONS

Zone Districts

The analysis of the trade area characteristics of adult businesses revealed that they tended to attract a regional rather than local clientle. This finding suggests that such uses should be restricted to regionally oriented commercial zone districts. These districts are usually located along heavily traveled streets such as arterials and interstate highways, and are not normally near single-family neighborhoods. Commercial zone districts that are designed for a regional orientation include CBD, DMU, CH, CS and CS-1 and to a lesser extent, the GR, L, MI, and LI zone districts.

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The assignment of proper zone districts must also consider the type of adult business. Adult Entertainment Businesses, (including bookstores, theaters, and film stores) represent a form of free speech which is protected by the First Amendment. Regulation of these uses must not unduly restrict freedom of speech. Adult Service Businesses, such as massage parlors and modeling studios, are not as sensitive to First Amendment issues.

Adult Entertainment Businesses are recommended in the GR, L, CBD, DMU, CS, CS-1, CH, MI, and LI zone districts and Adult Service Business are recommended in the L, CBD, DMU, CS, CS-1, and CH zone districts.

Conditional Use Permits

The conditional use permit process offers a viable method of regulating adult businesses by providing an extra degree of review needed to address the potential impacts adult businesses generate to surrounding neighborhoods. Unlike traditional zone district regulations, conditional use permits require site plan review, thus affording additional analysis and control.

Austin's current zoning ordinance prohibits adult businesses from locating within 1000 feet of any property zoned or used as residential. This provision led to the invalidation of the ordinance in the suit initiated by Taurus Enterprises because it was found that almost all commercially zoned property is, in fact, located within 1000 feet of residential property. This is particularily true in older areas of the City where narrow strip commercial development is flanked by residential use. This restriction should be eliminated from the ordinance and the issue of neighborhood protection should be addressed via the conditional use permit.

Conditional use permits are recommended in the GR, L, DMU, MI, and LI zoning districts for Adult Entertainment businesses and for Adult Service businesses they are recommended in the L, DMU, CS and CS-1 zone districts. See Table 16 for a summary of these recommendations.

Table 16
Zoning Summary

	GR	L	CBD	DMU	CS	CS-1	CH	MI	LI
Adult Entertainment Businesses	C	C	P	C	P	P	P	C	C
Adult Service Businesses	–	C	P	C	C	C	P	–	–

C - Conditional Use
P - Permitted Use

Dispersion of Adult Businesses

The analysis of sex-related crime rates revealed that when more than one business was located in a study area, the crime rate was 66% higher. In order to address this potential problem, the regulation of adult businesses should prohibit their concentration. Presently, the ordinanee requires a 1,000 foot (about three city blocks) seperation between adult businesses. This requirement should be continued.

E. POTENTIAL LOCATIONS

The available use district maps were examined to identify potential locations where new adult entertanment business would be permitted to establish. Although the available maps do not provide full coverage of the city, the most heavily urbanized sections of the city were examined. The analysis found 4534 parcels of land of various sizes where an adult entertainment business would be permitted as a use by right under the current zoning assigned to these parcels. Adult entertainment businesses would be allowed as a conditional use on an additional 3328 parcels. These locations are located throughout the city and offer extensive sites for the establishment of new adult entertainment business. Permitted locations were found on approximately 110 use district maps, which comprise well over 90% of all maps examined. The maps will be retained on file in the Office of Land Development Services, 301 West Second Street, Austin, Texas 78767.

F. CONCLUSIONS

Implementation of the above recommended regulations will assure protection of First Amendment rights, and will also allow adult oriented business to operate without adversely affecting the property values and crime rates in surrounding neighborhoods.

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Appendix A

Analysis of Adult Business Studies in Indianapolis, Indiana and Los Angeles, California.

A. INDIANAPOLIS, INDIANA

In February, 1984, the Division of Planning in Indianapolis published a report entitled Adult Entertainment Businesses in Indianapolis: An Analysis. This report contained the results of an evaluation of the impact of adult business upon the surrounding area in terms of crime rates and real estate values.

Incidence of Crime

Methodology. The Indianapolis study assessed the impact of adult entertainment businesses on crime rates by researching six areas containing adult businesses and six similar areas containing no adult businesses. The six Study Areas were selected from among the forty three adult business locations. The criteria used to select the Study Areas were their zoning mix, population size, and the relative age of their housing stock. The Control Areas (having no adult businesses) were chosen on the basis of their proximate location to the Study Areas and their similarity in terms of population size and zoning mix. Of the six Study Areas, two consisted primarily of residential zoning, two consisted primarily of commercial zoning, and two contained a mix of both residential and commercial zoning. All Study and Control Areas were circular in shape with a 1000 foot radius.

The Indianapolis study evaluted crimes in the Study and Control Areas for the years 1978 through 1982. The study compiled all reported incidents to which police were dispatched. These data were assembled into two groups: Major Crimes and Sex-Related Crimes. Major Crimes included Criminal Homicide, Rape, Robbery, Aggravated Assault, Residence and Non-Residence Burglary, Larceny, and Vehicle Theft. Sex-Related Crimes included Rape, Indecent Exposure, Obscene Conduct, Child Molestation, Adult Molestation, and Commercial Sex.

Results. The evaluation found that for both the Study and Control Areas, the rate of major crimes was higher than the corresponding rate for the Indianapolis Police District as a whole. The average annual rate for major crimes in the Study Areas was 23 percent higher than the corresponding rate in the Control Areas. Comparison of the rates for sex-related crimes indicated a considerably larger difference between the Study and Control Areas. The average annual rate for sex-related crimes in the Study Area was 77 percent higher than the corresponding rate in the Control Area. The study also found a strong correlation between the crime frequency and the residential character of the Study areas. Crime rates were 56 percent higher in predominantly residential areas than in predominantly commercial areas. The study found a more acute difference regarding sex-related crimes. Sex-related crimes occurred four times more frequently in predominantly residential areas than in areas that were substantially commercial in nature.

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Real Estate Impacts

Methodology. The Indianapolis report also evaluated the impact of adult businesses on property values. The report approached the evaluation from two perspectives. The first approach compared the residential property appreciation rates of the Study Areas to those of the Control Areas and to a larger geographical area that included the Study and Control Areas. The second approach surveyed professional real estate appraisers to establish a "best professional opinion" regarding the market effect of adult businesses on surrounding land values.

The first part of the evaluation examined three sources in the assessment of residential property appreciation. These sources were: the Indianapolis Residential Multiple Listing Summaries of the Metropolitan Indianapolis Board of Realtors; 1980 Census Data; and the annual lending institution statements required by the Federal Home Mortgage Disclosure Act. The second part of the evaluation solicited the opinions of members of the American Institute of Real Estate Appraisers (AIREA). The survey sample was drawn at two levels. A 20 percent random sample of AIREA members from across the nation was constructed. A 100 percent sample of professional appraisers with the MAI (Member Appraisal Institute) designation, who practiced in the 22 Metropolitan Statistical Areas similar in size to Indianapolis, was compiled. The survey questionnaire was formulated to solicit information concerning the effect of adult businesses on residential and commercial property located within one to three blocks of the business site.

Results. The report adopted the following conclusions regarding the appreciation of residential properties. First, residential properties within the Study Areas appreciated at only one-half the rate of the Control Areas and one-third the rate of Center Township (representing the performance of the market at a broader scale). Second, while residential listing activity declined 52 percent in the Control Areas and 80 percent in Center Township, in the Study Area listings increased 4 percent. The report found that "twice the expected number of houses were placed on the market at substantially lower prices than would be expected had the Study Area real estate market performed typically for the period of time in question".

The tabulated results of the professional appraiser survey are depicted in Table 1. From these results, the report concluded that:

1. The large majority of appraisers felt that there is a negative impact on residential and commercial property values within one block of an adult bookstore.

2. The negative impact decreased markedly with distance from the adult bookstore. At a distance of three blocks the negative impact was judged by appraisers to be less than half that when compared to a distance of one block.

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3. The majority felt that the negative impact was greater for residential properties than for commercial properties.

Table I
Effect of Adult Businesses on Property Values in Indianapolis, Indiana

	Decrease 20% or more	Decrease 10 to 20%	Decrease 1 to 10%	No change	Increase 1 to 10%	Increase 10 to 20%
Residential Property One Block Radius						
20% National Survey	21.3	24.5	34.1	20.1	0.0.	0.0
100% MSA Survey	19.0	25.4	33.6	21.1	0.9	0.0
Commercial Property One Block Radius						
20% National Survey	10.0	19.3	42.6	28.1	0.0	0.0
100% MSA Survey	9.5	20.3	39.9	29.9	0.9	0.4
Residential Property Three Block Radius						
20% National Survey	1.6	9.3	25.4	63.3	0.4	0.0
100% MSA Survey	2.6	7.8	28.9	60.3	0.4	0.0
Commercial Property Three Block Radius						
20% National Survey	0.8	5.2	16.5	76.6	0.8	0.0
100% MSA Survey	2.2	3.9	16.8	75.9	1.3	0.0

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The Indianapolis appraiser survey included a question designed to help establish the basis for their opinions regarding the degree to which adult businesses affect property values in general. Almost 90 percent of those responding to the survey provided responses to this question. In the national survey, 29 percent saw little or no effect on surrounding property values resulting from adult businesses. They listed as a basis their professional experience; the observation that this use generally occurs in already deteriorated neighborhoods; and the feeling that the effect of only one adult business would be inconsequential.

One half of the respondents projected a substantial to moderate negative impact on surrounding property values. Their responses were based on the feeling: that adult businesses attract "undesirables" to the neighborhood; that adult businesses create a bad image of the area; and that this type of use offends the prevailing community attitudes thus discouraging homebuyers and customers from frequenting the area. Twenty percent of the respondents indicated that the potential impact on surrounding property values was contingent on other variables. Many felt the impact would be contingent on the existing property values in the area and the subjective value of area residents. Some felt that development standards controlling facade and signage would determine the degree of impact, while others indicated that the nature of the existing commercial area and its buffering capacity as the most important factor influencing the impact on surrounding property values.

The MSA survey results closely paralleled those of the national survey. Two additional responses are noteworthy. First, some respondents indicating a substantial to moderate negative impact based their opinion on the feeling that such uses precipitate decline and discourage improvements in the area. Second, some respondents felt that the impact on property values was contingent on whether or not it was likely that other adult businesses would be attracted to the area.

B. LOS ANGELES, CALIFORNIA

In June, 1977 the Department of City Planning of the City of Los Angeles published a report entitled Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles. The study includes an evaluation of the impact of adult businesses on both crime rates and property values.

Incidence of Crime

Methodology. The City's study evaluated the impact of adult businesses on criminal activity by comparing crime rates in Hollywood to crime rates for the city. Hollywood was selected as a study area because of its high concentration of adult businesses. The study focused on the years 1969 to 1975, during which time adult businesses in Hollywood proliferated from 11 to 88 establishments.

Results. The City's study monitored trends in Part 1 crimes. Part 1 crimes include homicide, rape, aggravated assault, robbery, burglary, larceny, and vehicle theft. The number of reported incidents of Part 1 crimes in the Hollywood area increased 7.6 percent from 1969 to 1975. This was nearly double the citywide average increase of 4.2 percent for the same time period. This report also monitored Part I crimes committed against a person (as opposed to those committed against property) and found that they increased at a higher than average rate in the Hollywood Area. Street robberies and purse snatchings, where in the victims were directly accosted by their assailant, increased by 93.7 percent and 51.4 percent, respectively; compared to the city wide average increase of 25.6 percent and 36.8 percent.

The increase in arrests for Part II crimes indicated an alarming differential between the Hollywood area and the city as a whole. Arrests for these crimes increased 45.5 percent in the Hollywood area but only 3.4 percent city wide. Prostitution arrests in the Hollywood area increased at a rate 15 times greater than the city average. While the city showed a 24.5 percent increase, prostitution arrests in Hollywood increased 372.3 percent. In 1969, arrests for prostitution in the Hollywood area accounted for only 15 percent of the city total; however, by 1975 they accounted for over 57 percent of the total. In the Hollywood area pandering arrests increased by 475 percent, which was 3 1/2 times greater than the city wide average. In 1969 pandering arrests in the Hollywood area accounted for 19 percent of the city total. By 1975, the share had increased to 46.9 percent.

The Los Angeles Police Department increased their deployment of police personnel at a substantially higher rate in the Hollywood area in response to the surge in crime. The report emphasized that sexually-oriented business either contributed to or were directly responsible for the crime problems in the Hollywood area.

Real Estate Impacts

Methodology. The study prepared by the City of Los Angeles utilized a two point approach in evaluating the impact of adult businesses on surrounding property values. The primary approach sought to establish the impact on property values by monitoring changes in assessed value from 1970 to 1976 for selected areas having concentrations of adult businesses and for appropriate control areas. The report selected five study areas containing 4 to 12 adult entertainment businesses. Three study areas were in Hollywood and the other two were in the San Fernando Valley. Four control areas, having no adult businesses were selected. The study examined property assessment data, U.S. census data, and other pertinent information to determine the rate of appreciation over the six year study period. The rates for the Study Areas were compared to the rates for the Control Areas to gauge the impact of adult businesses on property values.

The second approach of the study used survey questionnaires to subjectively establish the impact of adult businesses on surrounding residential and commercial properties. Two questionnaires were prepared. The first questionnaire was distributed to all members of the American Institute of Real Estate Appraisers having a Los Angeles address and to members of the California Association of Realtors having offices in the vicinity of the Study Areas. The second questionnaire was distributed to all property owners (other than single family residential) within 500 feet of the Study Areas. The results of these surveys were supplemented with input from the general public obtained at two public meetings held in the area.

Results. The evaluation found that there was some basis to conclude that the assessed valuation of property within the Study Areas had generally tended to increase at a lesser rate than similar areas having no adult businesses. However, the report noted that in the opinion of the planning staff there was insufficient evidence to support the contention that concentrations of adult businesses have been the primary cause of these patterns of change in assessed valuation.

The appraiser questionnaire was distributed to 400 real estate professionals with 20 percent responding. The results can be summarized as follows:

1. 87.7% felt that the concentration of adult businesses would decrease the market value of business property located in the vicinity of such establishments.

2. 67.9% felt that the concentration of adult businesses would decrease the rental value of business property located in the vicinity of such establishments.

3. 59.3% felt that the concentration of adult businesses would decrease the rentability/salability of business property located in the vicinity of such establishments.

4. 72.8% felt that the concentration of adult businesses would decrease the annual income of businesses located in the vicinity of such establishments.

5. Over 90% felt that the concentration of adult businesses would decrease the market value of private residences located within 1000 feet.

6. Over 86% felt that the concentration of adult businesses would decrease the rental value of residential income property located within 1000 feet.

7. Almost 90% felt that the concentration of adult businesses would decrease the rentability/salability of residential property located within 1000 feet.

Respondents to the appraisers' survey commented that the adverse effects are related to the degree of concentration and the type of adult business. They indicated that one free standing adult business may have no effect. A few comments indicated that property values and business volume might increase for businesses that are compatible with adult entertainment businesses (e.g.: other adult businesses, bars). A high percentage of appraisers and realtors commented on the adverse effect of adult businesses on neighborhood appearance, litter, and graffiti.

The survey of property owners indicated that almost 85 percent felt that adult entertainment establishments had a negative effect on the sales and profits of businesses in the area. Over 80 percent felt that adult businesses had a negative affect on the value and appearance of homes in the area immediately adjacent to such businesses. Area property owners and businessmen cited the following adverse effects resulting from adult entertainment establishments.

1. Difficulty in renting office space.

2. Difficulty in keeping desirable tenants.

3. Difficulty in recruiting employees.

4. Limits hours of operation (evening hours).

5. Deters patronage from women and families.

6. Generally reduces business patronage.

Respondents emphasized their concerns about the high incidence of crime. A high percentage of respondents commented that the aesthetics of adult businesses are garish, sleazy, shabby, blighted, tasteless, and tend to increase the incidence of litter and graffiti.

Testimony received at the two public meeting on this subject revealed that there was serious public concern over the proliferation of adult entertainment businesses, particularly in the Hollywood area. Citizens testified that they are afraid to walk the streets, particularly at night. They expressed concern that children might be confronted by unsavory characters or exposed to sexually explicit material.

Appendix B

TYPES OF CRIMES

Part 1 Crimes

Murder
Capital Murder
Criminal Negligent Homicide/Non-Traffic
Criminal Negligent Homicide/Traffic
Involuntary Manslaughter/Traffic
Justified Homicide

Sexual Assault
Attempted Sexual Assault
Aggravated Sexual Assault
Attempted Aggravated Sexual Assault
Rape of a Child
Attempted Rape of a Child

Aggravated Robbery/Deadly Weapon
Attempted Aggravated Robbery/Deadly Weapon
Aggravated Robbery by Assault
Robbery by Assault
Attempted Robbery by Assault

Attempted Murder
Attempted Capital Murder
Aggravated Assault
Aggravated Assault on a Peace Officer
Deadly Assault
Serious Injury to a Child
Arson with Bodily Injury

Burglary of a Residence
Attempted Burglary of a Residence
Burglary of a Non-Residence
Attempted Burglary of a Non-Residence

Theft
Burglary of a Vehicle
Burglary of a Coin-Operated Machine
Theft from Auto
Theft of Auto Parts
Pocket Picking
Purse Snatching
Shoplifting
Theft of Service
Theft of Bicycle
Theft from Person
Attempted Theft
Theft of Heavy Equipment
Theft of Vehicle/Other

Auto Theft
Attempted Auto Theft
Unauthorized use of a vehicle

Sex Related Crimes

Sexual Assault
Attempted Sexual Assault
Aggravated Sexual Assault
Attempted Aggravated Sexual Assault
Rape of a Child
Attempted Rape of a Child

Prostitution
Promotion of Prostitution
Aggravated Promotion of Prostitution
Compelling Prostitution

Sexual Abuse
Aggravated Sexual Abuse
Attempted Aggravated Sexual Abuse
Public Lewdness
Indecent Exposure
Sexual Abuse of a Child
Attempted Sexual Abuse of a Child
Indecency with a Child
Incest
Solicitation

Appendix C

COMPOSITION OF STUDY & CONTROL AREAS
BY ZONING DISTRICT

	Area One		Area Two		Area Three		Area Four	
	Study	Control	Study	Control	Study	Control	Study	Control
1-SF-3				2.92				
SF-3	18.78	26.97	25.43	22.31	33.26	47.29	22.49	22.39
SF-3-H								
MF-2	3.30			2.64	.77	2.32	1.72	
MF-3	.94		1.93	1.38	7.88	2.64	1.03	1.00
MF-4	.28							2.69
MF-5								
LO	4.47	1.45	.57	1.17	2.72	1.02		
GO		.43						
CS	13.90	15.88	26.54	13.06	10.31	1.21	13.16	24.99
CS-1	1.12	.78		.34	.40		15.44	1.55
CS-H								
GR	.98	.34		7.40	2.27	1.12	.77	1.55
LR	.54	.89		.37		3.78		
LI								3.62
AVIATION		3.05						
UNZ								
ROAD ROW	22.59	22.33	17.65	20.53	14.51	12.74	17.51	14.34
TOTAL	72.12	72.12	72.12	72.12	72.12	72.12	72.12	72.12

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ADULT ENTERTAINMENT BUSINESSES IN INDIANAPOLIS

AN ANALYSIS 1984

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ADULT ENTERTAINMENT BUSINESSES IN INDIANAPOLIS

AN ANALYSIS

Department of Metropolitan Development
Division of Planning
February, 1984

TABLE OF CONTENTS

SUMMARY AND RECOMMENDATIONS

During the past ten years, Indianapolis has experienced a significant growth in the number and variety of adult entertainment businesses located in its jurisdiction. An adult entertainment business, for the purposes of this study, is an establishment which primarily features sexually stimulating material or performances. As of mid-1983 there were sixty-eight such businesses operating in this City. They were located at forty-three separate sites.

The proliferation of these businesses heightened the community's awareness of their existence and resulted in numerous requests that the City control their presence. Beyond the moral objections raised by many citizens, it was also alleged that such businesses had a detrimental effect on property values and contributed to high crime rates where they were located.

The Indianapolis Division of Planning undertook this study in July of 1983. Of the existing adult entertainment sites, the study examined six representative locations (the Study Area) and the presence - or lack thereof - of certain relevant conditions therein. It then compared these sites with six physically similar locations (the Control Area) containing no adult entertainment business. Both groups of sites were compared with the City as a whole.

Because of their importance to the public welfare of the community, the study examined the factors of crime incidence during the period 1978 - 1982 and real estate value appreciation from 1979 - 1982. In support of limited real estate data on a small area level, the City collaborated with Indiana University in a national survey of real estate appraisers to develop a "best professional opinion" as to the effect of adult entertainment businesses on surrounding real estate values.

As discussed in Appendix III of this report, case law has firmly established the legal and constitutional basis for control of the use of land within their jurisdiction by states and municipalities in order to safeguard "the public health, safety, morals and general welfare of their citizens". The "public welfare", in this context, embraces the stabilization of property values and the promotion of desirable home surroundings. On the other hand, case law has also upheld the right of this business sector to operate in the community under the First and Fourteenth Ammendments of the Constitution.

In establishing an empiric base to determine whether controls were warranted in order to direct the location of these businesses, analyses of the data showed:

- The average major crime rate (i.e., crimes per 10,000 population) in the IPD District was 748.55, the Control Area 886.34, and the Study Area 1090.51. Major crimes occurred in areas of the study that contained at least one adult entertainment establishment at a rate that was 23% higher than the six similar areas studied not having such businesses and 46% higher than the Police District at large.

- Although it was impossible to obtain a discrete rate for sex-related crimes at the police district level, it was possible to compare rates between the Control Areas and the Study Areas. The average sex-related crime rate in the Control Areas over the five year period was 26.2, while that rate for the Study Areas was 46.4.

- If the ratio of sex-related crimes was the same as that established for major crimes between the Control Area and the Study Area, however, we would expect a sex-related crime rate of 32.3. The actual rate of 46.4 is 77% higher than that of the Control Areas rather than the 23% that would be expected and indicates the presence of abnormal influences in the Study Areas.

- Close examination of crime statistics within the Study Areas indicate a direct correlation between crime and the residential character of the neighborhood. Crime frequencies were 56% higher in residential areas of the study than in its commercial areas.

- At the same time, sex-related crimes occurred four times more frequently within residential neighborhoods having at least one adult entertainment business than in neighborhoods having a substantially district-related commercial make-up having adult entertainment.

- Although the housing base within the Study Areas was of a distinctly higher value than that of the Control Areas, its value appreciated at only one-half the rate of the Control Areas' and one-third the rate of Center Township as a whole during the period 1979 - 1982.

- Pressures within the Study Areas caused the real estate market within their boundaries to perform in a manner contrary to that within the Control Areas, Center Township and the County. In a time when the market saw a decrease of 50% in listings, listings within the Study Areas actually increased slightly.

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- As a result, 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.

- The great majority of appraisers (75%) who responded to a national survey of certified real estate appraisers felt that an adult bookstore located within one block would have a negative effect on the value of both residential (80%) and commercial (72%) properties. 50% of these respondents foresaw an immediate depreciation in excess of 10%.

- At a distance of three blocks, the great majority of respondents (71%) felt that the impact of an adult bookstore fell off sharply so that the impact was negligible on both residential (64%) and commercial (77%). At the same time, it appears that the residual effect of such a use was greater for residential than for commercial properties.

- In answer to a survey question regarding the impact of an adult bookstore on property values generally, 50% felt that there would be a substantial-to-moderate negative impact, 30% saw little or no impact, and 20% saw the affect as being dependent on factors such as the predominent values (property and social) existing in the neighborhood, the development standards imposed on the use, and the ability of an existing commercial node to buffer the impact from other uses.

While the statistics assembled and analyzed in this study should not be construed as proving that adult businesses cause the negative impacts illuminated herein, an obvious variable in each instance of comparison is their presence. Crime rates - particularly those that are sex-related - show substantial deviation from normal rates for this population. Analyses of real estate listings and sales show a negatively abnormal performance of the real estate market in areas where adult entertainment is offered. In this latter case, the best professional judgement available indicates overwhelmingly that adult entertainment businesses - even a relatively passive use such as an adult bookstore - have a serious negative effect on their immediate environs.

Consequently, it would seem reasonable and prudent that the City exercise its zoning power to regulate the location of adult entertainment businesses so that they operate in areas of the community that, while accessable to their patrons, are yet located in districts that are least likely to injure the general welfare of residents.

IT IS, THEREFORE, RECOMMENDED:

- THAT ADULT ENTERTAINMENT BUSINESSES BE ALLOWED TO LOCATE IN AREAS THAT ARE PREDOMINANTLY ZONED FOR DISTRICT-ORIENTED COMMERCIAL ENTERPRISES - I. E., C4 OR MORE INTENSE USE CATEGORIES.

- THAT NO ADULT ENTERTAINMENT BUSINESS BE ALLOWED TO LOCATE IN AREAS THAT ARE PREDOMINANTLY ZONED FOR NEIGHBORHOOD-ORIENTED COMMERCIAL ENTERPRISES - I. E., C3 OR LESS INTENSIVE USE CATEGORIES.

- THAT EACH LOCATION REQUIRE A SPECIAL EXCEPTION WHICH, AMONG OTHER CONSIDERATIONS, WOULD REQUIRE APPROPRIATE DEVELOPMENT STANDARDS DESIGNED TO BUFFER AND PROTECT ADJACENT PROPERTY VALUES.

- THAT THESE USES 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.

INTRODUCTION

As is the case in most large cities, Indianapolis has experienced a rapid growth in the number and variety of adult entertainment businesses over the past ten years. As of June, 1983 there were sixty-eight such businesses located singly and in clusters throughout Marion County.

For the purpose of this study, the term "adult entertainment business" is a general term utilized to collectively designate businesses which primarily feature sexually stimulating material and/or performances. These non-exclusively include adult bookstores, adult cabarets, adult drive-in theaters, adult mini motion picture theaters and arcades, adult entertainment arcades and adult service establishments.

These enterprises have posed a particular problem due, in part, to the moral implications attendant upon such businesses in the minds of many members of the community. While this is, perhaps, the view of the majority, case law on the subject has clearly established that the exclusion of such businesses from a community is an infringement of First Amendment rights. The proliferation of such businesses providing various forms of adult entertainment in Marion County has exacerbated this dilemma and given rise to additional charges of negative impacts on neighborhoods in proximity to their location.

Through the use of their zoning power, cities have within the past half century directed the physical growth of communities in order to assure a harmonious blend of land uses which foster the general welfare of the population. This power has been applied more recently to adult entertainment businesses in many communities and has served as a prime means of controlling possible negative impacts on neighborhoods.

This study was undertaken to examine these alleged negative impacts with the purpose of empirically establishing, to the extent possible, their existence or non-existence as well as their real dimensions in Indianapolis. The possible relationships between these impacts and the land use characteristics of the sites in which they are offered were also examined to ascertain whether certain land use classifications were better suited than others for the location of adult entertainment businesses.

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STUDY METHODS

As described below, the study methodology employs the comparison of different land areas in Indianapolis. The two basic areas of comparison are Study Areas and Control Areas. They are distinguished by the existence of adult entertainment establishments within their boundaries (the Study Areas) or the absence thereof (the Control Areas).

These two designations are further differentiated as to the general purpose or emphasis of the land uses they contain. Those that generally serve the immediately surrounding residential uses are termed "Neighborhood-Related" while those that contain uses meant to serve a broader geographic area are designated "Community-Related".

STUDY SITE LOCATIONS

At the time of the study's inception, there were at least forty-three possible, distinct sites in Indianapolis where adult entertainment was offered either singly or in clusters of establishments. For manageability purposes, it was decided to select six of these sites that were representative. In choosing these subject locations (as well as the Control Areas of the study),the determinant characteristics were their zoning mix, population size and the relative age of housing stock. In each case, adult entertainment was offered during the time span of the study.

The selection process was additionally based on the number of establishments located in a given neighborhood, whether it was residential in nature and therefore neighborhood-related, or contained a significant portion of its land use in regional, commercial uses which made it community-related.

The designation "Neighborhood-Related" was applied where a preponderance (75% or more) of the area within 1000 feet of the site was zoned D1 through D12 (residential dwelling district classifications) and the commercial areas were neighborhood-related - principally C3 (a neighborhood commercial classification). Special Use designations were judged to be neighborhood-related or not on an individual basis. SU1 (church) & SU2 (school), for example, were judged to be generally neighborhood-related.

"Community-Related" areas were described as areas where a significant proportion (30% or more) of the zoning within the 1000-foot radius was C4 (Community-Regional Commercial) or more intense and the Special Uses within the boundaries were of a community-wide nature. SU6 (hospital) and SU21 (cemetery) were judged, therefore, to be related to the community generally.

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Within these two broad classifications, six locations were chosen. Two of them were situated in residential settings, two in regional-commercial settings and two in areas that fell in between, i. e., areas that had a high percentage of residential zoning but also contained a certain proportion of regionally oriented commercial zoning. These six locations became the Study Areas of this investigation. (cf. Appendix I)

AREA ZONING CHARACTERISTICS
STUDY AREAS

SITE	CHARACTERISTICS			
	Residential	Commercial	Special	Parks
Residential				
1.5431 East 38th St.	D4=82%	C1=7% C3=8%	SU1=3%	-
2.3155 East 10th St.	D5=75%	C3=24%	SU9=1%	-
Coml./Residential				
3.3555 West 16th St.	D5=78%	C4=22%	-	-
4.2101 W. Washington	D5=60%	C3=3% C4=18%	SU2=17%	PK1=2%
Commercial				
5.6116 E. Washington	D5=65% D8=5%	C4=30%	-	-
6.4441-63 N. Keystone	D5=15%	C2=5% C3=10% C5=40%	I1U=12% I2U=13%	PK2=5%

Of the two sites chosen in residential areas, one contained an adult bookstore (Apollo Adult Books, 5431 East 38th St.) and a massage parlor(Eve's Garden of Relaxation, 5429 East 38th St.) The other residential location contained an adult movie house (Rivoli Theater, 3155 East 10th St.) and a topless bar (Ten-De Club, 3201 East 10th St.)

One of the commercial/residential areas had a topless bar within its boundaries (Blue Moon Saloon, 2101 West Washington), while the other harbored the White Front Bar which featured topless dancing (3535 West 16th St.)

The two commercial areas chosen were in the sixty-one hundred block of East Washington St. and the forty-four hundred block of North Keystone. The first site contained two adult bookstores (Modern Art Bookstore at 6118 and Adult Arcade at 6122) and a massage parlor (Spanish Moon at 6116.) The North Keystone location contained four massage parlors (Other World, 4441, Diamond's Angels, 4445, Pleasure Palace, 4461, and Town and Country, 4463), two adult bookstores (Video World, 4447 and Adult Bookstore, 4475) as well as a topless lounge (Devil's

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Hideaway, 4451).

Six areas were also selected to serve as control sites for the study. These sites were chosen on the basis of their proximate location to the Study Areas (or their location on major thoroughfares in areas physically similar in location and types of development), size of population and zoning characteristics. None contained adult entertainment businesses. Selection was also made so that two of the sites were in predominantly residential areas, two in commercial areas and two in areas that contained a significant mix of residential and regional commercial zoning. These six sites became the Control Areas of the study, (cf. Appendix I.)

AREA ZONING CHARACTERISTICS
CONTROL AREAS

SITE	CHARACTERISTICS			
	Residential	Commercial	Special	Parks
Residential				
1.2300 West 10th St.	D5=82%	C1=4% C3=14%	-	-
2.2500 East 10th St.	D5=80%	C2=12% C3=8%	-	-
Coml./Residential				
3.5420 E. Washington	D5=62% D6=8% D8=10%	C3=1% C4=19%	-	-
4.2600 W. Washington	D5=35% D4=34%	C1-2% C2=1% C5=13% C7=8%	SU1=3% SU2=3%	-
Commercial				
5.5200 N. Keystone	D2=7% D4=2% D5=15% D7=6%	C1=4% C3=9% C5=25% C7=20% CS=2%	11U=10%	-
6.750 N. Shadeland	D2=3% D3=15% D7=3%	C4=49% C5=10% CS=5%	SU1=15%	-

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AREA ZONING CHARACTERISTICS

	NEIGHBORHOOD-RELATED	COMMUNITY-RELATED
Residential		
Study Area		
1.	100%	-
2.	99%	1%
Control Area		
1.	100%	-
2.	100%	-
Coml./Residential		
Study Area		
3.	78%	22%
4.	82%	18%
Control Area		
3.	81%	19%
4.	78%	22%
Commercial		
Study Area		
5.	70%	30%
6.	35%	65%
Control Area		
5.	43%	57%
6.	36%	64%

STUDY SITE COMPARISONS

Throughout the following analyses, a series of comparisons are made at several different levels of geography: i.e., County/ Police District; Census Tract/Census Tract Cluster; and Control/ Study Area.

Large Area

When dealing with crime statistics, the Indianpolis Police Department District is used as the largest universe of comparison. In the case of real estate information, Marion County is used as the largest geographic area of comparison. Center Township is also used as a basis of comparison in the analysis of adult entertainment impacts on property values

Mid-Size Area

Intermediate geographic levels used for comparison in the study were census tracts when study sites were centrally located within their boundaries. Where they were not, those census tracts in proximity to the site were chosen as the basis of comparison.

CENSUS TRACTS/TRACT CLUSTERS
Study/Control Areas

	1	2	3	4	5	6
Control Areas	3412	3527	3611	3414	3216	3606
	2416	3547	3612	3426	3217	3607
		3548				3608
Study Areas	3310	3526	3411	3414	3607	3216
	3601	3548		3426		3224
		3549		3538		3225
						3226

Sub-Area

The Control Areas and the Study Areas, as described above, formed the smallest geographic group of the study. These target areas were constituted using the criteria listed in the previous section of this report and data derived for them by aggregating block-level or addressed data within a 1000-foot radius of the area centroid.

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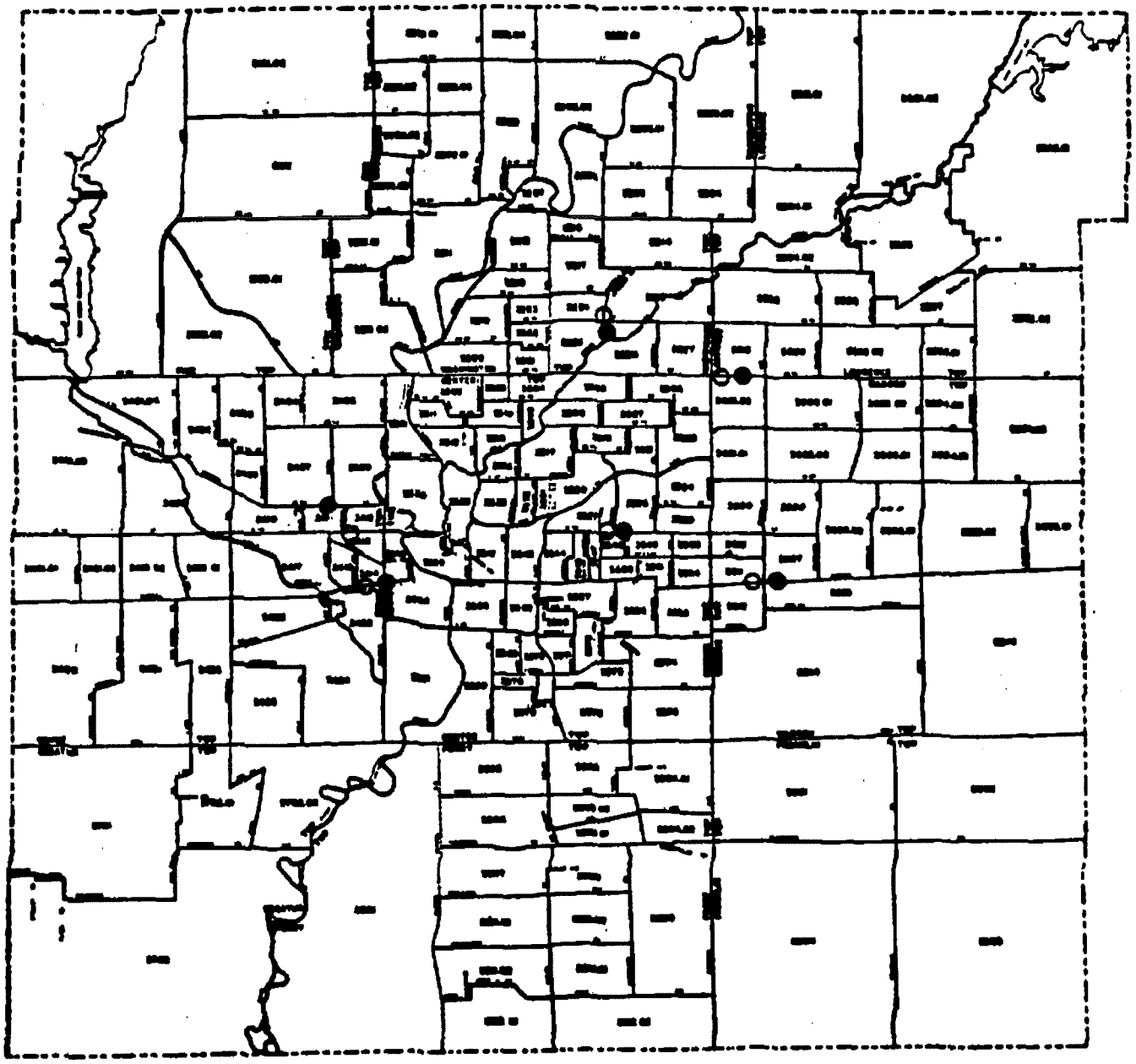

1980 CENSUS TRACTS

ADULT ENTERTAINMENT BUSINESS STUDY

● Study Area

○ Control Area

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CRIME INCIDENCE

The Data Processing Unit of the Indianapolis Police Department performed two computer runs of their "Incidence Files" [1] in August of 1983 at the request of the City Division of Planning. The resultant printouts detailed all reported incidents to which police had been dispatched in the Control Areas and the Study Areas during the years 1978, 1979, 1980, 1981 and 1982. Data were assembled from these printouts on a year-by-year, area-by-area basis. They were then grouped by Major Crimes[2] and Sex-Related Crimes.[3]

Summary data for the Indianapolis Police District were also assembled for major crimes during the years 1978 through 1982. Unfortunately, sex-related crimes had not been discreetly assembled for the Police District and study constraints would not allow their tabulation manually.

The purpose of these tabulations was to identify any possible abnormalities that might have occurred in expected frequency and nature of crime between the Indianapolis Police District, the Control Areas which were chosen for their similarity to the Study Areas and the Study Areas themselves in which adult entertainment establishments were in operation.

As was demonstrated in the previous section, the Study Area locations were chosen as being representative of existing adult entertainment sites in zoning mix, size of population, age of housing stock and types of adult entertainment services offered in the area. Excepting the latter, these same criteria were used in the choice of Control sites. Because they were representative, it is possible to compare Control and Study Areas as well as infer findings to other adult entertainment locations in the community.

Based on the summaries of crimes, crime rates were computed for each area using 1980 Census data as the population constant.[4] The crime rate statistics portrayed the frequency of crime in each area for each 10,000 of population and allowed direct comparison of crime impacts between the three areas. The same technique was used to compare the magnitude of sex-related crime in the Control Areas and the Study Areas.

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MAJOR CRIMES

The crimes of Criminal Homicide, Rape, Robbery, Aggravated Assault, Residence and Non-Residence Burglary, Larceny and Vehicle Theft are reported on a monthy basis by the Indianapolis Police Department as Major Crimes. During the period of this study (1978 - 1982), there were 175,796 major crimes reported in the IPD District with an annual high of 37,220 occuring in 1980. The crime rate for this year was 792.42 in the police district.

This represented an increase of 2,115 major crimes over the previous year total and an increase of 6% in the crime rate. The lowest annual total in the study period (33,898) was reported in 1981 which represented a drop of 10% in the crime rate from the previous year.

Indianapolis Police District Major Crimes/Rates
1978-1982

Population- 469,700

	1978	1979	1980	1981	1982
Murder	76/1.62	92/1.96	107/2.28	66/1.36	69/1.47
Rape	341/7.26	439/9.35	410/8.73	400/8.52	387/8.24
Robbery	1963/41.79	2063/43.71	2183/46.69	2184/46.71	1983/42.43
Aggravated Assault	1363/29.81	1594/33.94	1743/37.11	1880/40.03	1882/40.26
Residence Burglary	6848/136.11	6538/139.20	7496/159.57	7677/163.46	7783/166.70
Non-Residence Burglary	2382/50.93	2011/42.82	2578/54.91	2306/49.14	2213/47.12
Larceny	16892/397.96	16927/402.96	16906/402.51	16782/357.29	17497/372.51
Vehicle Thefts	3674/78.22	3461/73.47	3787/80.63	2682/56.18	2902/61.78
Total:	34637/741.69	35105/747.39	37220/792.42	33898/721.70	34736/738.54

Total Crimes: 175,796

Per 10,000 Population

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AN ANALYSIS OF THE EFFECTS OF SOBs ON THE SURROUNDING NEIGHBORHOODS IN DALLAS, TEXAS

AS OF APRIL 1997

Prepared for:

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Over the same period of time, the Control Area for this study had 5,170 major crimes committed within its boundaries - the highest number occurring in 1980 when 1,099 crimes were reported. The crime rate for this year was 942.05 in this area. This is compared to the lowest total of 912 and a crime rate of 781.76 for 1978. This represented an absolute difference of 187 total major crimes and a difference of 21% in the crime rate (160.29).

Control Area Major Crimes/Rates*1978-1982

(Population-11,666)

	1978	1979	1980	1981	1982
Murder	1/0.86	4/3.43	3/2.57	5/4.29	2/1.71
Rape	8/6.86	12/10.29	15/12.86	8/6.86	13/11.14
Robbery	37/31.72	44/37.72	44/37.72	50/42.86	36/30.86
Aggravated Assault	19/16.29	35/30.00	29/24.86	30/25.72	37/31.72
Residence Burglary	151/129.42	229/196.30	262/224.58	272/233.16	198/169.72
Non-Residence Burglary	71/60.86	50/42.86	62/53.15	59/50.57	79/67.72
Larceny	484/414.86	544/466.31	574/492.03	588/504.03	579/496.31
Vehicle Theft	141/120.86	112/96.01	110/94.29	83/71.15	90/77.15
	Total: 912/781.76	1,030/882.91	1,099/942.05	1,095/938.63	1,034/886.34
					Total: 5,170
*Per 10,000 Population					Average: 886.34

During the period 1978 - 1982, 4,657 major crimes were committed in the Study Area. As in the IPD District and the Control Area, the greatest volume of major crimes (1,103) occurred in 1980 which had a crime rate of 1,291.42. The fewest number of crimes in the study's time frame was 867 in 1978 which represented a differencial in the total number of major crimes reported and the rate of crime of -236 and -276.32 respectively from 1980

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Study Area Major Crimes/Rates* 1978-1982

(Population- 8,541)

	1978	1979	1980	1981	1982
Murder	3/3.51	0/-	2/2.34	5/5.85	0/-
Rape	3/3.51	12/14.05	11/12.88	9/10.54	8/9.37
Robbery	55/64.40	53/62.05	58/67.91	26/30.44	44/51.52
Aggravated Assault	25/29.27	18/21.08	22/25.76	16/18.73	29/33.95
Residence Burglary	161/188.50	200/234.17	244/285.68	190/222.46	189/221.29
Non-Residence Burglary	82/96.01	58/67.91	80/93.67	65/76.10	64/74.93
Larceny	462/540.92	450/526.87	586/686.10	560/655.56	464/543.26
Vehicle Theft	76/88.96	80/105.37	100/117.06	60/70.25	77/90.16
Total:	867/1015.10	851/1031.50	1103/1291.42	931/1090.04	875/1024.47

*Per 10,000 Population

Total: 4,857

Average: 1090.51

The frequency of crimes in the IPD District, the Control Areas and the Study Areas showed approximately the same pattern. In each of the areas, the number of major crimes increased from 1978 to 1980 when they peaked. Subsequent years showed frequency levels below the 1980 high.

The average crime rate figure for the Indianapolis Police Department District was 748.55. The Control Area had a rate that was 137.79 higher than the overall police district, whereas the Study Area was 204.17 points higher than the Control Area. In other words, people living in the Control Area of the study were exposed to a major crime rate in their neighborhoods that was 18% higher than that of the IPD population generally.

Residents of the Study Area, however, were exposed to a major crime rate that was 23% higher than that of the Control Area and 46% higher than the population of the IPD District as a whole.

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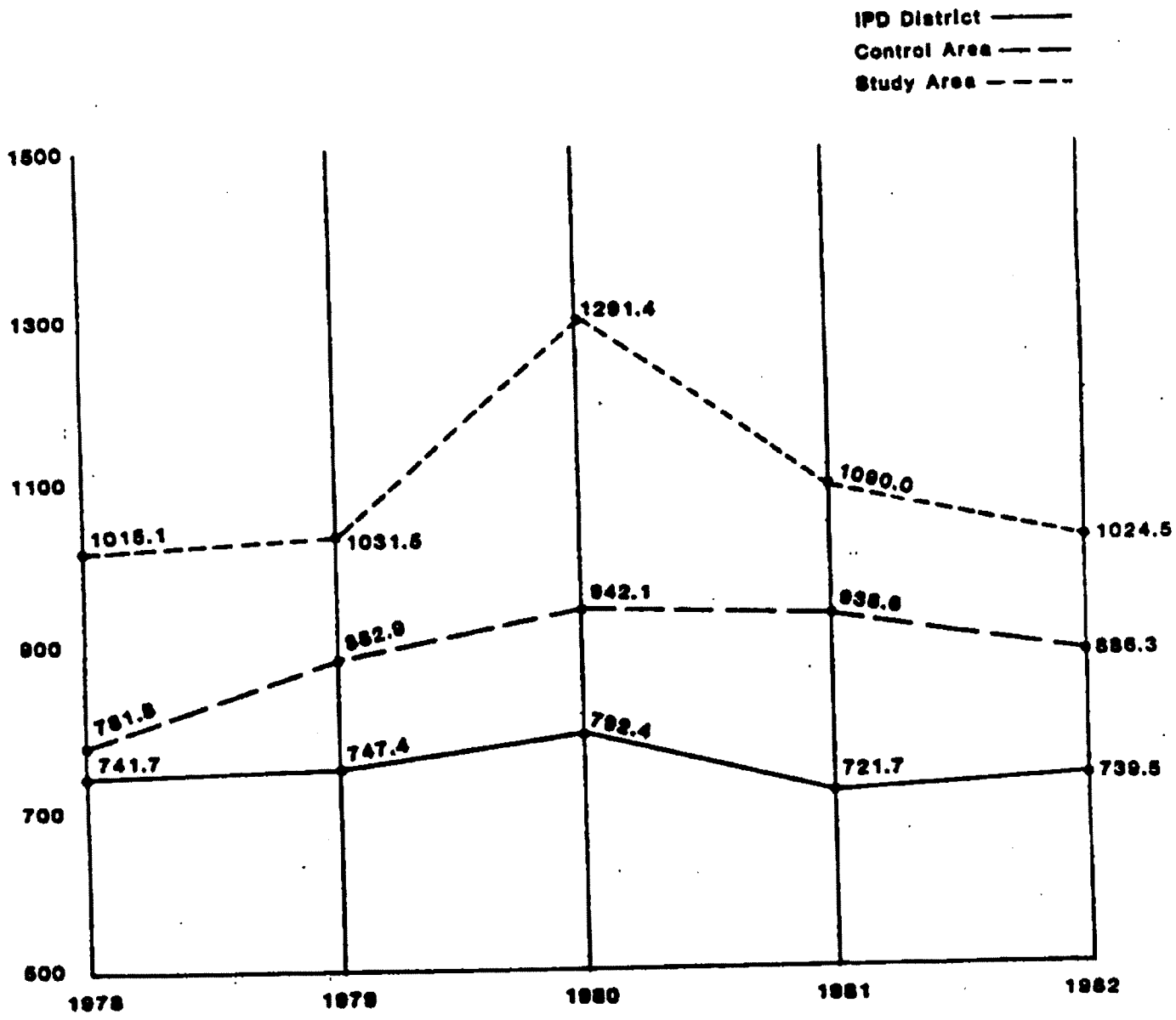
Major Crime Rate* 1978-1982



*The numerical instance of Criminal Homicide, Rape, Robbery, Aggravated Assault, Residence Burglary, Non-Residence Burglary, Larceny and Vehicle Theft- Per 10,000 Population.

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It is interesting to examine crime rates within the Control and Study Areas in relation to the land use characteristics of the locations in which they occurred.

Crime rates provide a better understanding of actual impact on the resident of the area than crime frequencies in that they establish a ratio of crime to each 10,000 of population. In this way, they tell us just how vulnerable a neighborhood is historically to crime within its boundaries.

1978-1982 ANNUAL AVERAGE MAJOR CRIME RATE

BY LAND USE

AREA	Commercial			Coml./Res.			Residential		
	Pop.	Crime	Ann. Rt	Pop.	Crime	Ann. Rt.	Pop.	Crime	Ann. Rt.
Control									
1.	379	240	1267						
2.	523	1147	4386						
	902	1387	3075						
3.				2828	837	592			
4.				2382	705	592			
				5210	1542	592			
5.							2159	1173	1087
6.							3395	1067	629
							5554	2240	807
Study									
1.	219	439	4009						
2.	1218	831	1365						
	1437	1270	1768						
3.				1015	834	1643			
4.				1203	653	1086			
				2218	1487	1341			
5.							3656	1232	674
6.							1230	668	1086
							4886	1900	778

Accordingly, we find that this impact is 74% higher in district commercial areas of the Control Area than similar district commercial areas of the Study Area. However, while the rate is approximately the same in the residential areas of both, the Study Area exhibits a crime rate that is 127% higher than the Control Area in locations that are mixed district-commercial and residential in nature.

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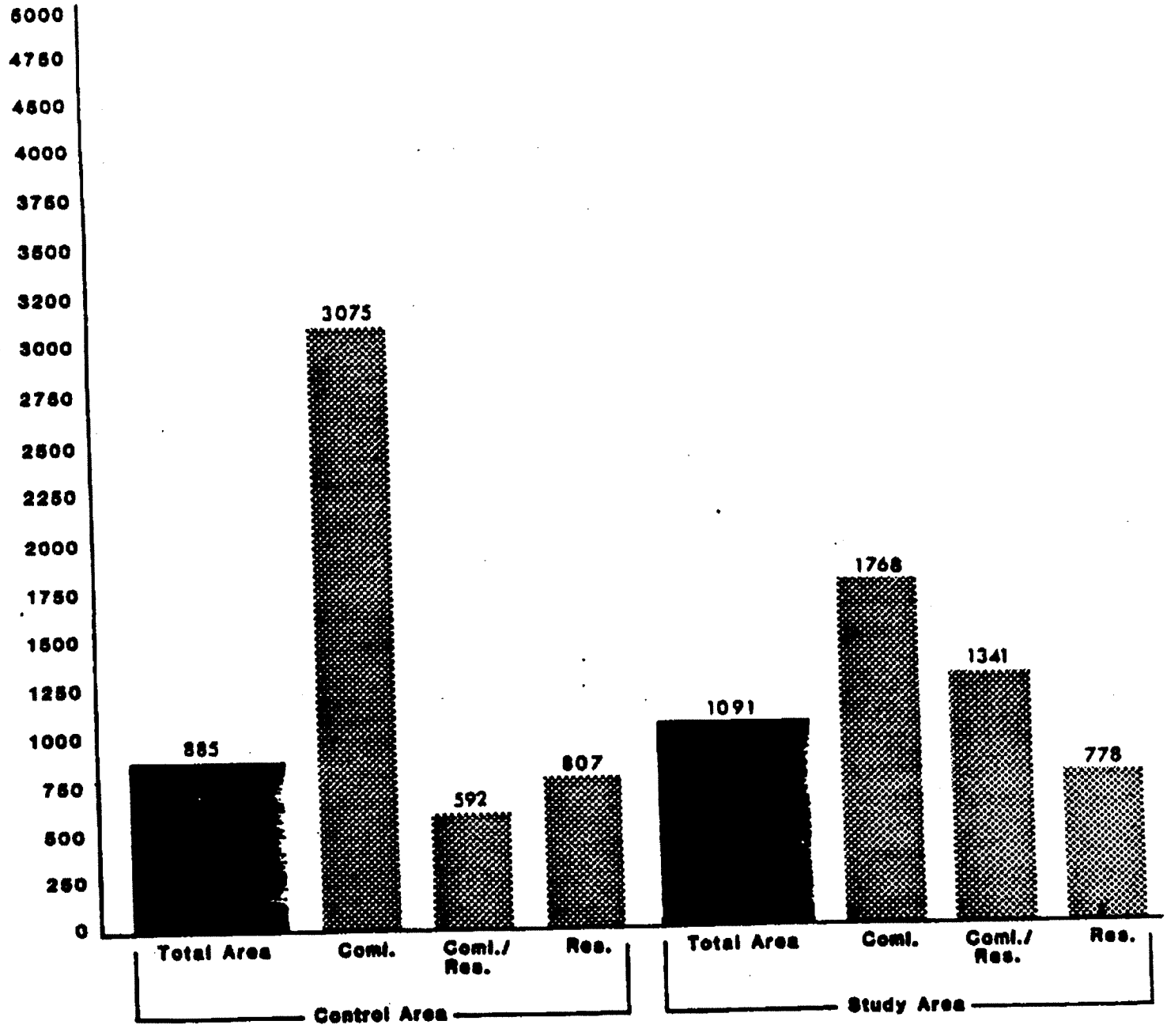
1978-1982 Annual Average Major Crime Rates*: Selected Areas



* Per 10,000 Population

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SEX-RELATED CRIME [5]

Crimes of Rape, Indecent Exposure, Obscene Conduct, Child Molestation, Adult Molestation and Commercial Sex were segregated and then aggregated from police printouts of total crime incidence occurring within the Study Area and the Control Area for the period 1978 - 1982. A total of 153 sex-related crimes was reported in the Control area during this period, with a high of 39 having occurred in 1979. During the same period, the Study Area experienced 198 sex-related crimes, reaching a high of 52 in 1981.

Control Area Sex-Related Crimes/Rates*1978-1982

(Population-11,868)

	1978	1979	1980	1981	1982
Rape	8	18	16	6	12
Indecent Exposure	7	10	0	18	4
Obscene Conduct	0	2	0	0	1
Child Molestation	6	10	4	8	12
Adult Molestation	2	3	0	1	3
Commercial Sex	0	1	1	0	0
Total:	22/19.7	39/33.4	25/24.8	33/25.7	32/27.4
					Total: 153

*Per 10,000 Population

Study Area Sex-Related Crimes/Rates*1978-1982

(Population-8,541)

	1978	1979	1980	1981	1982
Rape	2	12	11	10	6
Indecent Exposure	10	14	12	6	7
Obscene Conduct	0	0	0	1	0
Child Molestation	6	9	5	11	6
Adult Molestation	1	0	0	0	3
Commercial Sex	1	6	10	25	10
Total:	19/22.3	43/50.4	44/51.5	53/62.0	43/46.8
					Total: 198

*Per 10,000 Population

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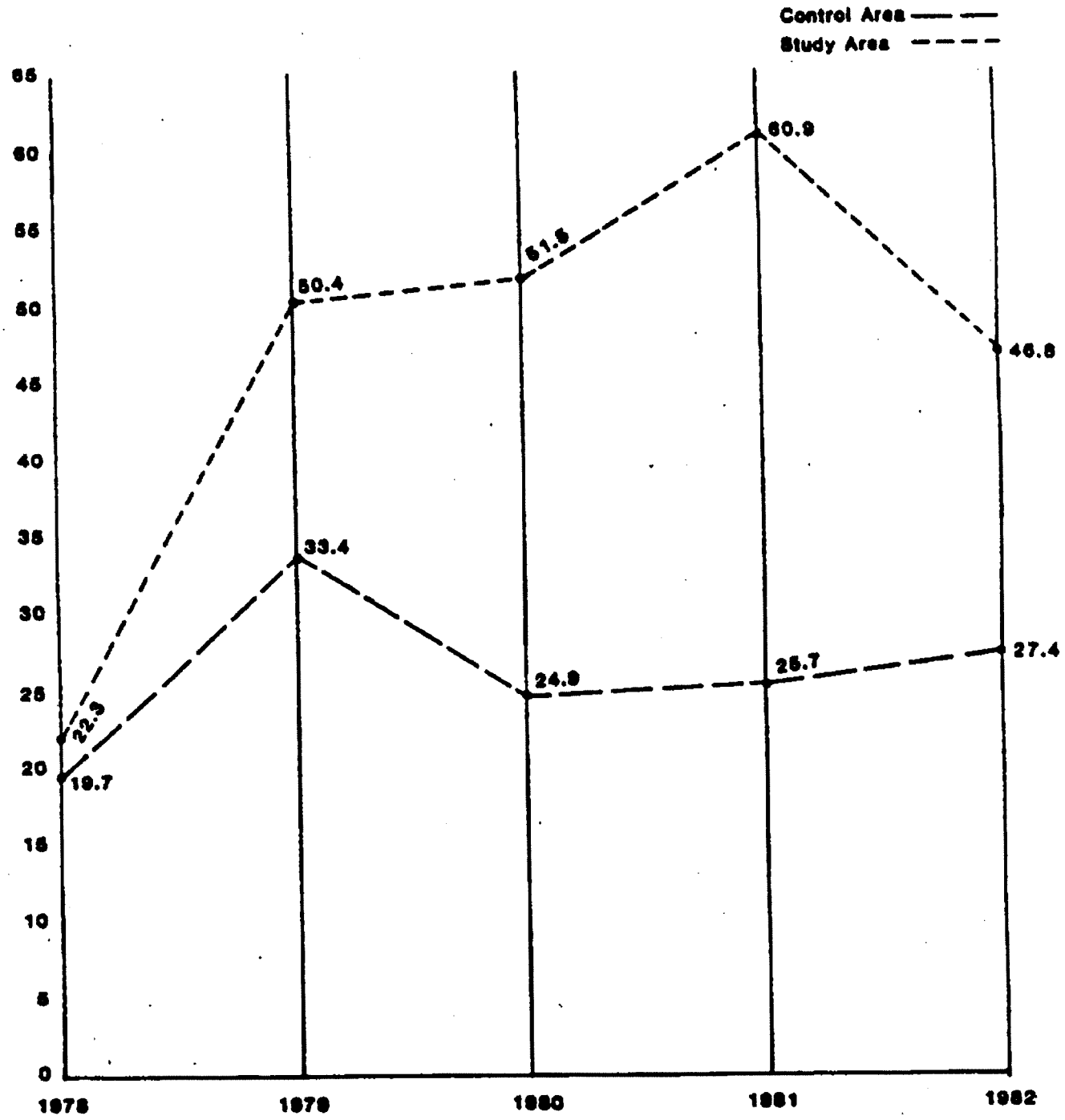
Sex-Related Crime Rate* 1978-1982



* The numerical instance of Rape, Indecent Exposure, Obscene Conduct, Child Molestation, Adult Molestation and Commercial Sex- Per 10,000 Population.

Whereas sex-related crime rates in the Control Areas varied from a low of 19.7 in 1978 to a high of 33.4 in 1979, the Study Areas increased from a low of 22.3 in 1978 to its peak of 60.9 in 1981.

The average sex-related crime rate in the Control Area was 26.2 over the five year period. The rate in the Study Area was approximately 77% higher than this average during the same period of time at 46.4.

Comparing the crime rate for sex-related crimes by land use categories in the Control and Study Areas, a different pattern than that for major crime rates emerges.

1978-1982 ANNUAL AVERAGE SEX-RELATED CRIME RATE BY LAND USE

Area	Commercial			Coml./Res.			Residential		
	Pop.	Crimes	Ann. Rt.	Pop.	Crimes	Ann. Rt.	Pop.	Crimes	Ann. Rt.
Control									
1.	379	2	11						
2.	523	7	27						
	902	9	20						
3.				2828	35	25			
4.				2382	29	24			
				5210	64	25			
5.							2159	49	45
6.							3395	29	17
							5554	78	28
Study									
1.	219	5	46						
2.	1218	23	38						
	1437	28	39						
3.				1015	38	75			
4.				1203	32	53			
				2218	70	63			
5.							3656	69	38
6.							1230	31	50
							4886	100	41

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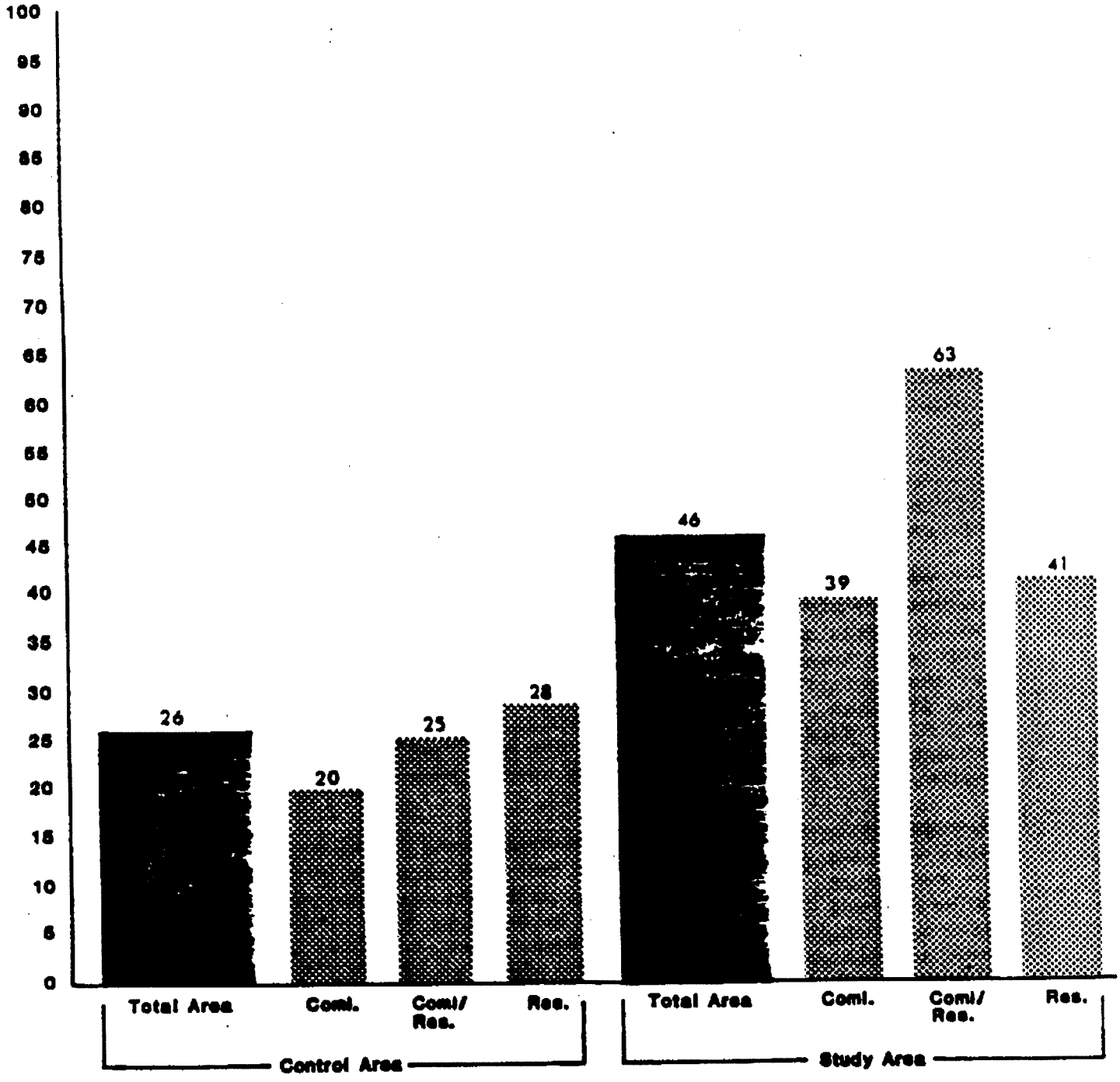
1978-1982 Annual Average Sex-Related Crime Rates*: Selected Areas



* Per 10,000 Population

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Whereas major crime rates were similar in residential areas of the Control and Study Areas, the Control Area rate was substantially higher in district commercial areas and lower in mixed district commercial/residential areas. In contrast to this, the sex-related crime rate was uniformly higher in all land use categories of the Study Area, ranging from +46% in residential areas to +152% in district commercial/residential areas.

SUMMARY OF FINDINGS

Both the Control and the Study Area experienced a significantly higher incidence of major crimes/10,000 population than the IPD District as a whole. Much of this increase would be expected given their location in generally older, less affluent and more populous areas of the city.

It is more difficult to explain the distinctly higher crime rate experienced in the Study Areas as compared to the Control Area - 1,090.51 versus 886.34.

This dicotomy is even more apparent in the instance of sex-related crime rates in the two areas. The average sex-related crime rate in the Control Areas was 26.2. The Study Areas had an average rate of 46.4.

If the same ratio between the Control and Study Areas established for major crime during this period were applied, we would expect a crime rate that was 23% higher - or 32.3 - in the Study Areas. The actual rate of 46.4 is 77% higher than that of the Control Area and underscores a distinct departure from the expected. Not only is the rate substantially higher in the Study Area, but it is twice the rate that would have been expected from the distribution of crimes generally in Indianapolis.

The anomalies demonstrated in the comparison of the Study Area with the general population and the Control Area will not, in themselves, establish a causal relationship between Adult Entertainment Businesses and the crime rates in the immediate area surrounding them. The fact does remain, however, that in each subsection of the Study Areas where adult entertainment is offered a substantially higher sex-related crime presence obtains over the corresponding subsections of the Control Area in which no adult entertainment is offered. The same is true regarding the rate of major crimes.

In areas chosen for their similarities otherwise, an obvious difference lies in the presence of one or more adult entertainment establishments.

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FOOTNOTES

1. The Incidence File is a computerized listing of all reports made by police after initial investigation of an incident to which they were dispatched. It, therefore, provides a more reliable indication of crime incidence than the computerized "Police Run" file which logs police dispatches based on preliminary information on the incidents.

2. Criminal Homicide, Rape, Robbery, Aggravated Assault, Residence Burglary, Non-Residence Burglary, Larceny and Vehicle Theft.

3. Rape, Indecent Exposure, Obscene Conduct, Child Molestation, Adult Molestation and Commercial Sex.

4. Since population estimates were not available for each year of the survey, the 1980 Census figures were used because they were the result of an actual enumeration and, falling at the mid-point of the survey, they would tend to balance out population trends during the five year time span.

5. Sex-related crimes are not isolated and compiled on a routine basis for the IPD District as a whole. A manual compilation of these data was proscribed by the time limitations of the study.

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AN ANALYSIS OF THE EFFECTS OF SOBs ON THE SURROUNDING NEIGHBORHOODS IN DALLAS, TEXAS

AS OF APRIL 1997

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IMPACT BY AREA TYPE

As it will be noted, sample size poses a distinct problem when attempting analysis at the small area level. This is particularly true in the instance of mortgage information. Due to this inadequacy, it is impossible to compare the impact of adult entertainment businesses on residential property value below a certain level of geography.

This is not the case, however, with crime statistics. In this case it is possible to compare sub-areas of the target areas since the comparisons are based on the actual instance of crime in the area (unlike mortgage data where average value is the basis of comparison.)

The sub-area comparisons were based on the nature of the areas in relation to their land use composition as determined by the Comprehensive General Land Use Plan of Marion County. Four sub-areas were of a distinct regional commercial nature, four were residential in nature and four were of a mixed residential-commercial makeup.

The three groupings were compared with each other to determine if crime, from a historical viewpoint, occurred more frequently in areas of one land use configuration than another.

Whether or not crime frequencies, at least in part, are determined by the land use characteristics in which they were committed cannot be definitively answered here. Several striking patterns do emerge from the comparison, however.

CRIME FREQUENCIES BY AREA TYPE

Of the 9,829 major crimes committed in the Control and Study Areas during 1978 - 1982, 27% were perpetrated in regional commercial areas, 31% in mixed commercial-residential areas and 42% in predominantly residential areas. In other words, crime frequencies were 56% higher in residential areas than commercial areas while mixed commercial-residential areas were 37% higher than commercial areas.

The following table displays major crime frequencies for the five year period by type of area, the existence or non-existance of adult entertainment and specific location.

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MAJOR CRIME FREQUENCY

	1978	1979	1980	1981	1982	Tot.	%
District Commercial							
Study Area							
No. Keystone	83	71	112	87	86	439	
E. Washington	150	152	202	186	141	831	
	233	223	314	293	227	1270	
Control Area							
No. Shadeland	38	41	34	43	84	240	
No. Keystone	212	217	210	259	249	1147	
	250	258	244	302	333	1387	
						2657	27%
Mixed Res./Coml.							
Study Area							
W. Washington	123	184	190	185	152	834	
West 16th St.	177	128	140	104	104	653	
	300	312	330	289	256	1487	
Control Area							
W. Washington	110	182	211	184	150	837	
E. Washington	160	151	130	139	125	705	
	270	333	341	323	275	1542	
						3029	31%
Residential							
Study Area							
East 10th St.	219	235	294	242	242	1232	
East 38th St.	115	111	165	127	150	668	
	334	346	459	369	392	1900	
Control Area							
East 10th St.	211	239	269	210	243	1173	
West 10th St.	181	200	244	260	182	1067	
	334	346	458	369	392	2240	
						4140	42%

The pattern was similar in comparison of the frequency of sex-related crime within the three areas during the same period of time. It was more pronounced, however. Fifty-one percent of the total occurred in residential environments, while thirty-eight percent occurred in mixed commercial-residential areas. In comparison, only eleven percent of the total occurred in district commercial areas.

The following table displays sex-related crime frequencies for the five year period by type of area, the existence or non-existence of adult entertainment and the individual locations included in the study.

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SEX-RELATED CRIME FREQUENCY

	1978	1979	1980	1981	1982	Tot.	%
District Commercial							
Study Area							
No. Keystone	-	2	2	-	1	5	
E. Washington	-	4	4	8	7	23	
	-	6	6	8	8	28	
Control Area							
No. Shadeland	-	-	-	-	2	2	
No. Keystone	1	3	1	1	1	7	
	1	3	1	1	3	9	
						37	11%
Mixed Res/Coml.							
Study Area							
W. Washington	5	10	12	8	3	38	
West 16 St.	1	4	8	9	10	32	
	6	14	20	17	13	70	
Control Area							
W. Washington	3	8	11	8	5	35	
E. Washington	4	10	3	8	4	29	
	7	18	14	16	9	64	
						134	38%
Residential							
Study Area							
East 10th St.	12	18	14	17	8	69	
East 38th St.	1	5	4	10	11	31	
	13	23	18	27	19	100	
Control Area							
East 10th St.	11	13	7	7	11	49	
West 10th St.	4	5	6	5	9	29	
	15	18	13	12	20	78	
						178	51%

These trends are not easily explained on the basis that "where there are more people there will be more crime." Community-related commercial areas draw clientele from a broad geographic area and can be expected to attract many times the residential population of the immediately surrounding area. This is the purpose of the district commercial zoning designation. Further, the transient nature of this population could be considered to contribute to the incidence of certain crimes.

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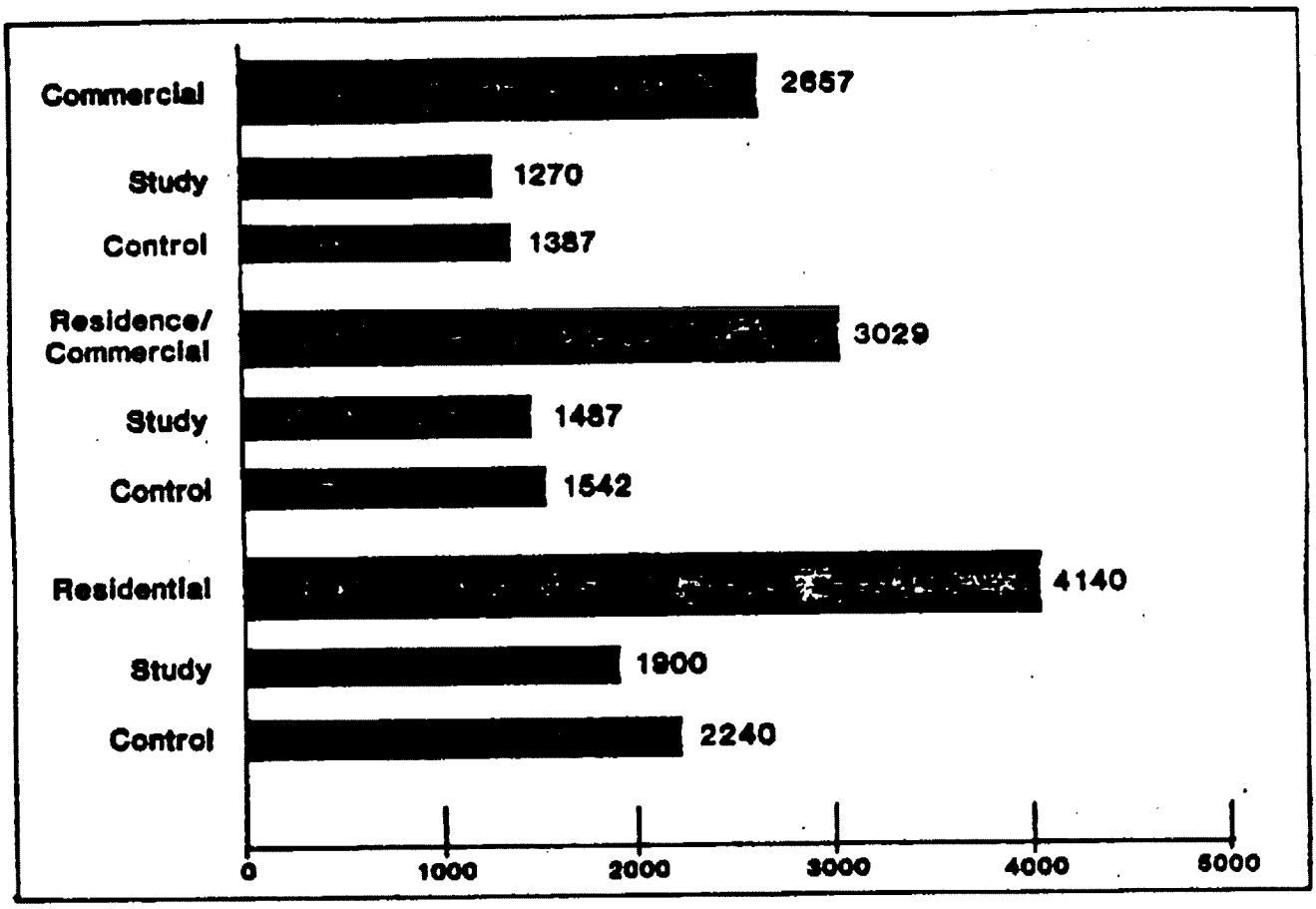
Major Crimes / 1978-1982, Selected Areas



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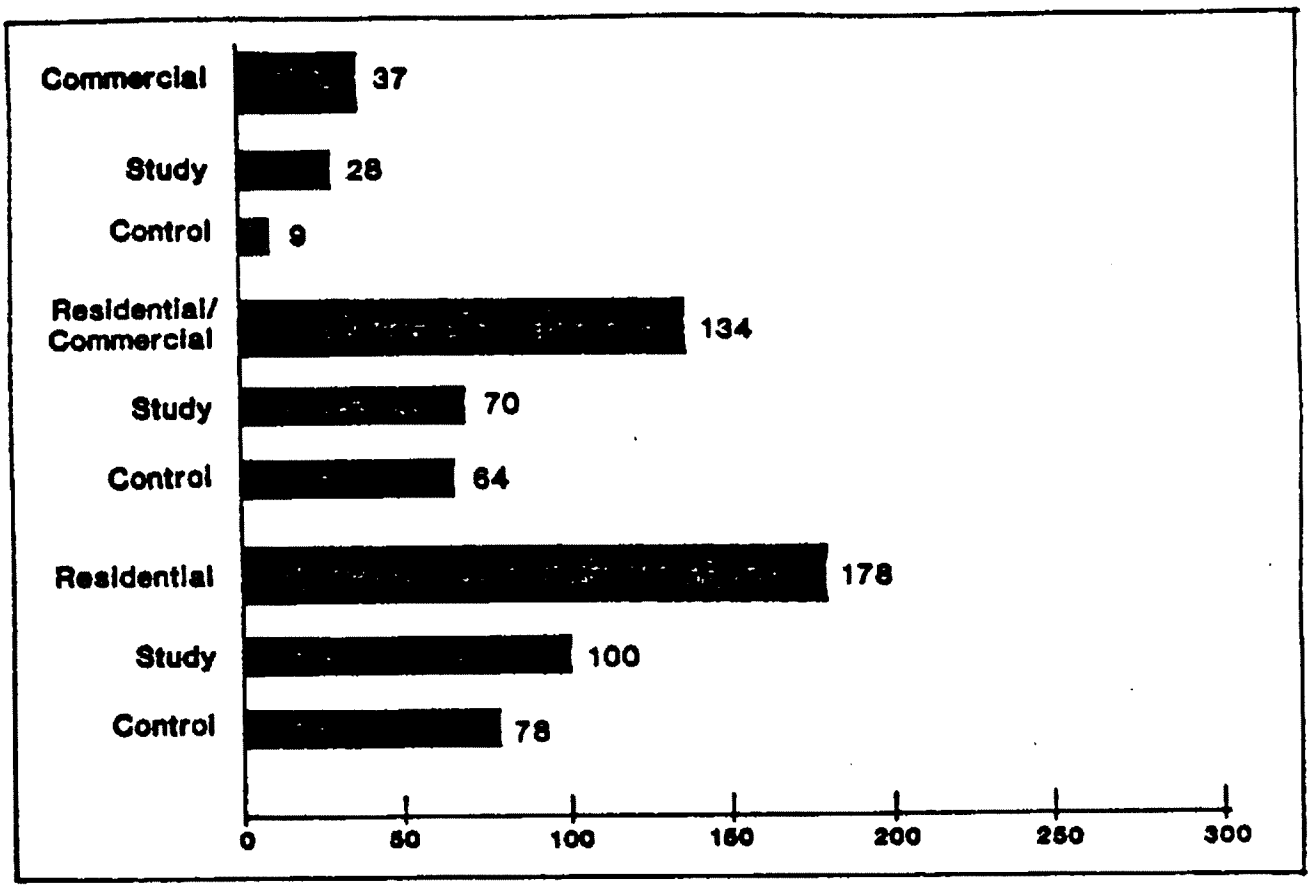
Sex-Related Crimes / 1978-1982, Selected Areas



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SUMMARY OF FINDINGS

There appears to be a strong correlation between crime frequency and the residential character of neighborhoods, i.e., the more residential the nature of the neighborhood, the greater is the instance of crime in that neighborhood. Crime frequencies were, in fact, fifty-six percent higher in residential areas than district commercial areas.

The above correlation is even more acute when considering sex-related crimes. Sex-related crimes occurred four times more frequently in substantially residential milieus having one or more adult entertainment businesses than in commercial environments having one or more such businesses.

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REAL ESTATE IMPACTS

This study also undertook the quantification of possible effects of the proximity of adult entertainment businesses on the value of residential properties within a one thousand foot radius of their locations.

In examining the potential impacts, three sources of residential property values were investigated: I.e., Indianapolis Residential Multiple Listing Summaries (MLS) of the Metropolitan Indianapolis Board of Realtors, the 1980 Census (tract and block occupied, single-unit housing valuation data); and, annual lending institution statements under the Federal Home Mortgage Disclosure Act (HDA).

Summary data from the MLS were available over the period 1979 - 1982, while actual mortgage values reported by lending institutions were available for the period 1977 - 1982. The U.S. Bureau of the Census provides homeowner estimates of home value at the time of the 1980 Census (April 1, 1980).

The data available from these three sources differ in other ways. The 1980 Census, while relying on homeowner estimates of the worth of property, is a 100 percent survey and is described down to the block level. Home Mortgage Disclosure Act data provide a record of actual mortgages processed and reported by local lenders (only a portion of the total volume). The lowest geographic level at which this information is available is the Census Tract and, even at this level, at times poses a difficulty with the available sample size. Multiple Listing Summaries generally reflect an estimate of worth based on current market conditions for the area and can be assembled at virtually any geographic level since they are listed by address. As in the case of the Mortgage Disclosure Act statements, however, there are at times problems with the sufficiency of the sample size at the small area level.

Each of the data sets presents some weaknesses. Although the 1980 Census only reflects an estimate of housing value at one point in time, it has the advantage of being a 100 percent survey of occupied, single-unit housing. The other two sources offer time series data over periods of four and five years. They have the liability, however, of sometimes lacking a sufficient sample size at the small area level in any given year to allow an acceptable level of statistical confidence.

Due to these characteristics of the data, certain modifications were made in the study's original intent. Rather than doing annual comparisons of housing value, 1979 was chosen as the comparison year and the 1980 Census data set chosen due to the ability to summarize it at the county, tract and block level.

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The geographic levels of comparison were the County as a whole, the Census Tract or Tract cluster in which the Study or Control Areas were located and the areas within a 1000-foot radius of the Study and Control location centroids.

A next step was to use the data available on real estate activity in the Multiple Listing Summaries to establish market performance between 1979 and 1982 in both the Control and Study Areas.* The results were compared to real estate activity in the residential market of Center Township which, in terms of value and general housing condition, most closely resembles the two areas among the nine Marion County townships.

COMPARISON RESULTS

AVERAGE MORTGAGE VALUES - 1979

Marion County[1]	$ 41,854	
	Control Areas	Study Areas
Tract/Tract Clusters[1]	$ 31,858	$ 28,003
[Tract/Tract Clusters[2]]	[27,872]	[21,605]
1000-Foot Radius[1]	23,721	24,616
[1000-Foot Radius[3]]	[16,038]	[23,823]

1. Source: 1980 Census.
2. Source: Home Mortgage Disclosure Act Statements.
3. Source: Residential Multiple Listing Summaries.

Comparison of the 1980 Census data would indicate that the value of housing in the areas addressed in this study are from 40 to 73 percent below the Marion County average. While the average value of housing at the census tract level was somewhat higher in the census tracts in which the Control Areas were located than those in which the Study Areas were located ($31,858 vs. $28,003), the opposite was true when comparing the target areas themselves. Housing values within 1000 feet of adult entertainment businesses in the Study Areas were greater (although by a lesser margin) than those in the Control Areas ($24,616 vs. $23,721).

* Whereas the sample size is sufficient in most years to provide acceptable confidence levels for mortgage averages, the sample is only marginally acceptable in 1981 and 1982 for the Control Area.

This finding is borne out by an examination of actual mortgages executed within the affected census tracts of the Control and Study Areas, as well as real estate listings at the 1000-foot level.

Using mortgage and real estate listing data we find that, while consistent with the Census data findings, the disparities were more acute. Average mortgages at the tract level were $27,872 vs. $21,605 in the Control and Study Area tract clusters respectively. At the 1000-foot level, real estate listing values in the Control Areas dropped to $16,038 while Study Area listings increased by approximately 10 percent over the average mortgage value in the tract clusters of the Study Area.

It would appear that, while property values at the tract cluster level are appreciably higher surrounding the Control Areas, housing within the Study Areas themselves is, on the average, of distinctly higher value than housing stock in the Control Areas.

TIME SERIES ANALYSIS RESULTS

During the period 1979 through 1982, mortgages processed in the Control Areas of the study showed an average annual appreciation rate of +24.7 percent. During the same time frame, mortgages appreciated at an average annual rate of only +8.7 percent in the Study Area. In comparison, residential mortgages in Center Township appreciated at a +16.7 percent average annual rate for the period.

AVERAGE MORTGAGE VALUES
1979 - 1982

	1979	1980	1981	1982	1979-1982 % Change
Control Area[1]	$16,038	$21,687	$22,650	$28,420	+ 77%
Study Area[1]	23,823	25,432	30,964	30,090	+ 26%
Center Township[2]	16,100	17,178	18,903	25,099	+ 56%

1. Source: Indianapolis Multiple Listings for Residential Prop.
2. Source: Home Mortgage Disclosure Act Statements.

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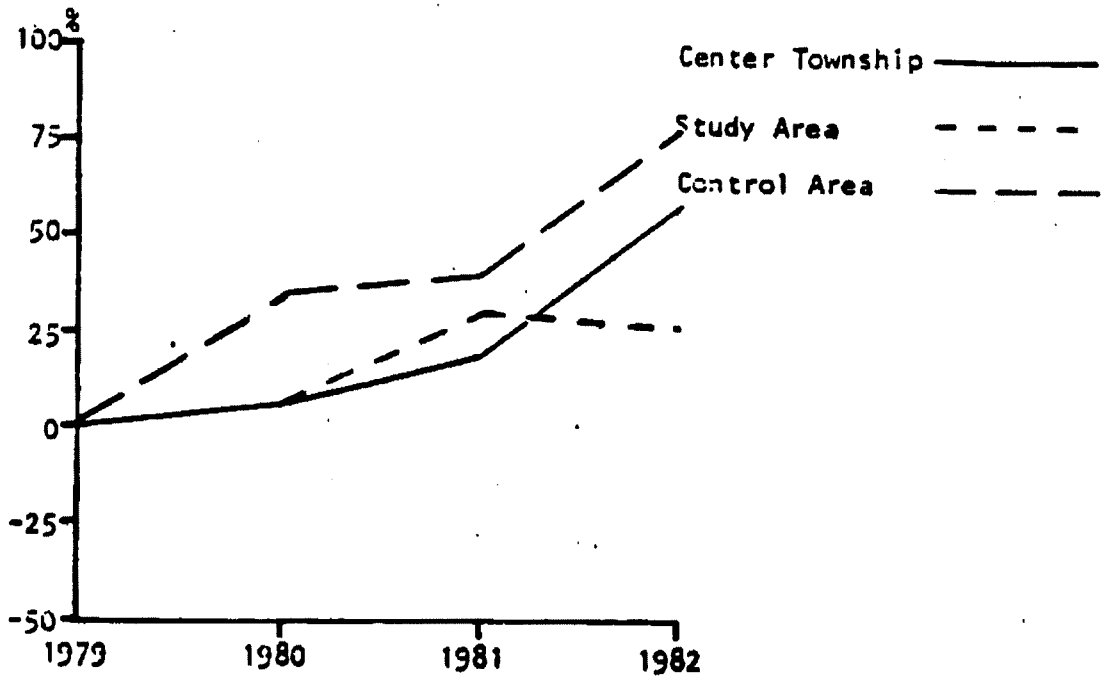
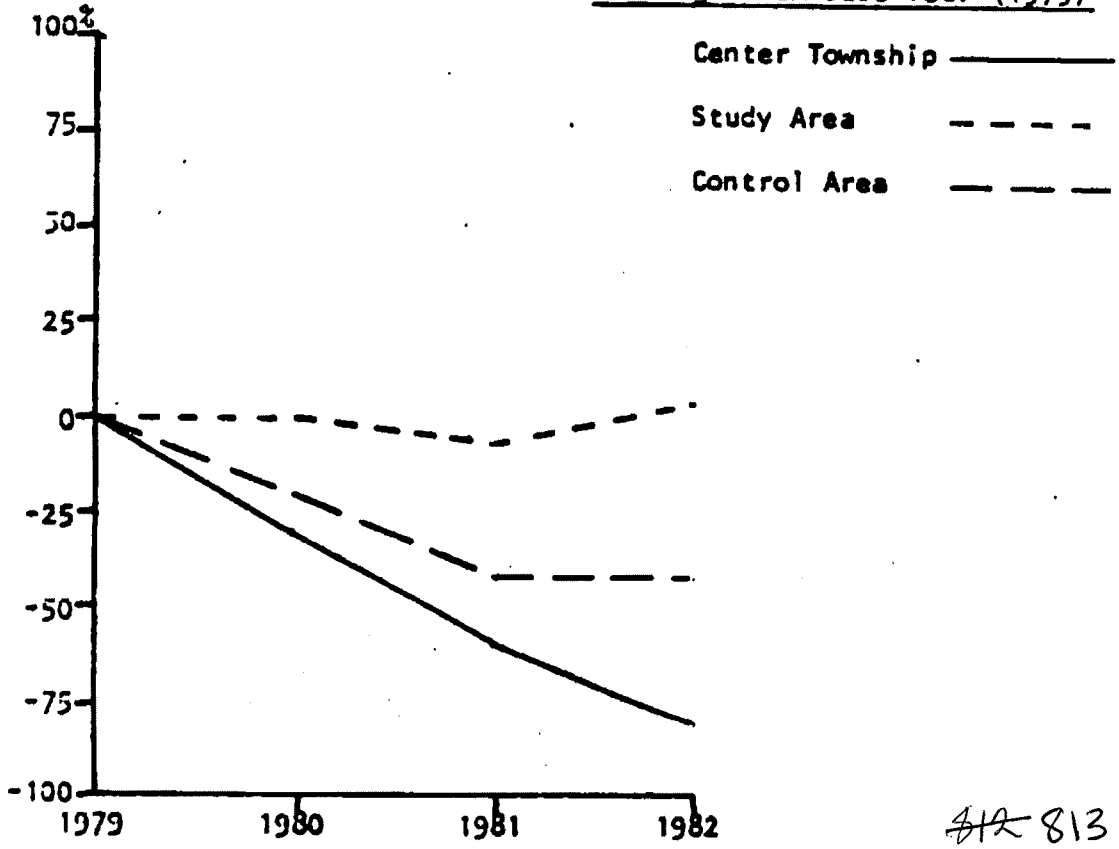
MORTGAGE VALUES

% Change From Base Year (1979)



REAL ESTATE LISTINGS

% Change From Base Year (1979)



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The average value of mortgages from 1979 to 1982 in Center Township increased by 56 percent while Control Area values increased by 77 percent and the Study Area by 26 percent.

RESIDENTIAL REAL ESTATE ACTIVITY
1979 - 1982

	1979	1980	1981	1982	% Change
Control Area Listings[1]	29	23	15	15	- 52%
Study Area Listings[1]	28	28	26	29	+ 4%
Center Township Mortgages[2]	898	635	377	182	- 80%

1. Source: Indpls. Multiple Listings, Residential Properties.
2. Source: Home Mortgage Disclosure Act Statements.

Both Center Township and the Control Area followed general market trends in the volume of real estate activity, falling by 80 percent and 52 percent, respectively, from 1979 to 1982. Once again, the Study Area performed in an atypical fashion, actually registering a slight increase in volume (4 percent) over the same period.

CONCLUSIONS

While bearing in mind the above-mentioned difficulties in certain cases with the sample size at the sub-area level, the following observations may be made on analysis of the data.

A comparison of residential real estate listings indicates that the areas chosen in this study which have adult entertainment establishments within their boundaries have, on the average, a residential housing base of substantially higher value than that located in the areas chosen as control sites.

Despite the higher value of housing stock in the Study Areas, property values appreciated at only one-half the rate of the Control Area and at one-third the rate of Center Township as a whole.

Another anomaly apparent in analysis of real estate activity within the three areas is that market forces within the Study Areas were present which caused real estate activity within its boundaries to run completely contrary to County, Township and Control Area trends.

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In summary, the available data indicate that twice the expected number of houses were placed on the market at substantially lower prices than would be expected had the Study Area real estate market performed typically for the period of time in question.

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PROFESSIONAL APPRAISAL OF IMPACTS

Because of the great number of variables that have the potential to cause a particular real estate market to perform erratically at a small area level, it was decided to solicit a "best available professional opinion" from real estate appraisers regarding the market effect of adult entertainment businesses on proximate land values.

The Indianapolis Division of Planning approached the Indiana University School of Business' Division of Research for assistance in polling the real estate appraisal community on the subject. The University proposed that the survey be national in scope and offered to design and pretest the survey instrument. Dr. Jeffrey Fisher of the University's School of Real Estate collaborated in drafting the instrument and conducted the initial test at a workshop in early September. Analysis of this pretest indicated the need for minor adjustments to the form.

In its final format, the instrument (cf. Appendix II) posited a hypothetical middle income, residential neighborhood in which an adult bookstore was about to locate. Respondents were asked to numerically rate the impact of this business on both residential and commercial property values within one block and three blocks of the store. They were also asked to rate a number of potential other uses as to whether they would increase or decrease property values. Finally, survey participants were asked to express what they generally felt the effect of adult bookstores was on property values.

The survey sample was drawn at two levels. Using the membership of the American Institute of Real Estate Appraisers as the survey universe, a twenty percent random sample of members was constructed for the entire nation. In addition, MAI (Member Appraisers Institute) members who practiced in 22 Metropolitan Statistical Areas[1] (MSAs - as defined by the U. S. Bureau of the Census) of a size similar to Indianapolis were surveyed at the one hundred percent level.

In January of 1984, 1527 questionnaries were mailed. As of February 22, 507 (33%) had been returned. These returns were split evenly between the 20% (249 returns) and 100% (258 returns) samples. In the national sample the rate of return by geographic region[2] was fairly consistent: East,41 - 27%; North Central, 56 - 28%; South, 89 - 25%; and, West, 63 - 24%.Return rates from the 100% MSA survey varied from 14% from Newark, N. J. to 62% from Cleveland, OH.

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20% NATIONAL SURVEY RESULTS

Survey respondents overwhelmingly (80%) felt that an adult bookstore located in the hypothetical neighborhood described would have a negative impact on residential property values of premises located within one block of the site. Of these, 21% felt that the property value would decrease in excess of 20%, while 59% foresaw a value decrease of from 1% to 20%. One-fifth of the respondents saw no resulting change in residential property values.

Seventy-two percent of the respondents also felt that there would be a detrimental effect on commercial property values at the same one block radius. Only 10%, however, felt that the effect would exceed 20% of worth with the majority (62%) seeing a 1% to 20% decrease in value. 28% of the survey predicted that there would be no negative effect.

While the great majority of appraisers felt that the effect of an adult bookstore on property within one block of the site would decrease property values, they felt that this impact fell off sharply as the distance from the site increased.

At a distance of three blocks, only 36% of the respondents felt that there would be a negative impact on residential properties, whereas 64% felt that there would be no impact at all. Better than three-fourths (77%) of the survey saw no impact on commercial property at this distance.

In summary:

- The great majority of appraisers who responded to this survey felt that there is a negative impact on residential and commercial property values within one block of an adult bookstore.

- This negative impact dissipates markedly as the distance from the site increases, so that at three blocks the estimate of negative impact decreases by more than one half judged by the number of respondents indicating negative impact at three blocks.

- The majority of respondents felt that the negative impact of an adult bookstore is slightly greater for residential properties than for commercial properties and decreases less dramatically with distance for residences.

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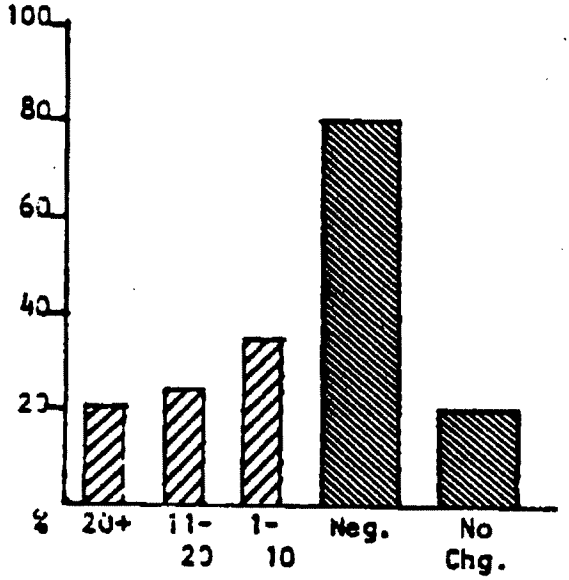
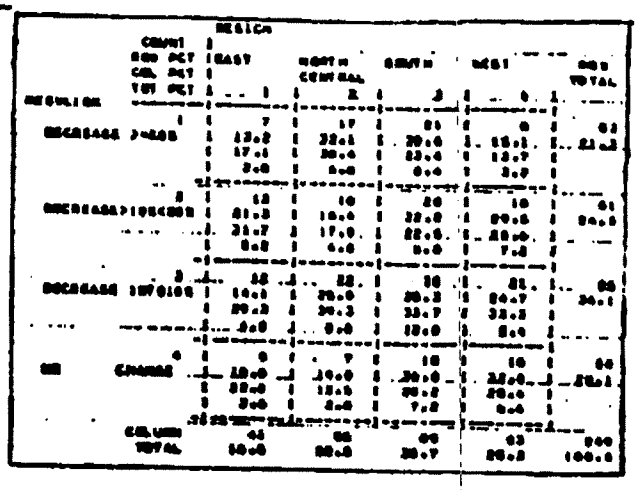
NATIONAL SURVEY OF APPRAISERS

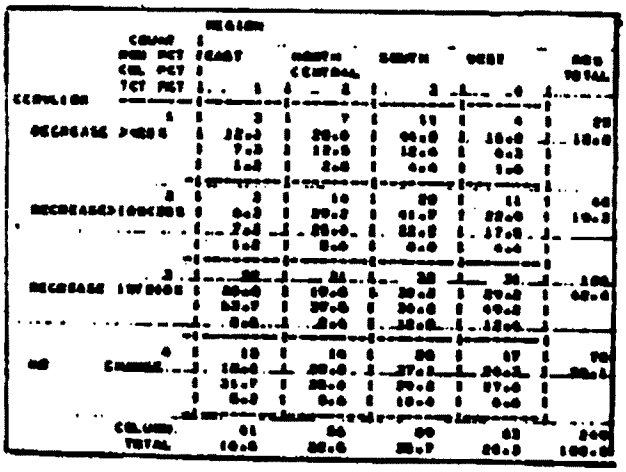
Impact of Adult Bookstores On Property Values

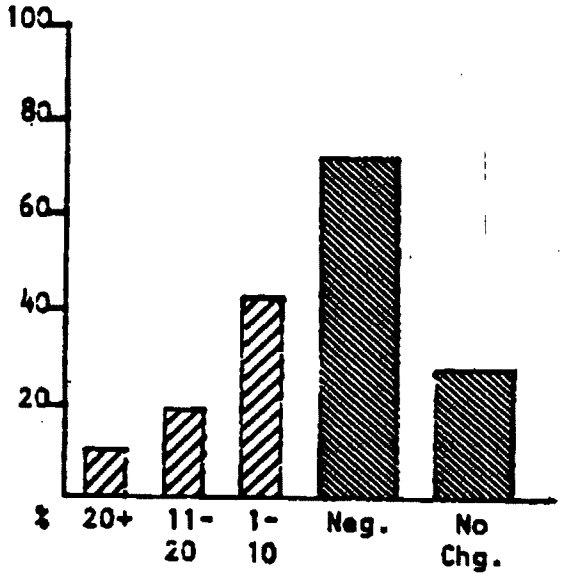
RESIDENTIAL PROPERTY AT ONE BLOCK [2]





COMMERCIAL PROPERTY AT ONE BLOCK





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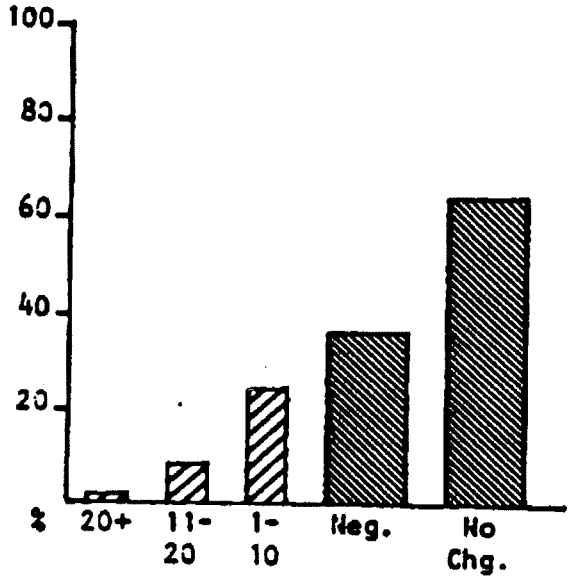
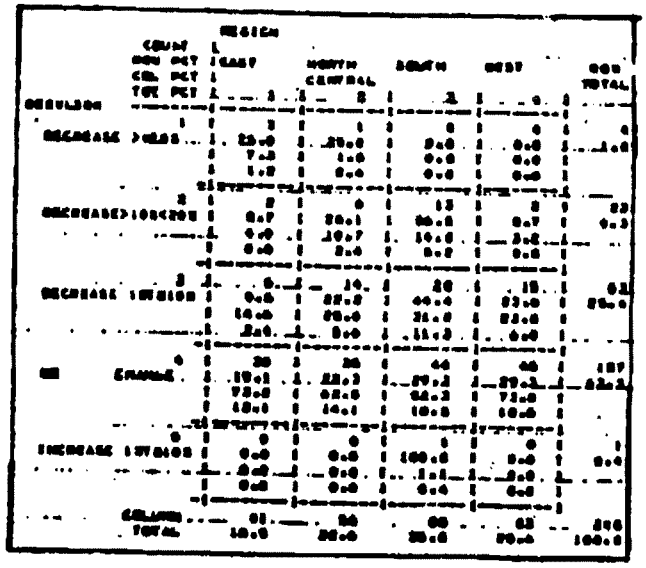
NATIONAL SURVEY OF APPRAISERS

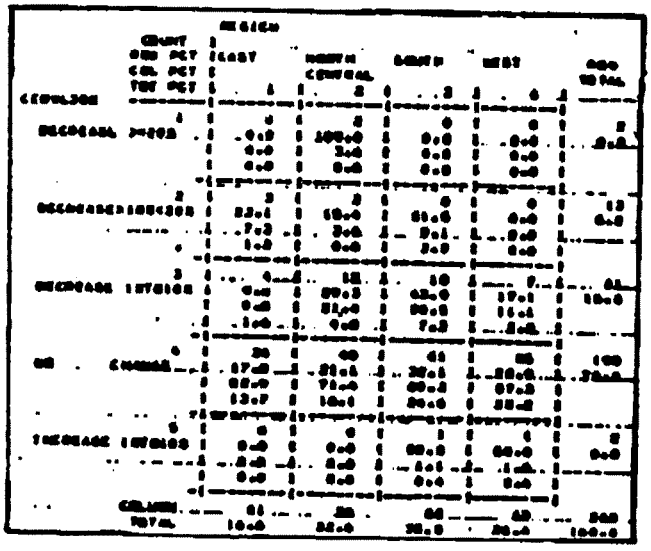
Impact of Adult Bookstores On Property Values

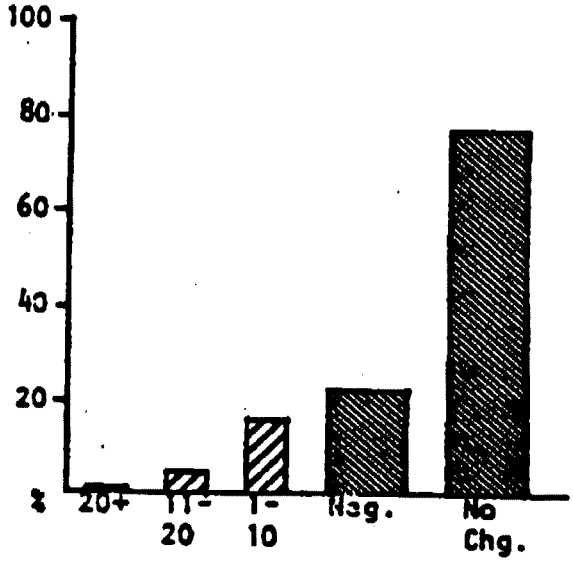
RESIDENTIAL PROPERTY AT THREE BLOCKS





COMMERCIAL PROPERTY AT THREE BLOCKS





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Respondents were also asked to evaluate the impact on residential property within one block of a number of alternate uses for the hypothetical site described in the survey.

Of the alternate uses proposed, a clear majority felt that a medical office or a branch library would increase the value of surrounding residential property. A store-front church, welfare office, tavern, record store, ice cream parlor or video-game parlor were generally felt to neither improve nor decrease residential property values significantly. On the other hand, a substantial majority felt that a pool hall, drug rehabilitation center or a disco would decrease property values - although not as overwhelmingly as an adult bookstore.

NATIONAL SURVEY OF APPRAISERS
Impact On Residential Properties

Land Use	Value				
	Higher			Lower	
	Much	Some	Same	Some	Much
Store-front church	5%	20%	58%	16%	1%
Pool hall	1%	8%	45%	38%	8%
Welfare office	-	12%	46%	33%	8%
Neighborhood tavern	2%	18%	45%	32%	4%
Record store	8%	27%	61%	5%	-
Medical office	24%	38%	35%	2%	-
Drug rehab Center	-	7%	35%	42%	17%
Ice cream parlor	15%	30%	53%	3%	-
Video-game parlor	1%	18%	50%	27%	5%
Disco	-	11%	42%	35%	12%
Branch library	24%	34%	38%	4%	-

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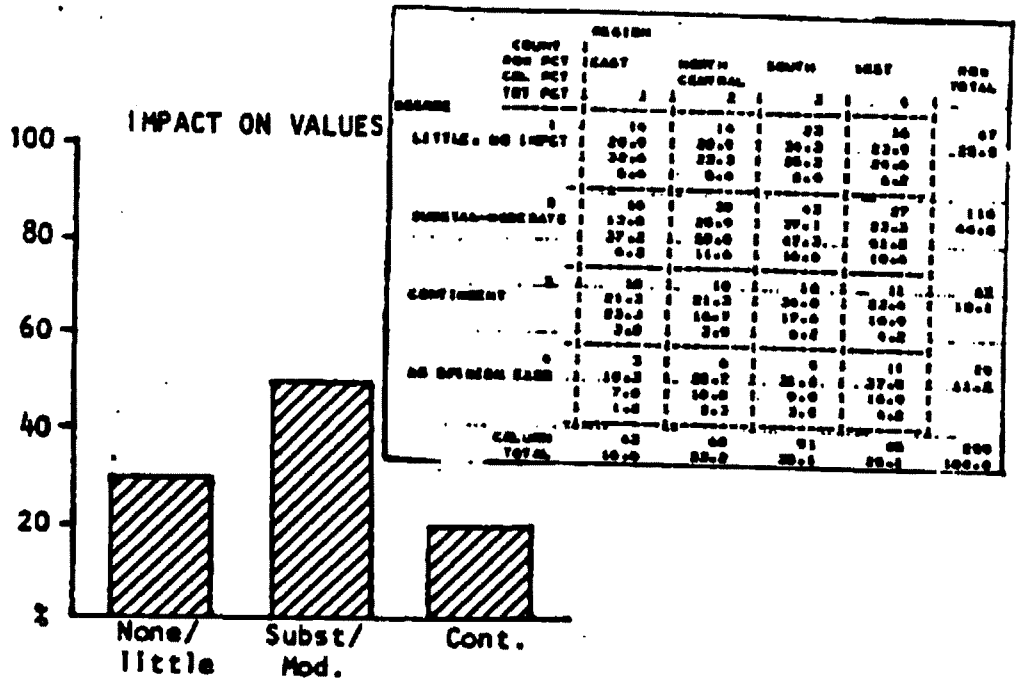
The survey also asked the degree to which adult bookstores affect property values generally and the basis for this opinion.

Twenty-nine percent of those expressing an opinion saw little or no effect as the result of adult bookstores on surrounding property values. They based this opinion on their own professional experience (13%), the observation that this use usually occurs in an already-deteriorated neighborhood (24%) and the feeling that only one such adult entertainment use would be inconsequential.

A substantial-to-moderate negative impact was projected by 50% of the respondents. Twenty-nine percent felt that this was because it attracted "undesirables" to the neighborhoods in which they were located, while 14% felt that it creates a bad image of the area and 15% felt that the use offended pervailing community attitudes so that home buyers/customers would be discouraged. 13% based their opinion on professional experience.

A number of survey respondents (20%) saw the potential impact on a neighborhood as being contingent on certain variables. 28% of these felt that it would depend on the existing property values in the area as well as the subjective values of its residents. 23% felt that development standards such as facade and signage would determine impact and 11% saw the nature of the existing commercial area and its buffering capacity as being most important.



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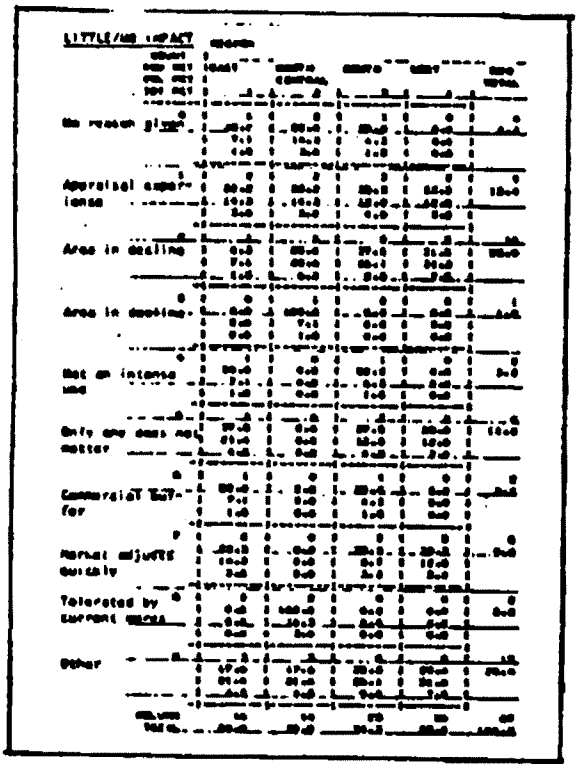
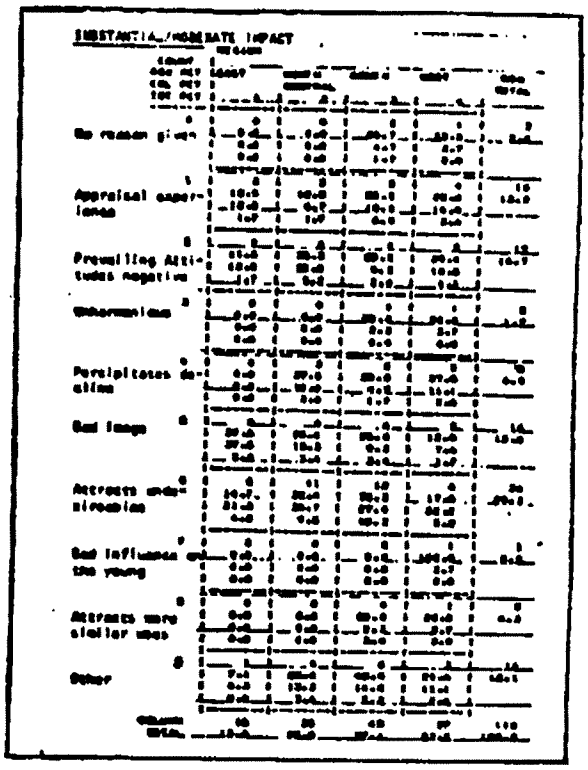
46.

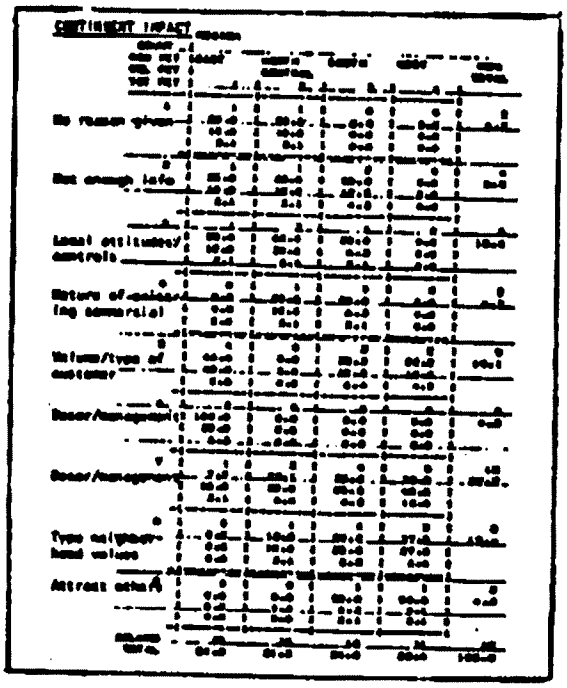
NATIONAL SURVEY OF APPRAISERS

Impact Of Adult Bookstores on

Property Values







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2-827

47

100% MSA SURVEY RESULTS

The 100% survey of Metropolitan Statistical Areas similar in size to Indianapolis produced results that were consistent in virtually all respects with the results of the 20% national survey.

As in the nationwide survey, respondents overwhelmingly (78%) indicated that an adult bookstore would have a negative effect on residential property values in the neighborhood described if they were within one block of the premises. 19% felt that this depreciation would be in excess of 20%, whereas 59% foresaw a decrease in value of from 1% to 20%.

Sixty-nine percent saw a similar decrease in commercial property values within one block of the adult bookstore. As in the national survey, far fewer (only 10%) felt that a devaluation of over 20% would occur. The majority (59%) saw the depreciation as being in the 1% to 20% range.

Once again, the negative impact observed within a one block radius of the adult bookstore fell off sharply when the distance was increased to three blocks - although, judged on the number of those indicating no impact, there would appear to be more of a residual effect on residential properties than on commercial properties.

39% of the appraisers felt that a negative impact on residential properties would still obtain at three blocks from the site. Only three percent felt that this impact would be in excess of twenty percent. The remaining 36% felt that depreciation would be somewhere in the one to twenty percent range. 61% saw no appreciable effect at all at three blocks.

Commercial property was judged to be negatively impacted at three blocks by 23% of the survey. 76% saw no change in value as a result of the bookstore.

In summary:

- Appraisers assigned a negative value to an adult bookstore located within one block of residential and commercial properties at an approximate three-to-one ratio.
- At a three block distance, this ratio tended to be reversed.
- The number of those indicating a decrease in value at three blocks decreased at only one half the rate for residential property as for commercial property.

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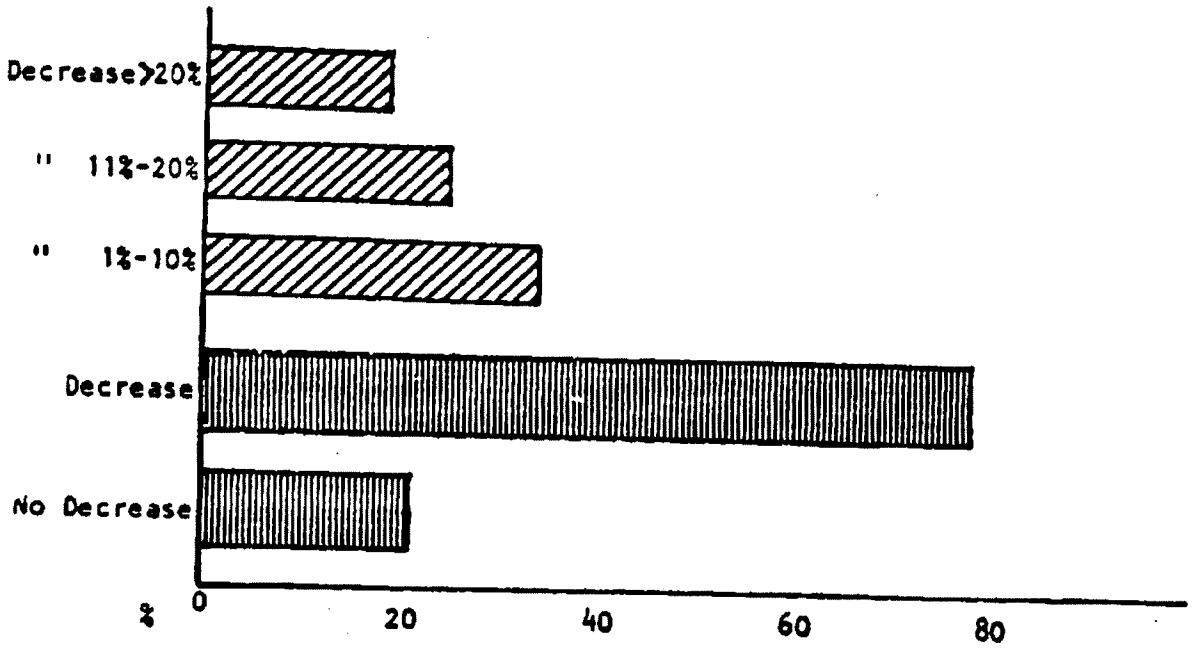
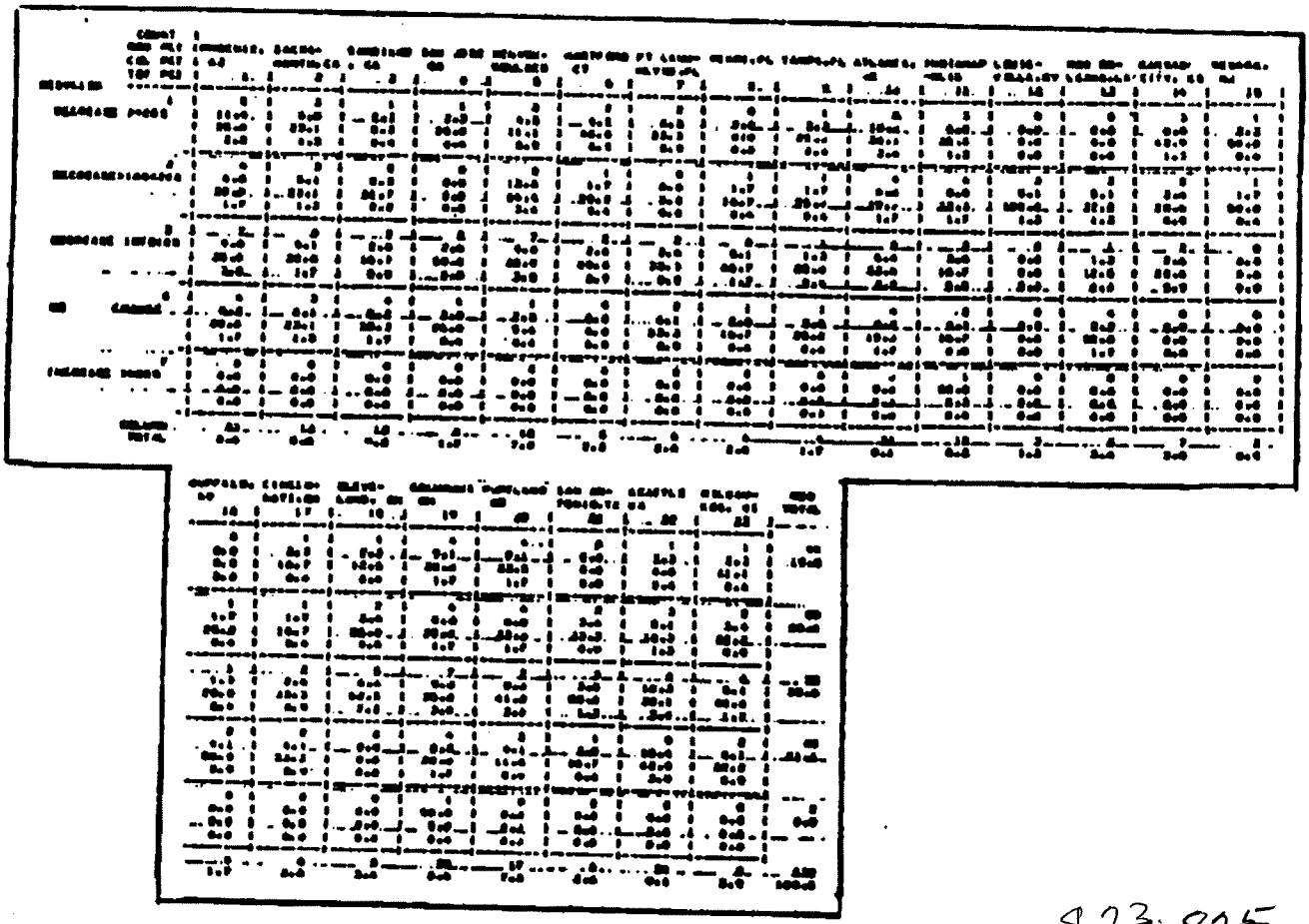
~~3-8~~

IMPACT OF ADULT BOOKSTORES ON RESIDENTIAL PROPERTY AT ONE BLOCK





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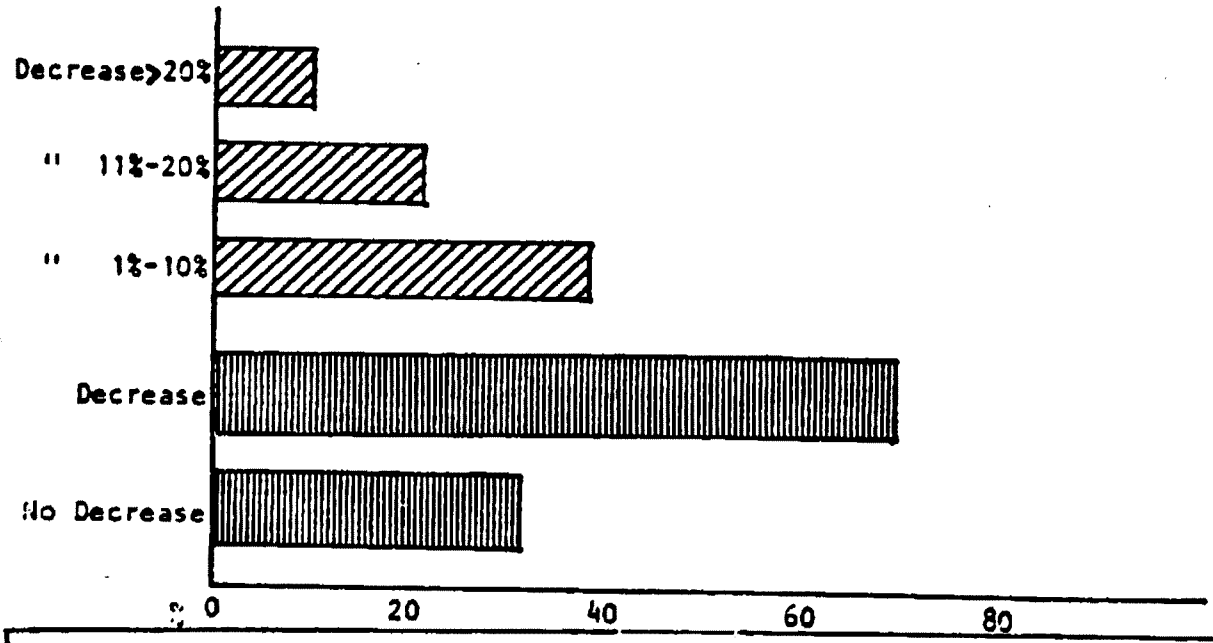
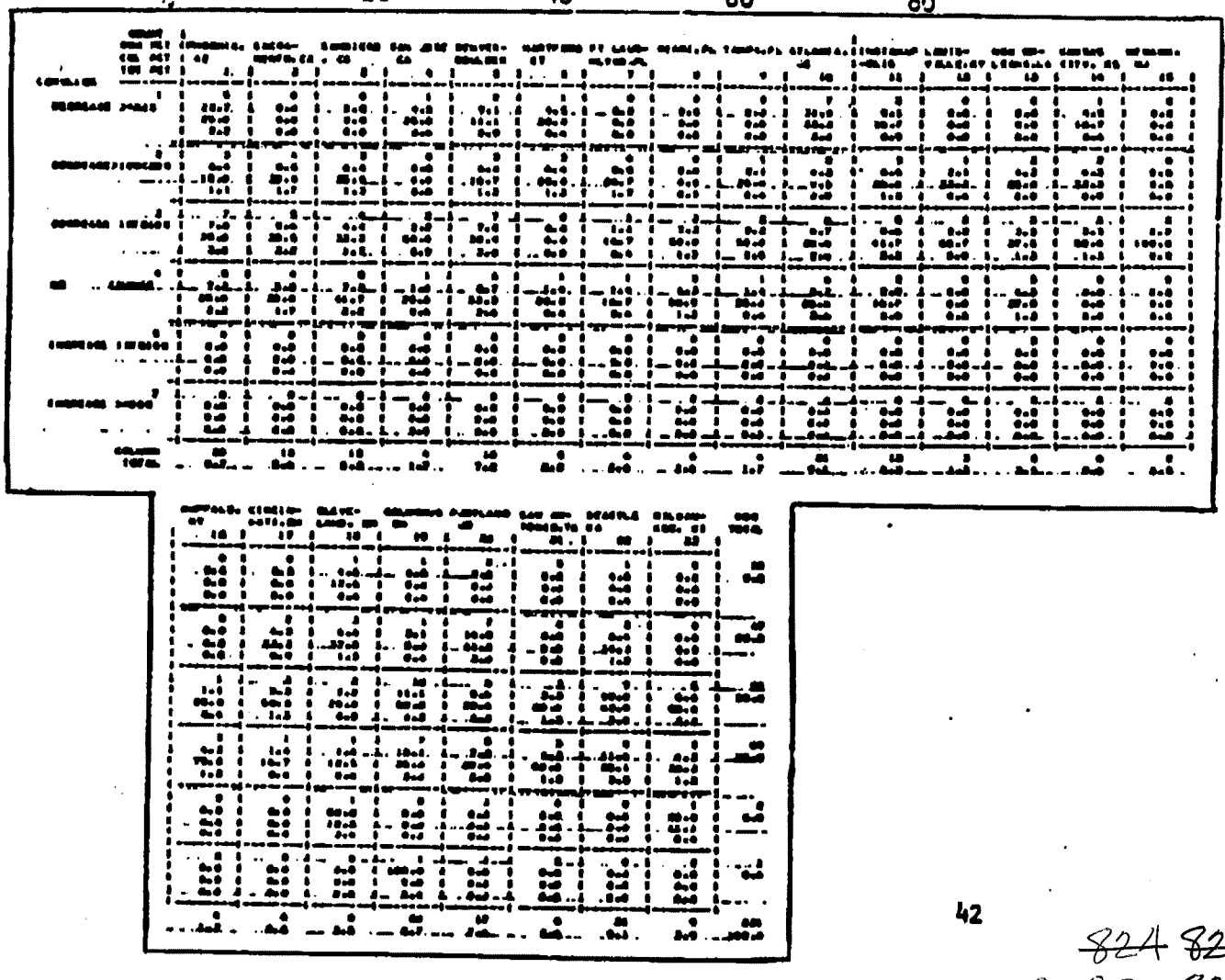
IMPACT OF ADULT BOOKSTORES ON COMMERCIAL PROPERTIES AT ONE BLOCK





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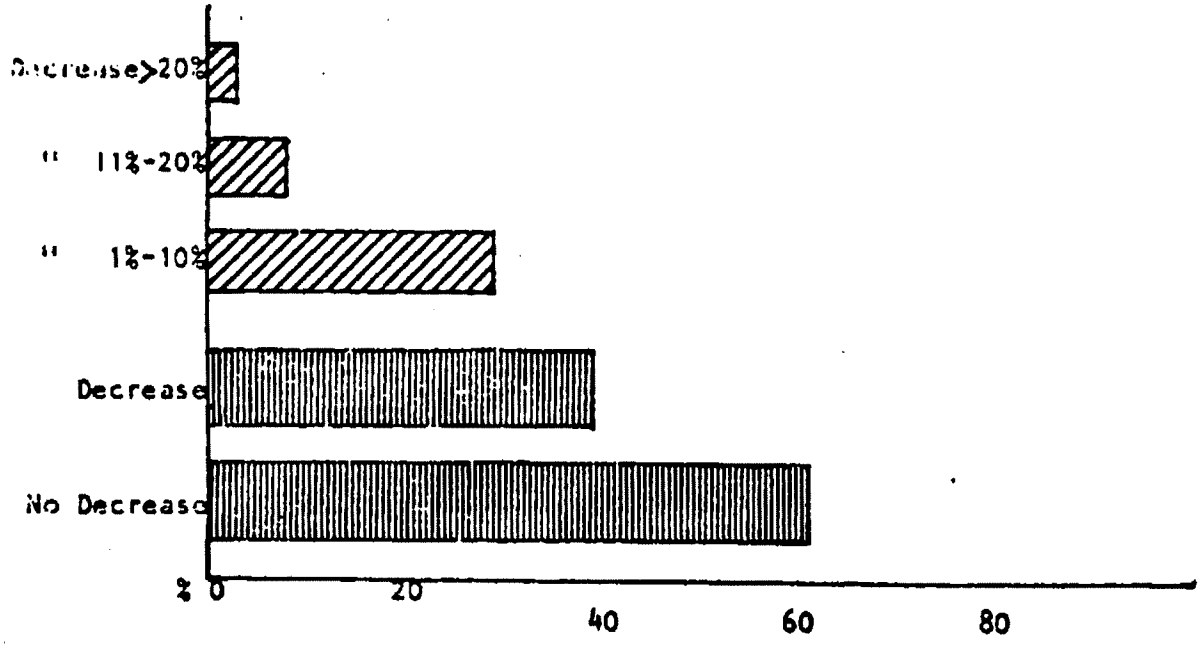
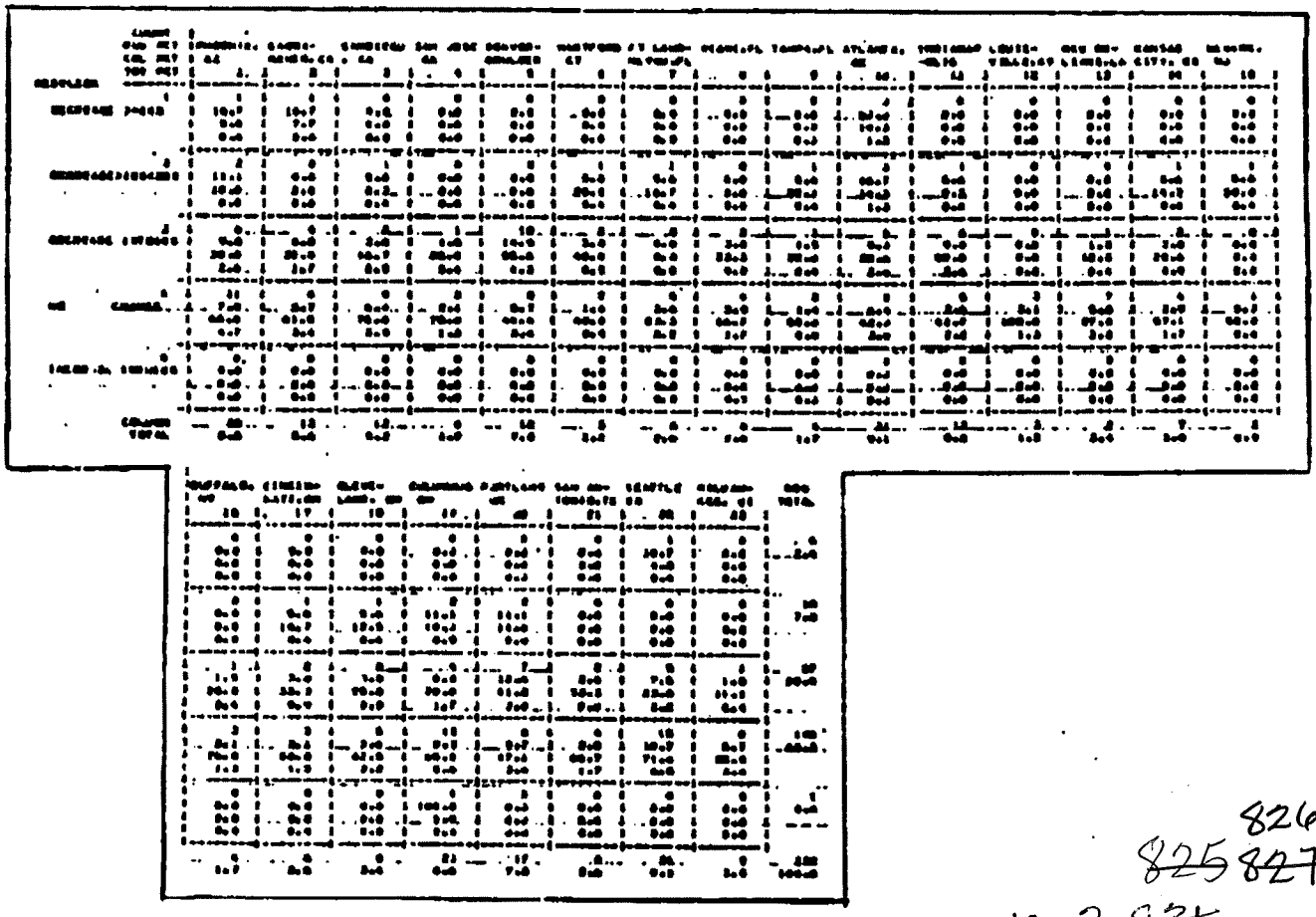
IMPACT OF ADULT BOOKSTORES ON RESIDENTIAL PROPERTY AT THREE BLOCKS





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825 827
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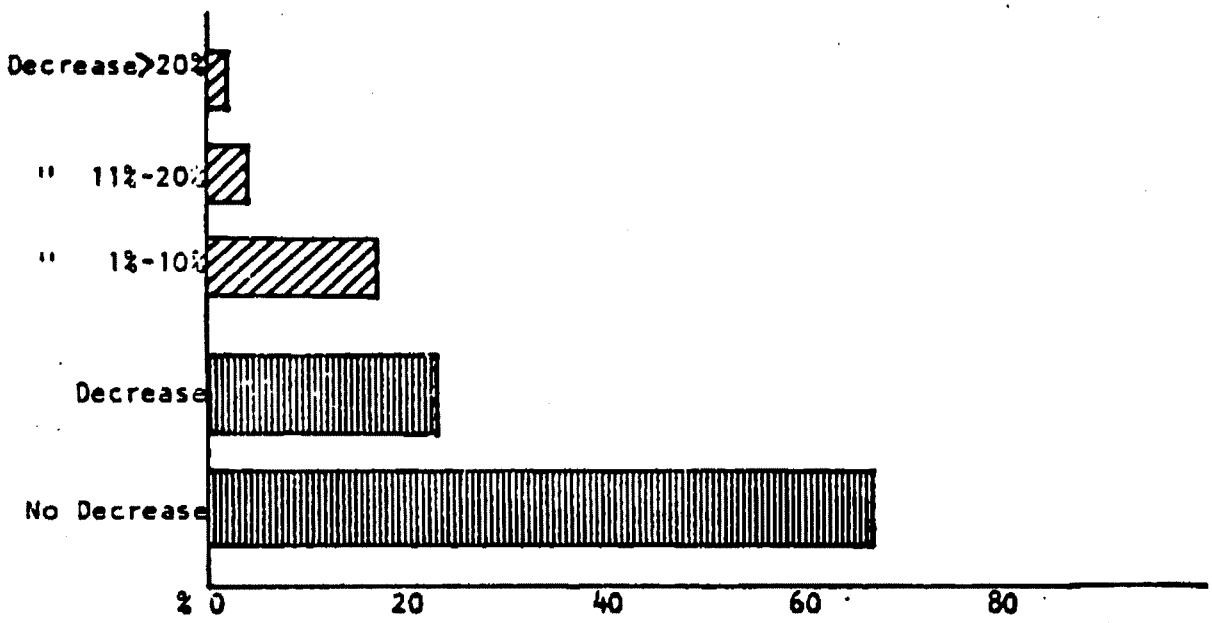
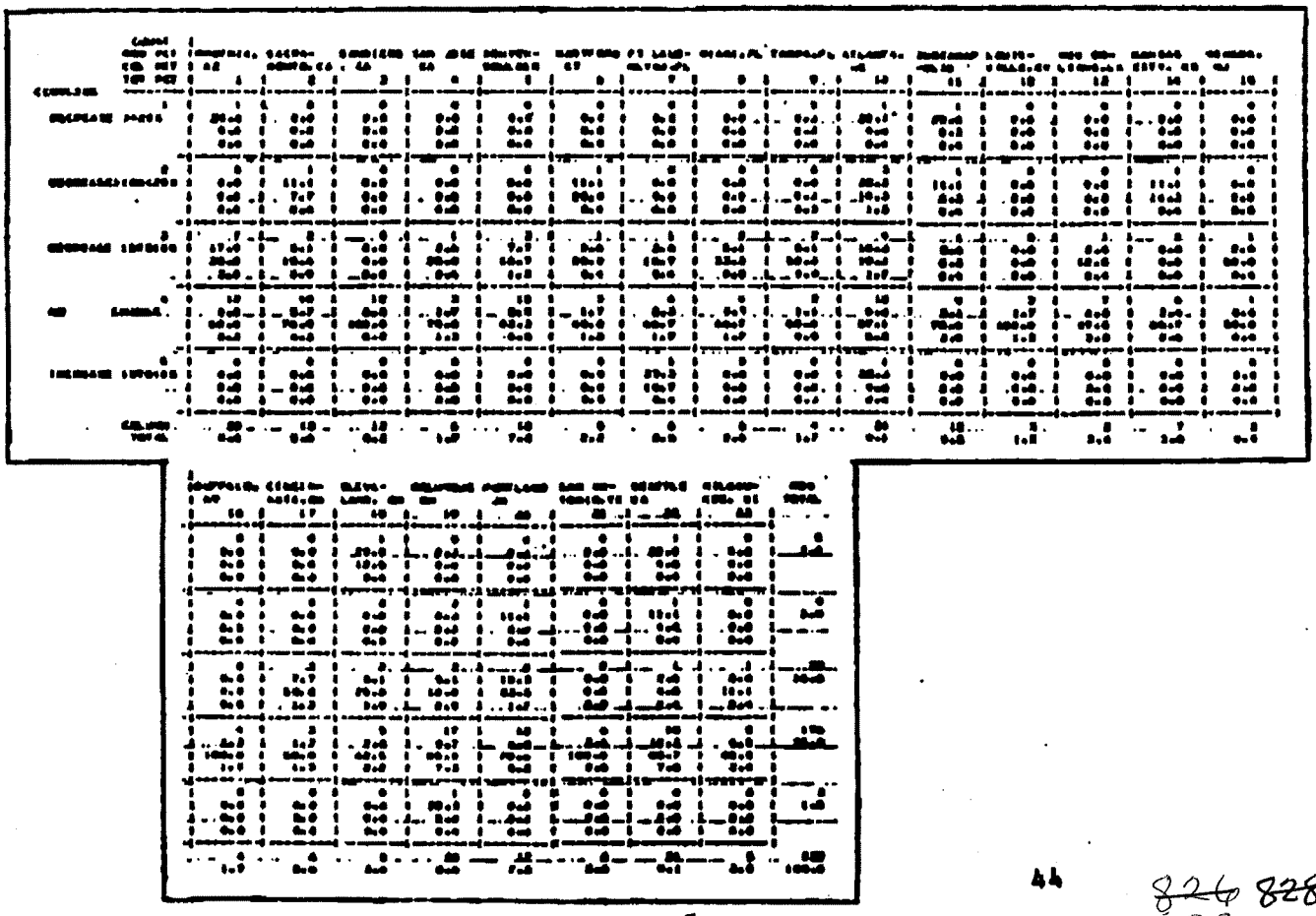
IMPACT OF ADULT BOOKSTORES ON COMMERCIAL PROPERTY AT THREE BLOCKS





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In response to a question asking appraisers to rate the impact of a number of different commercial uses at the same location on residential properties within one block, the majority felt that a medical office or a branch library would have a favorable impact while a welfare office or drug rehabilitation center would have an undesireable impact. The majority felt that a store-front church, pool hall, neighborhood tavern, record store, ice cream parlor or a video-game parlor would not have much of an impact and were about equally split as to whether the effect of a disco would be neutral or negative.

MSA SURVEY OF APPRAISERS
Impact On Residential Properties

Land Use	Value				
	Higher			Lower	
	Much	Some	Same	Some	Much
Store-front church	4%	24%	52%	20%	1%
Pool hall	1%	12%	48%	33%	6%
Welfare office	1%	13%	41%	37%	7%
Neighborhood tavern	-	17%	52%	25%	6%
Record store	6%	29%	54%	10%	-
Medical office	20%	37%	39%	4%	-
Drug rehab center	-	6%	39%	40%	15%
Ice cream parlor	14%	29%	52%	5%	-
Video-game parlor	1%	17%	51%	28%	3%
Disco	-	13%	44%	33%	10%
Branch library	24%	37%	34%	5%	1%

827828
2-833

53

In response to the question about their evaluation of the impact of adult bookstores generally on surrounding property values, 21% of those expressing an opinion felt that there would be little or no impact with such a use. They principally based this opinion on their experience as appraisers (20%) and the observation that such uses usually located in areas that had already deteriorated (26%).

47% of the survey felt that there is a substantial-to moderate impact. Their opinions were based on professional appraisal experience (18%), and the observations that: given current mores, an adult bookstore would discourage home buyers and customers (14%); the use precipitated decline and discouraged improvement (11%);and, it would attract "undesirables" to the neighborhood (29%).

The nature of this impact on property was contingent on a number of factors in the minds of 32% of the respondents. 13% felt that it depended on local attitudes and the adequacy of legal controls on their operation. Exterior factors such as signage and building facade quality were seen by 16% as the determinant. 30% felt the impact would be directly related to the values (both monitary and human) prevalent in the neighborhood. And 20% felt that the answer depended on whether or not the business was likely to attract other such businesses.

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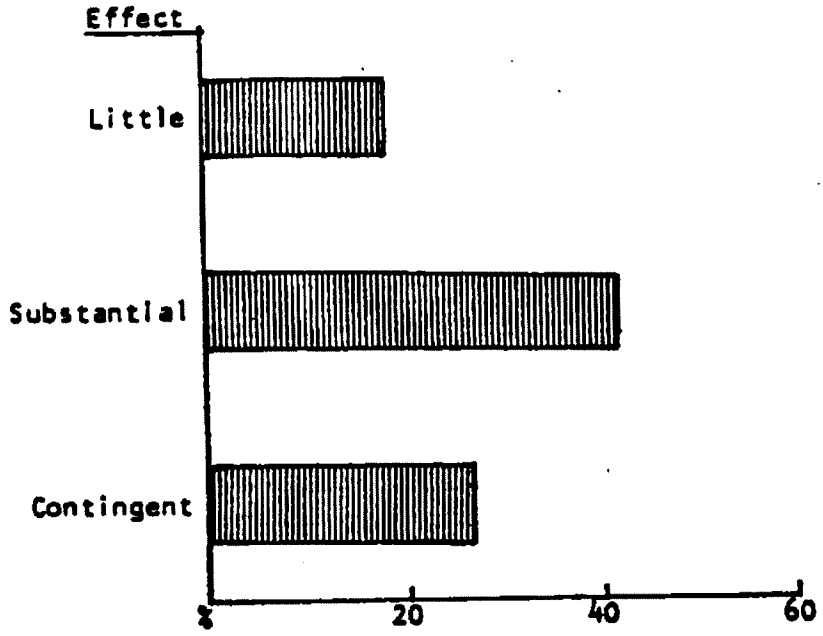
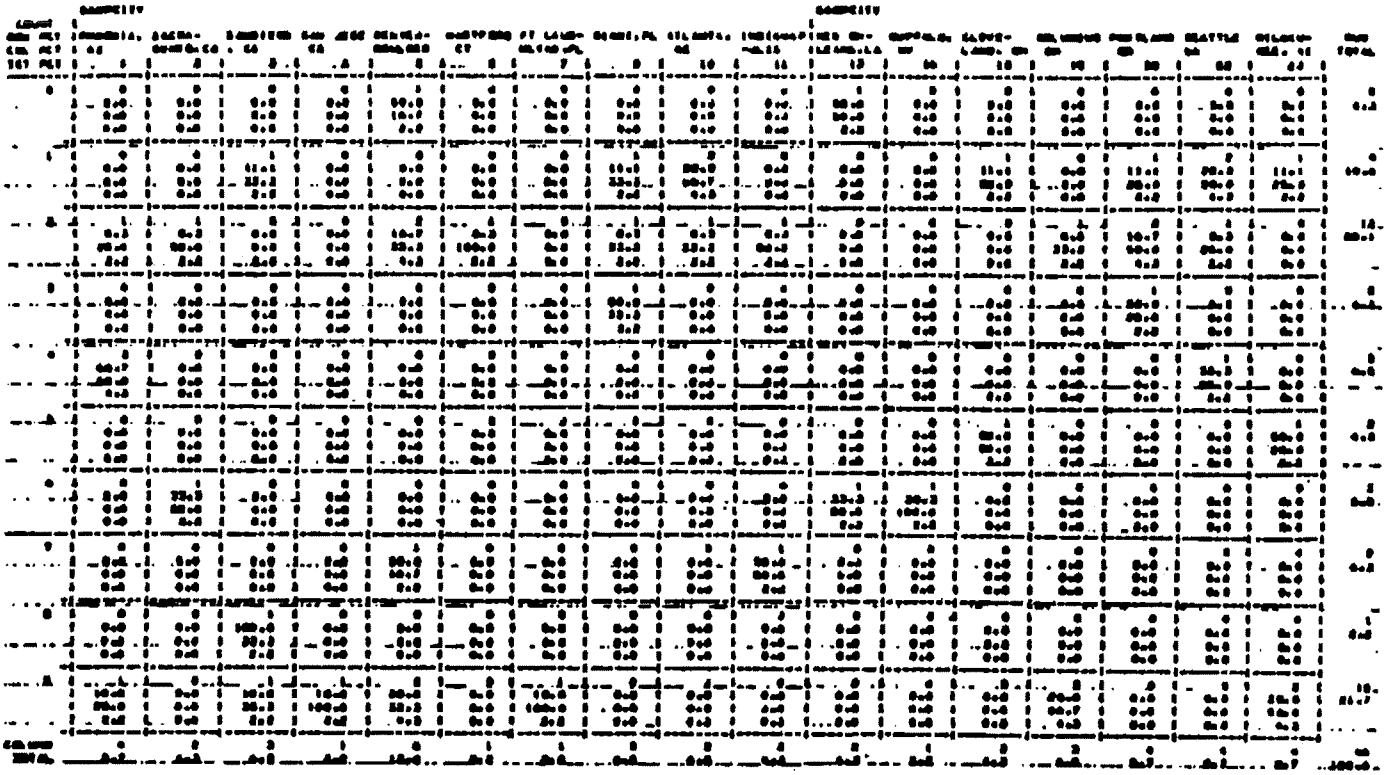
EFFECT OF ADULT BOOKESTORES ON PROPERTY VALUE
MSA SURVEY OF APPRAISERS



EFFECT OF ADULT BOOKSTORES ON PROPERTY VALUE
MSA SURVEY OF APPRAISERS

LITTLE OR NO EFFECT



0 = No reason given.
1 = Appraisal experience.
2 = Area in decline.
3 = Area in decline.
4 = Not an intense use.
5 = Only one does not matter.
6 = Commercial buffer.
7 = Market adjusts quickly.
8 = Tolerated by current mores.
9 = Other.

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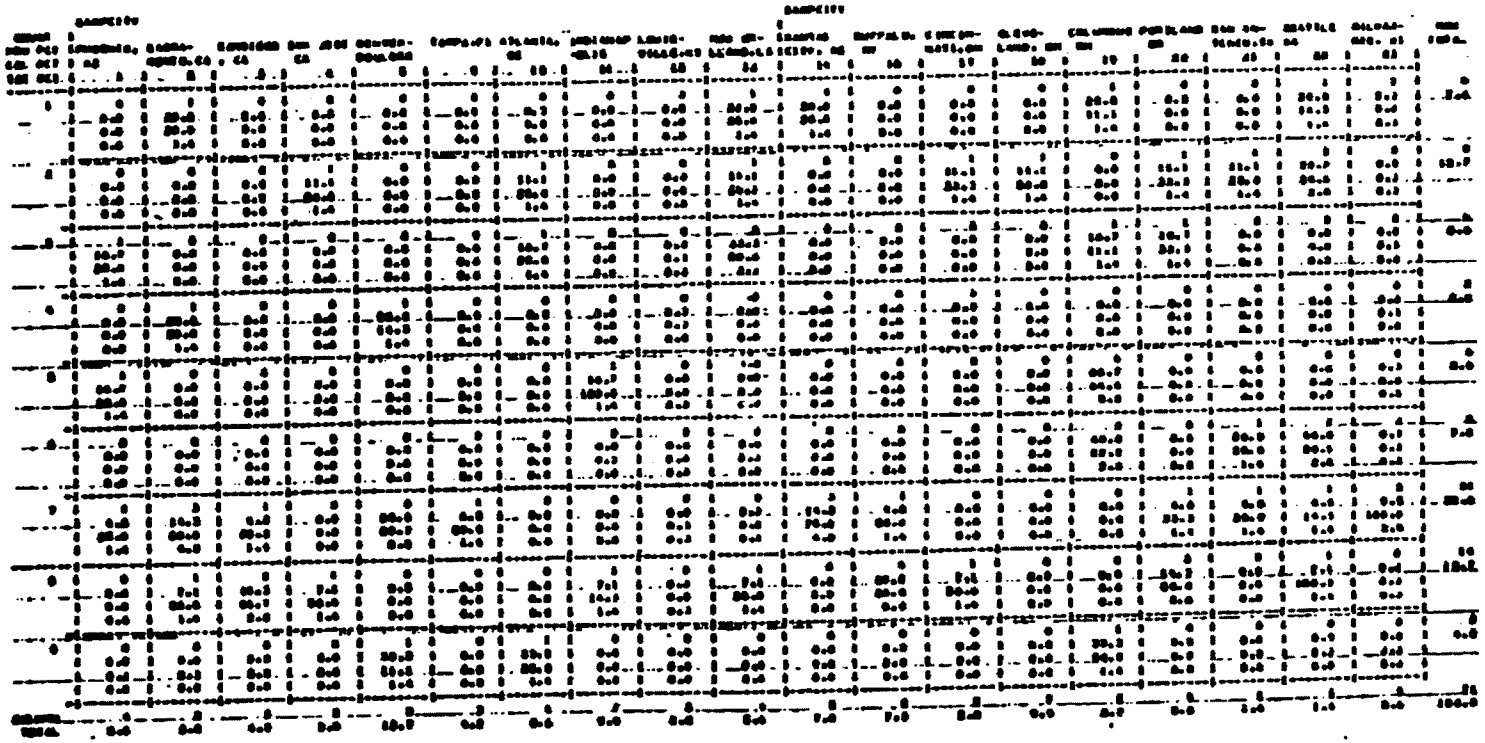
2-~~836~~

5

EFFECT OF ADULT BOOKSTORES ON PROPERTY VALUE
MSA SURVEY OF APPRAISERS

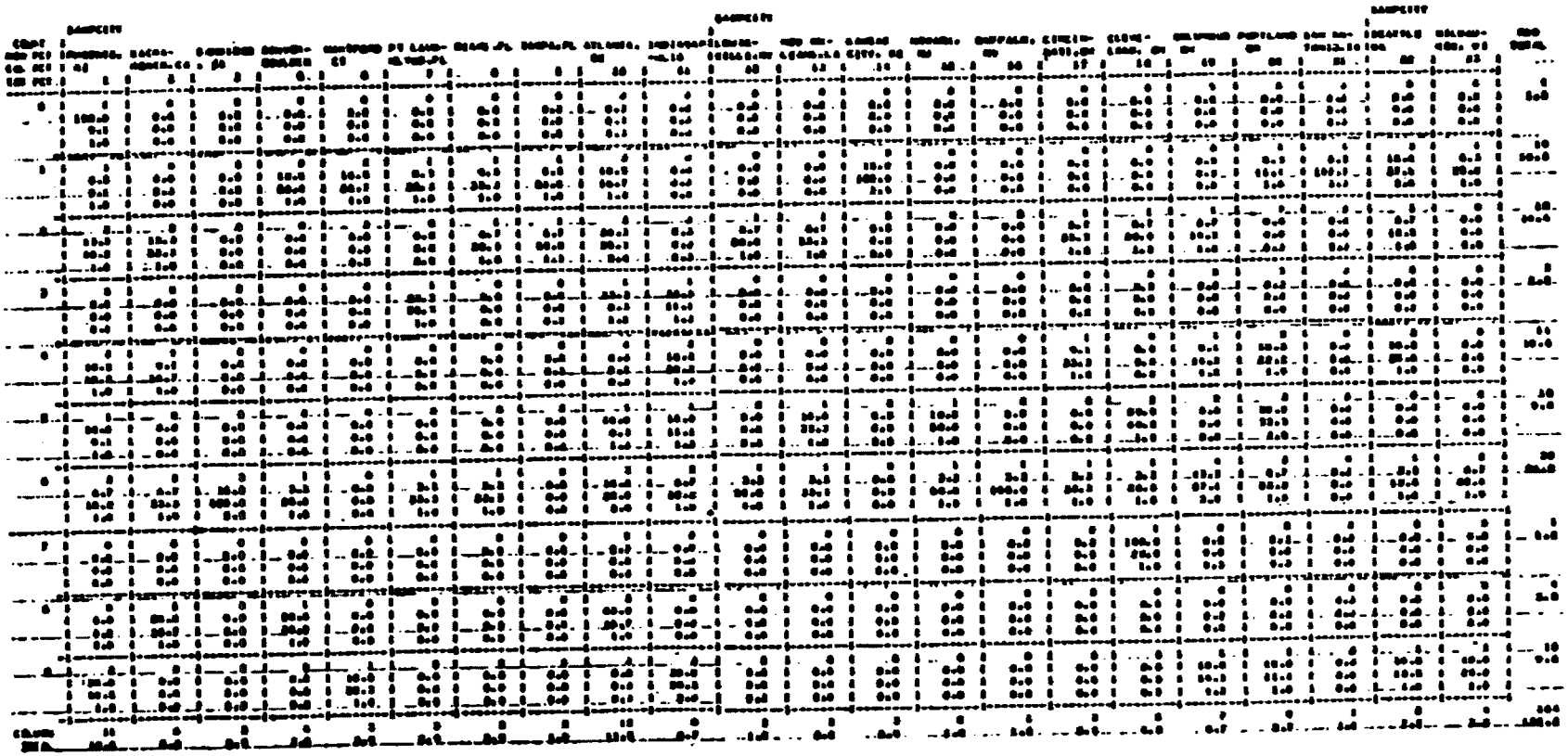
CONTINGENT EFFECT



1 = No reason given.
2 = Not enough information.
3 = Local attitudes and controls.
4 = Nature of existing commercial uses.
5 = Volume/type of customer.
6 = Decore/management.
7 = Decore/management.
8 = Type of nieghborhood values.
9 = If attracts similar uses.

EFFECT OF ADULT BOOKSTORES ON PROPERTY VALUE
MSA SURVEY OF APPRAISERS

SUBSTANTIAL OR MODERATE EFFECT



0 = No reason given.
1 = Appraisal experience.
2 = Prevailing attitudes are negative.
3 = Unharmonious use.
4 = Precipitates decline.
5 = Creates a bad image.
6 = Attracts undesirables.
7 = Bad influence on the young.
8 = Attracts similar uses.
9 = Other.

SUMMARY OF FINDINGS

The great majority of appraisers (75%) who responded to the national survey of certified real estate appraisers felt that an adult bookstore located within one block would have a negative effect on the value of both residential (80%) and commercial (72%) properties. 50% of these respondents foresaw an immediate depreciation in excess of 10%.

At a distance of three blocks, the great majority of respondents (71%) felt that the impact was negligible on both residential (64%) and commercial (77%) properties. Even so, it would appear that this residual effect of such a use was greater for residential than for commercial premises.

In answer to a survey question regarding the impact of an adult bookstore on property values generally, 50% felt that there would be a substantial-to-moderate negative impact, 30% saw little of no impact, and 20% saw the effect as being dependent on factors such as the predominant values (property and social) existing in the neighborhood, the development standards imposed on the use, and the ability of an existing commercial node to buffer the impact from other uses.

The results of the 20% national sample and the 100% survey of Metropolitan Statistical Areas were virtually identical. The one significant variation that did occur was in the response to the question asked as to the effect of adult bookstores on property values generally. Respondents in the MSA survey placed more emphasis (32% versus 20%) on conditional factors at the site.

~~833~~ 834
2-~~839~~

FOOTNOTES

1. Metropolitan Statistical Areas (MSAs) surveyed at 100% were chosen on the basis of having a one to two million population at the time of the 1980 U. S. Census. They were: Phoenix, Arizona; Sacramento, San Diego and San Jose, California; Denver/Boulder, Colorado; Hartford, Connecticut; Fort Lauderdale, Miami and Tampa, Florida; Indianapolis, Indiana; New Orleans, Louisiana; Kansas City, Missouri; Newark, New Jersey; Buffalo, New York; Cincinnati, Cleveland and Columbus, Ohio; Portland, Oregon; San Antonio, Texas; Seattle, Washington; and Milwaukee, Wisconsin. Although slightly outside the population parameters for this selection, Louisville, Kentucky and Atlanta, Georgia were also included.

2. Regional designations used were those employed by the U. S. Bureau of the Census for the 1980 Census. The data were processed and crosstabulations performed using the Statistical Package for the Social Sciences.

3. The discrepency between the number of survey responses and the number of responses to the question in this and subsequent tables is the result of some respondents having omitted answers to questions 6 and 7 of the survey.

~~834~~ 835
2-840

60

APPENDIX I

Area Maps

~~835~~ 836

2-~~84~~ 41

NOTE

For the purpose of this study, the maps included in this Appendix categorize existing land uses within the Study and Control Areas as having a Residential or a District Commercial Character.

All dwelling district, neighborhood-related commercial and special use zoning classifications are designated as being of "Residential Character".

More intense commercial uses, industrial uses and district-related special uses are considered to have a "District Commercial Character".

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2-842

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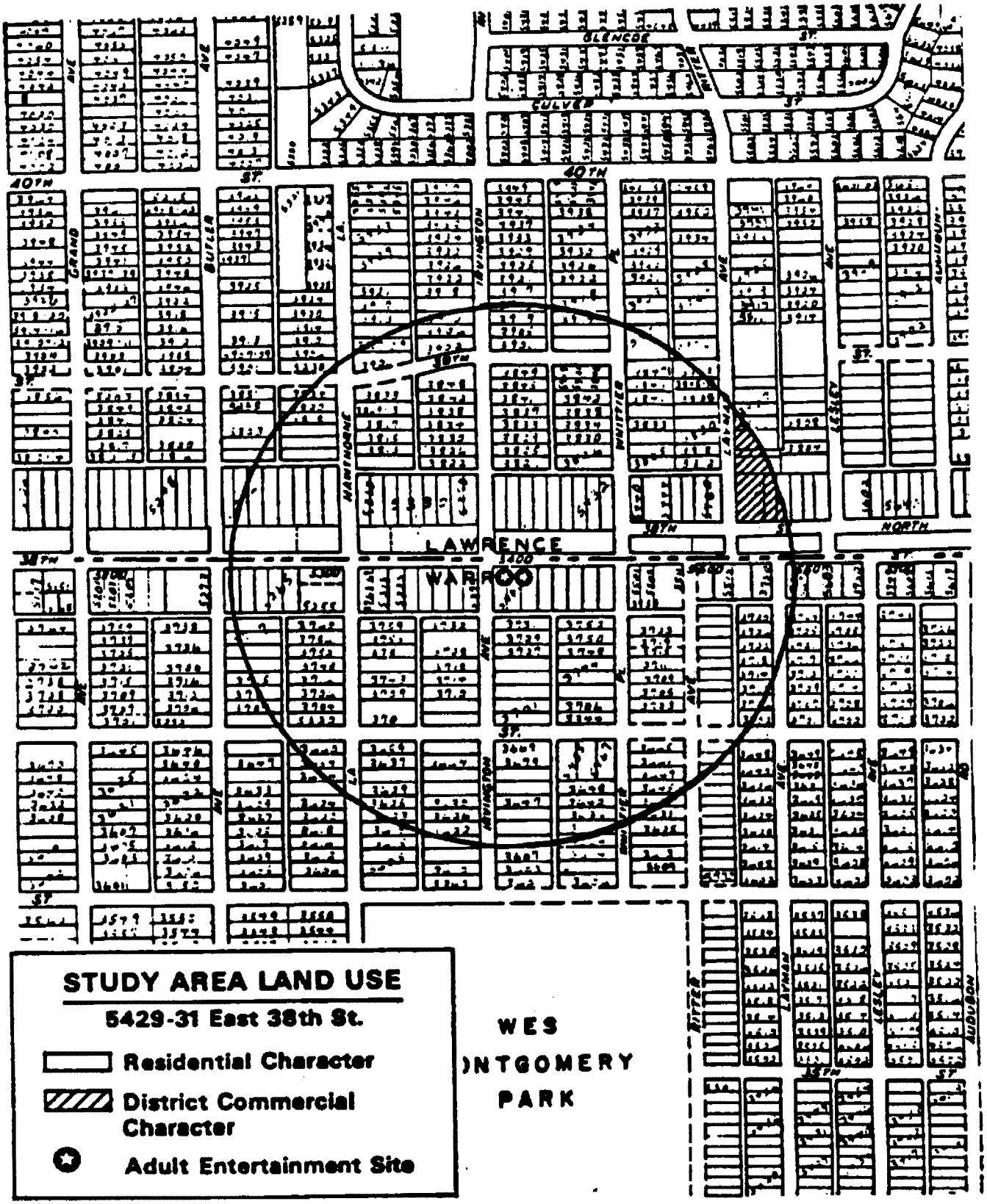
2-843
63

ADULT ENTERTAINMENT BUSINESS STUDY



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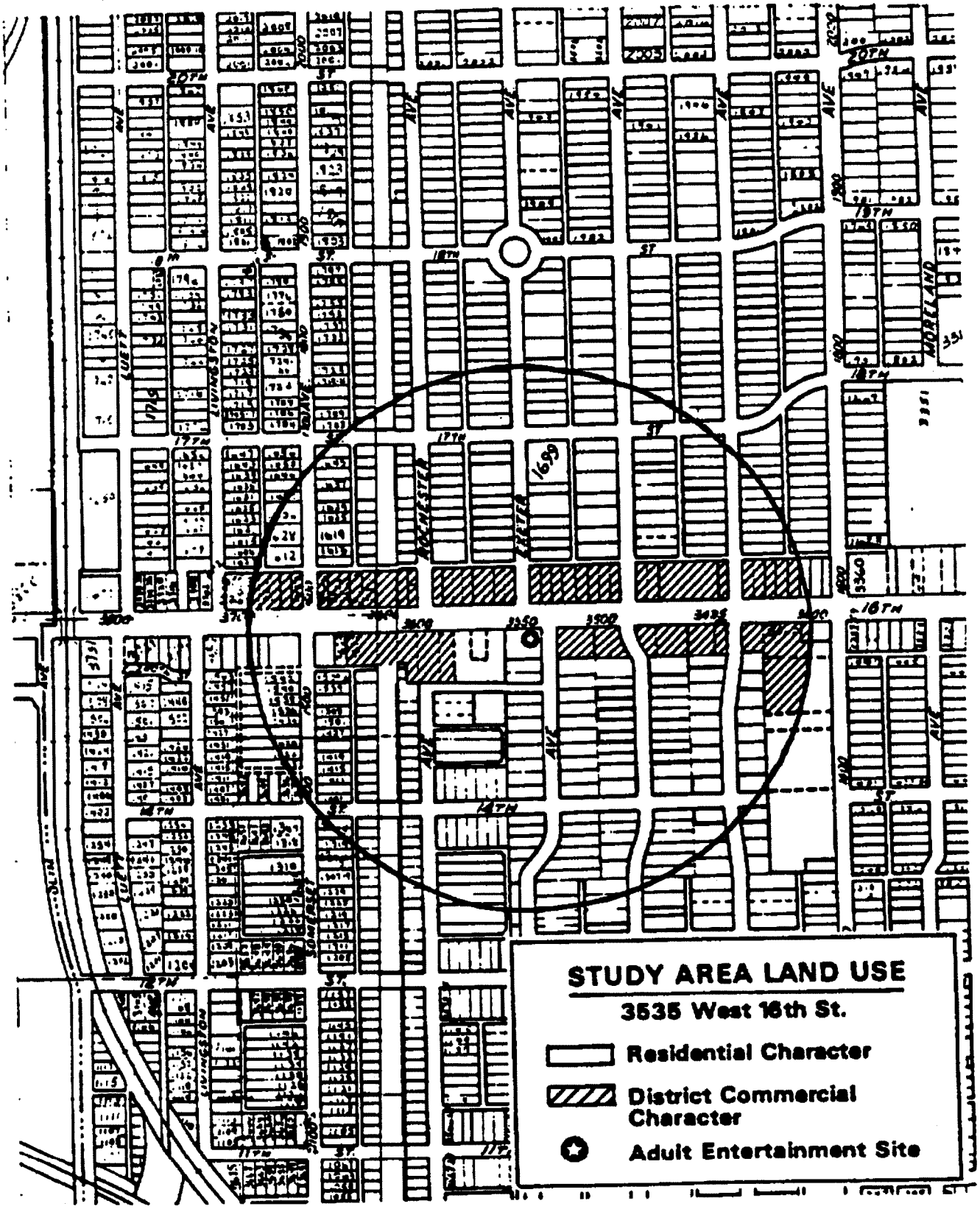
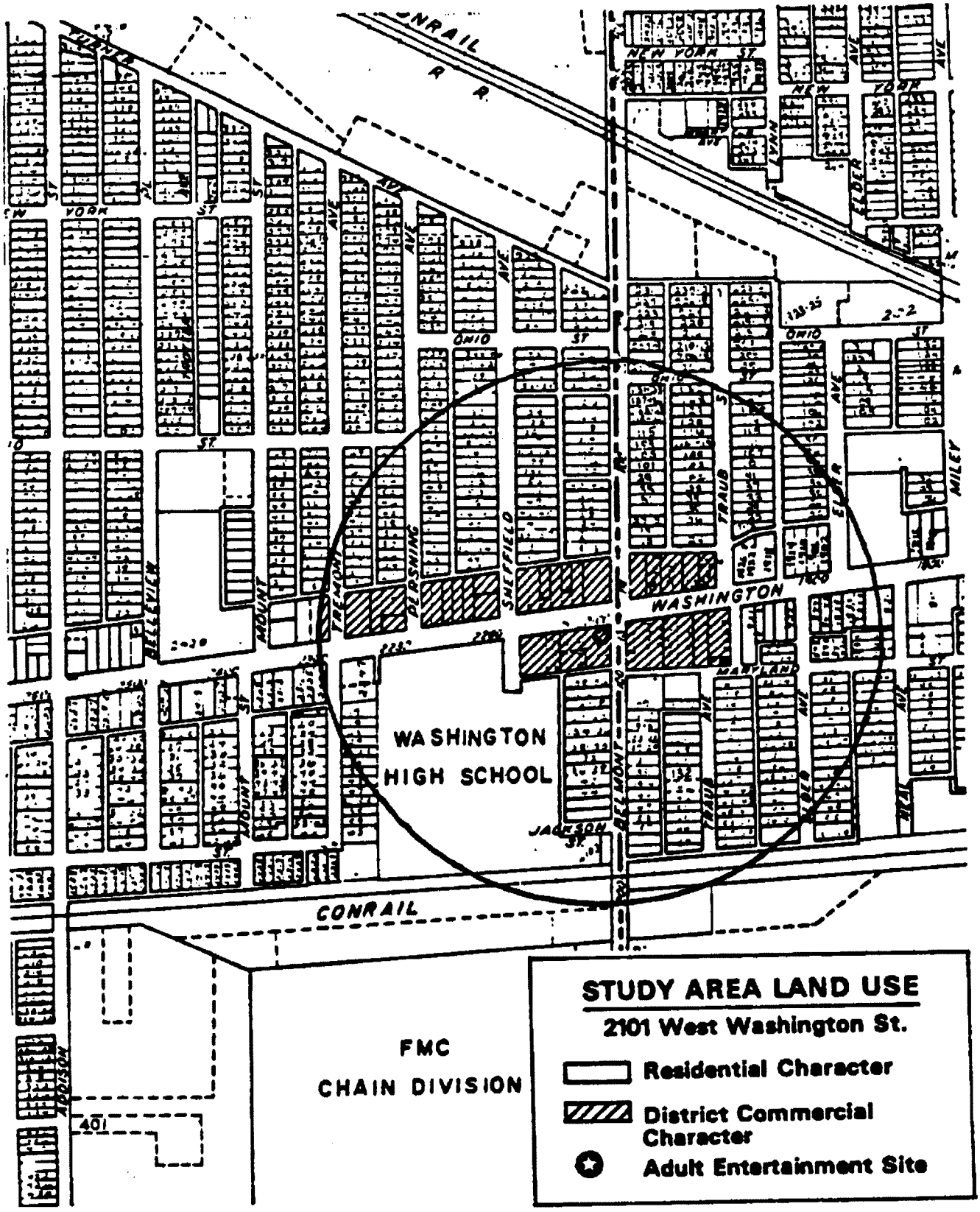
2-844

ADULT ENTERTAINMENT BUSINESS STUDY



84.0
2-846

ADULT ENTERTAINMENT BUSINESS STUDY



841
~~839~~ ~~840~~
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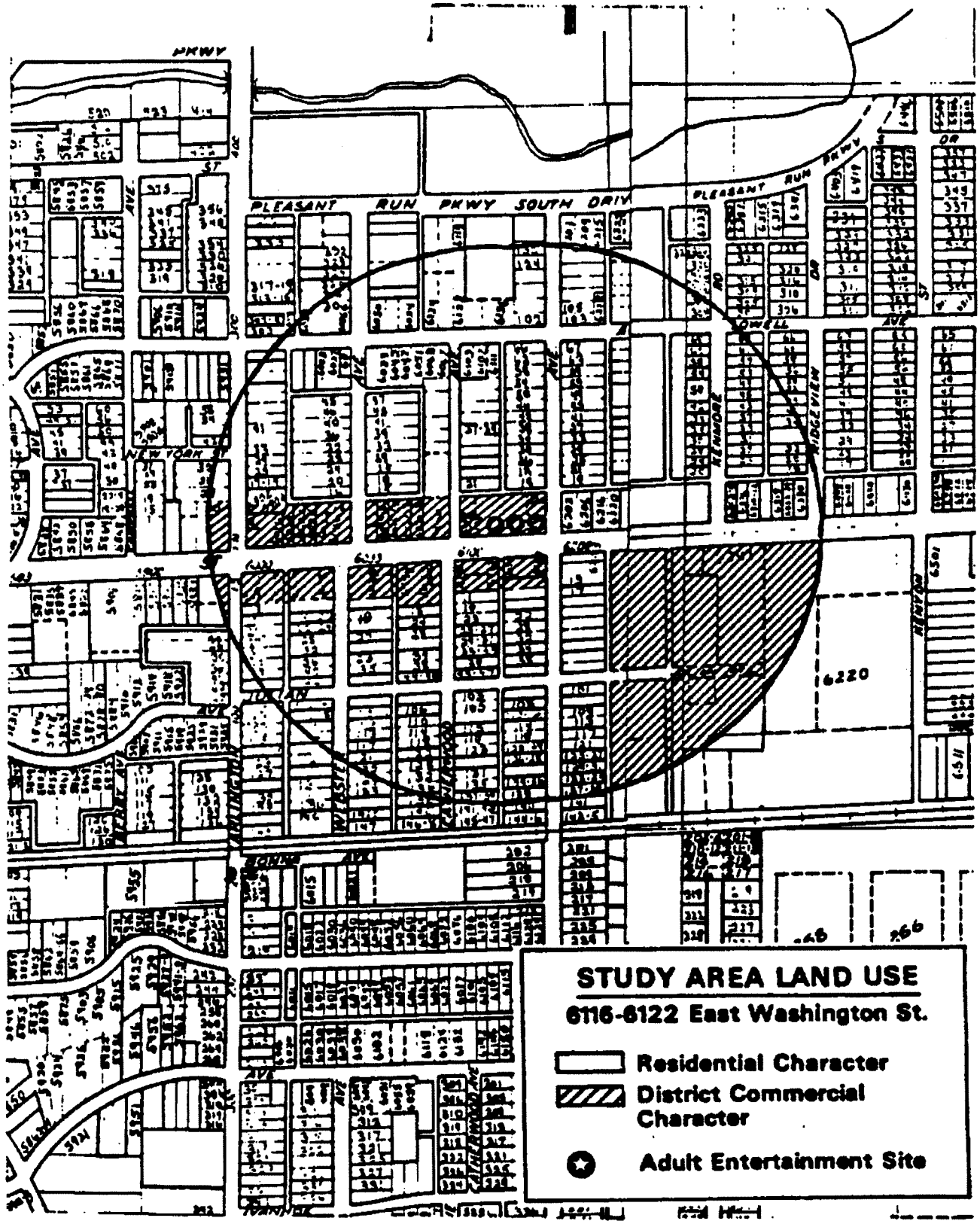

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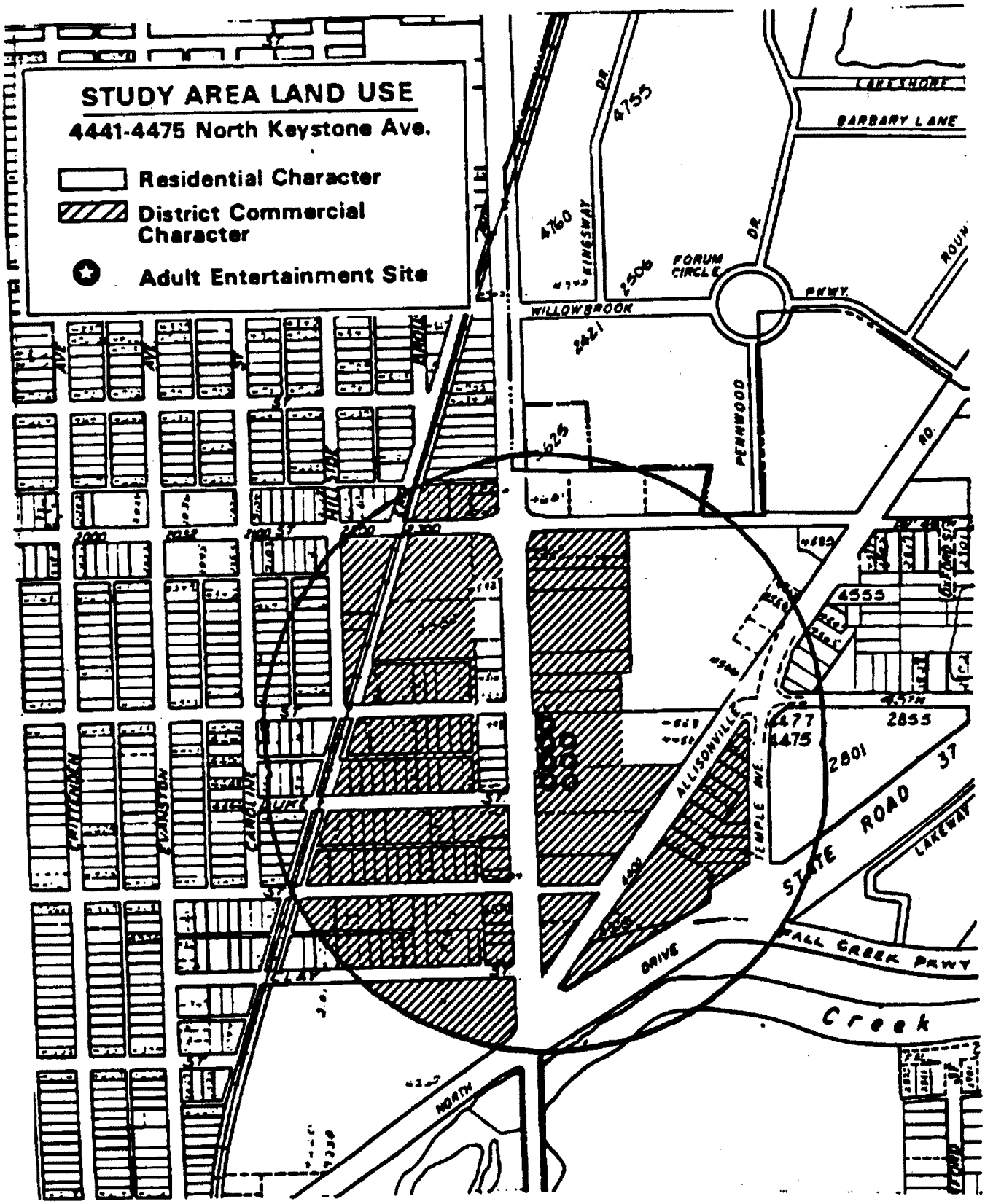
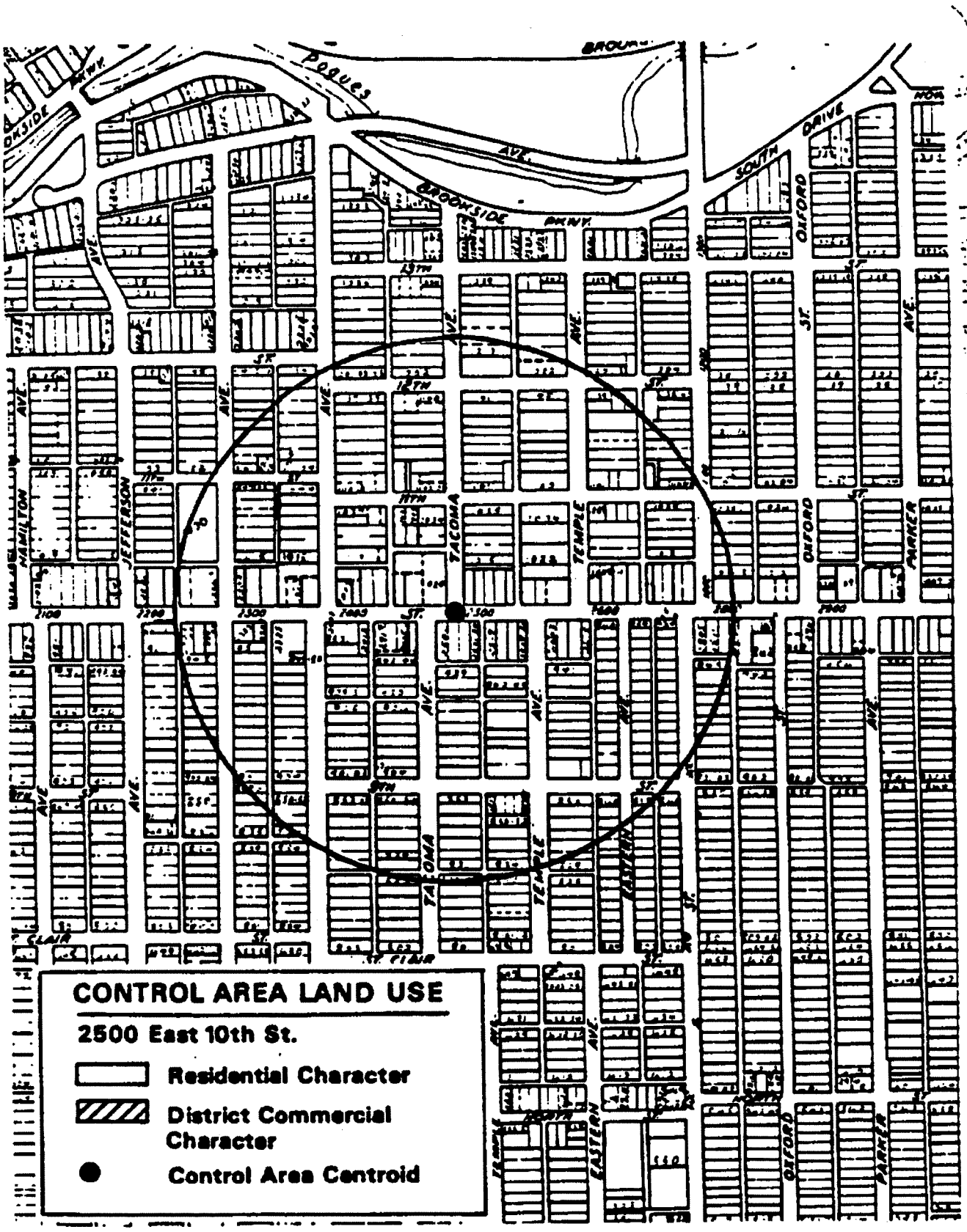
67


STUDY AREA LAND USE
4441-4475 North Keystone Ave.
Residential Character
District Commercial Character
Adult Entertainment Site
DR
4755
BARBARY LANE
4760
KINGSWAY
2500
FORUM CIRCLE
DR
WILLOWBROOK
PKWY.
2421
PENNWOOD
RD.
4555
4477
4475
2855
2801
ALLISONVILLE
TEMPLE AVE
37
STATE ROAD
LAKEWAY
FALL CREEK PKWY
DRIVE
Creek
NORTH

842 843
2-848



843 844
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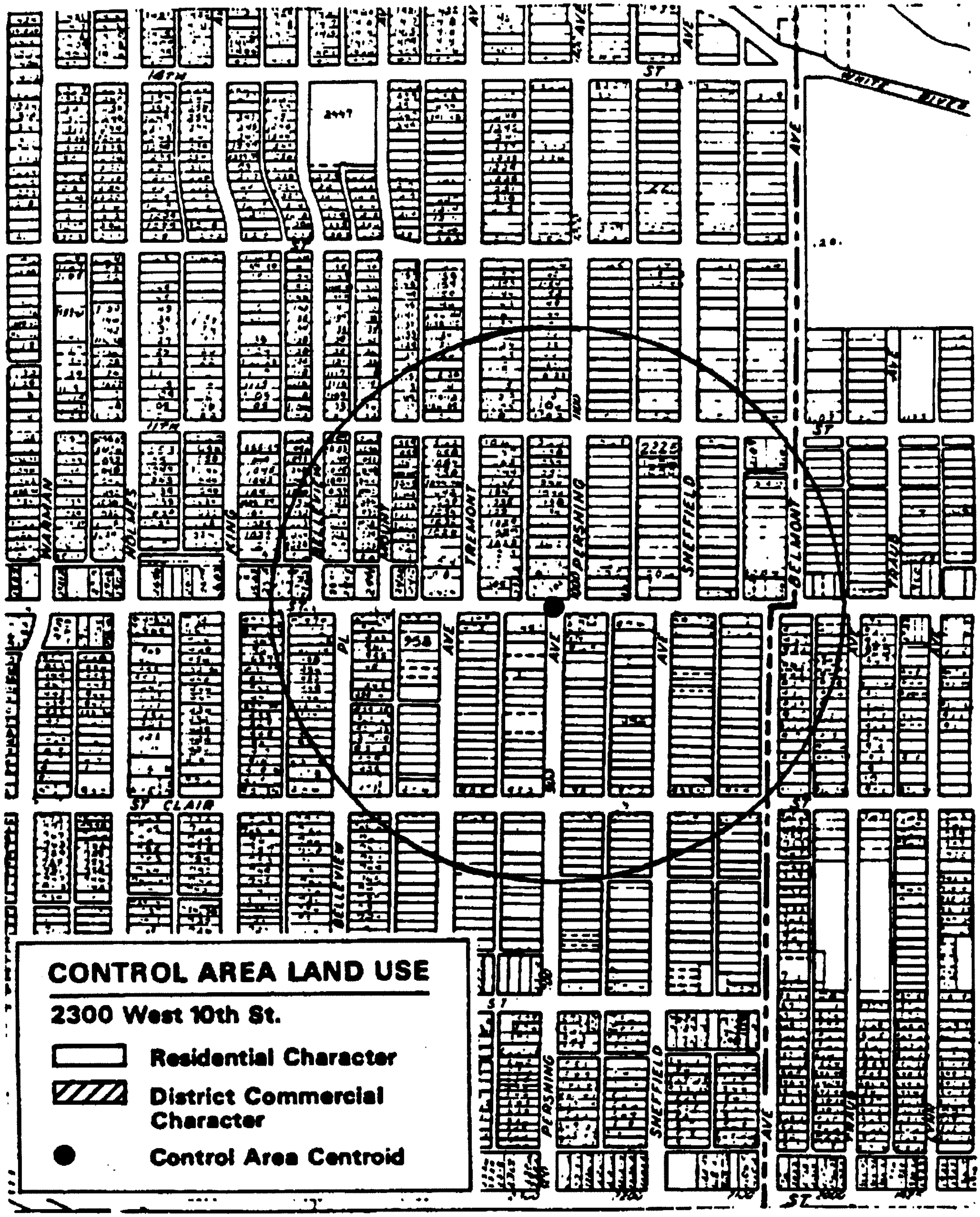
69



14TH
ST
AVE
11TH
WARMAN
HOLMES
KING
TREMONT
PERSHING
SHEFFIELD
BELMONT
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PL
ST CLAIR
BELLVIEW
CONTROL AREA LAND USE
2300 West 10th St.
Residential Character
District Commercial Character
Control Area Centroid

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ADULT ENTERTAINMENT BUSINESS STUDY

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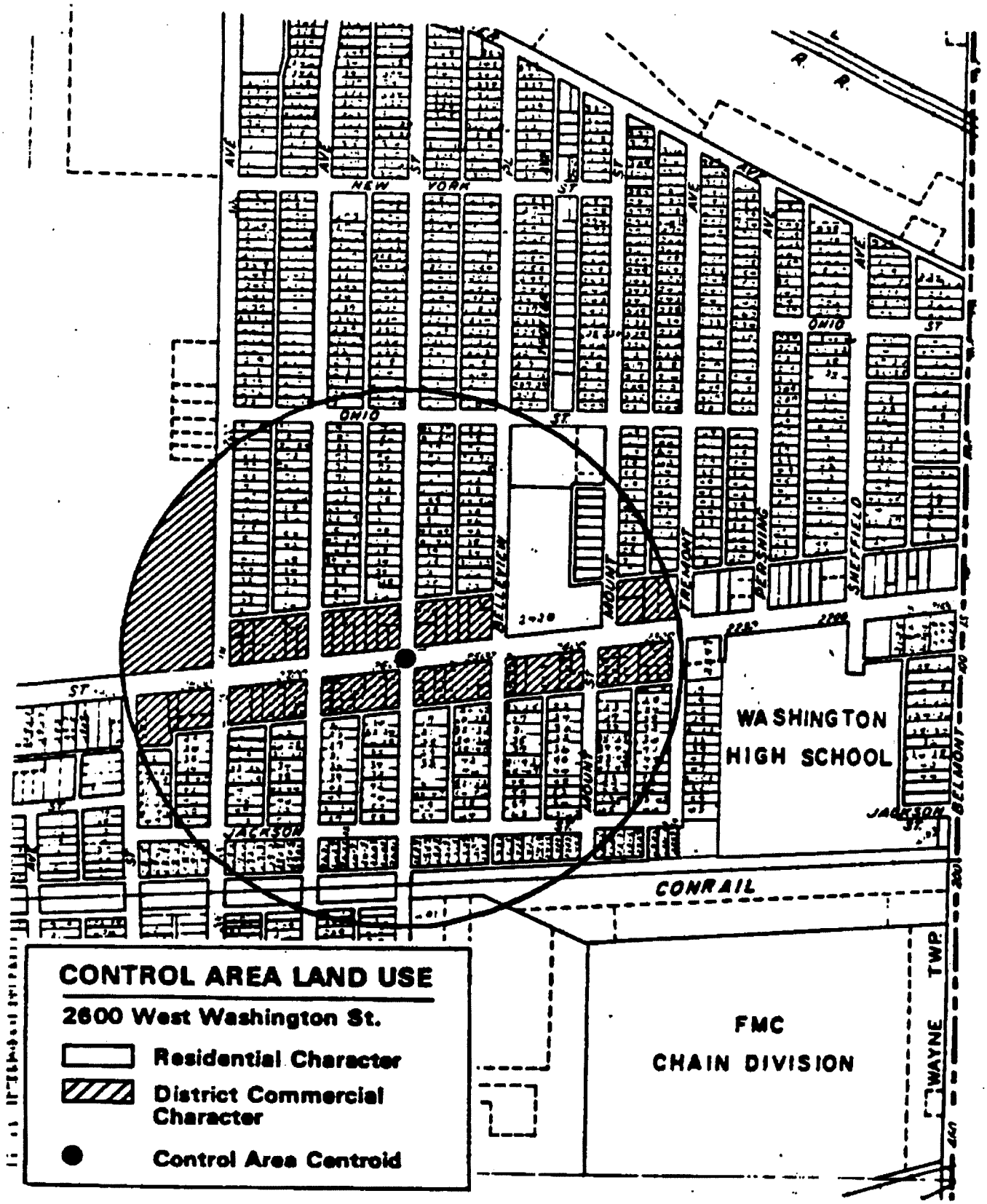

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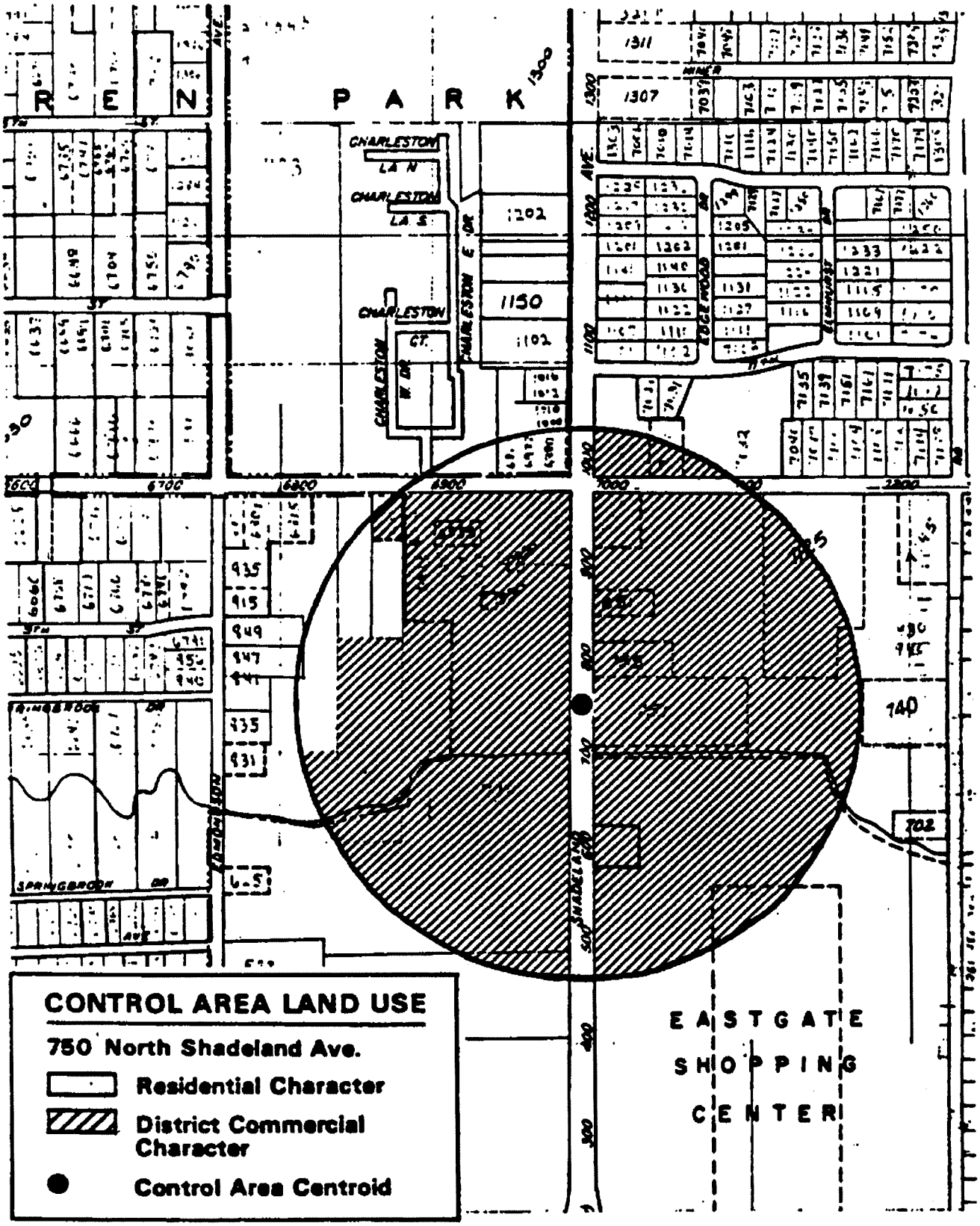
P A R K
CHARLESTON LA N
CHARLESTON LA S
CHARLESTON CT
CHARLESTON E DR
CHARLESTON W DR
1202
1150
1102
1311
1307
1300
1200
1100
6600
6700
6800
6900
7000
935
915
949
947
931
140
702
SPRINGBROOK DR
SPRINGBROOK AVE
SHADELAND AVE
EASTGATE SHOPPING CENTER
CONTROL AREA LAND USE
750 North Shadeland Ave.
Residential Character
District Commercial Character
Control Area Centroid

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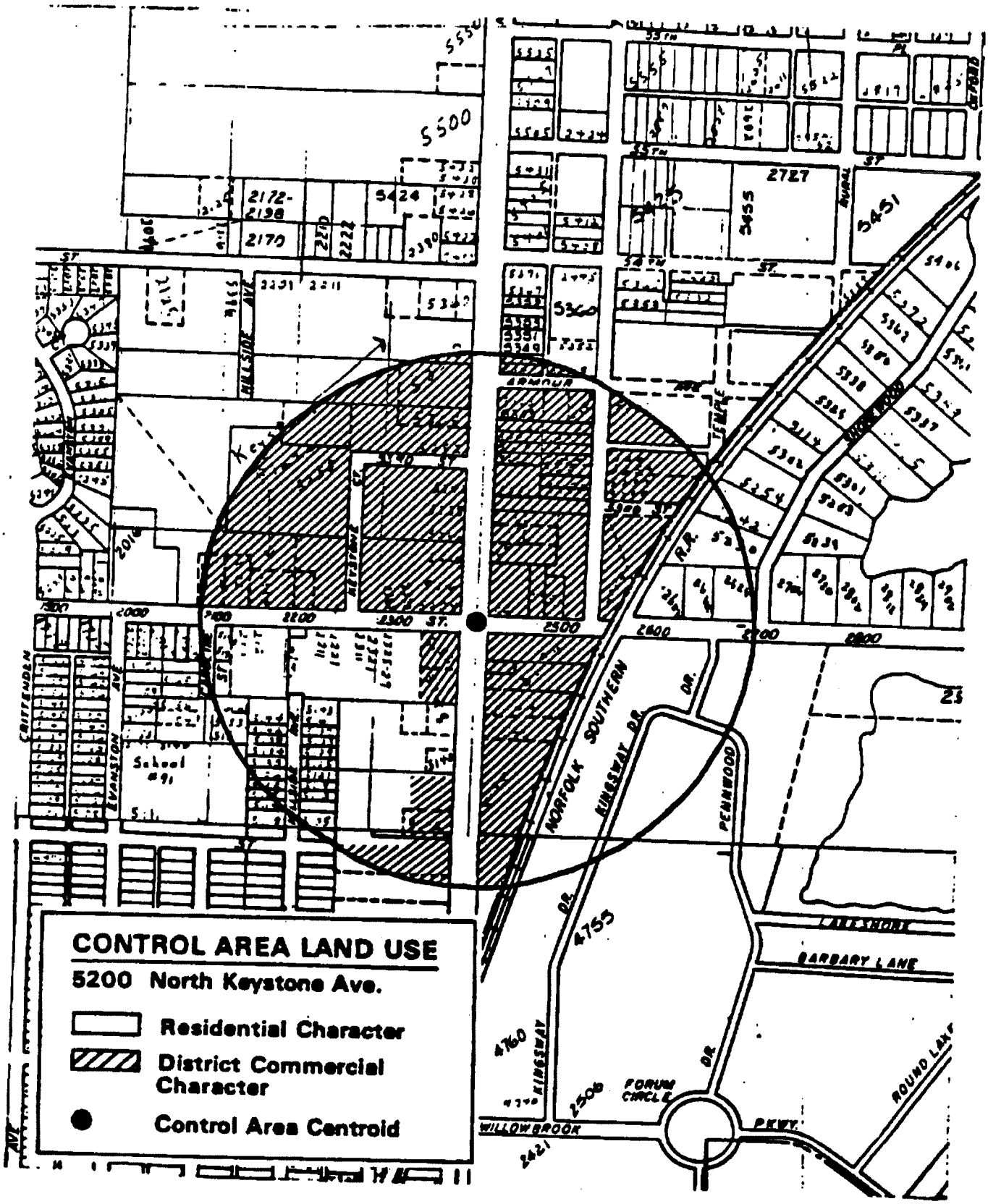
2-~~85~~3



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APPENDIX II

Appraiser Survey

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2-~~855~~ 75

CITY OF INDIANAPOLIS

WILLIAM H. HUDNUT, III
MAYOR

DAVID E. CARLEY
DIRECTOR

DEPARTMENT OF METROPOLITAN DEVELOPMENT

January 20, 1984

Dear MAI Member:

The City of Indianapolis, Indiana is currently in the process of preparing a new local ordinance that will regulate the location of adult entertainment businesses in relation to residential neighborhoods in our community.

In an effort to provide a basis for the proposed legislation that is equitable and legally defensible, I would like to ask your help in establishing a "best professional opinion" on the matter. As a real estate professional, the opinions you share with us on the enclosed survey forms would be very valuable to us in the development of a positive legislative approach to this difficult local issue.

Thank you very much for your assistance.

Sincerely,

David E. Carley

cc. L. Carroll

851
2-~~850~~
2-~~856~~

1880 CITY-COUNTY BUILDING • INDIANAPOLIS, INDIANA 46204 • (317) 236-4141

INDIANA UNIVERSITY

Division of Research

SCHOOL OF BUSINESS
Bloomington/Indianapolis
10th and Fee Lane
Bloomington, Indiana 47405
(812) 337-5507

TO: Professional Real Estate Appraisers

FROM: Indiana University, School of Business, Division of Research

Please help us in this brief national survey. The information provided will help clarify an important question. Read the following information about a hypothetical neighborhood and respond to a few questions in terms of your professional experience and judgment.

A middle income residential neighborhood borders a main street that contains various commercial activities serving the neighborhood. There is a building that was recently vacated by a hardware store and will open shortly as an adult bookstore. There are no other adult bookstores or similar activities in the area. There is no other vacant commercial space presently available in the neighborhood.

Please indicate your answers to questions 1 through 4 in the blanks provided, using the scale A through G.

SCALE:
- A Decrease 20% or more
- B Decrease more than 10% but less than 20%
- C Decrease from 0 to 10%
- D No change in value
- E Increase from 0 to 10%
- F Increase more than 10% but less than 20%
- G Increase 20% or more

1) How would you expect the average values of the RESIDENTIAL property within one block of the bookstore to be affected? ____

2) How would you expect the average values of the COMMERCIAL property within one block of the adult bookstore to be affected? ____

3) How would you expect the average values of RESIDENTIAL property located three blocks from the bookstore to be affected? ____

4) How would you expect the average values of the COMMERCIAL property three blocks from the adult bookstore to be affected? ____

- over -

851+852
2-857 77

5) Suppose the available commercial building is used for something other than an adult bookstore. For each of the following potential uses, would the average value of residential property within <u>one</u> block of the new business be...

A much higher
B somewhat higher
C about the same
D somewhat lower
E much lower

than if an adult bookstore occupied the site.

In the space provided, write the appropriate letter for each potential use.

Store-front church	_____	Drug rehabilitation center	_____
Pool hall	_____	Ice cream parlor	_____
Welfare office	_____	Video-game parlor	_____
Neighborhood tavern	_____	Disco	_____
Record store	_____	Branch library	_____
Medical office	_____		

6) In general, to what <u>degree</u> do you feel adult bookstores affect property values?

_____

_____

_____

_____

7) Why do you feel this way?

_____

_____

_____

_____

8) Where do you practice?

City_____ State_____

Your name _____

(If you prefer not to give your name, please check here _____)

Thank you for your cooperation. Please return this questionnaire in the postage paid envelope provided for your convenience.

853
~~852~~ 78
2-~~858~~

APPENDIX III

Land Use Control of
Adult Entertainment

853 854
2-859

APPENDIX III

LAND USE CONTROL OF ADULT ENTERTAINMENT

LEGAL BASIS

Zoning has traditionally been defined as a process by which a municipality legally controls the use which may be made of property and the physical configuration of development upon tracts of land within its jurisdiction. This is accomplished by means of zoning ordinances which are locally adopted to divide the land into different districts permitting only certain uses within each district for the protection of public safety, welfare, health and morality.[1]

Zoning regulations not only regulate the use to which buildings or property may be put within designated districts, but also the purpose or object of the use beyond the mere conditions or circumstances of the use.[2]

In a 1920 landmark decision, the New York Court of Appeals upheld New York City's comprehensive zoning legislation,[3] and reaffirmed this legislation as a proper exercise of the city's police powers.

In 1926, the practice of comprehensive zoning received substantial support when the United States Department of Commerce promulgated the Standard State Zoning Enabling Act. This Act became the model for most of the early zoning enabling legislation in the country.

While the courts have reaffirmed that municipalities are properly exercising their police powers through zoning regulation, it is generally held that they have no inherent power to zone except (as is the case with the police power itself) as such power is delegated to them by the state legislature through statutory enactment. The right of state legislatures to delegate comprehensive zoning power to municipalities, on the other hand, is uniformly recognized by the courts.[4]

Because municipalities in the state had to be enabled to exercise zoning powers within their jurisdictions, the Indiana State Legislature, by means of enabling legislation, delegated this power to local units of government.[5]

Control of the use of private land inevitably raised a number of constitutional questions. In the landmark 1926 case of Euclid v. Ambler Realty Co.[6], the United States Supreme Court upheld the city of Euclid, Ohio's municipal zoning ordinance which had been claimed to involve an unconstitutional deprivation of property by deciding that comprehensive zoning ordinances are a proper

exercise of the police power and do not constitute an unconstitutional deprivation of property. This position was reaffirmed by the Supreme Court of the United States in 1927.[7]

Thus, the general legality of zoning is established beyond doubt. Subsequent decisions by this court[8] established that such ordinances, however, could be unconstitutional when applied to a particular property. This established the basis for the system under which the City of Indianapolis currently operates where each variance or rezoning request is decided on its own merits.

THE PUBLIC WELFARE

The police power authorizes a government to adopt and enforce all laws necessary to protect and further the public health, safety, morals and general welfare of its citizens.[9]

Limitations on the exercise of zoning power are essentially the same as those restricting the police power under the U. S. Constitution, i. e., they must be reasonable and guarantee due process and equal protection. It may not be exercised in an unreasonable, oppressive, arbitrary or discriminatory way. Zoning laws, then, must have a real, substantive relation to the legitimate governmental objective of the protection and furtherance of the public health, safety, morals and general welfare of citizens.

The public welfare, in these contexts, means the stabilization of property values, promotion of desirable home surroundings, and happiness,[10] and embraces the orderliness of community growth, land value and aesthetic objectives[11] and is reasonably designed to further the advancement of a community as a social, economic and political unity.[12]

CONTROL OF ADULT ENTERTAINMENT[13]

Reacting to the increased availability of pornography in the United States and attendant pressures at the community level for its control, a number of municipal governments have addressed the proliferation of adult entertainment businesses through, among various methods, land use controls. The validity of such an approach was upheld in 1976 in the landmark decision Young v. American Mini Theatres, Inc.[14] in which the Court upheld a Detroit zoning ordinance which prohibited more than two adult movie theaters or other sexually-orientated enterprises from locating within 1000 feet of one another or certain other designated businesses. Against

attacks grounded in the First and Fourteenth Amendments to the Constitution of the United States, the Court sustained the ordinance on the dual bases that:

1. The ordinance was a reasonable response to demonstrated adverse land-use and property value effects associated with sexually-oriented enterprises; and

2. the ordinance silenced no message or expression but merely placed geographic restrictions upon where such expression could occur.

While an exhaustive analysis of the Young decision is beyond the scope of this discussion, the following generalized principles may be gleaned from the plurality, concurring and dissenting opinions of the Justices. First, hostility to constitutionally protected speech is an impermissible motive. The more apparent and rational the relationship of the adult use restrictions to recognized zoning objectives, such as the preservation of neighborhoods and the grouping of compatible uses, the greater the likelihood that the restrictions will be upheld.

Second, even a properly motivated ordinance will be invalidated if it unduly burdens first amendment rights. For example, an ordinance imposing locational restrictions that are so severe as to result in an inability to accommodate the present or anticipated number of adult businesses in a municipality will certainly be struck down. The Young court repeatedly moored its decision upholding the Detroit ordinance upon the finding that numerous sites complying with the zoning requirements were available to adult businesses and that the market for sexually-explicit fare, viewed as an entity, was therefore "essentially unrestrained".

Third, ordinances which are so vague in wording and definitions that a non-pornographic entrepreneur is unclear whether he falls within its proscriptions may be violative of due process. A vague ordinance may operate to hinder free speech through use of language so uncertain or generalized as to allow the inclusion of protected speech within its prohibitions or leave an individual or law enforcement officers with no specific guidance as to the nature of the acts subject to punishment.

Finally, an ordinance which authorizes the exercise of broad discretionary power by administrative officials to determine which adult business will be allowed to operate, especially if the exercise of such discretion is not grounded on objective, ascertainable criteria, will probably be disapproved as contrary to the precept that, in the First Amendment area, "government may regulate only with narrow specificity".

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Any community, then, which would employ its zoning power to regulate adult uses within its jurisdiction must be particularly concerned that the adoptive ordinance be demonstrably motivated by and founded on sound land use principles, it allow reasonable accommodation for such uses within its jurisdiction, and that it clearly define both the nature and regulations of the use in order to avoid, to the extent possible, the need for subjective interpretation of each proposed use.

The Young decision has encouraged a great amount of experimentation on the part of municipalities in an effort to prevent deterioration of their commercial districts and adverse impact upon adjacent areas. The effectiveness of these innovations will be determined by time and the legal tests to which they will be subject as this business segment establishes itself.

For the time being, however, this decision encourages an approach in which localities have tended to control the siting of adult entertainment businesses on the basis of land use.

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FOOTNOTES

1. Cf Smith v. Collison, 119 Cap App 180, 6 P2d (1931); Devaney v. Bd. of Zoning Appeals, 132 Conn. 537, 45 Ad2 828 (1946); Toulouse v. Bd. of Zoning Adjustment, 147 Me 387, 87 Ad2 670 (1952).

2. Cf American Sign Co. V. Fowler, 276 SW2d 651 (Ky 1955).

3. Cf Lincoln Trust Co. v. Williams Bldg. Corp., 229 NY 313, 128 NE 209 (1920).

4. Jonas v. Fleming Town Bd. & Zoning Bd. of Appeals, 51 Ad2d 473, 382 NYS 2d 394 (4th Dep't 1976).

5. I.C. 36-7-4.

6. Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S Ct 114, 71 L Ed 303 (1926).

7. Cf Zahn v. Bd. of Pub. Works, 274 U.S. 325, 47 S Ct 574, 71 L Ed 1074 (1927); and Garieb v. Fox, 274 U.S. 603, 47 S. Ct. 675, 71 L Ed 1228 (1927).

8. Cf Sup. Ct. In Nectow v. Cambridge (U.S. 183, 48 S. Ct. 447, 72 L Ed 842 (1928).

9. Cf Scrutton v. County of Sacramento, 275, Cal App 2nd, 79 Cal Rptr 872 (1969); Troiano v. Zoning Comm'n of Town of No. Branford, 155 Conn 265, 231 A2d 536 (1967); and, Trust Co of Chicago v. City of Chicago, 408 111 91, 96 NE 2nd 499 (1951).

10. Cf State v. Bessent, 27 Wisc. 2d 537, 135 NW 2d 317 (1965).

11. Ibid., and J.D. Construction Co. v. Bd. of Adj., 119 NJ Super 140, 290 A2d 452 (1972).

12. Ibid., and Fischer v. Bedminster Twp., 11 NJ 194, 93 A2d 378 (1952).

13. For a more complete discussion of this subject, see Mathew Bender, Book V, Chapter 111, Sections 11.01,11.02 and 11.03.

14. Cf 421 US 50, 96 S Ct 2440, 49 L Ed 2d 310, reh denied 97 S Ct 191 (1976), rev'd 518 F2d 1014 (6th Cir 1975).

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FOOTNOTES

1. Cf Smith v. Collison, 119 Cap App 180, 6 P2d (1931); Devaney v. Bd. of Zoning Appeals, 132 Conn. 537, 45 Ad2 828 (1946); Toulouse v. Bd. of Zoning Adjustment, 147 Me 387, 87 Ad2 670 (1952).

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13. For a more complete discussion of this subject, see Mathew Bender, Book V, Chapter III, Sections 11.01,11.02 and 11.03.

14. Cf 421 US 50, 96 S Ct 2440, 49 L Ed 2d 310, reh denied 97 S Ct 191 (1976), rev'd 518 F2d 1014 (6th Cir 1975).

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Final Report to the City of Garden Grove:

The Relationship Between Crime and Adult Business Operations on Garden Grove Boulevard

Richard McCleary, Ph.D.
James W. Meeker, J.D., Ph.D.

October 23, 1991

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I. Introduction and Executive Summary

This report summarizes an exhaustive series of statistical analyses conducted over a ten-month period by Richard McCleary, Ph.D., James W. Meeker, J.D., Ph.D., and five research assistants. This document presents the statistical analyses that we feel are the most relevant for the legal requirement of basing zoning restrictions on adult businesses on their negative impact on the community in terms of crime, decreased property value and decreased quality of life. It is constitutionally important that the City of Garden Grove base any restrictions on adult businesses on these so called "secondary effects" and not upon the content or moral offensiveness of such businesses. We are confident that any independent reanalysis will reach similar conclusions.

In July, 1990, we were contacted by the City Manager's Office and Police Department for advice on problems related to the operation of adult businesses on Garden Grove Boulevard. After years of experience with these businesses, the Police Department had come to suspect that their operation constituted a public safety hazard. Partly in response to this situation, the City had adopted a zoning ordinance which restricts the location and density of adult businesses. In order to withstand constitutional scrutiny, the City needs to be able to show that the ordinance was based on the negative secondary effects such businesses have on their surroundings and not on the content of these businesses or their morality. The precise dimensions of the negative impact of these businesses were unknown, however. It was not clear that the superficial spatial relationship between crime

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and these businesses was statistically significant, for example; and if the relationship *was* significant, it was not clear what aspect of the operation was responsible for the hazard. The exact extent of other negative effects, such as decreased property values and reduced quality of environment for others in the area, were also unknown.

In several meetings with the City Manager's Office and the Police Department during the summer and fall of 1990, and after reviewing several studies conducted by other cities to justify zoning restrictions on adult businesses, it was decided that we would assist the City in undertaking its own study. This study would consist of an extensive statistical analysis of the City's crime data, a survey of real estate professionals, and a survey of City residents living close to the currently operating adult businesses. The study was designed to focus on the following questions:

- **Does crime increase in the vicinity of an adult business? If so, is the increase statistically significant and does it constitute a public safety hazard?**
- **Can the public safety hazard be ameliorated by requiring a minimum distance between adult businesses? What is the required minimum distance?**
- **Are there any other practical zoning restrictions that would ameliorate the public safety hazard?**
- **Are adult businesses associated with a decrease in property values?**
- **Are adult businesses associated with declining quality of neighborhood?**

We agreed to conduct the surveys and appropriate statistical analyses under

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three conditions: First, we could expect to have any public data held by the Police Department or the City Manager's Office; second, we could expect the full co-operation of the Police Department and the City Manager's Office; and third, the City would accept any and all findings regardless of their implications for past, present, or future policy. These conditions were accepted in principle and honored in practice. We enjoyed an extraordinary degree of autonomy and co-operation from both the Police Department and the City Manager's Office.

In November, 1990, we began working with the Police Department to define the parameters of the crime data to be analyzed. The complete set of crime reports for 1981-90 were eventually downloaded and read into a statistical analysis system. The reliability of these data was ensured by comparing samples of the data downloaded from the Police Department computers with data archived at the California Bureau of Criminal Statistics and Federal Bureau of Investigation. Satisfied that the reliability of our data was nearly perfect, in January, 1991, we began the arduous task of measuring the absolute and relative distances between crime events. We were eventually able to measure the relevant distances for a subset of 34,079 crimes to within 40 feet of the actual occurrence with 99 percent confidence. In late January through April, 1991, these distances were analyzed in various models and with various methods. The results of these analyses show that:

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- Crime rises whenever an adult business opens or expands its operation and the change is statistically significant. The rise is found in the most serious crimes, especially assault, robbery, burglary, and theft. The rise in "victimless" crimes (drug and alcohol use, sex offenses, *etc.*) is also significant, though less consistent and interpretable. Given the nature and magnitude of the effects, *the adult businesses on Garden Grove Boulevard constitute a serious public safety hazard.*

- Except for expansions, the adult businesses were in operation at their present locations on Garden Grove Boulevard prior to 1981. There has been so little variation in spatial density since then that *the relationship between density and crime cannot be determined.*

- Architectural devices designed to ameliorate the nuisance of these businesses have no significant impact on crime.

- When an adult business opens within 1000 feet of a tavern (or *vice versa*) the impact of the adult business on crime is aggravated substantially and significantly.

During this same period of time, two questionnaire instruments were developed and administered. In January and February, 1991, a sample of real estate professionals was surveyed. Over nine hundred questionnaires were distributed with a response rate of fifteen percent. The results of this survey show that:

- Real estate professionals overwhelming agree that close proximity of adult businesses are associated with decreased property values for commercial, single-family residential and multiple-family residential property.

- Real estate professionals associate the close proximity of adult business with increased crime and other negative impacts on the quality of the neighborhood.

During the spring and summer, 1991, a random sample of households living near the adult businesses was surveyed. The results of this survey show that:

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- Residents who live near adult businesses, as well as those who live farther away, associate adult businesses with increased crime and other negative impacts on the quality of the neighborhood.

- A large proportion of residents who live near adult businesses report personal negative experiences that are attributed to these businesses.

- Public support for regulation of adult businesses is overwhelming. While virtually all segments of the community voice support for all regulatory initiatives, home owners and women are the strongest supporters of regulation.

Each of these findings is fully supported by every bit of data available to us and by every analysis that we conducted.

The crime data and analyses underlying our four major research tasks are described in subsequent sections. Most readers will be more interested in the policy recommendations based on these analyses, however. Based on the four major components of our research, we recommend that:

- *Lacking any conclusive evidence on the relationship between spatial density and crime, there is no reason to change the current 1000 foot minimum spacing requirement between two adult businesses.*

- *Given the serious public safety hazard, no adult business should operate within 1000 feet of a residence.*

- *Where feasible, the Conditional Use Permit process should be used to ameliorate the public safety hazard. For optimal effectiveness, the Police Department must be fully involved in every aspect of this process.*

- *Given the interaction effect, no tavern should be allowed to operate within 1000 feet of an adult business and vice versa.*

- *The evidence clearly supports the current city ordinance in demonstrating the presence of negative secondary effects associated with location and density of adult businesses as required by current federal and state case law.*

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These recommendations are informed by an understanding of the legal foundation of the problem. After developing that foundation in the following section, we present our analyses of crime patterns in Garden Grove and two related opinion surveys.

II. Legal Requirements For Controlling Adult Businesses

The legal control and regulation of pornography in general and "adult entertainment" businesses specifically has a long and controversial history. The 1970 Commission on Obscenity and Pornography overwhelmingly voted to eliminate all legal restrictions on use by consenting adults of sexually explicit books, magazines, pictures, and films.[1] While President Nixon, who appointed the Commission, was not pleased with the findings, they were consistent with the general liberal view that pornography should be tolerated as a matter of individual choice and taste unless it directly harms others.[2] The Williams Committee in England supported a similar position in 1979.[3] Alternatively, the 1986 Attorney General's Commission on Pornography called for a more aggressive enforcement of obscenity laws and regulation of pornography that it deemed harmful even if not legally obscene.[4]

The current judicial doctrinal standard that governs the difficult balance of constitutionally protected free speech and the direct regulation of pornography, is

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[1] *Report of the Commission on Obscenity and Pornography* (Bantam Books, 1970.

[2] See D.A. Downs, *The New Politics of Pornography* (University of Chicago Press 1989).

[3] See W.A. Simpson, *Pornography and Politics: Report of the Home Office* (Waterlow Publishers, 1983).

[4] Attorney General's Commission on Pornography, *Final Report* (U.S. Department of Justice, 1986).

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found in *Miller v. California* 413 U.S. 15 (1973):

> (a) whether "the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (24)

Despite this standard, the Attorney General's Commission concluded that:

> [after the *Miller* decision]... the nature and extent of pornography in the United States has changed dramatically, the materials that are available today are more sexually explicit and portray more violence than those available before 1970. The production, distribution and sale of pornography has become a large, well-organized and highly profitable industry.[5]

Indeed, there is some empirical evidence to suggest that the number of prosecutions[6] and appeals[7] of obscenity convictions have declined nationwide.[8]

Recently much of the local control of pornography has been of a more indirect nature given the difficulties of direct regulation and legal constraints involving First Amendment rights. One rather unique approach has been the attempt to regulate pornography as a violation of women's civil rights. This use of

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[5] *Final Report* supra note 4 at 461.

[6] The New York Obscenity Project, "An Empirical Inquiry in to the Effects of Miller v. California on the Control of Obscenity", *New York University Law Review* 52:843 (1977).

[7] R.E. Riggs, "Miller v. California Revisited: An Empirical Note," *Brigham Young University Law Review* 2:247 (1981).

[8] See generally *Downs*, supra, note 2 at 20.

anti-discrimination statutes was first tried by Minneapolis[9] but has failed to catch on in general.[10] However, many municipalities have been very successful in regulating where pornographic businesses and adult entertainment businesses can locate through the use of zoning laws.

Municipalities have followed two major strategies in regulating the location of adult entertainment businesses. One approach is to concentrate adult businesses in a limited area, often called the Boston or "combat zone" approach. The other approach follows the opposite tactic by dispersing adult entertainment businesses, preventing their concentration, often called the Detroit approach.[11]

In Boston, adult entertainment businesses had been unofficially concentrated in a specific area of the city for many years.[12] This "combat zone" was officially established as the Adult Entertainment District in 1974. It was felt that by formally restricting such businesses to an area where they were already established would prevent the spreading of these businesses to neighborhoods

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[9] Minneapolis Code of Ordinances (MDO), Title 7, ch. 139.20, sec. 3, subd. (gg), (1).

[10] See *Downs* supra note 2.

[11] For a general discussion of these two approaches see Planning Committee of the Los Angeles City Council, *Study of the Effects of the Concentration of Adult Entertainment Establishments In the City of Los Angeles*, Los Angeles City Planning Department (June, 1977) (Hereinafter *LA Study*).

[12] This discussion of Boston and the "combat zone" approach is taken from the *LA Study* id., at 9-10.

where they were deemed inappropriate. In addition, concentration of adult businesses might aid in the policing of such activities and would make it easier for those who wanted to avoid such businesses to do so. There has been some question as to the effectiveness of this regulatory approach, as the *LA Study* observed:

> The effectiveness and appropriateness of the Boston approach is a subject of controversy. There has been some indication that it has resulted in an increase in crime within the district and there is an increased vacancy rate in the surrounding office buildings. Due to complaints of serious criminal incidents, law enforcement activities have been increased and a number of liquor licenses in the area have been revoked. Since the "Combat Zone" and most of the surrounding area are part of various redevelopment projects, however, the change in character of the area cannot be attributed solely to the existence of "adult entertainment" businesses.[13]

The other approach that municipalities have followed is the dispersement model, sometimes called the Detroit model. In 1972 Detroit modified an "Anti-Skid Row Ordinance" to provide that subject to waiver, an adult theater could not be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area. Regulated uses applied to ten different kinds of business establishments including adult theaters, adult book stores, cabarets, bars, taxi dance halls and hotels. This statutory zoning approach to regulating adult business was legally challenged and subsequently upheld by the Supreme Court as

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[13] Id., at 9.

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such zoning laws. In *Renton v. Playtime Theatres, Inc.*[16] the Supreme Court held such statutes cannot be enacted for the purpose of restraining speech but have to be "content-neutral" time, place, and manner regulations designed to serve a substantial governmental interest and not unreasonably limit alternative avenues of communications. In making this determination the court must look to the municipality's motivation and purpose for enacting the statute. If the statute is primarily aimed at suppressing First Amendment rights it is content based and invalid. But, if it is aimed at the "secondary effects" such businesses have on the surrounding community, it is content neutral and therefore valid.

In making this determination the court must look at a number of factors, from the evidence the municipality offers to support a finding of secondary effects, to whether the zoning statute eliminates the possibility of any adult businesses within the jurisdiction of the municipality. It is the first factor this report is primarily concerned with.[17] In the *Mini Theatres* case the Detroit Common Council made a finding that adult businesses are especially injurious to a

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[16] 475 U.S. 41 (1986)(Hereinafter *Renton*).

[17] Even if an ordinance were enacted for the proper reasons the court still must determine whether the ordinance would effectively prevent any operation of an adult business within the municipality's jurisdiction, see *Walnut Properties, Inc v. City of Whittier* 808 F.2d 1331 (1986). However this is presumably not an issue for the City of Garden Grove's ordinance because the enforcement of the ordinance would still allow the operation of adult businesses in various locations throughout the city.

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constitutional in *Young v. American Mini Theatres, Inc.*[14] This model has been adopted by numerous cities including Los Angeles and twelve other Southern California cities for controlling adult businesses.[15]

While the dispersal model has been found constitutionally valid, several subsequent court decisions have limited the way in which municipalities can adopt

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[14] 427 U.S. 50 (1976) (Hereinafter *Mini Theatres*). This decision is often cited as the legal basis for a dispersal approach, however the opinion appears to support the constitutionality of both the dispersal and concentration models:

> It is not our function to appraise the wisdom of its [Detroit's] decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems (427 U.S. 50, 71).

Indeed the Supreme Court upheld the Constitutionality of the concentration model in *Renton*, "Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in *Renton*."(infra note 16 at 52).

[15] The best single source for information on this topic is the Los Angeles City Council Planning Committee. According to the *LA Study*:

> Locally, the cities of Bellflower and Norwalk have enacted ordinances requiring adult bookstores and theaters to obtain a conditional use permit. As a part of their study the City of Bellflower surveyed over 90 cities in Southern California to determine how other cities were controlling adult bookstores. Of the cities which responded to the Bellflower survey, 12 require a conditional use permit for new bookstores. The conditions for obtaining such a permit generally include dispersal and distance requirements based upon the Detroit model. Bellflower also includes. (*LA Study* supra note ___ at 12).

The *LA Study* also presents a table listing 9 cities nationally that have taken a dispersal zoning approach (Id., Table 11).

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neighborhood when they are concentrated. This was supported by expert opinion evidence:

> In the opinion of urban planners and real estate experts who supported the ordinances, the location several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.[18]

The courts have not been very explicit in terms of the exact type and nature of the evidence of "secondary effects" that is required to uphold zoning ordinances regulating the location of adult businesses. On the one hand, failure to introduce any evidence linking secondary effects with the way the ordinance is enforced, is insufficient.[19] On the other hand, a complete independent analysis of secondary effects in each jurisdiction that enacts such laws is not necessary. In *Renton*[20] the Supreme Court upheld an ordinance without benefit of an independent analysis.

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[18] *Mini Theatres* supra note 18 at 55.

[19] "Here, the County has presented no evidence that a single showing of an adult movie would have any harmful secondary effects on the community. The County has thus failed to show that the ordinance, as interpreted by the County to include any theater that shows an adult movie a single time, is sufficiently "'narrowly tailored' to affect only that category of theatres shown to produce the unwanted secondary effects." *Renton* 106 S.Ct. at 931. Nor do we see how the County could make such a showing, since it is difficult to imagine that only a single showing ever, or only one in a year, would have any meaningful secondary effects." *Tollis, Inc. v. San Bernardino County* 827 F.2d 1329,1333 (9th Cir. 1987).

[20] *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 2a(1986).

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In this case the City of Renton relied heavily upon the study of secondary effects done in Seattle to justify its ordinance. The Court held:

> We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's [*Northend Cinema, Inc. v. Seattle*, 90 Wash. 2d 709, 585 P. 2d 1153 (1978)] opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to problem that the city addresses."[21]

The Los Angeles City Planning Department conducted a study of secondary effects in 1977,[22] to support a spacing ordinance similar to the Detroit dispersal model. Since Garden Grove's ordinance follows the same model it may have been legally sufficient for the City of Garden Grove to rely on the Los Angeles study. However, the Los Angeles study is 19 years old and it could be argued that because of its size, population structure, real estate market, and other municipal characteristics, Los Angeles is not a good comparison city for Garden Grove.

Like the *LA Study*[23] this analysis relies on a multimethodological approach to analyze secondary effects associated with the location of adult businesses. Both an analysis of crime rates and surveys were conducted to analyze secondary effects

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[21] *Renton*, id., 475 U.S. 41 at 51-52.

[22] See *LA Study* supra note .

[23] Supra note 11.

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associated with such businesses. Unlike the *LA Study* this analysis is more sophisticated in several respects.

The *LA Study* examined the secondary effect of crime rates and their association with adult business by comparing the crime rates of Hollywood area (which had a large concentration of adult businesses during the period studied, November 1975 and December 1976) to the rest of the city.[24] This analysis did show there was an increase in both Part I[25] and Part II[26] crimes associated with the Hollywood area and its higher concentration of adult businesses in comparison to the rest of the city. While supporting the presence of secondary effects, the analysis has several disadvantages for supporting a dispersion regulation model in Garden Grove.

The City of Garden Grove is not very similar to Hollywood, either in municipal character, or concentration and type of adult businesses.[27] More

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[24] The analysis presented in the *LA Study* was taken from a report prepared by the Los Angeles City Police Department, *The Impact of Sex Oriented Businesses on the Police Problems in the City of Los Angeles*.

[25] Part I crimes include homicide, rape aggravated assault, robbery, burglary, larceny, and vehicle theft.

[26] Part II crimes include other assaults, forgery and counterfeiting, embezzlement and fraud, stolen property, prostitution, narcotics, liquor law violations, gambling, and other miscellaneous misdemeanors.

[27] Hollywood in 1969 had 1 hard-core motel, 2 bookstores, 7 theaters, and 1 massage parlor/scam joint; in 1975 had 3 hard-core motels, 18 bookstores, 29 theatres, and 38 massage parlor/scam joints.(see *LA Study*, Table VI, p. 54). Garden Grove on the other hand only has seven bookstores and adult video stores.

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importantly, Garden Grove seeks to control adult businesses in terms of their location to schools, churches, and residences (200 feet) and in relation to each other (1000 feet).[28] To substantiate the relation between these distances and the secondary effects needed to justify the regulation, the analysis should demonstrate an association between the secondary effects and these distances. For example, if crime rates are higher within 1000 feet of an adult business than they are around other businesses, this demonstrates a stronger association between secondary effects and the regulation designed to control them. While areas of a city that have higher concentrations of adult businesses may have higher crime rates than other areas, this gives little support for regulation of specific distances between adult business and other land uses.

The *LA Study* also presents the analyses of two questionnaires, one to businessmen and residential property owners, and one to realtors, real estate appraisers and lenders, to determine the effects of adult businesses. While the questionnaires do ask the respondents about possible negative effects, there was no distinction between the negative effects when the distances from adult businesses varied, nor when there were two or more such business located near each other. Both of these issues are important aspects of the Garden Grove ordinance.

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[28] See Appendix for the Garden Grove ordinance.

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III. Crime in Garden Grove, 1981-1990

During the decade of our study, 1981-1990, the Garden Grove Police Department recorded 108,196 UCR Part I crimes (112 homicides, 548 rapes, 3,835 robberies, 16,677 assaults, 24,498 burglaries, 51,393 thefts, and 11,133 auto thefts) and 17,274 UCR Part II crimes (2,828 sexual offenses, 5,353 drug offenses, 5,651 alcohol offenses, 972 weapons offenses, and 2,460 disorderly conduct. Figure 1 lends perspective to these numbers. Part I crimes, which are ordinarily thought to be the "most serious" crimes, make up more than 85 percent of the total. Part II crimes, which include many of the so-called "victimless" crimes, make up less than fifteen percent of the total. Another important difference between these two categories is that, while Part I crimes almost always begin with a citizen complaint, Part II crimes may result from proactive policing. For this reason, Part II crimes have turned out to be less interesting to this study. Although we find a strong relationship between the distribution of Part II crimes (especially Part II sex offenses) and the locations of adult businesses, we cannot draw a valid causal relationship from this finding. Part I crimes are quite another matter.

As shown in Figure 1, Part I crimes can be divided further into Personal and Property categories. Personal crimes (or crimes against the person) account for approximately twenty percent of the Part I total. Seventy-eight percent of Personal crimes are assaults; 18 percent are robberies, three percent are rapes,

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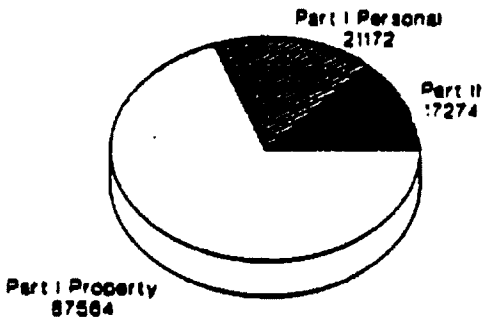
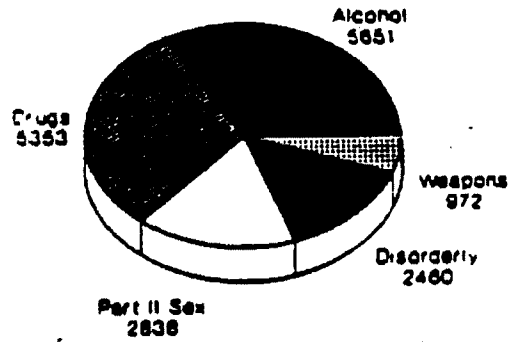
Figure 1 - Distribution of Crimes in Garden Grove, 1981-1990

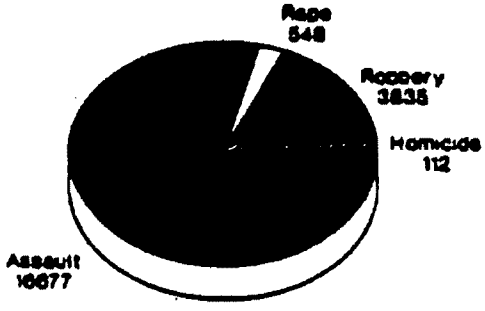
Total Crime



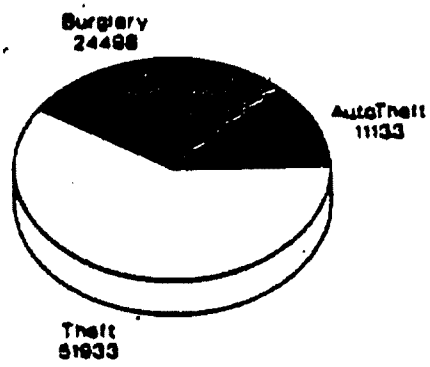
Part II



Part I Personal



Part I Property



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and slightly less than one percent are homicides. Property crimes (or crimes against property) account for approximately eighty percent of the Part I total. Of these, 60 percent are thefts, 28 percent are burglaries, and 12 percent are auto thefts. Although it is tempting to think of Property crimes as less serious than Personal crimes, we caution the reader to remember that *every* crime has a deadly potential. Every armed robbery is a potential homicide. Every theft, burglary, or auto theft could quickly turn into a deadly confrontation. While subsequent analyses may distinguish among the seven crimes then, we do this for didactic purposes only. In our opinion, in practice, any Part I crime poses a serious threat to public safety.

With this *caveat*, we note that the mix of crimes in Garden Grove is not significantly different than the mix found in other California cities during the same period. This is also true of population-adjusted crime *rates*. Relative to other California cities, Garden Grove has neither a "high" or "low" crime rate.[29] To illustrate this point, Table 1 lists the 1985 Part I crime rates for twenty-four representative cities. Garden Grove ranks slightly above the median on homicide and auto theft, and slightly below the median on rape, robbery, assault, burglary,

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[29] The Garden Grove Police Department is organized into community "teams," however, and it is generally believed that this organizational structure encourages police-citizen interaction, including reporting of crimes. Other things being equal, Garden Grove is expected to have a higher crime rate than a city whose police department is structured along more traditional lines.

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Table 1 - Crimes per 100,000 Population for California Cities, 1985

	Homicide	*Rape*	*Assault*	*Robbery*	*Burglary*	*Theft*	*Auto Theft*
Anaheim	7.3	48.8	273.8	199.6	2351.	4348.	777.
Bakersfield	.6	65.3	567.2	489.5	3651.	6649.	796.
[illegible]	10.6	41.6	638.7	435.5	2836.	7971.	841.
C[illegible]	2.9	27.9	102.2	258.3	1376.	4076.	430.
Fremont	2.3	25.8	65.2	372.1	1354.	2969.	265.
Fresno	21.2	81.8	566.9	392.7	3632.	7745.	812.
Fullerton	4.9	32.3	168.2	201.5	1503.	4071.	503.
Garden Grove	10.5	38.1	325.2	293.6	2159.	4040.	693.
Glendale	2.9	12.2	189.1	140.2	1378.	2940.	663.
Hayward	6.4	38.5	267.1	405.0	1809.	4926.	503.
Huntington Beach	2.4	22.3	100.9	147.8	1378.	2883.	450.
Inglewood	28.7	112.6	1236.2	630.8	2417.	2586.	1660.
Modesto	4.7	52.4	187.0	276.7	1979.	6149.	505.
Ontario	9.0	76.6	327.6	713.8	2821.	4088.	699.
Orange	5.5	25.2	219.8	247.1	1712.	3540.	602.
Oxnard	6.5	61.9	294.8	300.4	2008.	3984.	527.
Pasadena	24.6	49.1	596.3	590.3	2262.	5110.	921.
Pomona	25.9	92.7	907.9	1035.1	3155.	4337.	911.
Riverside	8.2	57.4	340.0	690.5	2628.	4849.	570.
San Bernadino	14.3	87.6	876.3	914.2	3783.	5295.	1127.
Santa Ana	16.2	28.9	424.0	294.6	2498.	6612.	1134.
Stockton	18.2	61.4	475.4	497.7	3347.	7937.	739.
Sunnyvale	4.7	27.2	77.9	100.4	759.	2544.	245.
Torrance	3.1	28.5	254.9	202.5	1150.	3024.	865.

Source: Uniform Crime Reports, 1985

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and theft. None of these rankings is significantly different than the median, of course, and furthermore, the rankings fluctuate slightly from year to year. While Garden Grove has an "average" crime rate relative to other cities, however, like any other city, Garden Grove has a range of "high" and "low" crime neighborhoods. We will address this point in greater detail shortly. For the present, it is important to note that crime rates vary widely across any city.

Crime rates also vary widely over time. To illustrate again, Figure 2 shows annual Part I and Part II crime totals for Garden Grove over the decade of this study, 1981-1990.[30] In some cases, auto theft and assault, for example, crime appears to trend steadily upward. In other cases, particularly burglary, crime appears to trend steadily downward. In all cases, however, the trend is *only* apparent. *In every constant spatial area that we have examined for this report, we found ten-year trends to lie well within the bounds of stochastic error. In other words, we found no statistically significant trends.* For reasons too numerous, complicated, and obscure to be discussed here, time series of crime totals drift stochastically from year to year and it is the mathematical nature of a drifting process to appear to rise or fall systematically over time. Although this phenomenon has been widely reported by statisticians since the early 19th century, it is not well

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[30] Since these are crime *totals* (not crime *rates*), Figure 2 must be interpreted cautiously. Due to annexation, in-migration, out-migration, and growth, the population of Garden Grove has changed dramatically over the last ten years.

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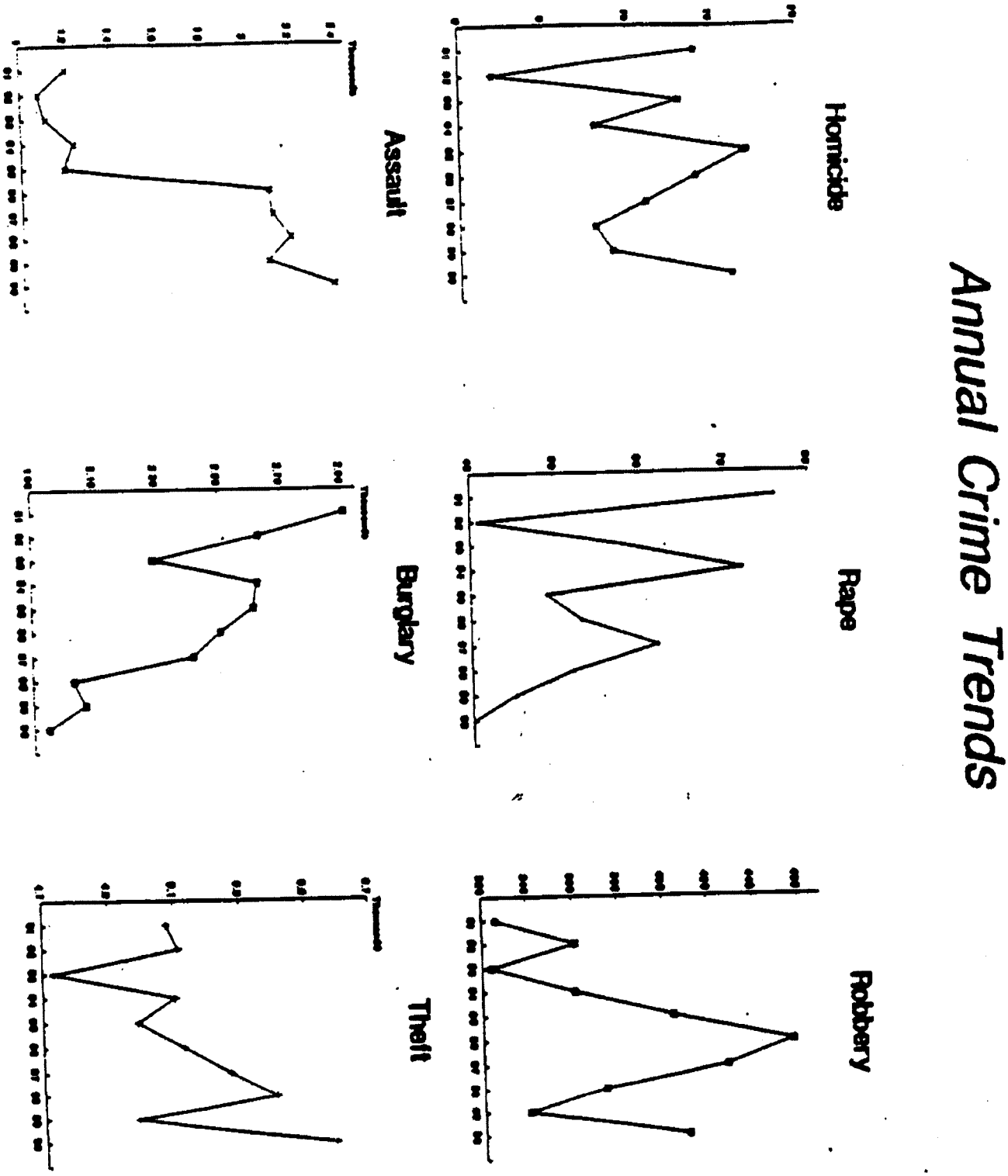
Figure 2 - Annual Crime Trends in Garden Grove, 1981-1990



Annual Crime Trends

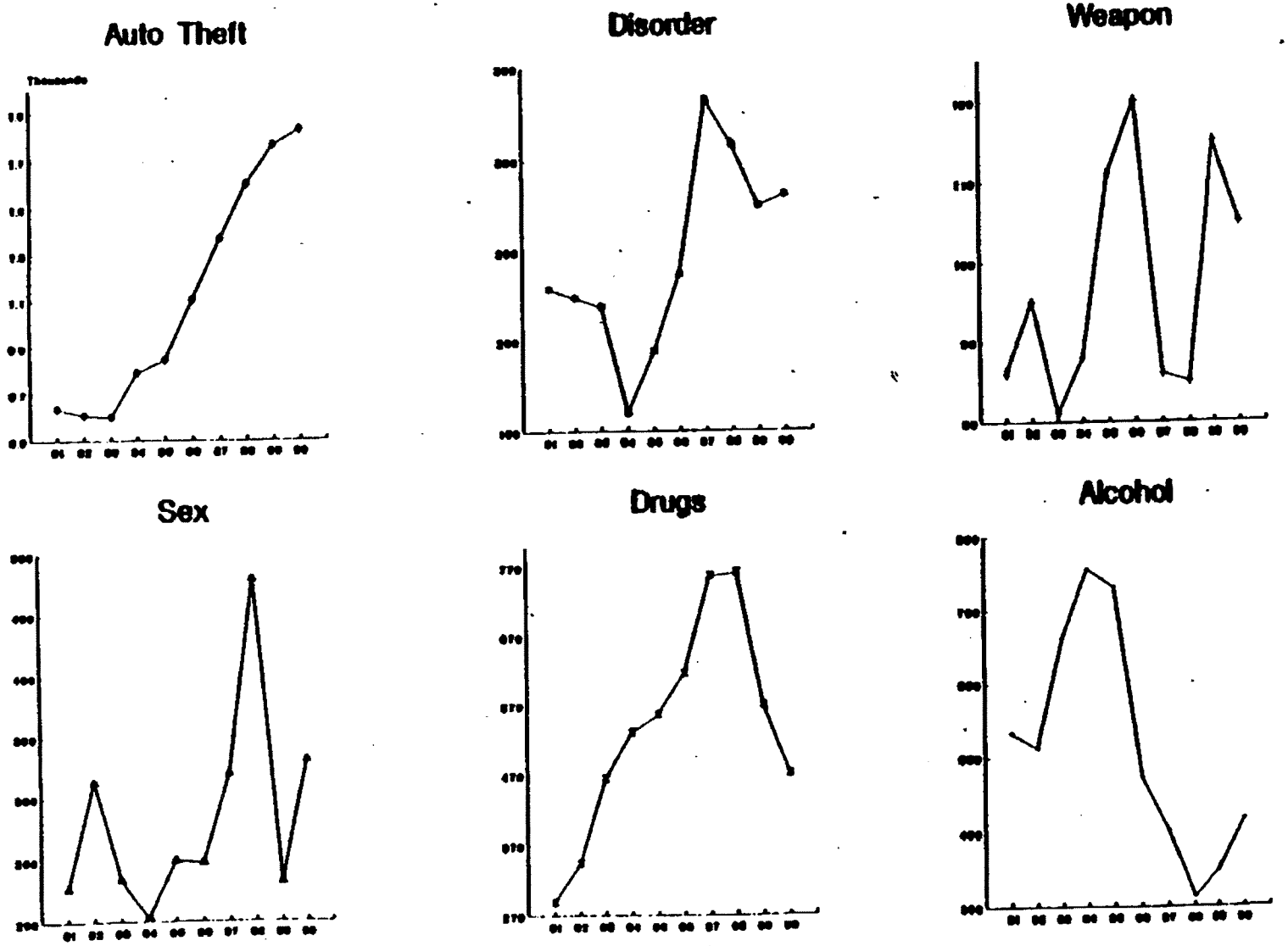
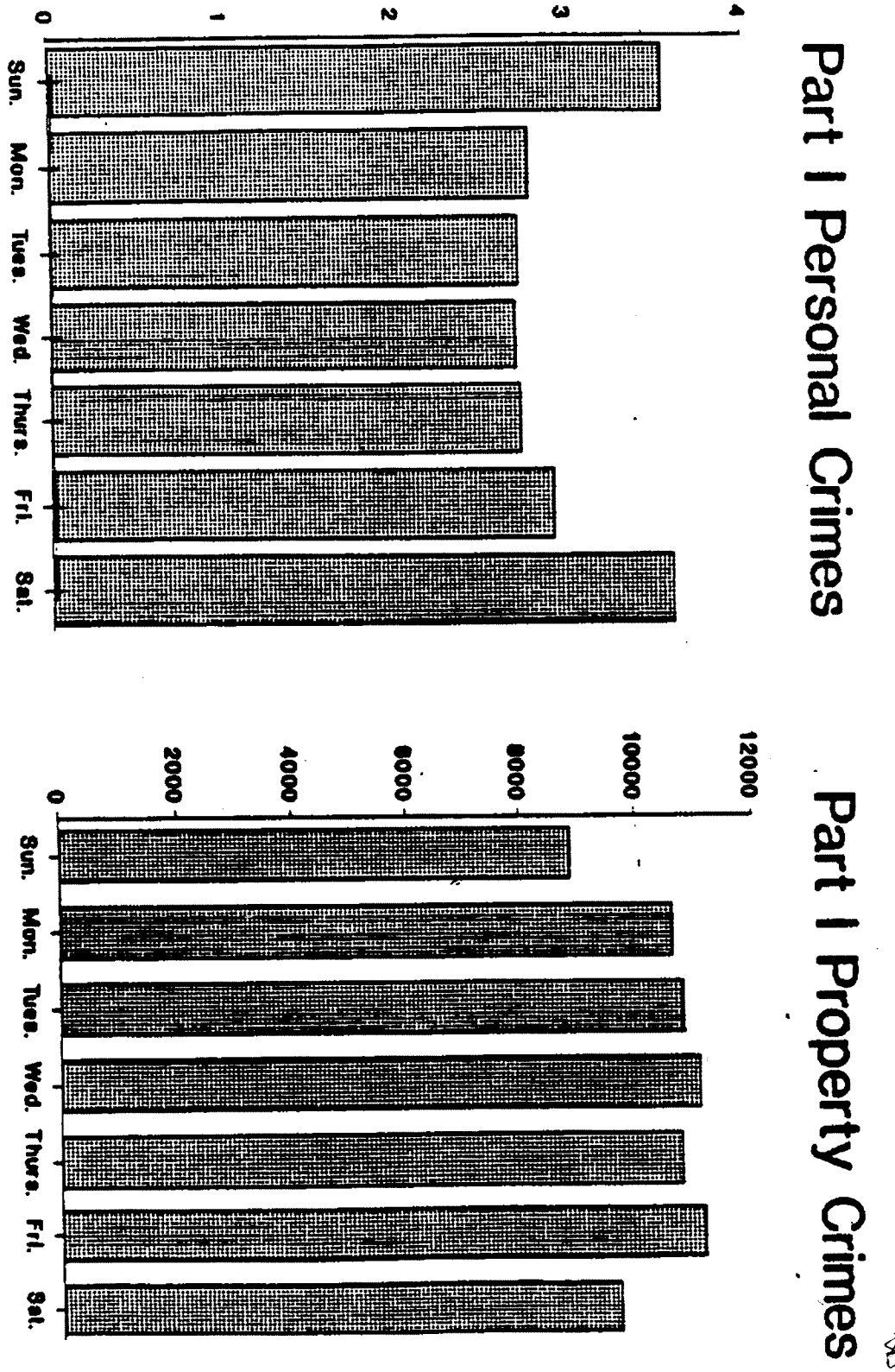


Figure 2 - Annual Crime Trends in Garden Grove, 1981-1990

understood by popular media or the public. Nevertheless, each of the seven Part I crime trends is consistent with a "random" process and, hence, each is amenable to a statistical analysis. The five Part II crime trends, in contrast, are not at all consistent with a "random" process. To illustrate, note that total sex offenses *increase* (from 320 to 480) by fifty percent from 1987 to 1988 and then *decrease* (from 480 to 232) by fifty percent from 1988 to 1989. Annual changes of this magnitude lie well beyond the bounds of Normal "random" variation. In fact, the anomalous 1988 total is due to a concerted enforcement effort by the Garden Grove Police Department. Lacking complete information on Part II enforcement activities during the 1981-1990 decade, we cannot attribute changes in Part II crime rates to the operation of adult businesses. Although we report effects for Part II crimes in subsequent analyses, the only internally valid effects are for Part I crimes.

Figure 3 shows another type of trend. Examining the day of the week of the seven Part I crimes, a distinct pattern emerges. We see here that the occurrence of Personal crimes peaks on weekends. Conversely, Property crimes peak during midweek and are least likely to occur on weekends. The basis for this pattern is well established in theory: crimes occur when the *opportunity* is made available to a person who is inclined to commit criminal actions. Opportunity is defined differently for Personal and Property crimes, however. Personal crimes (especially anonymous robbery and assault committed against strangers) are best

Figure 3 - Crimes Weekday in Garden Grove, 1981-1990



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conducted under cover of darkness, on an intoxicated victim, in a relatively deserted public location. These conditions presumably occur on weekend nights outside bars or adult businesses. In daylight, the desired anonymity is unobtainable and the vulnerable, prospective victims are not on the street. Thus, Personal crimes are committed most often on weekend nights.

The opposite pattern holds for Property crimes. These crimes, notably theft and burglary, are most often committed when the offender is least likely to encounter any witnesses. In theory, the best time to break into a residence undetected is during the weekday daytime hours when most occupants are away from home. For our purposes, however, the weekday patterns found in these data, as shown in Figure 3, are a simple confirmation of the reliability of our data. More important, perhaps, finding the same patterns in all four Personal crimes and all three Property crimes justifies collapsing Part I crimes into two broad categories. Hereafter, except where an effect or pattern varies across the Part I crimes, effects and patterns will be reported for Personal, Property, and Part II crime categories.

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IV. The Impacted Area and the Public Safety Hazard

At present, seven adult-oriented businesses operate on Garden Grove Boulevard. The *Party House*, located at 8751 Garden Grove Boulevard, was in operation on December 16, 1980, when the City of Garden Grove annexed this area. Two other adult businesses, the *Bijou* and the *Video Preview Rental Center*, located at 8745 and 8743 Garden Grove Boulevard in the same building as the Party House, opened in March, 1986 and August, 1988 respectively. Given the proximity of these three businesses, their individual impacts on crime are confounded. Treating them as a single cluster of businesses, however, we find a significant increase in both Personal and Property crimes following the openings of the adult businesses at 8745 and 8743 Garden Grove Boulevard in March, 1986 and August, 1988.

The *Adult*, located at 8502 Garden Grove Boulevard, and the *A to Z*, located at 8192 Garden Grove Boulevard, are far enough away from the 8700 block to allow for an assessment of individual impact. But since these businesses opened in February and May, 1980, at the very beginning of our crime data, there is no simple causal benchmark for attributing crime around these businesses to their operation. The pattern of crime around these businesses is nevertheless consistent with that hypothesis. At the other end of Garden Grove Boulevard, the *Hip Pocket* (12686) and the *Garden of Eden* (12061-5), which opened in 1971

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and 1977 respectively, pose the same problem. In March, 1983, however, the *Garden of Eden* expanded its operation from one suite to three. As in the case of the *Party House-Bijou-Video Preview Rental Center* complex on the other end of Garden Grove Boulevard, we find a significant rise in crime coincident with this expansion. The analyses supporting these findings will be presented shortly.

In our opinion, these seven adult businesses constitute a serious and significant public safety hazard. One aspect of this hazard is apparent in Table 2. During the 1981-90 decade, 610 Garden Grove Boulevard addresses had one or more crimes.[31] The seven adult business addresses accounted for 239 Personal, 694 Property, and 538 Part II crimes, however, so *these seven addresses accounted for 10.5 percent of the Part I and 25.5 percent of the Part II crime on Garden Grove Boulevard during the last decade.* Since this disparity could occur by chance alone less than one time in one hundred, the implied difference between these seven addresses and the 603 other Garden Grove Boulevard addresses with one or more crimes is statistically significant. The second column of numbers in Table 2 are *ranks*. These numbers tell the same story but from a different perspective. As shown, three of the top ten Part I crime "hot spots" are found at the adult business addresses. Five of the top ten Part II crime "hot spots" are found at the adult

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[31] Of course, *most* Garden Grove Boulevard addresses had no crimes during 1981-90. Of these addresses with at least one crime, more than 55 percent had only *one* crime.

Table 2 - Reported Crimes for Adult Businesses Garden Grove Boulevard Only, 1981-1990

Bookstores/Peepshows

Address	*Personal* N	Rank	*Property* N	Rank	*Part I* N	Rank	*Part II* N	Rank
8192 Garden Grove	16	19	190	5	206	5	160	1
8502 Garden Grove	25	9	93	13	118	11	52	7
8743 Garden Grove	0		7	192	7	217	4	71
8745 Garden Grove	3	91	17	98	20	112	10	70
8751 Garden Grove	12	29	116	7	128	9	94	5
12061 Garden Grove	11	34	98	10	109	15	68	6
12686 Garden Grove	6	57	173	6	179	6	150	2

Bars/Taverns

Address	*Personal* N	Rank	*Property* N	Rank	*Part I* N	Rank	*Part II* N	Rank
8112 Garden Grove	41	1	94	12	135	8	22	17
8284 Garden Grove	15	23	35	50	50	40	4	69
8575 Garden Grove	28	7	84	16	112	13	35	11
8801 Garden Grove	10	46	38	47	48	41	14	31
8803 Garden Grove	21	13	56	28	77	23	20	20
12045 Garden Grove	26	8	59	25	85	20	19	23
12082 Garden Grove	33	4	87	15	120	9	43	9
12761 Garden Grove	11	40	24	78	35	61	4	81
12889 Garden Grove	34	3	78	18	112	13	19	23

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business addresses, but this may be expected.

Of course, one can argue that the relationship is noncausal or spurious; that these businesses simply moved into a neighborhood that happened to already have a high crime rate. We test and reject this hypothesis in the next section. For now, we draw attention to the Bar/Tavern addresses in Table 2. If the alternative hypothesis is that the Garden Grove Boulevard neighborhoods had high crime rates before the seven adult businesses moved in, we would expect to these addresses to have high crime rates as well (more so given that alcohol is served at these addresses). On the contrary, however, we find that these addresses have generally lower crime rates than the adult business addresses. Whereas three of seven adult business addresses are in the top ten Part I crime "hot spots," only two of nine bar/tavern addresses make the top-ten list. In this sense, the seven adult business addresses on Garden Grove Boulevard constitute serious, significant public safety hazards.

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V. Quasi-Experimental Contrasts

The address-specific crime counts in Table 2 are compelling evidence of the public safety hazard posed by the adult businesses on Garden Grove Boulevard. Simple counts do not satisfy the criterion of scientific validity, however, for there are many *non*causal explanations for any set of numbers. Validity requires that a *change* in the operation of an adult business be followed by a *change* in the crime rate near the business. If the before-after change proves statistically significant, validity requires further that the same before-after change *not* be found in a suitable "control" area. Only after both criteria are satisfied can we state in scientifically valid terms that an adult business poses a public safety hazard.

The fact that the adult businesses on Garden Grove Boulevard have operated continually for the past decade has had an impact on our ability to conduct proper before/after analyses. Ideally, crime should be contrasted in a location before and after an adult business opens. Although this is not literally possible, given the constraints of time and data, there were three major expansions of adult businesses at two existing locations and analyses of these changes confirm the picture of these businesses painted by Table 2. The quasi-experimental contrasts derived from these analyses are outlined in greater detail here.

1) In March, 1982, the *Garden of Eden* expanded from a single suite at 12061 Garden Grove Boulevard into the adjoining suites at 12063 and 12065

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Garden Grove Boulevard. The before/after and test/control contrasts for this change are:

	One Year Before				One Year After			
Test Site	*200'*	*500'*	*1000'*		*200'*	*500'*	*1000'*	
Personal Crimes	1	14	28	43	15	16	28	59
Property Crimes	10	46	84	140	17	58	167	242
Part II Crimes	21	11	16	48	16	12	17	45
Control Site	*200'*	*500'*	*1000'*		*200'*	*500'*	*1000'*	
Personal Crimes	0	11	22	33	1	9	28	39
Property Crimes	13	52	76	141	12	56	87	155
Part II Crimes	15	23	27	65	11	22	29	62

Over the next year, Personal crimes within a 200-foot radius rose significantly compared to the preceding year.[32] Also compared to the preceding year, Property crimes within a 1000 foot radius rose significantly. The effect of the expansion on Part II crimes was mixed and largely insignificant. To control for the possibility that these effects were due to unrelated extraneous variables, a "control" site was developed from the mean crime counts of the other six adult businesses. While crime rose in the vicinity of the *Garden of Eden*, however, crime remained static at the "control" site. Accordingly, we attribute the increases in Personal and Property crimes to the expansion of the adult business.

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[32] Hereafter, unless stated otherwise, a significant effect will imply a probability of .01 or less.

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2) In March, 1986, the *Bijou* opened at its present location, 8745 Garden Grove Boulevard. Since the *Party House* had been operating at 8751 Garden Grove Boulevard prior to this time, the opening of *Bijou* was in effect an expansion. The before/after and test/control contrasts for this change are:

	One Year Before				One Year After			
Test Site	*200'*	*500'*	*1000'*		*200'*	*500'*	*1000'*	
Personal Crimes	2	7	21	30	6	11	30	47
Property Crimes	3	19	94	116	11	40	113	164
Part II Crimes	13	14	43	70	8	13	42	63
Control Site	*200'*	*500'*	*1000'*		*200'*	*500'*	*1000'*	
Personal Crimes	2	10	30	42	1	11	31	43
Property Crimes	19	49	76	144	20	60	67	147
Part II Crimes	24	13	25	62	19	16	34	69

Over the next year, both Personal and Property crimes rose significantly within a 500-foot radius. The effect on Part II crimes was mixed and largely insignificant. Since no similar effect was observed at a "control" site developed from the mean crime counts of four other adult businesses, the increases are attributed to the opening of the *Bijou*.

3) In August, 1988, the *Video Preview Rental Center* opened at 8743 Garden Grove Boulevard. Since the *Party House* and *Bijou* were already in operation, this opening too is treated as an expansion. The before/after and test/control contrasts

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for this change are:

	One Year Before				One Year After			
Test Site	*200'*	*500'*	*1000'*		*200'*	*500'*	*1000'*	
Personal Crimes	0	10	51	61	4	15	46	65
Property Crimes	3	19	67	89	6	25	60	91
Part II Crimes	11	13	16	40	34	11	25	70
Control Site	*200'*	*500'*	*1000'*		*200'*	*500'*	*1000'*	
Personal Crimes	1	13	49	63	1	11	54	66
Property Crimes	5	22	74	101	4	24	68	96
Part II Crimes	9	17	22	48	28	13	20	61

In the following year, Personal crime rose significantly within a 500-foot radius, Property crime rose significantly within a 200-foot radius, and Part II crimes rose significantly within a 200-foot radius (which is to say, at the *Party House-Bijou-Video Preview Rental Center* complex. No increases were observed at a "control" site developed from the mean crime counts of four other adult businesses.

The consistent pattern of effects in these three cases demonstrates that the adult businesses are indeed a public safety hazard as the data presented in the preceding section suggest. Given the nature of the operational changes in these three cases, furthermore, it appears that *any* expansion of an adult business will have the same effect. In light of the potentially large area of the hazard and the predatory nature of the crimes associated with the hazard, we recommend that no new adult businesses be allowed to operate within 1000 feet of a residential area.

Of course, virtually any increase in economic or social activity might be

expected to produce some increase in crime (though perhaps not so large an increase as was observed in these three cases). When an increase in crime can be attributed to a specific economic or social activity, it is reasonable to expect the responsible parties to take steps designed to ameliorate the problem. In one instance where an adult business acted to ameliorate a nuisance, however, the act had no impact on crime.

4) In September, 1988, the City installed a blockade in the alley immediately to the west of the *Adult* (8502 Garden Grove Boulevard) to prevent "cruising." While the blockade undoubtedly accomplished this intended purpose, there was no significant effect on Personal, Property, or Part II crimes in the vicinity of the *Adult*. The before/after contrasts for this change are:

	One Year Before				One Year After			
Test Site	*200'*	*500'*	*1000'*		*200'*	*500'*	*1000'*	
Personal Crimes	2	13	26	41	2	11	21	34
Property Crimes	3	19	67	89	6	25	60	91
Part II Crimes	11	13	16	40	34	11	25	70

Although this simple architectural device had no significant impact on crime, there are undoubtedly many positive steps that an adult business can take to reduce crime in its vicinity. Since to our knowledge, no such steps were taken during 1981-1990, we cannot speak with authority on the likely effectiveness of the various

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amelioration strategies.[33] Nevertheless, we recommend that the City use its legitimate zoning authority to ensure that any new adult business will have a minimum impact on crime in its vicinity. Beyond this recommendation, we find strong evidence to suggest that the public safety hazard posed by adult businesses on Garden Grove Boulevard is exacerbated by proximity to a bar or tavern. This is based on two contrasts.

5) In April, 1985, a bar opened at 8112 Garden Grove Boulevard, approximately 425 feet from the *A to Z*. The before/after and test/control contrasts for this change are:

	One Year Before				One Year After			
Test Site	*200'*	*500'*	*1000'*		*200'*	*500'*	*1000'*	
Personal Crimes	0	1	12	13	2	8	35	45
Property Crimes	9	29	56	94	7	41	62	110
Part II Crimes	4	2	7	13	2	9	11	22
Control Site	*200'*	*500'*	*1000'*		*200'*	*500'*	*1000'*	
Personal Crimes	0	1	14	15	0	2	14	16
Property Crimes	4	12	45	61	2	19	51	72
Part II Crimes	4	8	7	19	5	9	12	26

In the subsequent year, Personal crime within 1000 feet rose significantly.

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[33] A similar architectural device was installed at the *A to Z* (8192 Garden Grove Boulevard) in May, 1990. We have insufficient data to measure the effect of this intervention, however.

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Although Property crime also rose, the increase was not significant. No significant change was observed at a "control" site, so the increase in Personal crime was attributed to proximity to the bar. Since analyses of crime 200, 500, and 1000 feet from 8112 Garden Grove Boulevard (the bar) show no comparable effect, the rise in Personal crime cannot be attributed to the bar alone. Rather, it must be due to an interaction between the bar and the adult business.

6) In May, 1989, a bar closed at 12889 Garden Grove Boulevard, approximately 1075 feet from the *Hip Pocket*. The before/after and test/control contrasts for this change are:

	One Year Before				One Year After			
Test Site	*200'*	*500'*	*1000'*		*200'*	*500'*	*1000'*	
Personal Crimes	2	9	13	24	2	13	9	26
Property Crimes	4	15	29	48	5	19	39	63
Part II Crimes	13	22	8	43	80	26	5	111
Control Site	*200'*	*500'*	*1000'*		*200'*	*500'*	*1000'*	
Personal Crimes	0	2	12	14	1	1	14	16
Property Crimes	5	11	39	55	3	13	44	60
Part II Crimes	7	8	7	22	7	8	13	28

In the subsequent year, no significant change was observed either in Personal or Property crime; significance not withstanding the change was in the opposite direction of what was expected. Part II crimes within 200 feet of the *Hip Pocket* rose precipitously and significantly. No change was observed at a "control" site.

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Information from the Police Department suggests, however, that the increase in Part II crimes was the result of an unrelated enforcement campaign.

Failure to find any significant effect in this case suggests that the interaction effect observed in the preceding case is limited to 1000 feet. While we strongly recommend that no new adult business be located within 1000 feet of a bar (and *vice versa*), there is no evidence of interaction at distances exceeding 1000 feet.

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VI. Survey of Real Estate Professionals

Following the research model of the *LA Study*, an analysis of real estate professionals was conducted to determine the prevailing professional opinion of the secondary effects produced by presence of adult businesses.[34] The questionnaire instrument developed for this task distinguished between the effects on single-family residential property, multiple-family residential property and commercial property values. In addition, it asked for information on the effects of adult businesses within 200 feet, within 200-500 feet and the effects of two or more adult businesses within these distances. Not only were the effects on property values determined but also, effects on other issues that litigation in this area has found important such as crime, traffic, noise, safety of women and children, quality of life, rents, loitering, and the ability to attract other businesses and customers were identified.

In January and February, 1991, copies of the instrument were sent to the membership list of the West Orange County Association of Realtors. Of the total 954 surveys sent out, 30 were returned with incorrect addresses. The remaining sample of 924 resulted in a return of 141 completed questionnaires. Of these 141,

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[34] See the Appendix for a copy of the questionnaire instrument and a complete tabulation of responses.

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19 where eliminated because of response bias.[35] The final analysis is based on 122 valid responses.[36]

The overall sample was very experienced in real estate, with 12.6 of years experience on average. This group of real estate professionals was very knowledgeable about Garden Grove real estate, with a mean experience in Garden Grove real estate of 10.1 years. The overwhelming majority of respondents (94.3%) also said that they had an opinion on the impact of adult businesses on the community.

The first set of items in our survey elicited opinions pertaining to the impact on property values by adult businesses. When adult businesses are located within 200 feet of a residential or commercial property the overwhelming opinion is that property values will be substantially decreased:

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[35] Throughout the questionnaire, various questions were worded in either a negative or positive fashion. This is done to eliminate respondents that merely circle one response, such as strongly agree, to all questions. The assumption is that a respondent who is answering the questionnaire in a responsible fashion would not strongly agree with both a negative assessment of adult businesses and a positive assessment of adult businesses.

[36] This gives a response rate of 122/924 or 13.2%. This is somewhat lower than the response rate for the *LA Study* of 81/400 or 20% (p. 38). However, that report makes no mention of correction for response bias. If the 19 returned questionnaires that were eliminated for response bias had been included in the analysis, the response rate would have been 141/924 or 15.3%.

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	Decrease	*No Effect*	*Increase*
Single-family	97.5%	2.5%	0.0%
Multiple-family	95.0%	5.0%	0.0%
Commercial	81.5%	15.1%	3.3%

When adult businesses are located more than 200 feet but less than 500 feet of a residential or commercial property, the effect diminishes only slightly:

	Decrease	*No Effect*	*Increase*
Single-family	95.1%	4.9%	0.0%
Multiple-family	92.5%	6.7%	0.8%
Commercial	77.5%	20.0%	2.5%

The difference between 200 and 500 feet is insignificant. Otherwise, the strongest impact occurs for single-family residences with a smaller (though still extremely large and significant) impact on commercial property.

The density of adult businesses is also considered to have a negative impact on property values. When two adult businesses are located within 1000 feet of each other and within 200 to 500 feet of a property, values are expected to diminish significantly:

	Decrease	*No Effect*	*Increase*
Single-family	89.3%	9.8%	0.8%
Multiple-family	86.8%	12.3%	0.8%
Commercial	71.9%	27.3%	0.8%

Density impacts are judged to be slightly smaller than the impacts of location *per*

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se. The density impacts on property value are large and significant nevertheless and support a density regulation.

For location and density alike, the overall pattern is clear. The vast majority of real estate professionals associate location of an adult business with decreased property values for single-family residential, multiple-family residential and commercial property. Clearly, these data indicate the presence of an adult business creates the secondary effect of decreased property values.

A second set of items elicited opinions on the impact of adult businesses on residential neighborhood qualities. A majority of respondents felt that locating an adult business within 200 feet of a residential area would result in increased crime, traffic, litter, loitering and noise; and decreased safety for women and children, quality of life, and rents. Specific responses were:

	Increase	*No Effect*	*Decrease*
Crime	93.1%	6.0%	0.9%
Traffic	97.4%	1.7%	0.9%
Litter	86.2%	12.1%	1.8%
Noise	72.4%	24.1%	3.6%
Safety	27.4%	10.6%	61.9%
Quality of Life	18.4%	6.1%	75.4%
Rents	8.0%	10.6%	81.4%
Loitering	85.5%	5.1%	9.4%

When asked about problems in relation to commercial properties, the vast majority of respondents blamed adult businesses for the same problems cited for residential

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properties and, also, for decreases in quality of business environment, commercial rents, ability to attract new businesses, and ability of non-adult businesses to attract customers. Specifically:

	Increase	*No Effect*	*Decrease*
Crime	88.7%	9.6%	1.7%
Traffic	76.7%	20.7%	2.6%
Litter	83.5%	15.7%	0.9%
Noise	67.0%	29.5%	3.6%
Safety	23.2%	12.5%	64.2%
Business Environment	11.5%	6.3%	81.2%
Commercial Rents	8.4%	15.9%	75.7%
Loitering	77.0%	8.0%	15.0%
Attract Businesses	7.9%	3.5%	88.5%
Attract Customers	8.8%	7.0%	84.3%

This general response pattern is essentially duplicated when respondents are asked about the impact of locating two or more adult businesses within 1000 feet of each other and within 200 feet of a residential or commercial area.

These findings are consistent with other studies addressing the negative impact associated with the location of adult businesses.[37] Closer analysis of response patterns reveals that respondents who felt adult businesses produce a decrease in property values also are likely to respond that these businesses have a negative effect on a neighborhood. One of the strongest associations was between decreased property values and increased crime. This is consistent with our analysis

[37] See for example the *LA Report*.

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of the crime data. The data from this survey clearly indicates that real estate professionals feel that adult businesses are associated with decreased property values and decreased quality of neighborhood for both residential and commercial areas.

VII. Household Survey Results

The final component of this research project was a survey of Garden Grove households to assess citizen perceptions of the issues. Toward this end, we first developed a questionnaire instrument based on instruments used in prior research but modified to reflect the particular circumstances of Garden Grove. After field-testing an early version of the instrument on a random sample of Santa Ana telephone households in March and April, 1991, a refined final version of the instrument was then administered to a stratified "random" sample of Garden Grove telephone households in the summer of 1991.[38] To ensure that the sample included households in the proximity of problem areas, the total sample of N=250 included 200 addresses located within 1500 feet of an adult business. We cannot therefore generalize our results to the larger population without applying a set of sample weights. As it turns out, however, the survey results are so nearly unanimous that there is no need for complicated statistics.

Interviews were conducted by Garden Grove Police Department cadets, the Consultants, and their research assistants. Standard survey research conventions were observed and independent audits were used to maintain the reliability and validity of responses. By Labor Day, 1991, each of the 250 households in the

[38] A copy of the final version of this instrument and tabulated response frequencies are found in the Appendix.

sample had either been contacted (with a completed interview or a refusal) or ruled out of the sample.[39] The final breakdown of the sample by interview status is:

Completed	118	47.2%	80.3%
Refused	29	11.6%	19.7%
Language	20	8.0%	
No Answer	42	16.8%	
Invalid	41	16.4%	
Total	250	100.0%	100.0%

Non-English speaking households could not be interviewed and this is unfortunate. Nevertheless, the number of completed interviews (118) and the completion rate (80.3%) of this survey (80.3%) exceed the numbers realized in household surveys conducted in other cities. Accordingly, we believe that our results present the most accurate available picture of attitudes toward adult businesses.

General Perceptions of the Problem. The general public perceives the adult businesses on Garden Grove Boulevard as a serious problem that has a real impact on daily life. While perceptions of the nature of this problem vary somewhat, virtually everyone polled associates these businesses with one or more negative

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[39]Phone number were ruled out for any of three reasons: (1) the number was not located in Garden Grove; (2) the number was a business; or (3) no one at the number spoke English.

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aspects of urban life. Exceptions to this rule are rare and the intensity of the feeling is greatest in neighborhood nearer Garden Grove Boulevard.

Each interview began by asking the respondent to estimate the distance from his or her house to the nearest adult business. The breakdown of responses in the sample of completed interviews was:

200 Feet/1 Block	12	9.8%	6.9%
500 Feet/2 Blocks	17	14.4%	4.9%
1000 Feet/3+ Blocks	54	45.8%	65.1%
Don't Know	35	29.7%	

The accuracy of these subjective estimates was checked by asking the respondent to name (or at least, to describe) the adult business nearest their home. In a subset of cases, we were also able to measure the distance objectively. From these data, it is clear that people are quite aware of how near or far away they live from these businesses.

We next asked respondents to assess the impact that an adult entertainment business located in their neighborhood would have on series of "social problems." Specifically:

> **I am going to ask a series of questions concerning what the impact of an adult entertainment business has, or would have, if it were located within 500 feet of your neighborhood. Please tell me if the impact would be a substantial increase, some increase, no effect, some decrease or a substantial decrease.**

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Responses to this series of questions reveal a consistent perception of the impact of adult businesses on the part of citizens. Broken down into three categories:

	Increase	*No Effect*	*Decrease*
Crime	72.9%	27.1%	0.0%
Traffic	60.7%	38.5%	0.9%
Litter	66.7%	32.5%	0.9%
Noise	62.1%	36.2%	1.8%
Safety	31.9%	20.7%	47.5%
Quality of Life	16.3%	23.9%	59.8%
Property Values	14.5%	15.4%	70.1%
Rents	15.7%	38.9%	45.3%
Loitering	74.3%	22.2%	3.5%
Graffiti	56.6%	41.7%	1.7%
Vandalism	65.5%	32.8%	1.7%

Respondents were asked if they knew of any *specific* incidents related to adult entertainment businesses in their neighborhoods. Twenty-five respondents (21.4%) answered affirmatively, citing specific examples of the 11 general problem areas covered in the survey instrument. Not surprisingly, most of these respondents lived relatively near an adult business.

Finally, to measure the depth of public sentiment, respondents were asked whether they would move if an adult entertainment business were to move into their neighborhood. Seventy-one respondents (61.2%) indicated that they would ("definitely" or "probably") move. Of the minority (38.8%) who indicated that they would ("definitely" or "probably") *not* move, nearly half qualified their answers by

explaining that financial considerations precluded a move for any reason.

Attitudes on Regulation. With an exception to be noted, the public believes that the City should regulate adult businesses. One hundred respondents (85.5%) believe that the City should regulate the location of adult businesses. Despite the apparent *laissez faire* implications of the minority opinion, however, only one respondent (0.9%) believed that adult businesses should be allowed to operate in residential neighborhoods. Though perhaps disagreeing on the nature and extent of regulation then, even the most ardent opponents of regulation seem to support some type of regulation.

A series of questions designed to measure support for and/or opposition to various approaches to regulation reveal a remarkable depth of support for all types of regulation. Regulatory initiatives designed to protect the integrity of residential life, for example, garner nearly unanimous support from every element of the community:

Would you support a law that prohibited the establishment of an adult entertainment business within 500 feet of a residential area, school or church?.

Strongly Support	**92**	**78.0%**	**78.0%**
Support	**13**	**11.0%**	**11.0%**
Neutral	**4**	**3.4%**	**3.4%**
Oppose	**6**	**5.1%**	**5.1%**
Strongly Oppose	**3**	**2.5%**	**2.5%**

Regulatory initiatives designed to reduce the density of adult businesses, on the

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Regulatory initiatives designed to reduce the density of adult businesses, on the other hand, while not nearly so popular, are supported by a significant majority of citizens.

Would you support a law that prohibited the concentration of adult entertainment businesses within 1000 feet of each other?

Strongly Support	52	44.1	44.4
Support	21	17.8	17.9
Neutral	16	13.6	13.7
Oppose	22	18.6	18.8
Strongly Oppose	6	5.1	5.1

It should be noted, furthermore, that some of the respondents who oppose density regulations do so because they oppose any initiative short of prohibition.

Group Differences. Due to the overwhelming degree of support for almost any regulatory initiative and, also, due to the relatively small sample size, few group differences are statistically significant. Home ownership and gender are exceptions. In general, home owners are more likely than renters and women are more likely than men to endorse any regulatory initiative. These differences are expected, of course, but a careful examination of response patterns reveals a curious difference. When asked whether the City should regulate the locations of adult businesses, for example, home owners and women alike express stronger support for regulation than their complementary groups. Specifically,

	Own	*Rent*		*Women*	*Men*	
Regulate Yes	74	24	98	57	42	99
Regulate No	7	10	17	6	11	17
	81	34	115	63	53	116

Both differences (owners *vs.* renters and women *vs.* men) are statistically significant. This common factor helps define the small minority (14.5%) of respondents who feel that the City should not regulate adult businesses at all.[40] Asked if they would move if an adult business were to open in their neighborhood, on the other hand, home owners and women diverge slightly:

	Own	*Rent*		*Women*	*Men*	
Move Yes	52	17	69	43	27	70
Move No	28	17	45	20	25	45
	80	34	114	63	52	115

While home owners are more likely (*vs.* renters) to say that they would move out of their neighborhoods to avoid an adult business, the difference is not statistically significant. In contrast, the difference for women (*vs.* men) is quite significant.

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[40] Respondents who expressed the opinion that the City should not regulate adult businesses tend to be younger (76.5% under 45) men (64.7%) who rent (58.8%). More important, perhaps, these respondents tend to live relatively far away from adult businesses (76.5% at least three blocks away) and to live in households with no children (70.6%). Several of these respondents volunteered that they were "libertarians." Of course, many of the respondents who initially told us that they opposed any regulation later expressed the opinion that adult buisnesses should not be allowed to locate near residential neighborhoods.

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	Own	*Rent*		*Women*	*Men*	
Regulate Yes	74	24	98	57	42	99
Regulate No	7	10	17	6	11	17
	81	34	115	63	53	116

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This divergence reflects a salient difference in the way home owners and women calculate costs and benefits. In the unstructured portions of the interviews, many home owners expressed feelings of resignation. One respondent who had lived in the vicinity of an adult business for more than thirty years, for example, told us that the social and economic costs of moving to another neighborhood precluded this option; and in any event, there would no guarantee that adult businesses would not eventually move into the new neighborhood. On the other hand, many women respondents expressed overwhelming fear for their safety and the safety of their children. One woman respondent with three young children told us that she had already moved because one of her children had been harassed by a man who she believed was a customer of an adult business. Although her new apartment was smaller and more expensive, she believed that the move was absolutely necessary for the safety of her children. Anecdotal data of this sort are not amenable to statistical analysis. Nevertheless, these data provide a context for interpreting the objective item responses of our survey.

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VIII. Conclusions

The data and analyses reported in this document make a clear, compelling statement about the secondary consequences of the adult entertainment businesses along Garden Grove Boulevard. In terms of property values alone, the survey of real estate professionals leads to the unambiguous conclusion that the mere presence of these businesses depresses residential and commercial property values. While the effect on commercial property values is problematic, the effect on residential property values argues for strict regulations governing the distance of adult businesses from residential neighborhoods. In commercial zones, moreover, the consistent opinions of real estate professionals suggest that high density also depresses commercial property values. This argues for strict regulations governing the distances between adult businesses.

A separate survey of Garden Grove households is fully consistent with the responses of real estate professionals. Put simply, these businesses have a real impact on the daily lives of their neighbors. By all measures, respondents living near one of these businesses are aware of the presence of the businesses and have a pessimistic (but apparently realistic) view of their impact on the neighborhood. Whereas public hearings might lead one to conclude that actual incidents involving these businesses are rare, our survey results show the opposite; *more than one in five respondents reported a specific incident related to the operation of adult*

businesses. This experience leads to strong public support for regulation. Nine of ten respondents endorse regulations that prohibit adult businesses from operating near residential neighborhoods; nearly two-thirds endorse regulations that prohibit the geographical concentration of adult businesses.

Although these two surveys may represent subjective opinion, their results are consistent with objective analyses of crime data. Comparing temporal crime rates before and after changes in the operation of adult businesses, we find strong evidence of a public safety hazard. The subjective impressions of Garden Grove residents and real estate professionals have an empirical basis, in other word. Given the seriousness nature of this public safety hazard, we recommend that

- *No new adult businesses should be allowed to operate within 1000 feet of a residence.*

We find a significant interaction effect between the adult businesses and taverns or bars. When an adult business opens within 1000 feet of a tavern or bar, crime rates rise by a factor that cannot be attributed to either business alone. Accordingly, we recommend that

- *No new tavern or bar should be allowed to operate within 1000 feet of an adult business and vice versa.*

Since the adult businesses on Garden Grove Boulevard (or more precisely, their *locations*) were in operation prior to the advent of our data, we find no optimum

or ideal distance between locations that would ameliorate the public safety hazard. Accordingly, we recommend that

- *The present spacing code between adult businesses should be maintained.*

Recognizing the legal and practical difficulties of changing the existing operations, furthermore, we have no recommendations for the existing operations. Although we find no evidence that the public safety hazard can be ameliorated by simple arhitectural barriers (walls, *e.g.*), the hazard could conceivably be minimized by regulations such as limiting the hours of operation, special lighting, and so forth. Toward this end, we recommend that

- *Where feasible, the Conditional Use Permit process should be used to ameliorate the public safety hazard. For optimal effectiveness, the Police Department must be fully involved in every aspect of this process.*

There is a tendency to view adult entertainment businesses as "moral nuisances" when, in fact, the data show that they are public safety "hot spots." Adopting this view, it may be useful to enact policies designed to ensure the safety of customers and neighbors. The Garden Grove Police Department is ideally suited to advise on the range of policy options that might be implemented.

A final recommendation pertains to public involvement in the process. The results of our household survey reveal strong sentiments favoring any attempt to ameliorate the secondary consequences of this problem. Nevertheless, we detect a

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spirit of cynicism in the responses of citizens who live in the midst of the problem. For example, the weaker public support for density regulation (*vs.* regulating the distance from a residential neighborhood) reflects in part a draconian view of the problem; more than a few of the respondents who expressed little or no support for this regulation did so on the grounds that the businesses should not be allowed to operate *anywhere* in the City. It would not be entirely correct to attribute this view to moral or moralistic attitudes. In many cases, respondents related personal experiences and fears that make these views understandable. Public support for any practial regulation may require a process that addresses the experiences and fears of these citizens. Unfortunately, we have no expertise (or even specific insights) to suggest how this might be accomplished.

APPENDIX

Real Estate Survey Frequencies

Household Survey Frequencies

Real Estate Instrument

Household Instrument

Proposed Statute

Real Estate Professionals Survey Response Tabulations

Based on your personal observations as a real estate professional, or on information received through the practice of your profession, do you have an opinion as to whether the presence of an adult bookstore affects the resale or rental values of nearby properties?

Yes	115	94.3	94.3
No	6	4.9	4.9
Missing	1	.8	.8

How many years have you practiced in the real estate profession?

5 Years or Less	36	29.5	29.5
6-10 Years	16	13.1	13.1
11-25 Years	60	49.2	49.2
25 Years or More	10	8.2	8.2

How many years have you practiced real estate in the Garden Grove area?

5 Years or Less	47	38.5	38.5
6-10 Years	19	15.6	15.6
11-25 Years	51	41.8	41.8
25 Years or More	3	2.4	4.1
Missing	2	1.6	

Based on your professional experience, how would you expect average values of the following types of property to be effected if they are less than 200 feet away from the new adult bookstore?

...Single-family residential

20% Decrease	76	62.3	62.8
10-20% Decrease	28	23.0	23.1
0-10% Decrease	14	11.5	11.6
No Effect	3	2.5	2.5
Missing	1	.8	

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...Multiple-family residential

20% Decrease	46	37.7	38.3
10-20% Decrease	42	34.4	35.0
0-10% Decrease	26	21.3	21.7
No Effect	6	4.9	5.0
Missing	2	1.6	

...Commercial

20% Decrease	24	19.7	20.2
10-20% Decrease	40	32.8	33.6
0-10% Decrease	33	27.0	27.7
No Effect	18	14.8	15.1
0-10% Increase	3	2.5	2.5
20% Increase	1	.8	.8
Missing	3	2.5	

How would you expect the average value to be affected if the properties are within 200 to 500 feet of the new adult bookstore?

...Single-family residential

20% Decrease	67	54.9	55.4
10-20% Decrease	29	23.8	24.0
0-10% Decrease	19	15.6	15.7
No Effect	6	4.9	5.0
Missing	1	.8	

...Multiple-family residential

20% Decrease	41	33.6	34.2
10-20% Decrease	36	29.5	30.0
0-10% Decrease	34	27.9	28.3
No Effect	8	6.6	6.7
10-20% Increase	1	.8	.8
Missing	2	1.6	

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...Commercial

20% Decrease	20	16.4	16.7
10-20% Decrease	37	30.3	30.8
0-10% Decrease	36	29.5	30.0
No Effect	24	19.7	20.0
0-10% Increase	2	1.6	1.7
10-20% Increase	1	.8	.8
Missing	2	1.6	

Assume that a new adult bookstore will be located within 1000 feet of an existing adult bookstore or other adult entertainment use. Based upon your professional experience, how would you expect the average values of the following types of properties to be affected if they are less than 200 feet away from the new bookstore?

...Single-family residential

20% Decrease	51	41.8	41.8
10-20% Decrease	38	31.1	31.1
0-10% Decrease	20	16.4	16.4
No Effect	12	9.8	9.8
0-10% Increase	1	.8	.8

...Multiple-family residential

20% Decrease	41	33.6	33.6
10-20% Decrease	32	26.2	26.2
0-10% Decrease	33	27.0	27.0
No Effect	15	12.3	12.3
0-10% Increase	1	.8	.8

...Commercial

20% Decrease	27	22.1	22.3
10-20% Decrease	27	22.1	22.3
0-10% Decrease	33	27.0	27.3
No Effect	33	27.0	27.3
10-20% Increase	1	.8	.8
Missing	1	.8	

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How would you expect the average values to be affected if the properties are within 200 to 500 feet of the adult bookstore?

...Single-family residential

20% Decrease	65	53.3	55.1
10-20% Decrease	29	23.8	24.6
0-10% Decrease	15	12.3	12.7
No Effect	8	6.6	6.8
0-10% Increase	1	.8	.8
Missing	4	3.3	

...Multiple-family residential

20% Decrease	42	34.4	35.3
10-20% Decrease	41	33.6	34.5
0-10% Decrease	25	20.5	21.0
No Effect	10	8.2	8.4
0-10% Increase	1	.8	.8
Missing	3	2.5	

...Commercial

20% Decrease	25	20.5	21.4
10-20% Decrease	40	32.8	34.2
0-10% Decrease	25	20.5	21.4
No Effect	23	18.9	19.7
0-10% Increase	4	3.3	3.4
Missing	5	4.1	

Based upon your professional experience, how would you evaluate the impact of locating an adult bookstore within 200 feet of an area on the following problems, if the area is residential?

...Crime

Substantial Increase	59	48.4	50.9
Some Increase	49	40.2	42.2
No Effect	7	5.7	6.0
Some Decrease	1	.8	.9
Missing	6	4.9	

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...Traffic

Substantial Increase	28	23.0	23.9
Some Increase	60	49.2	51.3
No Effect	26	21.3	22.2
Some Decrease	2	1.6	1.7
Substantial Decrease	1	.8	.9
Missing	5	4.1	

...Litter

Substantial Increase	52	42.6	44.8
Some Increase	48	39.3	41.4
No Effect	14	11.5	12.1
Some Decrease	1	.8	.9
Substantial Decrease	1	.8	.9
Missing	6	4.9	

...Noise

Substantial Increase	35	28.7	31.3
Some Increase	46	37.7	41.1
No Effect	27	22.1	24.1
Some Decrease	3	2.5	2.7
Substantial Decrease	1	.8	.9
Missing	10	8.2	

...Safety

Substantial Increase	24	19.7	21.2
Some Increase	7	5.7	6.2
No Effect	12	9.8	10.6
Some Decrease	24	19.7	21.2
Substantial Decrease	46	37.7	40.7
Missing	9	7.4	

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...Quality of life

Substantial Increase	14	11.5	12.3
Some Increase	7	5.7	6.1
No Effect	7	5.7	6.1
Some Decrease	39	32.0	34.2
Substantial Decrease	47	38.5	41.2
Missing	8	6.6	

...Rents

Substantial Increase	3	2.5	2.7
Some Increase	6	4.9	5.3
No Effect	12	9.8	10.6
Some Decrease	51	41.8	45.1
Substantial Decrease	41	33.6	36.3
Missing	9	7.4	

...Loitering

Substantial Increase	60	49.2	51.3
Some Increase	40	32.8	34.2
No Effect	6	4.9	5.1
Some Decrease	3	2.5	2.6
Substantial Decrease	8	6.6	6.8
Missing	5	4.1	

Based upon your professional experience, how would you evaluate the impact of locating an adult bookstore within 200 feet of an area on the following problems, if the area is commercial?

...Crime

Substantial Increase	45	36.9	39.1
Some Increase	57	46.7	49.6
No Effect	11	9.0	9.6
Substantial Decrease	2	1.6	1.7
Missing	7	5.7	

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2-932

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...Traffic

Substantial Increase	24	19.7	20.7
Some Increase	65	53.3	56.0
No Effect	24	19.7	20.7
Some Decrease	1	.8	.9
Substantial Decrease	2	1.6	1.7
Missing	6	4.9	

...Litter

Substantial Increase	36	29.5	31.3
Some Increase	60	49.2	52.2
No Effect	18	14.8	15.7
Substantial Decrease	1	.8	.9
Missing	7	5.7	

...Noise

Substantial Increase	27	22.1	24.1
Some Increase	48	39.3	42.9
No Effect	33	27.0	29.5
Some Decrease	3	2.5	2.7
Substantial Decrease	1	.8	.9
Missing	10	8.2	

...Safety

Substantial Increase	16	13.1	14.3
Some Increase	10	8.2	8.9
No Effect	14	11.5	12.5
Some Decrease	36	29.5	32.1
Substantial Decrease	36	29.5	32.1
Missing	10	8.2	

...Quality of business environment

Substantial Increase	6	4.9	5.4
Some Increase	8	6.6	7.1
No Effect	7	5.7	6.3
Some Decrease	53	43.4	47.3
Substantial Decrease	38	31.1	33.9
Missing	10	8.2	

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2-~~433~~ 67

...Commercial rents

Substantial Increase	3	2.5	2.8
Some Increase	6	4.9	5.6
No Effect	17	13.9	15.9
Some Decrease	58	47.5	54.2
Substantial Decrease	23	18.9	21.5
Missing	15	12.3	

...Loitering

Substantial Increase	41	33.6	36.3
Some Increase	46	37.7	40.7
No Effect	9	7.4	8.0
Some Decrease	11	9.0	9.7
Substantial Decrease	6	4.9	5.3
Missing	9	7.4	

...Ability to attract new businesses

Substantial Increase	4	3.3	3.5
Some Increase	5	4.1	4.4
No Effect	4	3.3	3.5
Some Decrease	39	32.0	34.5
Substantial Decrease	61	50.0	54.0
Missing	9	7.4	

...Ability to attract customers

Substantial Increase	6	4.9	5.3
Some Increase	4	3.3	3.5
No Effect	8	6.6	7.0
Some Decrease	37	30.3	32.5
Substantial Decrease	59	48.4	51.8
Missing	8	6.6	

Based on your professional experience, how would you evaluate the impact of locating two or more bookstores within 1000 feet of each other and within 200 feet of an area on the following problems if the area is residential?

927 928
2-934

...Crime

Substantial Increase	75	61.5	64.1
Some Increase	37	30.3	31.6
No Effect	4	3.3	3.4
Substantial Decrease	1	.8	.9
Missing	5	4.1	

...Traffic

Substantial Increase	43	35.2	36.1
Some Increase	60	49.2	50.4
No Effect	14	11.5	11.8
Substantial Decrease	2	1.6	1.7
Missing	3	2.5	

...Litter

Substantial Increase	63	51.6	52.9
Some Increase	46	37.7	38.7
No Effect	8	6.6	6.7
Substantial Decrease	2	1.6	1.7
Missing	3	2.5	

...Noise

Substantial Increase	48	39.3	41.4
Some Increase	46	37.7	39.7
No Effect	17	13.9	14.7
Some Decrease	2	1.6	1.7
Substantial Decrease	3	2.5	2.6
Missing	6	4.9	

...Safety

Substantial Increase	22	18.0	18.8
Some Increase	10	8.2	8.5
No Effect	7	5.7	6.0
Some Decrease	24	19.7	20.5
Substantial Decrease	54	44.3	46.2
Missing	5	4.1	

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2-~~935~~ 69

...Quality of life

Substantial Increase	10	8.2	8.5
Some Increase	2	1.6	1.7
No Effect	6	4.9	5.1
Some Decrease	30	24.6	25.6
Substantial Decrease	69	56.6	59.0
Missing	5	4.1	

...Rents

Substantial Increase	5	4.1	4.4
Some Increase	5	4.1	4.4
No Effect	7	5.7	6.1
Some Decrease	45	36.9	39.5
Substantial Decrease	52	42.6	45.6
Missing	8	6.6	

...Loitering

Substantial Increase	62	50.8	53.4
Some Increase	37	30.3	31.9
No Effect	5	4.1	4.3
Some Decrease	6	4.9	5.2
Substantial Decrease	6	4.9	5.2
Missing	6	4.9	

Based on your professional experience, how would you evaluate the impact of locating two or more bookstores within 1000 feet of each other and within 200 feet of an area on the following problems if the area is commercial?

...Crime

Substantial Increase	53	43.4	44.2
Some Increase	59	48.4	49.2
No Effect	6	4.9	5.0
Substantial Decrease	2	1.6	1.7
Missing	2	1.6	

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2-~~936~~

...Traffic

Substantial Increase	33	27.0	27.5
Some Increase	62	50.8	51.7
No Effect	22	18.0	18.3
Some Decrease	2	1.6	1.7
Substantial Decrease	1	.8	.8
Missing	2	1.6	

...Litter

Substantial Increase	50	41.0	42.7
Some Increase	53	43.4	45.3
No Effect	12	9.8	10.3
Some Decrease	1	.8	.9
Substantial Decrease	1	.8	.9
Missing	5	4.1	

...Noise

Substantial Increase	39	32.0	33.1
Some Increase	48	39.3	40.7
No Effect	29	23.8	24.6
Substantial Decrease	2	1.6	1.7
Missing	4	3.3	

...Safety

Substantial Increase	17	13.9	14.3
Some Increase	8	6.6	6.7
No Effect	12	9.8	10.1
Some Decrease	38	31.1	31.9
Substantial Decrease	44	36.1	37.0
Missing	3	2.5	

...Quality of business environment

Substantial Increase	5	4.1	4.3
Some Increase	3	2.5	2.6
No Effect	8	6.6	6.9
Some Decrease	47	38.5	40.5
Substantial Decrease	53	43.4	45.7
Missing	6	4.9	

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2-~~937~~

...Commercial rents

Substantial Increase	6	4.9	5.4
Some Increase	9	7.4	8.1
No Effect	13	10.7	11.7
Some Decrease	39	32.0	35.1
Substantial Decrease	44	36.1	39.6
Missing	11	9.0	

...Loitering

Substantial Increase	49	40.2	42.6
Some Increase	45	36.9	39.1
No Effect	5	4.1	4.3
Some Decrease	8	6.6	7.0
Substantial Decrease	8	6.6	7.0
Missing	7	5.7	

...Ability to attract new businesses

Substantial Increase	4	3.3	3.5
Some Increase	4	3.3	3.5
No Effect	7	5.7	6.1
Some Decrease	43	35.2	37.7
Substantial Decrease	56	45.9	49.1
Missing	8	6.6	

...Ability to attract customers

Substantial Increase	7	5.7	5.9
Some Increase	3	2.5	2.5
No Effect	10	8.2	8.5
Some Decrease	38	31.1	32.2
Substantial Decrease	60	49.2	50.8
Missing	4	3.3	

Would you mind if we contacted you in the future regarding your responses to these survey questions?

No	63	51.6	64.3
Yes	26	21.3	26.5
Missing	33	78.1	

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2-938

Household Survey Response Tabulations

To the best of your knowlege, how close is the nearest adult bookstore or adult entertainment establishment?

200 Feet	6	5.1	5.1
500 Feet	2	1.7	1.7
1000 Feet	8	6.8	6.8
1 Block	6	5.1	5.1
2 Blocks	15	12.7	12.7
3+ Blocks	46	39.0	39.0
Don't Know	35	29.7	29.7

I am going to ask a series of questions concerning what the impact of an adult entertainment business has or would have if it were located within 500 feet of your neighborhood. Please tell me if the impact would be a substantial increase, some increase, no effect, some decrease, or a substantial decrease.

... Crime

Substantial Increase	55	46.6	46.6
Some Increase	31	26.3	26.3
No Effect	32	27.1	27.1
Some Decrease			
Substantial Decrease			

... Traffic

Substantial Increase	42	35.6	35.9
Some Increase	29	24.6	24.8
No Effect	45	38.1	38.5
Some Decrease	1	.8	.9
Substantial Decrease			
Missing	1	.8	

... Litter

Substantial Increase	43	36.4	36.8
Some Increase	35	29.7	29.9
No Effect	38	32.2	32.5
Some Decrease	1	.8	.9
Substantial Decrease			
Missing	1	.8	

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2-934

... Noise			
Substantial Increase	40	33.9	34.5
Some Increase	32	27.1	27.6
No Effect	42	35.6	36.2
Some Decrease	1	.8	.9
Substantial Decrease	1	.8	.9
Missing	2	1.7	
... Safety			
Substantial Increase	25	21.2	21.6
Some Increase	12	10.2	10.3
No Effect	24	20.3	20.7
Some Decrease	9	7.6	7.8
Substantial Decrease	46	39.0	39.7
Missing	2	1.7	
... General Quality of Life			
Substantial Increase	14	11.9	12.0
Some Increase	5	4.2	4.3
No Effect	28	23.7	23.9
Some Decrease	18	15.3	15.4
Substantial Decrease	52	44.1	44.4
Missing	1	.8	
... Property Values			
Substantial Increase	9	7.6	7.7
Some Increase	8	6.8	6.8
No Effect	18	15.3	15.4
Some Decrease	23	19.5	19.7
Substantial Decrease	59	50.0	50.4
Missing	1	.8	

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2-~~940~~

... Rents

Substantial Increase	12	10.2	11.1
Some Increase	5	4.2	4.6
No Effect	42	35.6	38.9
Some Decrease	17	14.4	15.7
Substantial Decrease	32	27.1	29.6
Missing	10	8.5	

... Loitering

Substantial Increase	68	57.6	58.1
Some Increase	19	16.1	16.2
No Effect	26	22.0	22.2
Some Decrease	3	2.5	2.6
Substantial Decrease	1	.8	.9
Missing	1	.8	

... Graffiti

Substantial Increase	44	37.3	38.3
Some Increase	21	17.8	18.3
No Effect	48	40.7	41.7
Some Decrease	2	1.7	1.7
Substantial Decrease			
Missing	3	2.5	

... Vandalism

Substantial Increase	53	44.9	45.7
Some Increase	23	19.5	19.8
No Effect	38	32.2	32.8
Some Decrease	2	1.7	1.7
Substantial Decrease			
Missing	2	1.7	

Would you move if an adult entertainment business were located near your neighborhood?

Definitely Move	36	30.5	31.0
Probably Move	35	29.7	30.2
Probably not Move	28	23.7	24.1
Definitely not Move	17	14.4	14.7
Missing	2	1.7	

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Do you believe the City should regulate the location of adult businesses?

No	17	14.4	14.5
Yes	100	84.7	85.5
Missing	1	.8	

The courts have ruled that cities must provide a place for adult businesses to operate. How far away from your neighborhood would these businesses have to be to have a negligible effect on your neighborhood?

500 Feet	4	3.4	3.4
1000 Feet	10	8.5	8.6
1 Block	3	2.5	2.6
3+ Blocks	89	75.4	76.7
Farther	10	8.5	8.6
Missing	2	1.7	

In what zone do you think these types of business should be allowed?

Residential	1	.8	.9
Commercial	44	37.3	37.6
Industrial	68	57.6	58.1
None	4	3.4	3.4
Missing	1	.8	

Would you support a law that prohibited th tablishment of an adult entertainment business within 500 feet of a residential area, ool or church?

Strongly Support	92	78.0	78.0
Support	13	11.0	11.0
Neutral	4	3.4	3.4
Oppose	6	5.1	5.1
Strongly Oppose	3	2.5	2.5

Would you support a law that prohibited the concentration of adult entertainment businesses within 1000 feet of each other?

Strongly Support	52	44.1	44.4
Support	21	17.8	17.9
Neutral	16	13.6	13.7
Oppose	22	18.6	18.8
Strongly Oppose	6	5.1	5.1
Missing	1	.8	

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Are you aware of any specific incidents related to adult entertainment businesses in your neighborhood?

No	92	78.0	78.6
Yes	25	21.2	21.4
Missing	1	.8	

Do you own your home or do you rent?

Owner	82	69.5	70.7
Renter	34	28.8	29.3
Missing	2	1.7	

How long have you lived at your current residence?

One Year or Less	9	7.6	7.7
Four Years or Less	26	22.0	22.2
Ten Years or Less	30	25.4	25.6
More than Ten Years	52	44.1	44.4
Missing	1	.8	

What is your sex?

Female	64	54.2	54.7
Male	53	44.9	45.3
Missing	1	.8	

What is your age?

21 or Under	6	5.1	5.5
22 thru 35	32	27.1	29.1
36 thru 45	26	22.0	23.6
46 thru 65	34	28.8	30.9
66 or Older	12	10.2	10.9
Missing	8	6.8	

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What is your highest level of education?

Grade School	2	1.7	1.8
High School	32	27.1	28.1
Some College	48	40.7	42.1
College Degree	28	23.7	24.6
Graduate	4	3.4	3.5
Missing	4	3.4	

How many children do you currently have living with you under the age of eighteen?

None	60	50.8	51.3
1-2	42	35.6	35.9
3 or More	15	12.7	12.8
Missing	1	.8	

How would you characterize your ethnicity?

Caucasian	85	72.0	72.6
Hispanic	19	16.1	16.2
Vietnamese	4	3.4	3.4
Oriental	5	4.2	4.3
Black	1	.8	.9
Other	3	2.5	2.6
Missing	1	.8	

Would you like to be notified of any public hearings related to the restriction of adult entertainment businesses in Garden Grove?

Yes	76	65.0	65.0
No	42	35.0	35.0

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CITY OF GARDEN GROVE
ADULT BUSINESS SURVEY CALL SHEETS

CASE ID: _____

Phone number: _____

Address: _____

_____

	Interviewer	date	time	outcome	time/date of callback
1.					
2.					
3.					
4.					
5.					
6.					
7.					
8.					
9.					
10.					

General Notes and Problems:

_____

_____

_____

_____

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Hello, my name is _____, I am an employee with the City of Garden Grove. We are conducting a survey of Garden Grove residents to gather information on the impact of certain businesses, such as adult bookstores, nude or topless dancing establishments, massage parlors, adult theaters showing X-rated movies, peep shows, etc. on your residential area. The City is conducting this survey in order to properly develop legislation in this area. Your responses are greatly appreciated and will be kept confidential.

(Need to confirm that the respondent is a responding from a residence and not a business. If responding from a business discontinue the interview.)

1. To the best of your knowledge, how close is the nearest adult bookstore or adult entertainment establishment?

- ❑ 200 feet
- ❑ 500 feet
- ❑ 1000 feet
- ❑ Don't know
- ❑ 1 block
- ❑ 2 blocks
- ❑ 3+ blocks

2. Which adult entertainment establishment is it?
(Prompt respondent for identifying information, ie the exact business name, or location, or general identification)

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6. The courts have ruled that cities must provide a place for adult businesses to operate. How far away from your neighborhood would these businesses have to be to have a negligible effect on your neighborhood?

- ❑ Less than 500 feet
- ❑ 500 feet
- ❑ 1000 feet
- ❑ 1 block
- ❑ 2 blocks
- ❑ 3+ blocks

7. In what zone do you think these types of businesses should be allowed?

- ❑ Residential
- ❑ Commercial
- ❑ Industrial

8. Would you support a law that prohibited the establishment of an adult entertainment business with 500 feet of a residential area, school or church?

- ❑ Strongly support
- ❑ Support
- ❑ Neutral
- ❑ Oppose
- ❑ Strongly oppose

9. Would you support a law that prohibited the concentration of adult entertainment business within 1000 of each other?

- ❑ Strongly support
- ❑ Support
- ❑ Neutral
- ❑ Oppose
- ❑ Strongly oppose

10. Are you aware of any specific incidents related to adult entertainment businesses in your neighborhood?

- ❑ No
- ❑ Yes

If yes please explain:

11. Do you own your home or do you rent ?

- ❑ Own
- ❑ Rent

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18. **Would you like to be notified of any public hearings related to the restriction of adult entertainment businesses in Garden Grove?**

- ❑ Yes
- ❑ No

If yes, confirm name and mailing address

Thank you for your assistance in responding to our questions.

(*If they insist on a number of someone to contact about the survey give them the City Manager's Office number 714-741-5101*)

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REAL ESTATE PROFESSIONAL SURVEY

Please complete this brief survey and return it to the City of Garden Grove, City Manager's Office, by March 1, 1991. A postage paid envelope is enclosed for your convenience.

1. Based upon your personal observations as a real estate professional, or on information received through the practice of your profession, do you have an opinion as to whether the presence of an adult bookstore affects the resale or rental values of nearby properties?

   Yes _____

   No opinion _____

2. How many years have you practiced in the real estate profession? _____

3. How many years have you practiced real estate in the Garden Grove area? _____

Questions 4 through 15:

Please read the following information about a hypothetical neighborhood and respond to a few questions in terms of your professional experience and judgment.

A middle-income residential neighborhood borders a main street that contains various commercial uses that serve the neighborhood. Although most of the neighborhood is comprised of single-family homes, there are two multiple-family residential complexes in the neighborhood as well. A commercial building recently has become vacant and will open shortly as a typical adult bookstore. (A "typical" adult bookstore in Garden Grove also contains several "peep show" booths.) There are no other adult bookstores or similar activities in the area. There is no other vacant commercial space presently available in the area.

Based upon your professional experience, how would you expect average values of the following types of property to be affected if they are less than 200 feet away from the new adult bookstore? (Circle the appropriate number for each type of property.)

	Decrease 20%	Decrease 10-20%	Decrease 0-10%	No Effect	Increase 0-10%	Increase 10-20%	Increase 20%
4. Single-family residential	1	2	3	4	5	6	7
5. Multiple-family residential	1	2	3	4	5	6	7
6. Commercial	1	2	3	4	5	6	7

How would you expect the average value to be affected if the properties are within 200 to 500 feet of the new adult bookstore?

	Decrease 20%	Decrease 10-20%	Decrease 0-10%	No Effect	Increase 0-10%	Increase 10-20%	Increase 20%
7. Single-family residential	1	2	3	4	5	6	7
8. Multiple-family residential	1	2	3	4	5	6	7
9. Commercial	1	2	3	4	5	6	7

Assume that the new adult bookstore will be located within 1000 feet of an existing adult bookstore or other adult entertainment use. Based upon your professional experience, how would you expect the average values of the following types of properties to be affected, if they are less than 200 feet away from the new bookstore?

	Decrease 20%	Decrease 10-20%	Decrease 0-10%	No Effect	Increase 0-10%	Increase 10-20%	Increase 20%
10. Single-family residential	1	2	3	4	5	6	7
11. Multiple-family residential	1	2	3	4	5	6	7
12. Commercial	1	2	3	4	5	6	7

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How would you expect the average values to be affected if the properties are within 200 to 500 feet of the new adult bookstore?

	Decrease 20%	Decrease 10-20%	Decrease 0-10%	No Effect	Increase 0-10%	Increase 10-20%	Increase 20%
13. Single-family residential	1	2	3	4	5	6	7
14. Multiple-family residential	1	2	3	4	5	6	7
15. Commercial	1	2	3	4	5	6	7

Questions 16 and 17:

Based upon your professional experience, how would you evaluate the impact of locating an adult bookstore within 200 feet of an area on the following:

16. If the area is residential:

	Substantial Increase	Some Increase	No Effect	Some Decrease	Substantial Decrease
a. crime	1	2	3	4	5
b. traffic	1	2	3	4	5
c. litter	1	2	3	4	5
d. noise	1	2	3	4	5
e. safety of women and children	1	2	3	4	5
f. general quality of life	1	2	3	4	5
g. rents	1	2	3	4	5
h. loitering	1	2	3	4	5

17. If the area if commercial:

a. crime	1	2	3	4	5
b. traffic	1	2	3	4	5
c. litter	1	2	3	4	5
d. noise	1	2	3	4	5
e. safety of women and children	1	2	3	4	5
f. general quality of the business environment	1	2	3	4	5
g. rents	1	2	3	4	5
h. loitering	1	2	3	4	5
i. ability to attract other new businesses	1	2	3	4	5
j. ability of other businesses to attract customers	1	2	3	4	5

Questions 18 and 19:

Based on your professional experience, how would you evaluate the impact of locating two or more adult bookstores within 1000 feet of each other and within 200 feet of an area on the following:

18. If the area is residential:

	Substantial Increase	Some Increase	No Effect	Some Decrease	Substantial Decrease
a. crime	1	2	3	4	5
b. traffic	1	2	3	4	5
c. litter	1	2	3	4	5
d. noise	1	2	3	4	5
e. safety of women and children	1	2	3	4	5
f. general quality of life	1	2	3	4	5
g. rents	1	2	3	4	5
h. affect loitering	1	2	3	4	5

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If the area is commercial:

	Substantial Increase	Some Increase	No Effect	Some Decrease	Substantial Decrease
a. crime	1	2	3	4	5
b. traffic	1	2	3	4	5
c. litter	1	2	3	4	5
d. noise	1	2	3	4	5
e. safety of women and children	1	2	3	4	5
f. general quality of the business environment	1	2	3	4	5
g. rents	1	2	3	4	5
h. loitering	1	2	3	4	5
i. ability to attract other businesses	1	2	3	4	5
j. ability of other businesses to attract customers	1	2	3	4	5

20. In general, to what degree do you feel adult entertainment businesses affect property values?

_____

_____

_____

_____

21. Why do you feel this way?

_____

_____

_____

_____

22. OPTIONAL: Name, Name of Firm, and Address

_____

_____

_____

_____

Would you mind if we contacted you in the future regarding your responses to these survey questions?

Yes _____

No _____

Thank you again for your assistance with this survey.

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SECTION 9.1.1.05 DEFINITIONS

A. PURPOSE The purpose of this Section is to promote consistency and precision in the application and interpretation of this Chapter. The meaning of words and phrases defined in this Section shall apply throughout this Chapter, except where the context or usage of such words and phrases clearly indicates a different meaning intended in that specific case.

B. GENERAL INTERPRETATION The following general interpretations shall apply throughout this Section:

1. The word "shall" is mandatory and not discretionary. The word "may" is permissive and discretionary.

2. In case of any conflict or difference in meaning between the text of any definitions and any illustration or sketch, the text shall control.

3. Any references in the masculine or feminine genders are interchangeable.

4. Words in the present and future tenses are interchangeable and words in the singular and plural tenses are interchangeable, unless the context clearly indicates otherwise.

5. In case a definition is not listed in this section, the most current Webster Collegiate Dictionary shall be referred to for interpretation.

6. In the event of a conflict between the definitions section and the remainder of Title IX, the Title IX provision shall prevail.

C. DEFINITIONS Unless otherwise specifically provided, the words and phrases used in the Chapter shall have the following meanings:

A ACCESSORY BUILDINGS AND STRUCTURES (NON-RESIDENTIAL): A building, part of a building, or structure that is incidental or subordinate to the main building or use on the same lot, which accessory use does not alter the principal use of such lot or building. If an accessory building is attached to the main building either by a common wall or if the roof of the accessory building is a continuation of the roof of the main building, the accessory building will be considered a part of the main building.

ACCESSORY LIVING QUARTERS: Living quarters within an accessory building that is ancillary and subordinate to a principal dwelling unit, located on the same lot, for the sole use of persons employed on the premises or for temporary use by guests of the occupants. Such quarters are expressly prohibited from containing kitchen facilities or any other area used for the daily preparation of food.

ADULT ENTERTAINMENT BUSINESSES: Adult entertainment businesses shall be defined as follows:

1. Adult Book Store means an establishment having as a substantial or significant portion of its stock in trade, books, magazines, other periodicals, prerecorded motion picture film or videotape whether contained on an open reel or in cassette form, and other materials that are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas or an establishment with a segment or section devoted to the sale, display, or viewing of such materials.

2. Adult Motion Picture Theater means an enclosed building with a capacity of fifty (50) or more persons used for presenting material distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas for observation by patrons therein.

3. Adult Mini Motion Picture Theater means an enclosed building with a capacity for less than fifty (50) persons used for presenting materials distinguished or characterized by an emphasis on matter depicting or relating to specified sexual activities or specified anatomical areas for observation by patrons therein.

4. Adult Hotel or Motel means a hotel or motel where material is presented that is distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas.

5. Adult Motion Picture Arcade means any establishment required to obtain a permit under Chapter 5.60 of the Garden Grove Municipal Code or any other place to which the public is permitted or invited wherein coin, token, or slug-operated or electronically, electrically or mechanically controlled still or motion picture machines, projectors or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by an emphasis on depicting or describing specified sexual activities or specified anatomical areas.

6. Cabaret means a nightclub, theater or other establishment that features live performances by topless and bottomless dancers, "go-go" dancers, exotic dancers, strippers, or similar entertainers, where such performances are distinguished or characterized by an emphasis on specified sexual activities or specified anatomical areas.

7. Escort Bureau and Introductory Services means any establishment required to obtain a permit pursuant to Chapter 5.55 of the Municipal Code.

8. Massage Parlor or Bath House means any establishment required to obtain a permit pursuant to Chapter 5.12 of the Garden Grove Municipal Code where, for any form of consideration or gratuity,

massage, alcohol rub, administration of fomentations, electric or magnetic treatments, or any other treatment or manipulation of the human body occurs.

9. Model Studio means any business where, for any form of consideration or gratuity, figure models who display specified anatomical areas are provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by persons paying such consideration or gratuity.

10. Sexual Encounter Center means any business, agency or person who, for any form of consideration or gratuity, provides a place where three or more persons, not all members of the same family, may congregate, assemble or associate for the purpose of engaging in specified sexual activities or exposing specified anatomical areas.

11. Any other business or establishment that offers its patrons services, products, or entertainment characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas.

12. For purposes of the above definitions, "emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas" is found to be in existence when one or more of the following conditions exist:

    a. The area devoted to merchandise depicting, describing or relating to specified sexual activities or specified anatomical areas exceeds more than 15 percent of the total display or floor space area open to the public or is not screened and controlled by employees.

    b. One of the primary purposes of the business or establishment is to operate as an adult entertainment establishment as evidenced by the name, signage, advertising or other public promotion utilized by said establishment.

    c. One of the primary purposes of the business or establishment is to operate as an adult entertainment establishment as demonstrated by its services, products or entertainment constituting a regular and substantial portion of total business operations and/or a regular and substantial portion of total revenues received; where such services, products or entertainment are characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas. For purposes of this Section, "regular and substantial portion" is defined to mean greater than fifteen (15) percent of total operations or revenues received.

    d. Certain types of "adult merchandise" are displayed or merchandised. For purposes of this Section, "adult merchandise" means adult, sexually oriented implements and paraphernalia,

such as, but not limited to: dildo, auto suck, sexually oriented vibrators, edible underwear, benwa balls, inflatable orifices, anatomical balloons with orifices, simulated and battery operated vaginas, and similar sexually oriented devices.

AGRICULTURAL CROPS: The use of property for the growth and harvest of agricultural crops, including the display or sale of seasonal agricultural products grown on the parcel or an adjacent parcel in a roadside stand.

ALLEY: A public or private thoroughfare or way that may afford a primary or a secondary means of access to abutting properties.

APARTMENT: A room, or a suite of two or more rooms, in a multiple dwelling, occupied or suitable for occupancy as a dwelling unit for one family but not including motels or hotels.

ARCADE: Any place of business containing ten (10) or more amusements devices, including but not limited to pinball, air hockey and video games, for use by the public at a fee.

B BAR: A public or private business open to the general public and licensed by the California Department of Alcoholic Beverage Control with an "on-sale premises" type license, providing preparation and retail sale of alcoholic beverages for consumption on the premises, including taverns, bars and similar uses.

BILLBOARD: A sign identifying a use, facility, or service not conducted on the premises or a product that is produced, sold or manufactured off-site.

BILLIARD PARLOR OR POOL HALL: "Billiard parlor" or "pool hall" means a building, structure, or portion thereof in that are located one or more tables designed or used for play of pool, billiards, bagatelle, snooker, bumper pool, or similar games, or any establishment required to obtain a permit under Chapter 5.40.20 of the Municipal Code.

BOARDING/LODGING FACILITY: A building containing a dwelling unit where lodging is provided, with or without meals, for compensation with not more than five (5) guest rooms for ten (10) persons.

BUILDING: Any structure that is completely roofed and enclosed on all sides, excluding all forms of vehicles even though immobilized.

BUILDING FRONT: That side of any building designed or utilized as the primary customer or pedestrian entrance to the building. Each building may have more than one side of the building designated as a front under this definition.

BUILDING HEIGHT: The vertical distance measured from the average level of the building site to the uppermost roof point of the structure, excluding chimneys, antennas, architectural appurtenances and similar features.

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(7) For shopping center associations, the number of days shall be used on a monthly or quarterly schedule.

(8) The number of days for individual business addresses shall count toward the maximum allowable days allocated for special event sales.

(9) All merchandise, materials, signs and debris shall be removed from the outdoor area by 10:00 a.m. of the day following the closure of the event, unless extended by the Director.

7. Holiday Lot Sales

Christmas tree sales, fireworks sales and pumpkin sales may be permitted to operate, subject to the following conditions:

a. Such use shall be restricted to commercially zoned property.

b. Applications must be submitted ten (10) days in advance of the sale.

SECTION 9.1.2.06 ADULT ENTERTAINMENT USES

A. PURPOSE.

The City Council of the City of Garden Grove finds that adult entertainment businesses, as defined in Section 9.1.1.05C, because of their very nature, have certain harmful secondary effects on the community. These secondary effects include:

1. Depreciated property values, vacancy problems in commercial space (particularly in the newer commercial buildings).

2. Interference with residential neighbors' enjoyment of their property due to debris, noise, and vandalism.

3. Higher crime rates in the vicinity of adult businesses.

4. Blighted conditions such as a low level of maintenance of commercial premises and parking lots.

The City Council further finds that the restrictions and development standards contained in this Section will tend to mitigate, and possibly avoid, the harmful secondary effects on the community associated with adult entertainment businesses. The primary purpose of these regulations is the amelioration of harmful secondary effects on the community. The regulations contained in this section are unrelated to the suppression of free speech and do not limit access by adults to materials with First Amendment potential.

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B. SPECIFIED SEXUAL ACTIVITIES AND ANATOMICAL AREAS.

Pursuant to Section 9.1.1.05C, an adult entertainment business is any business or establishment that offers its patrons services, products or entertainment characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas."

1. For purposes of this Section, "specified sexual activities" shall include the following:

   a. Actual or simulated sexual intercourse, oral copulation, anal intercourse, oral-anal copulation, bestiality, direct physical stimulation of unclothed genitals, flagellation or torture in the context of a sexual relationship, or the use of excretory functions in the context of a sexual relationship, and any of the following depicted sexually oriented acts or conduct: analingus, buggery, coprophagy, coprophilia, cunnilingus, fellatio, necrophilia, pederasty, pedophilia, piquerism, sapphism, zooerasty; or

   b. Clearly depicted human genitals in a state of sexual stimulation, arousal or tumescence; or

   c. Use of human or animal masturbation, sodomy, oral copulation, coitus, ejaculation; or

   d. Fondling or touching of nude human genitals, pubic region, buttocks or female breast; or

   e. Masochism, erotic or sexually oriented torture, beating or the infliction of pain; or

   f. Erotic or lewd touching, fondling or other contact with an animal by a human being; or

   g. Human excretion, urination, menstruation, vaginal or anal irrigation.

   h. Dancing by one (1) or more live entertainers in a manner displaying specific anatomical areas.

2. For the purpose of this Section, "specified anatomical areas" shall include the following:

   a. 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

   b. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

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C. SPECIAL REGULATIONS.

In a C-2 zone, where the adult entertainment businesses regulated by this Part would otherwise be permitted, it shall be unlawful to establish any such entertainment business without the benefit of the hearing body approving a Conditional Use Permit and if the location is:

1. Within two hundred (200) feet of any area zoned for residential use or within two hundred (200) feet of any building owned and occupied by a public agency;

2. Within one thousand (1,000) feet of any other "adult entertainment" business;

3. Within one thousand (1,000) feet of any school facility, public or private, grades K through 12; park; playground; public libraries; licensed day care facilities; church and accessory uses.

The "establishment" of any "adult entertainment" business shall include the opening of such a business as a new business, the relocation of such business or the conversion of an existing business location to any "adult entertainment" business uses.

For the purposes of this Section, all distances shall be measured in a straight line, without regard to intervening structures or objects, from the nearest point of the building or structure used as a part of the premises where said adult entertainment business is conducted to the nearest property line of any lot or premises zoned for residential use, or to the nearest property line of any lot or premises of a church or educational institution utilized by minors or to the nearest point of any building or structure used as a part of the premises of any other adult entertainment business.

D. VARIANCE OF LOCATIONAL PROVISIONS.

Any property owner or his authorized agent may apply to the hearing body for a variance of any locational provisions contained in this Section. The hearing body, after a hearing, may grant a variance to any locational provision, if the following findings are made:

1. That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Section will be observed;

2. That the proposed use will not unreasonably interfere with the use and enjoyment of neighboring property or cause or exacerbate the development of urban blight;

3. That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation or revitalization nor will it interfere with any program being carried out pursuant to the Community Redevelopment Law; and

4. That all applicable regulations of this Code will be observed.

The procedure for this hearing shall be the same as that provided in Article 6, Division 2 of the Garden Grove Municipal Code, with, among other matters, the same notice requirements, the same right of appeal to the City Council, and the same fees payable by the applicant. The Development Services Department shall prepare the necessary application form for this variance.

E. ADULT MERCHANDISE IN NON-ADULT USE BUSINESS.

1. Definitions. For the purposes of this Part, "adult merchandise" is defined as any product dealing in or with explicitly sexual material as characterized by matter depicting, describing, or relating to specified sexual activities or specified anatomical areas. In addition, "non-adult use business" means any business or establishment not included in Section 9.11.05C.

2. Floor Space Limitations. No more than fifteen (15) percent of total floor space area open to the public of a non-adult use business shall be devoted to adult merchandise.

3. Segregation of Adult Merchandise. Retailers classified as non-adult use establishments shall display adult merchandise in an area of the business segregated and screened from the area used for the sale and display of non-adult merchandise. Screening may be accomplished with partitions or said adult materials may be displayed in separate rooms.

4. Access by Minors. Non-adult use establishments shall provide controls sufficient to prohibit access by persons under eighteen (18) years of age to areas screened or segregated for the purpose of selling or displaying adult merchandise.

5. Certain Merchandise Prohibited. Non-adult use businesses shall not display or merchandise adult, sexually oriented implements and paraphernalia, including, but not limited to: dildos, auto sucks, sexually oriented vibrators, edible underwear, benwa balls, inflatable orifices, anatomical balloons with orifices, simulated and battery operated vaginas, and similar sexually oriented devices.

F. NEWSRACKS.

Newsracks shall not display specified sexual activities or specified anatomical areas.

SECTION 9.1.2.07 ALCOHOLIC BEVERAGE SALES

A. PURPOSE. To establish criteria and conditions for uses that sell, serve, or allow consumption of alcoholic beverages.

REAL ESTATE PROFESSIONAL SURVEY

Please complete this brief survey and return it to the City of Garden Grove, City Manager's Office, by March 1, 1991. A postage paid envelope is enclosed for your convenience.

1. Based upon your personal observations as a real estate professional, or on information received through the practice of your profession, do you have an opinion as to whether the presence of an adult bookstore affects the resale or rental values of nearby properties?

   Yes _____

   No opinion _____

2. How many years have you practiced in the real estate profession? _____

3. How many years have you practiced real estate in the Garden Grove area? _____

Questions 4 through 15:

Please read the following information about a hypothetical neighborhood and respond to a few questions in terms of your professional experience and judgment.

A middle-income residential neighborhood borders a main street that contains various commercial uses that serve the neighborhood. Although most of the neighborhood is comprised of single-family homes, there are two multiple-family residential complexes in the neighborhood as well. A commercial building recently has become vacant and will open shortly as a typical adult bookstore. (A "typical" adult bookstore in Garden Grove also contains several "peep show" booths.) There are no other adult bookstores or similar activities in the area. There is no other vacant commercial space presently available in the area.

Based upon your professional experience, how would you expect average values of the following types of property to be affected if they are less than 200 feet away from the new adult bookstore? (Circle the appropriate number for each type of property.)

	Decrease 20%	Decrease 10-20%	Decrease 0-10%	No Effect	Increase 0-10%	Increase 10-20%	Increase 20%
4. Single-family residential	1	2	3	4	5	6	7
5. Multiple-family residential	1	2	3	4	5	6	7
6. Commercial	1	2	3	4	5	6	7

How would you expect the average value to be affected if the properties are within 200 to 500 feet of the new adult bookstore?

	Decrease 20%	Decrease 10-20%	Decrease 0-10%	No Effect	Increase 0-10%	Increase 10-20%	Increase 20%
7. Single-family residential	1	2	3	4	5	6	7
8. Multiple-family residential	1	2	3	4	5	6	7
9. Commercial	1	2	3	4	5	6	7

Assume that the new adult bookstore will be located within 1000 feet of an existing adult bookstore or other adult entertainment use. Based upon your professional experience, how would you expect the average values of the following types of properties to be affected, if they are less than 200 feet away from the new bookstore?

	Decrease 20%	Decrease 10-20%	Decrease 0-10%	No Effect	Increase 0-10%	Increase 10-20%	Increase 20%
10. Single-family residential	1	2	3	4	5	6	7
11. Multiple-family residential	1	2	3	4	5	6	7
12. Commercial	1	2	3	4	5	6	7

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If the area is commercial:

	Substantial Increase	Some Increase	No Effect	Some Decrease	Substantial Decrease
a. crime	1	2	3	4	5
b. traffic	1	2	3	4	5
c. litter	1	2	3	4	5
d. noise	1	2	3	4	5
e. safety of women and children	1	2	3	4	5
f. general quality of the business environment	1	2	3	4	5
g. rents	1	2	3	4	5
h. loitering	1	2	3	4	5
i. ability to attract other businesses	1	2	3	4	5
j. ability of other businesses to attract customers	1	2	3	4	5

20. In general, to what degree do you feel adult entertainment businesses affect property values?

_____

_____

_____

_____

21. Why do you feel this way?

_____

_____

_____

_____

22. OPTIONAL: Name, Name of Firm, and Address

_____

_____

_____

_____

Would you mind if we contacted you in the future regarding your responses to these survey questions?

Yes _____

No _____

Thank you again for your assistance with this survey.

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How would you expect the average values to be affected if the properties are within 200 to 500 feet ne new adult bookstore?

	Decrease 20%	Decrease 10-20%	Decrease 0-10%	No Effect	Increase 0-10%	Increase 10-20%	Increase 20%
13. Single-family residential	1	2	3	4	5	6	7
14. Multiple-family residential	1	2	3	4	5	6	7
15. Commercial	1	2	3	4	5	6	7

Questions 16 and 17:

Based upon your professional experience, how would you evaluate the impact of locating an adult bookstore within 200 feet of an area on the following:

16. If the area is residential:

	Substantial Increase	Some Increase	No Effect	Some Decrease	Substantial Decrease
a. crime	1	2	3	4	5
b. traffic	1	2	3	4	5
c. litter	1	2	3	4	5
d. noise	1	2	3	4	5
e. safety of women and children	1	2	3	4	5
f. general quality of life	1	2	3	4	5
g. rents	1	2	3	4	5
h. loitering	1	2	3	4	5

17. If the area if commercial:

a. crime	1	2	3	4	5
b. traffic	1	2	3	4	5
c. litter	1	2	3	4	5
d. noise	1	2	3	4	5
e. safety of women and children	1	2	3	4	5
f. general quality of the business environment	1	2	3	4	5
g. rents	1	2	3	4	5
h. loitering	1	2	3	4	5
i. ability to attract other new businesses	1	2	3	4	5
j. ability of other businesses to attract customers	1	2	3	4	5

Questions 18 and 19:

Based on your professional experience, how would you evaluate the impact of locating two or more adult bookstores within 1000 feet of each other and within 200 feet of an area on the following:

18. If the area is residential:

	Substantial Increase	Some Increase	No Effect	Some Decrease	Substantial Decrease
a. crime	1	2	3	4	5
b. traffic	1	2	3	4	5
c. litter	1	2	3	4	5
d. noise	1	2	3	4	5
e. safety of women and children	1	2	3	4	5
f. general quality of life	1	2	3	4	5
g. rents	1	2	3	4	5
h. affect loitering	1	2	3	4	5

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HOUSTON CITY COUNCIL

COMMITTEE ON THE PROPOSED REGULATION OF SEXUALLY ORIENTED BUSINESSES

LEGISLATIVE REPORT ON AN ORDINANCE AMENDING SECTION 28-73 OF THE CODE OF ORDINANCES OF THE CITY OF HOUSTON, TEXAS; PROVIDING FOR THE REGULATION OF SEXUALLY ORIENTED COMMERCIAL ENTERPRISES, ADULT BOOKSTORES, ADULT MOVIE THEATRES AND MASSAGE ESTABLISHMENTS; AND MAKING VARIOUS PROVISIONS AND FINDINGS RELATING TO THE SUBJECT

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COMMITTEE ON THE PROPOSED REGULATION OF SEXUALLY ORIENTED BUSINESSES

LEGISLATIVE REPORT

INTRODUCTION

This Legislative Report has been prepared by the Committee on the Proposed Regulation of Sexually Oriented Businesses as a summary of the Committee's work in preparing the draft ordinance which has been submitted to the Houston City Council for consideration. This Report briefly sketches some of the most significant aspects of the history of the Committee, summarizes prior efforts at the regulation of sexually oriented businesses both in Houston and elsewhere, recapitulates the principal themes heard in the public testimony taken by the Committee, and offers a brief section-by-section analysis of the proposed ordinance.

This Report has not been drafted as a legal treatise on the regulation of sexually oriented businesses. Certainly considerable care was taken by the Committee to consult with the Legal Department at every step of the legislative process. Representatives of the Legal Department actually drafted the language of the ordinance pursuant to the directions of, and in consultation with, the Committee. However, the various legal issues raised during the Committee's deliberations are dealt with here from a layman's, not the lawyer's perspective, although it is the lawyer's perspective that undergirds the ordinance. The purpose of this Report is to explain to members of Council, and to the general public, what the Committee has recommended, and why, in the plainest possible language. For the same reason, this Report is not filled with footnotes, although all of the information is drawn from the materials and transcripts compiled by the Committee, and available as a matter of public record.

ORIGINS AND ESTABLISHMENT OF THE COMMITTEE.

On September 27, 1982, Mayor Kathryn J. Whitmire of the City of Houston announced the formation of a special committee of Council Members for the purpose of determining the need for an appropriate means of regulating sexually oriented businesses in Houston. This Council Committee on the Proposed Regulation of Sexually Oriented Businesses was composed of Council Members Dale M. Gorczynski, who represents District H, Council Member George Greanias, who represents District C, and Council Member Christi Hartung, who represents District G. Mayor Whitmire appointed Council Member Greanias to serve as chair of the Committee.

The Committee was formed by the Mayor in response to growing community concerns about the proliferation of sexually orie-ted

businesses in Houston. This concern had been summarized in a memorandum from Council Member Greanias to the Mayor on September 20, 1982:

> "Given its healthy economic climate and a legal environment that is, despite our identification with the Bible Belt, laissez faire on most sexual matters, Houston has long been an attractive environment for sexually oriented businesses. . . .
>
> "Since Houston is not zoned, these sexually oriented businesses are located anywhere and everywhere, oftentimes near residential areas, or near schools, churches, or public parks. Their locations are frequently marked by garish or enticing signage. The effect on the ability of neighborhoods and commercial areas to retain their identity after the opening of such businesses in the area has been extremely adverse. Moreover, the establishment of one such business in an area has often led to the opening of another, in a rather perverse example of synergy. Finally, there is a growing body of evidence to suggest that there are substantial links between at least some of these businesses and various forms of organized crime. . . ."

The memorandum from Council Member Greanias made clear that in his mind at least the issue was not one of morality, or of passing judgment on the lifestyle of any individual, but of reasonable land use controls versus the rights and privileges of the individual:

> "The importance of the city's ability to deal meaningfully with the issue of sexually oriented businesses should not be underestimated. To some it may seem a parochial question, relevant only to those who live in areas where sexually oriented businesses have located; to others it may appear just one more item on the agenda of those who are convinced that the city is in the terminal throes of sexual degradation on every front.
>
> "But the problem imposed by these sexually oriented businesses is much broader in its implications, and runs directly to the heart of our present policies on land use. Does our decision not to impose zoning carry with it the requirement that we not seek to moderate the influence of sexually oriented businesses on our neighborhoods, whatever the consequences for the stability and quality of those neighborhoods?

> Does our decision not to impose zoning tie our hands in dealing with the collateral criminal activity that apparently attaches to some of these operations?"

At the same time, the initial memorandum from Council Member Greanias to Mayor Whitmire underscored a problem for which the Committee was to show great concern during the course of its deliberations:

> "There is also another, equally important question: Does our desire to protect the freedom and privacy of the individual, and to permit that individual to pursue his or her life without inhibition, mean that we are proscribed from taking any actions that while not significantly infringing on those rights nevertheless sets a standard for the community as a whole?"

It was these questions that formed the heart of the Committee's inquiry during its one year of existence. The Committee believes that these questions have been successfully addressed in the proposed ordinance that has been presented to Council for its consideration.

OPERATION OF THE COMMITTEE

Methodology. The Committee conducted its work in several phases. The first phase, which was carried out in November and December of 1982, involved a series of public hearings in several parts of the city, as well as at City Hall. There were three regional hearings and one hearing in City Council Chambers. The first hearing was held at Spring Woods Senior High School on November 8, 1982. The second hearing was held at Berean Baptist Church on November 22, 1982. The third hearing was held at Bering Methodist Church on December 5, 1982. The fourth and final session in this first series of hearings was held in City Council Chambers on December 15, 1982. (During the course of these hearings, several comments were made about choosing churches as the sites for some of the hearings. The Committee chose these locations not because of their religious significance, but because they had a history of being used for community affairs, their locations were well known to the general public, and access to each such site was convenient from various places around the city.)

After the first set of hearings had been completed, the Committee went into executive sessions for a period of approximately three months, from late December of 1982 until the early part of April 1983. During that time, the Committee met with representatives of the Legal Department to review the testimony

gathered in the initial hearings, as well as to discuss the results of staff research on the subject. Among those participating in this work were Messrs. John Whittington, Robert Collins, Charles Williams, and Adam Silverman from the Legal Department of the City of Houston, Kent Speer, John Elsenhans and Michael McEachern from the office of Council Member George Greanias, Fred Harper from the office of Council Member Christin Hartung, and Nancy Brame from the office of Council Member Dale Gorczynski. Francis J. Coleman, Jr., City Attorney for the City of Houston, also participated in these conversations from time to time.

On May 6, 1983, the Committee published the results of its efforts: a draft of a proposed ordinance regulating sexually oriented businesses in the City of Houston. At the time that the Committee published its draft ordinance, further hearings were announced at which the Committee would solicit testimony on the ordinance as proposed. These hearings -- originally planned to be three in number -- were held on Wednesday, May 15, 1983, Wednesday, May 22, 1983, and Thursday, May 24, 1983, in City Council Chambers. A fourth hearing, not originally planned, was held on Thursday, June 16, 1983.

Based upon these further public hearings, the Committee then went back into executive session with its legal counsel and other staff to make further refinements in the ordinance. The changes made pursuant to the public comments are noted in the commentary on the specific ordinance provisions themselves.

An additional word is perhaps warranted on the decision of the Committee generally not to meet with individuals and groups apart from the public sessions. It was determined early on that an ordinance such as that being considered by the Committee, with its potential for controversy, should not be subject to private bargaining between individuals or businesses and members of the Committee behind closed doors. It was felt by all members of the Committee that it would be far more preferable to gather all testimony and evidence in a public forum, and then reflectively to consider the information without conferral with private parties. At the same time, the Committee felt that its executive deliberations were justified in encouraging the free flow of discussion of ideas and sensitive concepts, knowing that the entire work product would be subject to the public comment, review and debate inherent in the Committee's procedures and the processes of Council.

The Committee also felt it imperative not to become subject to demands for quick action at the price of working with deliberate speed towards its goals. It is for this reason that the original date scheduled for submission to Council of a draft

version of an ordinance was moved from January 25 to Jul[illegible] u
(This date was pushed back several more times, and for simila
reasons, before the ordinance was finally submitted to Council.
It was for this same reason that additional hearings wer
scheduled during the second phase of the public sessions
Likewise, the Committee decided to request that the propose
ordinance be considered during the course of three readings, a
contrasted with the normal procedure of suspending th
three-reading practice and passing ordinances -- even thos
oftentimes having major effects on the city -- on an emergenc
basis in just one reading. Throughout its work, the goal of th
Committee was to assure ample ventilation of all points of view
the thoroughgoing examination of all of the very difficul
questions involved, and as complete an understanding as possibl
by all parties of the issues confronting the Committee and th
solutions arrived at.

Analysis of Testimony. The hearings held by the Committe
on the Proposed Regulation of Sexually Oriented Businesses wer
among the most extensive ever held by any committee of th
Houston City Council. The hearings were open to all persons wh
wished to testify, and the Committee made no attempt to limit th
type of remarks made to the Committee or to censor those remark
in any way. (At this point it should be noted that the Committe
also accepted written comments from anyone, regardless of whe[illegible]he
they testified in person. Such comments became part of [illegible]
Committee's public record as a matter of course.) However,
clear distinction should be drawn between the Committee's will
ingness to permit full expression of diverse views -- a willing
ness that is reflected in the transcript of the hearings -- an
any wholesale incorporation of those remarks by the Committe
into the ordinance proposed to Council. Indeed, a chief functio
of the Committee was to evaluate the testimony, and to set asid
those comments seen as not germane to the issues at hand or no
dealing with problems, addressing instead those issues within th
rightful purview of the city.

Thus, although there were a substantial number of witnesse
expressing a fundamentalist opposition to what those witnesse
deemed obscenity and pornography, the Committee chose -- and i
fact made clear during the hearings -- to focus its efforts o
land use issues rather than questions of pornography and ob
scenity. Similarly, a number of witnesses made comments advers
to the operation of gay bars. Again it was pointed out to thos
witnesses that such establishments were not necessarily withi
the working definition of a "sexually oriented business" (
definition that was modified over time as the ordinance wa
further refined) and therefore not a subject in themselves to b
dealt with in the proposed ordinance. Finally, a number c
witnesses made statements and proposals that would effecti[illegible]l

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ban all sexually oriented businesses, as that phrase is broadly defined. The Committee made it clear, both during the hearings and afterwards, that it was not the intention of the Committee to propose any ordinance that would be subject to a successful court challenge because it either directly or indirectly (or for that matter inadvertently) eliminated the opportunities for such businesses to exist in the City of Houston.

With these comments by way of preface, it is useful to review briefly the principal points made during the hearings and later relied upon by the Committee in the drafting of the proposed ordinance. Further comments on the use of the testimony in the development of the various ordinance provisions can be found in the section by section analysis of the ordinance that concludes this Report.

The first point made by many witnesses that seemed of merit to the Committee was that sexually oriented businesses, while a nuisance and not necessarily representative of the desires or activities of a majority of Houstonians, nonetheless have a right to exist. The rights of individuals were a theme in the testimony of a number of the witnesses. The willingness of Houstonians to "live and let live" was reinforced in the findings of a Houston attitudes survey conducted by Dr. Steven Klineberg, of Rice University, along with others. Briefly put, that study concluded that Houstonians were loath to support restrictions on personal behavior. Among those witnesses whose testimony was seen as most helpful by the Committee, the majority of such witnesses were generally solicitous of individual and minority rights, not anxious to impose any community standard of conduct on unwilling individuals, and concerned with merely striking an appropriate balance between the needs of the community at large and the rights of individuals to do as they please.

The second point made by many of the witnesses to whose testimony the Committee repeatedly referred during its deliberations was that while these businesses might have the right to exist, protection of their rights could be consistent with effective regulatory restrictions that would minimize the adverse consequences of those businesses to adjacent areas and activities. These witnesses -- many of them individuals who had direct personal experience of these businesses in their neighborhoods, or representatives of civic organizations that had had many dealings with the problems created by such businesses -- stated that while the businesses might have a right to exist, steps could be taken that, while not unduly restrictive of their operations, would offer some assistance to those neighbors and businesses surrounding the sexually oriented business. For instance, one gentleman living on West Alabama next to an adult bookstore, while agreeing that such businesses would probably

continue to exist and that he was resigned to that fact, also cited a series of untoward incidents occurring on or near his property that were directly related to that adult bookstore. His position seemed to be that while Council might not be able to rid him of the business, it might nonetheless take steps to ameliorate the worst effects of that enterprise.

The third point made by many of the witnesses who proved most helpful to the Committee in providing guidance for the drafting of the ordinance was that among the most important negative effects of these businesses were the adverse consequences on neighborhood protection and enhancement, and the consequent adverse effect on property values. A number of neighborhood representatives and civic club participants recounted numerous instances of problems that had been created by these businesses for neighborhoods which were trying to preserve a neighborhood fabric. Several real estate brokers with substantial experience in areas affected by sexually oriented businesses offered documented instances in which property values had been affected by the establishment of sexually oriented businesses, as well as information of a more general nature as to the effect of these businesses on the course of neighborhood development. In expert testimony by Dr. Andrew Rudnick of the Rice Center, given before the full Council, this "cause and effect" syndrome was again attested to. It seemed to be a consensus among both the [illegible] and expert witnesses that in neighborhood areas and areas of quality commercial development, the establishment of sexually oriented businesses had a detrimental effect on property values, at least in part because they were perceived adversely to affect the quality of life -- including among other things such issues as suitability for family activities and stability of the neighborhood environment -- of the area.

The fourth point made by the witnesses whose testimony was most commonly relied upon by the Committee was that among the most significant problems created by the businesses were the ancillary activities caused by the clustering of businesses, as in the case of street prostitution in the lower Westheimer area, and the problem of exterior appearance. Even where businesses could not be forced to relocate because of apparent preemptions in state law, most witnesses stated that reasonable controls on signage and exterior appearance were required. The intrusiveness of the signage and exterior features into the consciousness of the community was repeatedly cited. It was also noted that although adults might train themselves to ignore such signage, it would be hard if not impossible to demand the same self-discipline from children. That children would be likely attracted to such advertising (which in at least one case even featured popular cartoon characters) was perceived as a significant problem in the expert testimony of one psychiatr[illegible],

who cited information discussing the relations between exposure to such signage and psychological problems those children might subsequently experience.

The fifth point developed in the testimony and regarded as significant by the Committee was that sexually oriented businesses are likely contributory factors to criminal activities that are encouraged as ancillary to these enterprises. This link between these businesses and related problems of criminal activity was affirmed by the Chief of Police and other representatives of the Police Department, as well as by non-expert witnesses with long personal experience of living in areas where sexually oriented businesses are located. To the Committee, this issue of criminal activity occurring in the area of sexually oriented businesses was not a central problem, but rather a concurrent question of somewhat lesser significance than the land use issues. At the same time, however, the Committee felt that the testimony justified the conclusion that the criminal activity that does tend to occur in the vicinity of sexually oriented businesses, particularly where those businesses have clustered, has an adverse effect on property values. This adverse effect makes such activities a secondary concern, even though the principal focus of the Committee and the ordinance is on land use matters.

The sixth point brought out in the testimony -- particularly the testimony of city employees engaged in enforcing current statutes regulating such businesses, as well as private individuals who have sought legal recourse against such businesses -- was the difficulty of achieving reasonable enforcement of the law. Part of this enforcement problem centers on the relatively limited arsenal of remedies available to home-rule cities under Texas law in such circumstances. Some of the problem has been alleviated by cooperative efforts between cities and counties, as is the case in Houston, where Harris County cooperates with the city by bringing suits whenever requested to accompany a city suit, thus bringing into play the padlock power of the county -- a power the city lacks. However, another part of the problem is that existing laws and ordinances are structured in such a way as to make it difficult to sustain an action against even an offender clearly in violation of the law. For example, if an injunction for abatement of a nuisance is brought against the owner of a particular sexually oriented business -- such as an adult modeling studio -- it is quite possible that by the time the suit is actually brought to trial the ownership of the business has been transferred. The case is then thrown into limbo because the appropriate party or parties is (or are) no longer "joined" in the suit. The lawsuit stalls while the business continues in operation.

Another point which the Committee thought relevant to t deliberations regarded those businesses which are thought t enjoy special protection under the First Amendment. This issu was perhaps one of the most difficult that the Committee faced Despite whatever personal preference the members of the Committe might have had, the clear mandate of the Committee was to prepar an ordinance that was as legally defensible as possible. Aft considerable deliberation, the Committee accepted the contention of those lawyers who argued that to lump First Amendment and a other businesses into one indistinguishable category for purpose of regulation would probably be unwise and cause the ordinance t be submitted to substantial challenges. This is not to say tha the arguments of the lawyers are unquestionably correct. Nor i it to say that following the recommendations of these lawyer represents what the Committee believes to be wise public policy But what the Committee did was to remember continuously it principal charge, and to set aside its personal preferences an opinions in favor of proposing an ordinance with a maximu likelihood of being upheld in court.

While a variety of other issues and problems were raised i testimony taken before the Committee, the foregoing points seeme to members of the Committee to be the most significant and worth of attention. The manner in which this testimony was translate into proposals for legislative action will become clear in h Section by Section Analysis that follows below.

PRIOR HOUSTON ATTEMPTS TO REGULATE

Early Efforts. The proposed ordinance does not represen the first attempt by the City of Houston to regulate sexuall oriented businesses. As stated in HOUSTON: A HISTORY, b David G. McComb:

> "In 1840 a city ordinance provided a fine of not les than $50 and a jail term of ten to thirty days for any woma committing lewd actions or exhibiting herself in a publi place in a style 'not usual for respectable females. Brothels within the city limits could not be located close than two squares to a family residence. A supplementa ordinance in 1841 required a $20 bond for a 'female of i fame' found in a public place after 8:00 p.m. in order ensure good behavior. Although perhaps not a prostitut one of the most notorious female characters from the perio was Pamela Mann, an expert at firearms, knives, horseba riding, and profanity. She appeared in court at variou times charged with counterfeiting, forgery, fornicatio larceny, and assault. According to William Ransom Hoga she ran the Mansion House Hotel in such fashion tha 'Mrs. Mann and her 'girls' achieved a satisfying suc ss

providing Houston with female companionship of a 'robust and none too virtuous nature.'"

Universal Amusement. A more recent and perhaps more relevant attempt to regulate sexually oriented businesses in Houston occurred in 1977, with the passage of Ordinances 28-65 and 36-14. Ordinance 28-65 amended a prior ordinance to make it "unlawful for any person to operate or cause to be operated an adult commercial establishment within two thousand (2000) feet of a Church, school or other educational or charitable institution." Under this ordinance, an "adult commercial establishment" was defined as "any business or enterprise having as a substantial or significant portion of its stock in trade or activity the sale, distribution, lending, rental, exhibition, or other viewing of material depicting sexual conduct or specified anatomical areas for consideration." Ordinance 36-14 made it unlawful to operate within two thousand (2,000) feet of a church, school or other educational or charitable institution any motion picture theatre "which exhibits a film that explicitly depicts ... contact between any part of the genitals of one person and the genitals, mouth or anus of another person; ... contact between a person's mouth, anus, or genitals and the mouth, anus, or genitals of an animal or fowl; ... manipulation of a person's genitals; ... defecation; or ... urination." Both ordinances required all businesses coming under the ambit of the law to bring themselves into compliance within thirty (30) days of passage of the ordinances. (A third ordinance, not as significant, dealt with a redefinition of "public amusement park" and "places of public entertainment and amusement.")

The 1977 ordinances were successfully challenged in a 1977 case styled Universal Amusement Co., v. Hofheinz. In an opinion handed down October 5, 1977, Judge Ross N. Sterling granted the request of plaintiffs for declaratory and injunctive relief. At the conclusion of the trial, the Court orally declared the ordinances unconstitutional on their face, permanently enjoined their enforcement against plaintiffs, and severed plaintiffs' claims for punitive damages and attorneys' fees.

For purposes of considering the ordinance now being proposed by the Committee, it is instructive to consider the grounds on which the 1977 ordinances were struck down as unconstitutional by the Court. Although at least one of the attorneys appearing before the Committee during its second session of hearings alleged that no ordinance could be fashioned that would meet the objections made by the Court, the Committee is of the opinion that it is indeed possible to draft such an ordinance.

In summary, Judge Sterling held the ordinances unconstitutional on grounds of vagueness, stating that this alone would be

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sufficient grounds to void the ordinance on grounds of unconstitutionality. However, he went on to say that in his opinion there were other constitutional defects, namely that the ordinances were violative of the First and Fourteenth Amendments to the Constitution by abridging the freedoms of speech and press guaranteed therein, that they denied the plaintiffs the equal protection of the laws as guaranteed by the Fourteenth Amendment, and that they denied plaintiffs due process of law as guaranteed by the Fifth and Fourteenth Amendments.

Vagueness. The Court found that the challenged ordinances violated basic tenets of constitutional law. It cited the general rule that whenever a penal statute is involved -- as was the case here, since a fine of up to $200 was to be imposed for violations of ordinance 28-65 -- the terms of that statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties" and that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

However, the Court was quick to point out that even more than the usual rule requiring exactness in the drafting of a penal statute was involved in the case at hand. The ordinances in question were not only penal, but also restricted the exercise of First Amendment rights. While the Court did not hold that no such restrictions on First Amendment rights could ever be successfully enacted, it did state emphatically that in such instances even stricter standards than those required of ordinary penal statutes would be called for.

The plaintiffs in Universal Amusement claimed that the ordinances under examination failed both the general test of strictness required of any penal statute, not to mention the stricter standard applied when a law restricting First Amendment rights are in question. With this argument the Court agreed. Especially troublesome was the lack of any definitions whatsoever for such words as "Church," "school," or "other educational or charitable institution." Similarly, the works "substantial" and "significant" as used to modify "portion of its stock in trade or activity" was found by the Court to be "hopelessly vague." As the Court pointed out:

> "Any theater which ever exhibited 'X or R' movies might be covered from time to time depending on the meaning of the words 'substantial' and 'significant.'"

The Court noted that one of the asserted purposes of the ordinances was the protection of children, but held that it is

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to live in a particular section of town so that a watchful eye could be kept on them. To paraphrase The Mikado, the legislative remedy should fit the problem. Another possible way of looking at it is that the cure should not be worse than the disease.

In Universal Amusement the Court found that there was not just overbreadth, but "substantial overbreadth." The Court seemed to be of the opinion that the attempt to regulate businesses which dealt in material depicting "sexual conduct" or "specified anatomical areas" failed the overbreadth test because it raised the distinct possibility that the ordinances would "deter those who normally deal with such materials from exercising their right to sell or exhibit them because (1) what they sell or exhibit might fall within the scope of the ordinance, and (2) their dealings with such material might result in the branding of their businesses as "adult commercial establishments." In the opinion of the Court, the ordinances being challenged had the potential to effectively prohibit all theatres from showing "R" rated movies and medical bookstores from selling books on anatomy or physiology which depicted nudity or partial nudity. Coupled with the fact that the ordinances as written were not in the opinion of the Court subject to narrowing by state law decisions, the ordinances were found to be consequently overbroad and therefore constitutionally infirm.

Protected Speech. The ordinances that were the subject of the lawsuit in Universal Amusement attempted to regulate to some extent activities normally considered as under the ambit of the First Amendment. Therefore one of the issues was whether the ordinances abridged freedom of speech in any unwarranted fashion. The Court noted that there could be regulation of such speech. But, the Court stated, such regulation must be reasonable. In the case of the ordinances at issue, the Court held that the administrative officials charged with enforcement of the ordinances were left free to exercise what the Court characterized as "virtually unfettered discretion." For instance, under the ordinances it was left to a policeman to determine what was a "church" or "school." Such breadth of discretion was found by the Court to be unacceptable in ordinances which proposed to regulate what were considered First Amendment activities.

This concern for protected speech was heightened by the fact that as a practical matter the ordinances did not merely limit the time and place and manner where the activities at issue could be engaged in. Instead, in application the ordinances banned all such activities from the City of Houston, at least as far as the Court could see under its review of the facts. Under such circumstances, the Court stated, it was impossible to say that these particular ordinances represented a reasonable restraint on the First Amendment activities at issue.

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Equal Protection. The Court in Universal Amusement al stated that while a city can treat different classes of people in different ways, the difference in treatment must be based on some rationale directly connected with the appropriate exercise of municipal power for accepted purposes. The question in the particular case was whether the city, in treating the businesses at issue differently than other businesses, was doing so for reasons that were grounded in acceptable public policy consistently applied. The Court also noted that of some importance would be whether the state had already enacted legislation to deal with the public policy issues stated as the grounds for the ordinances.

In Universal Amusement, the Court found that the purported purpose of protecting children and permitting them to be raised in a suitable atmosphere, while perhaps worthwhile, did not call for the expansive ordinances that had been attempted. Moreover, the Court noted that there were already a substantial number of laws on the books at the state level dealing with the problem of protecting children from such activities. The Court distinguished the Detroit ordinance, on which Houston had relied, by noting that one of the primary purposes of that ordinance was to preserve the quality of urban life. Given these facts, the Court seemed to believe that the City of Houston had gone too far in its ordinances, given the goals it was seeking to accomplish.

Due Process. The final issues dealt with by the Court in Universal Amusement was that of denial of due process. The Court found that while some exercise of municipal authority in this area might be justified, the ordinances at issue went far beyond what was permissible and in effect deprived persons of their property without adequate reason or compensation. First, the ordinances effectively banned such businesses from the city even though it purportedly only limited their ability to locate in certain areas. Second, the ordinances were drafted in such a way that even if a business could find an acceptable location, the business would forever be in jeopardy of losing its authority to operate if a church or school moved within the prohibited distance.

Summary. In reviewing the decision of Universal Amusement for purposes of its work in drafting an ordinance proposal, the Committee kept several points in mind with regard to the foregoing discussion. First, businesses that are argued as under the ambit of the First Amendment enjoy special protection. But even the Court in Universal Amusement seemed to indicate that such protection is not absolute and that reasonable regulation is permissible. Therefore, the Committee took special care in all matters of regulation affecting First Amendment businesses to exercise what the Committee deemed prudence and restrai

Fifth, the Committee has provided in the ordinance for several avenues of recourse for any party that believes himself aggrieved by administration of the ordinance. At the same time, however, the ordinance has throughout been designed to limit the discretion of the administrative officers in charge of the ordinance to minimize the possibilities for such abuses of discretion that would require redress.

Sixth and finally, the Committee has spent considerable time reviewing computerized maps to give reasonable assurance that while the ordinance may be restrictive in absolute terms of locations available to sexually oriented businesses, it is not prohibitory in what it seeks to accomplish. After reviewing a series of maps developed in accordance with the distance formulas set forth in the ordinance, the Committee feels that there is reasonable evidence to support the conclusion that such is indeed the case.

REMEDIES ADOPTED BY OTHER CITIES

Houston is not the only American city to have had to deal with the problem of sexually oriented businesses. Other municipalities such as Detroit, Boston, Chicago, Dallas, Los Angeles, and Santa Maria, California, as well as regional governments such as Fairfax County, Virginia, have also grappled with the issue. Although Houston is unique as compared to these other governments with respect to the zoning issue, there are nonetheless lessons that can be drawn from comparing the experience of other municipalities to our own.

Detroit. The efforts of the city of Detroit to regulate sexually oriented businesses found their roots in attempts made in 1962 to combat the skid-row effects occurring in certain neighborhoods. Ultimately, the city in 1976 amended the anti-skid row ordinance developed out of that earlier effort to cover sexually oriented businesses. These new regulations were upheld by the United States Supreme Court. The key elements of this ordinance provided the following:

(1) Sexually oriented businesses were explicitly defined;

(2) Sexually oriented businesses were prohibited within five hundred feet (500') of an area zoned residential;

(3) Sexually oriented businesses were prohibited from locating within one thousand feet (1000') of any two other regulated sexually oriented businesses; and

mixed into the general run of office buildings and retail and wholesale operations. Substantial residential housing or residential activities were not part of the fabric of the neighborhood.

The decision to create a Combat Zone proved advantageous to the city of Boston for a number of reasons. First, the creation of a single such zone where all businesses were treated alike avoided any charges that the Boston regulatory scheme violated the equal protection provisions of the Fourteenth Amendment. Second, by creating a particular zone where such businesses could be established without question, the City avoided the sometimes difficult issues involved in trying to define what would or would not be considered a "sexually oriented business." Finally, the city was under this scheme able to avoid the difficulties and confusions that can sometimes be attendant upon any system involving licensing. In addition, the Boston approach entailed lower administrative costs, gave the city firm control over the growth of the sexually oriented businesses industry, and provided city officials with a controlled environment -- essentially a laboratory -- in which to investigate the effects of sexually oriented businesses on their surrounding environment. It is interesting to note that while the Boston plan has met with reasonable success, it has not been copied by any other American city.

While the Committee was urged to consider the combat zone concept for Houston, the proposal was discarded at a rather early point in the deliberations. The principal reason for rejecting the concept was the geographical difference between Boston and Houston. Boston proper is a city of fairly limited land area. Houston currently contains approximately 560 square miles. While a single combat zone might work in Boston, given its limited size, the Committee concluded that a defensive combat zone approach in Houston would require at least several such areas throughout the city. Otherwise, those located at a distance from the single combat zone might argue that their right of access to sexually oriented businesses had been wrongfully limited. The other problem, of course, would be that of locating sites for these multiple combat zones. Although several witnesses advocated this approach to the Committee, no witness was ready to volunteer his or her area as a candidate for such a zone -- in itself eloquent testimony to the perception of the effect of these businesses on their surrounding areas, a perception that expert witnesses would show appears to translate into adverse consequences for property values.

Chicago. In 1977, the city of Chicago amended its municipal [illegible] to include new regulations on adult-use businesses. The Chicago ordinance generally followed the Detroit legislation. The basic strategy of the regulatory scheme could be broken into three parts: first, there was a strong effort to define the purpose and intent of the ordinance; second, there was a good deal of effort put into defining sexually oriented businesses; and third, there was substantial time spent to carefully define the type of regulation and enforcement being adopted.

The Chicago ordinance also had some features not found in the Detroit ordinance. First, registration standards were imposed that required nine types of responses, mostly concerning ownership. Certain restrictions, though vaguely defined, were placed on exterior displays. On this particular point, the ordinance provided that "no adult use shall be conducted in any manner that permits the observation of any material depicting, describing or relating to 'specified sexual activities' or 'specific anatomical areas' from any public way or from any property not registered as an adult use." This provision was under the ordinance applicable to "any display decoration, sign, show window, or store opening." Finally, fines of not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00) were imposed for each offense with the provision that in the case of a continuing offense each day during which the offense continued could be counted as a separate case.

Dallas. The city of Dallas adopted an ordinance regulating sexually oriented businesses in 1977. Interestingly, while Dallas is a zoned city, this regulatory ordinance was not made part of the zoning ordinance, but rather was incorporated into the general municipal code. The Dallas ordinance, like that in Chicago, was closely modelled on the Detroit law.

Under the Dallas ordinance, the distance requirement between sexually oriented businesses and areas zoned residential was one thousand feet (1000'). This distance was measured as a straight line from property line to property line of the two conflicting structures without regard to intervening structures. It is instructive to note that this one thousand foot (1000') restriction was struck down due to lack of evidence as to the deteriorating effects sustained by neighborhoods as a result of the interposition of sexually oriented businesses.

Los Angeles. In 1978, the city of Los Angeles imposed a thirty (30) day moratorium on the establishment of new sexually oriented businesses in order to provide an opportunity for the city to draft a new and comprehensive ordinance regulating the industry. (It is not clear whether such a moratorium would be permissible under recent antitrust decisions involving the

liability of municipalities for violation of the Sherman Act. The city then used its Planning Department to study the effects of sexually oriented businesses on their surrounding environments. The conclusion of this study was that regulation of sexually oriented businesses was necessary to "prevent the continued erosion of the character of the affected neighborhoods."

The drafting of the Los Angeles ordinance followed the basic pattern established in the wake of the successful effort by the city of Detroit. What businesses were "sexually oriented" was meticulously defined and the activities of those businesses were likewise carefully delineated. Similar care was taken in the definition of the city's regulatory authority and with respect to the fines imposed for violations of the ordinance. An additional section provided for severability of the ordinance, thus allowing the ordinance to stand even if a particular section failed a judicial test.

At this writing, our best information indicates that the Los Angeles ordinance has withstood any challenges and remains intact as originally passed. Again, a key element in the success of the ordinance was the careful development of information on the nature of the problem being addressed, thoughtful efforts to delineate as clearly as possible the intent and operation of the ordinance, and a strong rational tie between the problems being addressed and the regulatory scheme.

Fairfax County, Virginia. The ordinance adopted in Fairfax County, Virginia, for the regulation of sexually oriented businesses again follows the general pattern successfully established by the city of Detroit. However, in the area of issuance of permits, the Fairfax County ordinance is much more detailed.

Specifically, the Fairfax County ordinance gives the chief of police jurisdiction over the application process. In exercising this responsibility, the chief of police receives assistance from the Inspection Services Division, the Fire and Rescue Services, the Director of Health, and the Zoning Enforcement Division. The annual fee for renewal of the license is Two Thousand Dollars ($2,000.00); this annual renewal fee is in addition to a business license tax. The applicant must also complete a comprehensive application form dealing with the type of business, location and ownership. With respect to ownership, in-depth information is requested, and checks are made on the criminal records or prior questionable activities of the applicant.

Additionally, permit fees are required from massage technicians. These permits specify fees, term of the permit and health

requirements. Again, the application is comprehensive and delves into the applicant's background and history, and is accompanied by fingerprints. The ordinance also goes further than the Detroit law in setting minimum standards for sexually oriented businesses with regard to structure and general hygiene, the display of permits, and the establishment of a right of entry for relevant government inspection agents.

Santa Maria, California. The ordinance enacted by Santa Maria, California, is interesting in that it provides a regulatory scheme whereby sexually oriented businesses are divided into different classes, as follows:

> "Class A" sexually oriented businesses are those which provide entertainment in conjunction with the operation of an eating place.
>
> "Class B" sexually oriented businesses are those which provide entertainment in conjunction with a business whose principal activity is the serving of alcoholic beverages.
>
> "Class C" sexually oriented businesses are those where entertainment is offered in conjunction with either of the business activities described as "Class A" or "Class B," but where the exhibition of the human body is involved.

Under this regulatory scheme, "Class A" businesses are the most lightly regulated, "Class B" businesses more so, and "Class C" businesses most of all. "Class C" businesses must deposit with the Director of Finance a refundable deposit of five hundred dollars ($500.00). This deposit would be used to pay the costs of additional city services such as police and fire assistance. This particular legislation was probably less referred to by the Committee than any other statutory scheme because its purposes seemed on the face of the ordinance to differ notably from the purposes of the ordinance proposed for Houston.

SECTION-BY-SECTION SUMMARY OF ORDINANCE

Legislative Findings. The legislative findings sections of the ordinance has been drafted to summarize as concisely but as completely as possible the underlying reasons why an ordinance is needed, and why the ordinance has been structured in its present form. This Report is also incorporated by reference into the Legislative Findings.

The city bases its right to regulate sexually oriented commercial enterprises on its general police powers -- the right

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to pass legislation to assure public safety, health, morals & other related goals. The city also bases its right to regulate as proposed in this ordinance under specific grants of authority from the state, including Art. 1175, §22 (authorizing regulation by municipalities of places of public amusement), Art. 1175, §23 (authorizing licensing by municipalities of businesses susceptible to the police power), Art. 1175, §24 (authorizing municipal regulation of billboards and other exterior signage), Art. 1175, §34 (authorizing municipalities to exercise the general police power), and Art. 2372w (authorizing municipalities to regulate businesses whose principal activity is the offering of services intended to provide sexual stimulation or sexual gratification).

The Committee has proposed that Council exercise the foregoing powers on the basis of its findings generated through the hearings held by the Committee and Council between November 4, 1982 and October 25, 1983. These findings have already been discussed at some length in the foregoing subsection titled "Analysis of Testimony." The Legislative Findings section of the ordinance briefly summarizes those findings.

Article I: Definitions. The definitions included under Article I have been carefully crafted to conform with the Committee's intention to regulate as effectively as possible, without infringing on federal constitutional guarantees, areas preempted by state legislation or the operation of legitimate business. Although most of the definitions are by their nature self-evident, comments on some of the definitions are warranted to underscore the balance which the Committee constantly sought between effective regulation on the one hand and, on the other, the limits placed on municipal action by federal constitutional guarantees and state law.

"Enterprise," for example, refers only to those establishments whose major business involves products or services intended to provide sexual stimulation or gratification. Inclusion of the word "major" is intended to exempt out such businesses as convenience stores which sell "Playboy" or "Playgirl" or other similar such magazines as a relatively small part of their overall operation. In addition, specific exemptions are granted to several categories of businesses. Adult bookstores, adult movie theatres and businesses licensed to sell alcoholic beverages are exempted because of apparent preemption by state law; massage parlors are omitted because they are covered by another city ordinance. (It should be noted, however, that although the foregoing businesses are not defined as "enterprises," and therefore not subject to the locational and permit requirements of the ordinance, they still are subject to specified provisions of the ordinance.) Businesses licensed by the state, such as those employing

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psychologists or physicians are also exempted, as are businesses whose major activity is the selling of clothes.

The definitions in Article I also offer good examples of the consistency in reasoning which the Committee sought to achieve in its work. For instance, it has already been noted that a major theme in the testimony heard by the Committee concerned the deleterious effects of sexually oriented businesses on children, and the consequent problems caused for neighborhood stability and the quality of life, as reflected in property values. For this reason, schools were placed within the category of protected establishments near which such sexually oriented businesses cannot be located. (It was this same general line of reasoning -- namely, the need to protect areas frequented by children and used for family oriented activities -- that led to including churches among the protected activity categories.) However, it was also concluded by the Committee that at some point a person, even though still in school, matures to the point where the city can no longer reasonably claim the right to protect him or her from such businesses. While the age at which maturity may be achieved by different individuals may vary, it was concluded by the Committee that a reasonable cutoff age as a general rule would be seventeen (17), coinciding with earliest usual age of graduation from secondary school. For this reason the definition of "school" (Article I, Section V) is limited "to public and private schools used for primary or secondary education."

Another problem the Committee faced in drafting the ordinance proposal was to minimize opportunities for circumvention of the ordinance. Concern was expressed by all members of the Committee and by the Legal Department, that some sexually oriented businesses, eager to escape the locational restrictions placed upon them, might start showing movies and argue that they were in fact "Adult Movie Theaters" protected by state law and not subject to municipal restrictions on location. The Committee has sought to deal with problems of this sort by careful drafting, as in the definition of "Adult Movie Theatre", which specifically requires that such theatres have tiers or rows of seats facing a screen or projection area, making it clear that simply setting up a projector and a screen will not make a modeling studio a movie theater under the ordinance.

Article II. Permit Required. Article II of the ordinance establishes that all sexually oriented commercial enterprises within the Houston city limits must obtain a license from the Director of Finance and Administration before they can operate.

Article III. Permit Applications. The requirements which must be fulfilled before a permit may be granted to a sexually oriented commercial enterprise are set out in Article III. The

list of information to be supplied, which shall be submitted to the Director of Finance and Administration, was taken for the most part from the present ordinance 28-73. This was decided by the Committee on the basis of issues raised during the hearings. For instance, a number of witnesses cited the problems inherent in tracking down the person ultimately responsible for a partnership or corporation; hence, the Committee has recommended a series of ownership disclosures which, while not onerous to the business enterprise, will provide information adequate for reasonable enforcement of the ordinance should its provisions subsequently be violated. The application requirements also call for submission of relevant state-issued documents pertaining to the authorization of the enterprise to do business within the State of Texas. The application form shall also include a written declaration that all information contained in the application is true and correct, and that the applicant is in conformity with all provisions of the ordinance; violation of these provisions will be grounds for suspension or revocation of the permit.

Article IV. Permit Fee. The ordinance establishes a permit fee of $350.00 for each permit application. The amount of this fee was based on testimony by William R. Brown, Director of Finance and Administration, which fixed the cost of processing each such application at within Ten Dollars ($10.00) of the $350.00 figure later adopted by the Committee. Since the $350.00 represents the cost to the city of actually processing the application, regardless of whether the permit is approved or disapproved, the fee is payable at the time the permit is requested and shall be nonrefundable. The permit shall be good for one year from the date of issuance, and shall be renewable annually; the $350.00 fee for each renewal of the permit represents the costs of each year's review of the permit application and the ongoing costs of administering the regulations established by the ordinance, including the costs of enforcement through inspections of the establishments by city personnel.

It should also be noted that just prior to submission of the proposed ordinance to Council, a general review of all fees and charges of the City of Houston was undertaken. This general review, which will generate the most reliable direct and indirect cost data in the city's history, may produce a different figure for the processing of the permit. If so, an adjustment (most likely upward) will have to be made in the permit fee. At the time of this writing, however, the $350.00 figure still represents the best estimate of the actual cost of processing the application and administering the regulations proposed under the ordinance.

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Article V. Issuance or Denial of a Permit. Assuming the submitted application conforms to the requirements of the ordinance, the Director of Finance and Administration must within twenty (20) days issue a permit to the applicant. Although there are several grounds on which an application for a permit will be denied -- the failure to supply all of the required information, for example, or the giving of information that is knowingly false, fraudulent or untruthful -- the most important of these reasons focuses on certain distance requirements that must be met in the location of sexually oriented commercial enterprises. (Again, exempted from these locational restrictions are adult movie theaters, adult bookstores, businesses selling alcoholic beverages, and massage parlors.) Specifically, the ordinance would require that all subject businesses be located not less than 750 feet from a church or school (both terms being defined in the ordinance) and not less than 1,000 feet from each other. (In the event two such businesses are closer to each other than 1,000 feet, then Article VI, Section B provides that a permit shall be issued to the applicant "having the longer period of enterprise ownership at the same location for which a permit is sought.")

A third distance requirement set out in Article V has been characterized as the "residential concentration" test. A circle with a 1,000 foot radius is drawn around the location of the proposed business. If within the circle thereby determined seventy-five percent (75%) or more of the tracts are residential (that is, if seventy-five percent (75%) or more of the tracts were coded as residential, in the city's Metrocom computer), then the business could not locate there. Conversely, however, should land use in the area become more commercial, such that the percentage dropped below seventy-five percent (75%), the business might under a new permit application be granted the right to operate at the formerly unacceptable location.

These distance requirements are good examples of the Committee's efforts to analyze the information preserved during the public hearings, to distill from that information the real nature of the problems to be addressed and to then develop solutions logically and consistently related to the actual problems. For example, while many who testified acknowledged the right of such businesses to exist, and while many of these same witnesses expressed solicitude for the rights of those who might want to avail themselves of the goods or services offered by such businesses, the same witnesses also expressed strong concern about balancing these considerations against the effects such businesses might have on children and the fabric of the family unit, as well as property values and the quality of urban life. In reviewing the testimony, the Committee concluded that this concern was justified -- particularly in light of some of the

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expert testimony offered -- and hence created the 750 foot [illegible]e with respect to churches and schools which were viewed as cent[illegible]s for family oriented activities.

A second set of problems brought out in the hearings is the detrimental effect that the clustering of such businesses can have on a surrounding area. Testimony from the Chief of Police, as well as information supplied by residents of areas where concentrations of such businesses are unusually high, repeated the point that the clustering of such businesses exacerbate the problems they create by developing an atmosphere in which a "secondary market" of illicit activities -- both sexual and otherwise -- are encouraged. Although most witnesses agreed that the location of such businesses could not be restricted in such a way as to effectively eliminate them altogether, most witnesses -- including the Chief of Police -- stated that in their view a "separation" or "nonclustering" provision would alleviate some of the problems normally associated with the operation of such businesses. In reviewing this testimony, and in considering the experience of cities such as Detroit, the Committee concurred with the judgment of the witnesses and therefore included a requirement regarding spacing of the businesses from each other.

A third set of problems identified during the hearings was the difficulties created when these businesses locate in areas that are primarily residential in character. These problems [illegible]e aggravated in Houston because of the lack of zoning laws; in [illegible]e absence of any ordinance, only deed-restricted developments are allowed some measure of protection and even that degree of protection stops at the border of the deed restricted area. Most witnesses who testified on this point before the Committee acknowledged that there was little likelihood that zoning would be imposed in Houston. At the same time, however, many of these same witnesses indicated their belief that reliance on deed restrictions as the sole method of protection was woefully inadequate, particularly since so many of the areas most severely affected by the problem of sexually oriented businesses were ones in which deed restrictions had irrevocably lapsed, or in which such restrictions had never existed at all.

In reviewing the testimony on this point, the Committee concluded that there were sound policy reasons for the city to provide greater protection for areas of high residential concentration from the adverse consequences of too many sexually oriented businesses. Concern for children and family-related activities already cited above with respect to the distance requirement from church and schools was likewise a factor here. Concern was also felt for the need to maintain some degree of stability in residential areas so as to provide at least a measure of corresponding stability in the property tax base.

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Finally, concern was expressed that the protections afforded deed restricted areas, however minimal, ought to be extended by providing singular (if not the same) protection to any area with a high concentration of residential usage. (Although the Committee considered extending the same sorts of proections to areas less residential in character, it was not thought that the same policy considerations applied with equal force as areas became "less residential.")

In evaluating these distance requirements, the Committee also remained sensitive to concerns that were raised during the hearings by opponents of the ordinance. For instance, at least one of the lawyers representing some of the businesses that will be affected by the ordinance argued that the "residential concentration" test was tantamount to zoning. After careful consideration the Committee respectfully disagreed. To the Committee, there is a great deal of difference between an ordinance creating a zoning commission which then proceeds to establish use categories for entire areas of the city and an ordinance which merely requires that if the market, operating freely, has resulted in an area that is "predominantly residential" in character, then certain businesses cannot locate within a fixed distance of that area. In the first instance, the city dictates land usage and only a change by the city in the ordinance fixing such usage will permit deviation from that rule. In the second instance, the city merely provides that in the event usage in a particular area should through operation of the free market develop along certain lines, then certain restrictions will be involved. Conversely, should the market dictate a change in overall usage of an area (as in a case where an area formerly predominantly residential became commercial), then the city restrictions would be lifted. The difference might best be characterized as that between active and passive -- or "reflective" -- land management.

The Committee also took quite seriously the concerns expressed during the hearings by some representatives of the affected businesses that determining whether a proposed location would conform with the ordinance would prove unduly burdensome and costly. However, the Committee believes that introduction of the Metrocom computerized mapping system into city government effectively answers this concern. As stated in testimony offered before the Committee by Ken Strange, the Metrocom administrator, it will be possible, for a minimal charge which reflects the actual cost of computer and clerical time, to determine in advance -- and within just a few hours -- whether a particular proposed site is permissible for a sexually oriented business. Under the circumstances, the Committee concluded that the "residential concentration" test was not only a suitable remedy for some of the problems adduced during the hearings, but also that

the test would not place an undue or unfair burden on businesses to be regulated.

A brief comment should be made with respect to the appeals process established to provide recourse from permit denials by the Director of Finance and Administration. While an initial appeal hearing before the Director is provided for in the ordinance, the Committee felt that given the nature of the issues involved, and the desire to assume that the ordinance in both theory and practice did not operate to abuse individual rights, an appeal to Council should also be provided. This has been done in Article V, Section E.

Article VI. Existing Enterprises. The method of transition from the present situation to that under the new ordinance, and specifically the treatment of previously existing businesses under the new ordinance was the subject of considerable thought by the Committee. The results of that lengthy consideration of the transition problems are embodied in Article VI.

Section A of Article VI provides the timetable under which businesses must conform with the ordinance. For this purpose the ordinance divides the City into four quadrants; compliance with the terms and conditions of the ordinance are phased through use of these quadrants. Section B provides that where two subject businesses are within 1,000 feet of each other, that business having the longer period of ownership at the same location shall receive the permit, while the business with the lesser ownership period at the same location shall be denied a permit. In the opinion of the Committee, this approach seemed the fairest way to treat the difficult problem of dealing fairly with businesses too close together to comply with the ordinance, without abandoning entirely the attempt to enforce the ordinance against existing businesses. The Committee chose to remain consistent with this "prior in time, prior in right" approach by providing that where a subject business is closer than 750 feet to a church or school that business will not be required to abandon the location if it can be shown that the period of enterprise ownership at the same location exceeds the length of time the church or school has been located at that site.

Sections C and D of Article VI deal with the difficult issue of grandfathering versus amortization of existing businesses. The Committee decisions with respect to the issues raised by this question again exemplify the careful attempt to base legislative action on the relevant information gathered during the hearing process as well as the desire of the Committee to offer the maximum possible protection to individual interests while also dealing effectively with the need for action testified to in the hearings.

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During the hearings, it became evident to the Committee that the problems created by sexually oriented businesses had been allowed to persist for so long that merely addressing the problem "from here on out" would not be adequate. Prospective legislation would do little or nothing to alleviate the current serious problem caused by businesses already existing. The Committee therefore concluded that existing businesses should come under the ordinance; for this reason the Committee rejected grandfathering of existing businesses and determined that amortization would be the appropriate approach. At the same time, however, the Committee recognized that even if existing businesses were to be brought under the ordinance, this could not be done in a way that would ignore the investments that had been made in the businesses (and therefore prima facie unconstitutionally deprive persons of their property without just compensation,). The Committee understood -- and if it had not, it certainly would have after having been drilled on the point numerous times by representatives of the Legal Department -- that even under an amortization approach the amortization period could not be so short as to effectively deprive the owners of the subject businesses of their property interests without just compensation.

Sensitivity to the need for an adequate amortization period was frustrated, however, by the lack of evidence in the hearing record on which the Committee could base its decision as to what constitutes an appropriate amortization period. No member of the affected industries, nor owners or representatives of affected individual businesses, appeared before the Committee for purposes of offering testimony on this point. (One owner of an adult bookstore did suggest, by written correspondence to the Committee, that the amortization period be extended to ten (10) years; however, the Committee believed that this suggestion was unrealistic. Certainly the recommendation was not supported by any factual data.)

In the absence of such testimony, the Committee found itself in a difficult position. While the Committee admittedly wished to legislate the shortest possible period within which subject businesses must come under the ordinance or, alternatively, abandon their present locations, the members did not want to impose a time limit that, based on actual numbers, was unfair. The problem, however, was that the numbers were not available because the relevant affected businesses had chosen not to supply them to the Committee. (The Committee briefly considered using the subpoena powers available to Council under the Charter when considering such legislative matters, but decided against doing so for reasons explained below.)

In the end, the Committee devised ordinance provisions -- Sections C and D of Article VI -- which deal with this dilemma in an effective, fair and practical way. Section C of Article VI provides that if an existing business cannot qualify for a permit under the ordinance, then that business shall terminate its operations at that particular location within six months after the business receives notice from the Director of Finance and Administration of its ineligibility for a permit. However, should any business so notified believe that six months will be insufficient for the business to recoup the investment represented by the enterprise, then the owner or owners of that business shall have the right to petition the Director of Finance and Administration for an extension, which can be as long as the Director determines appropriate based on the evidence presented.

The Committee believes this approach adequately answers the dilemma presented by the lack of factual testimony in the record as to the earning capacity of these businesses. The provisions set forth a reasonable minimum time period for compliance that speaks to the Committee's desire for speedy implementation of the ordinance. At the same time, businesses which believe six months is too short, can, if they choose, come forward with books and records supporting their contention that they are entitled to a longer amortization period -- indeed, to as long an amortization period as they can prove. Should the Director of Finance and Administration refuse to grant such an extension despite the evidence submitted or should the extension be less than that reasonably justified, the decision could be appealed to the Council under Article V, Section E. And if that appeal failed it is the Committee's understanding that the applicant may have standing to appeal the Director's decision to the state district courts as an arbitrary and capricious exercise of discretionary authority under those doctrines relating to taking of property.

The Committee believes that this approach is fairer and more feasible than fixing a longer period of amortization effective with respect to all businesses. Moreover, this approach avoids the need to subpoena books and records from business owners unwilling or at least hesitant to divulge financial information in order to develop an amortization period grounded in a hearing record. Instead, the decision is left to each individual business and its owner as to whether that particular owner wishes to divulge business data in order to secure an extension of the six month time limit. This assures the business owner maximum privacy should he or she so desire, while also allowing the city to achieve its goal of speedy compliance with the ordinance in order to deal as effectively as possible with a serious existing problem.

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Article VII. Revocation of Permit. The Committee in hearing testimony became concerned not just about the circumstances under which the initial permit would be granted, but also about the means by which a permit could be revoked should a business fall out of compliance with the ordinance during the term of the permit. For this reason, the Committee requested the drafting of provisions that dealt with the principal problems testified to during the hearings as to the operation of these businesses. These common problems can be classified as follows:

Minors as Employees. A number of witnesses before the Committee expressed concern, particularly with regard to adult modeling studios, as to the actual age of some persons employed on the premises. Article VII, Section A(1) provides that a permit shall be revoked if persons under the age of seventeen (17) are found to be employees of a subject enterprise. Seventeen years of age was selected to comply with relevant state law. A companion provision, Article XI, prohibits the entry upon the premises of such businesses of anyone younger than seventeen, and requires each affected business to provide an attendant to assure compliance with this prohibition.

Exterior Appearance and Signage. Although a majority of the witnesses appearing before the Committee felt that the control of the exterior appearance and signage of such businesses would help deal with the negative effect of such businesses on neighborhood stability and property values, most also stated concern that such provisions, if enacted, would not be heeded seriously by the businesses in question. In considering these arguments, the Committee concluded that effective enforcement of these provisions was a necessity. The Committee therefore provided that violation of these provisions will result in loss of the permit to do business.

Recurring or Chronic Criminal Activity. A consistent theme in the testimony before the Committee, whether offered by experts, citizens with specially significant experience with sexually oriented businesses or members of the general public, was the problem of associated crime taking place in these establishments without action being taken by the city or any other suitable authority against such establishments. Once again, many witnesses stated that while they understood the need to accept the right of such businesses to exist, they believed there was a need to provide sanctions against those businesses

which operate outside the law or which permit (either deliberately or by acts of omission) unlawful activities to take place on their premises. Article VII, Section A(3) addresses this problem raised during the hearings by providing that whenever three or more persons are adjudged guilty in a trial court of committing certain criminal acts (as specified in Chapter 21, Chapter 43, Section 22.011, or Section 22.021 of the Texas Penal Code) on the premises of such a business, the permit of that business will be revoked if it can be shown that the owner or operator of the business either knew of the activities and did not seek to prevent them, or else failed to take adequate steps to become aware of the activity.

The Committee believes that the concept of three or more persons being found guilty in a trial court serving as the triggering mechanism for this position is both fair and effective. Requiring actual convictions deals with the concern expressed by some during the hearings that such a provision, if triggered only by a certain number of arrests, would encourage police harassment of such establishments. The sensible alternative appeared to require judicial action on the arrest. At the same time, however, members of the Committee were keenly aware that the pace of the judicial process makes it unlikely that in any one-year period three or more persons would be arrested, tried and have their cases heard at all levels of appeal. Given these realities, Article VII, Section A(3) represents a compromise in which judicial action is required, but completion of the appeals process is not. Moreover, should a particular business owner feel that this revocation mechanism is being used improperly against him because of some defect in the adjudications relied upon, this issue can be raised independently in the appeal on the revocation where the Director can then make a determination on the merits of the argument separate from the criminal process.

False, Fraudulent or Untruthful Permit Information. One of the most significant difficulties reported to the Committee during its hearings by those agencies currently charged with enforcement of existing laws against those businesses proposed to be covered by the ordinance is the lack of accurate and complete data. In many instances according to testimony this lack of information is due to the businesses themselves, which engage in practices ranging from legally complex schemes of corporate ownership that

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obscure true authority and control to outright falsehoods and fraudulent misrepresentations with respect to the operations of a business. It is of course impossible to divert those who are determined to undertake such actions from doing so. But the Committee concluded that a major gap in enforcement would be created if the giving of false, fraudulent or untruthful information on the application form were not provided for; this is the reason for, and purpose of Article VII, Section A(4).

As a concluding comment, the Committee would point out that all of the revocation provisions are subject to the same appeals process provided for elsewhere throughout the ordinance. (These appeals provisions are set out in detail in Article V, Sections C through E.) This appeals process would include an appeal to Council. The Committee is also of the opinion that in the event Council were to uphold the revocation of a permit by the Director of Finance and Administration, that decision would be subject to appeal to a state district court.

Article IX. Other Permit Provisions. Article IX includes a member of miscellaneous but important provisions. Section A requires posting of the permit on the premises of the business authorized by that permit. The permit must be posted in an "open and conspicuous" place to assure ease of enforcement by public officials. (Open and conspicuous posting of the permit also benefits the business, since it allows for a check of the permit's existence with a minimum of disruption to normal business operations.)

Section B makes all permits issued under the ordinance good only for the location for which the permit was originally issued; in addition, permits are not assignable or transferable. This latter provision was adopted by the Committee in response to the problem cited during the hearing of "rolling over" ownership of a business. The propensity of such businesses when under scrutiny (as during a court case brought by the city for prohibited activities) to change ownership and thereby continue to do business while avoiding further legal action (because the new owner has not been named as a defendant in the city suit) is dealt with by making any such change of ownership grounds for termination of the permit. Section C of Article IX makes it unlawful to counterfeit, forge, change, deface or alter a permit in any way.

Articles IX and X. Restrictions on Exterior Appearance and Signage. Article IX which covers all sexually oriented businesses, as well as adult bookstores, adult movie theatres, and massage establishments, sets restrictions regarding the external

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appearance of all such businesses. (With respect to business selling alcohol, only signage and not exterior appearance regulated.) First, no such business can allow its goods or services to be visible from any point outside the establishment. Second, the ordinance forbids the use of flashing lights or pictorial representations on the exterior of such businesses; words can be used to a limited extent as noted below in the discussion of Article X. Third, the ordinance requires that all such businesses be painted a single achromatic color -- that is to say, some shade of grey. Exceptions to this requirement are permitted where the business is located in a commercial multi-unit center where the entire center is painted the same color, or where the color scheme employed is part of an overall architectural system or pattern. (A similar exception is provided for any unpainted portions of the exterior.) The ordinance provides that all subject businesses will come into conformity with these provisions of the ordinance within six months of the effective date of the ordinance.

Article X regulates the signage of all sexually oriented businesses, including adult bookstores, adult movie theatres, and massage establishments; businesses licensed to sell alcoholic beverages also are subject to the signage provisions. The ordinance allows two types of signs to be displayed. The first type -- a "primary sign" -- may contain only the name of the establishment and a generic phrase, selected from phrases specified in the ordinance, describing the nature of the establishment. The letters on a "primary sign" must be uniform and must be of a solid color. The background on the sign also must be of a solid color. Additionally, "primary signs" must not contain any pictorial representations or flashing lights, must be rectangular, must not exceed 75 square feet in area, and must not exceed 10 feet in height and 10 feet in length.

The second type of sign is the "secondary sign." A "secondary sign," while smaller than a "primary sign," has fewer restrictions placed on it. "Secondary signs" are regulated only to the extent that they must be attached to a wall or door of an establishment, must be rectangular, must not exceed 20 square feet in area and must not exceed 5 feet in height and 4 feet in length.

Non-conforming signs must be removed or made to conform within six months of the effective date of the ordinance. Extensions of the six month period can be granted by the Director of the Department of Finance and Administration if it can be proved that more time is needed to recoupment the investment in the non-conforming sign. Approval of the request for extension cannot be withheld if the request is adequately supported by financial records. The procedure for securing such an extension

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is virtually identical to the procedure set out in Art ..., Sections D through E, concerning requests for extensions of the six month amortization period for non-conforming existing enterprises.

The Committee adopted these provisions regarding exterior appearance and signage after hearing considerable testimony, both from expert witnesses and members of the lay public, regarding the problems caused by the exterior appearance and signage of the businesses. Again, the majority of witnesses admitted the right of such businesses to exist, and a number of witnesses pointed out what they believed to be the state-imposed limitations on the city's ability to regulate the location of certain kinds of these businesses, such as adult movie theaters and adult bookstores. However, it was also pointed out to the Committee by a number of witnesses that despite these concessions, action should still be taken to minimize the adverse effect of these businesses on their surrounding neighborhoods.

The Committee found in hearing testimony that these adverse effects take several forms. First, a number of experts in Houston real estate testified that the businesses adversely affect the value of adjoining and neighboring property. Specific examples of this phenomena were cited to the Committee during its hearings. (Similar testimony was offered during the additional hearing held before the entire Council.) Second, the Committee received lay testimony regarding the effects of the exterior appearance of such businesses on children. A number of parents expressed concern over the consequences to their own children and children of others because of exposure to the language and signage, including pictorial representations, used by these businesses. This testimony from lay persons was corroborated by expert statements regarding the adverse effects of such signage and exterior decoration upon children.

These two considerations -- the effect of the businesses on the value of neighboring properties and on children -- seemed to the Committee to be part of the more general problem of preseving a reasonable level of quality of life in Houston, a problem of paramount importance if the city is to maintain a stable community environment where property values are maintained (an essential element in any consideration of municipal finances, for example) and further investment is encouraged. There was considerable testimony, for instance, to the effect that the current situation along lower Westheimer is impeding economic redevelopment of the area. The sexually oriented businesses clustered in that area are apparently able to pay extraordinarily high monthly rents -- much higher than non-sexually oriented businesses can afford. The result has been the "shutting out" of non-sexually oriented businesses, which could survive

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economically except for the artificially high rents. In addition, there was considerable testimony as to how the atmosphere created by the clustering of such businesses made it difficult for non-sexually oriented businesses to attract sufficient clientele to be successful.) This inability to attract "seed businesses" has in turn made it difficult to encourage other larger-scale quality development in the area. It has also discouraged those who wish to reside in the area and thereby continue the mixed-development plan of land use that has historically made the Montrose a unique community.

In response to these problems, the Committee did not propose steps that would ban sexually oriented businesses altogether. Instead, the remedies proposed would limit the concentration of such businesses and their obtrusiveness even where allowed to locate; it is the intention thereby to create an economic situation in which other types of businesses might also be encouraged to locate in an area, thereby achieving a more balanced urban mix. Where the particular type of business could not be regulated as to its location -- as in the case of adult bookstores or adult movie theatres, thanks to the apparent preemption of any city action because of state law -- the Committee recommended the next most effective and available action: namely, to make the businesses as unobtrusive as possible, and to minimize the negative impact of the businesses on their surrounding areas through controls on signage and exterior appearance.

There were those who argued to the Committee that the signage of sexaully oriented businesses is no more alluring than that associated with other outdoor advertising. Other witnesses contended that even the garish external appearance of these businesses was no worse than might be found in conjunction with other non-sexually oriented businesses. Based on all of the testimony, however, the Committee concluded that the qualitative difference between the signage and exterior appearance regulated under this ordinance and other signage and exterior businesses themselves. Based on the testimony, it is the opinion of the Committee that sexually oriented businesses have adverse effects on their surrounding neighborhoods unlike any negative effects that could be shown by strip shopping centers in general, convenience stores or other commercial establishments. As the Committee reads the testimony of those witnesses deemed most credible, a clear case is made that sexually oriented businesses, because of their unique adverse consequences on the surrounding neighborhoods, require regulation in whatever way reasonably possible to minimize those adverse consequences.

It is also the Committee's finding that based both on the testimony and the experience of other city's, the single most

effective action to be taken with respect to sexually oriented businesses is to restrict their location. However, locational restrictions by themselves are not enough; where the law allows, these should be coupled with restrictions on external signage and appearance to minimize the obtrusiveness of the sexually oriented business wherever located. Where thanks to state law the city's right to regulate location has been preempted, the need to strictly regulate exterior signage and appearance becomes even more critical as almost the only meaningful tool left in the municipal arsenal to deal with the problems posed by sexually oriented businesses for the quality of Houston life.

Article XI. Age Restrictions on Entry. A recurrent theme in the testimony before the Committee was the effect of these businesses upon children, which in turn would affect the quality of life in Houston. One of the specific problems considered by the Committee in this regard was the entry by minors onto the premises of such businesses. The Committee felt that barring persons under the age of seventeen from entry onto the premises of a sexually oriented business -- which in this instance would include an adult movie theatre, adult bookstore or massage esablishment -- was a reasonable response to this concern. Section B of Article XI, placing an affirmative duty on the establiment to enforce this provision seemed to the Committee to be the simplest, most reasonable means of attaining enforcement of this article, particularly as the alternative would be a large number of roving inspectors, the cost of which would most likely be borne by the establishments through the permit fee.

Article XII. Restrictions on Employment of Minors. In addition to concern about the presence of minors in sexually oriented businesses as customers, the Committee also received testimony indicating that minors might be employed in some of these businesses, particularly the adult modeling studios. For this reason, the Committee felt it necessary to include a specific prohibition against the employment of persons under the age of seventeen in sexually oriented businesses -- again including adult movie theatres, adult bookstores and massage establishments.

Article XIII. Priority of Right. One issue raised during the Committee's deliberations was whether a sexually oriented enterprise, once lawfully permitted, could lose its permit if a school or church were to be established within 750 feet of the enterprise, or if seventy-five per cent of the tracts of land within the calculated circular area were to become residential in accordance with the terms and conditions of Article V, Section B(3). After substantial deliberation, the Committee concluded that the "prior in time, prior in right" doctrine should be consistently applied. A church or school which

knowingly chose its location despite the prior existence of a sexually oriented commercial enterprise, were not deemed by the Committee to occupy the same status as those schools, churches and residential areas which existed prior to the establishment of the sexually oriented business in question. However, the Committee did provide that this right to continued existence would terminate with the expiration without timely renewal or revocation of the permit.

Article XIV. Effect on Massage Establishments. The City of Houston already has one ordinance governing massage establishments -- Chapter 27 of the Houston Code of Ordinances. The provisions of this ordinance are not intended to supplant that Chapter; but instead are designed to complement its provisions. If a conflict should be deemed to exist between Chapter 27 and this new ordinance, however, the provisions of the new ordiance will govern.

Articles XV - XIX. Additional Provisions. Articles XV through XIX are additional provisions deemed necessary by the Committee for a complete and effective ordinance. Article XV sets the rules regarding notices under the ordinance; all such notices must be sent in writing and will be considered as having been delivered there days after their delivery to the U.S. Mails. Article XVI makes violations of the ordinance a Class C misdemeanor; each day a violation continues is deemed for purposes of the ordinance as a separate offense. Article XVII establishes the authority of the Director of Finance and Aministration, or his duly appointed subordinantes, to enforce the ordinance, if necessary by lawful entry by means of a search warrant onto the premises of the business in question. Article XVIII empowers the City Attorney to file suit to enforce this ordinance. Article XIX provides that if any provision of the ordinance should for any reason be held invalid, the remainder of the ordinance shall continue in full force and effect.

CONCLUSION

The Committee has attempted to show in this Report that the new ordinance regulating sexually oriented businesses is not a "knee jerk" response to public complaints about such establishments. Rather the ordinance is the cumulation of over one year's work during which time citizen input was received, specific problems were identified, various remedies were considered, and legal contours were set. The Committee candidly acknowledges that a more restrictive ordinance was envisioned in the early days of the project, as reflected by the draft initially propagated by the Committee. However, such a restrictive ordinance could not be sanctioned if the Committee were to adhere

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to its goal of striking a careful balance between the rights of those persons who do not wish to be exposed to sexually oriented businesses and the rights of those persons who wish to operate or patronize such establishments. The Committee earnestly believes that the current proposed ordinance achieves that goal, and that the ordinance proposed to Council represents the furthest legally defensible extent to which the city can go in the regulation of sexually oriented businesses.

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HOUSTON CITY COUNCIL

SEXUALLY ORIENTED BUSINESS ORDINANCE REVISION COMMITTEE LEGISLATIVE REPORT

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January 7, 1997

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INTRODUCTION

This report has been prepared by the Sexually Oriented Business Revision Committee for the purpose of summarizing the Committee's work in drafting a proposed amendment to Articles II and III of Chapter 28 of the Code of Ordinances, Houston, Texas. In addition, a new Article VIII has been proposed to be added to Chapter 28. These summaries include prior efforts of regulating sexually oriented businesses (hereinafter "SOBs"), testimony by the Vice Division of the Houston Police Department, reports and requests, citizen correspondence, industry memos, legal department research, and summaries of the principal themes heard in the public testimony taken by the Committee.

The Committee's intention is to supplement prior reports issued in 1983, 1986, and 1991. The original Ordinance was adopted in 1983. The 1986 Supplemental Report included premises that serve alcoholic beverages. The 1991 Supplemental Report addressed the addition of adult bookstores and movie theaters as regulated enterprises within the Ordinance's land use controls. The primary purpose of the current committee was twofold. First, the Committee desired to review the existing Ordinance and the City's ability to enforce the existing Ordinance. Secondly, there existed a need to assess and analyze the Ordinance with regard to its strengths and weaknesses and review them with regard to how effectively this Ordinance protects the interests of the public as well as the rights of the businesses subject to regulation. These amendments and additions relate principally to the licensing of SOB employees, lighting configurations, distancing requirements between land uses, prohibition of "glory holes," elimination of closed-off areas, public notification of sexually oriented business applications, clear lines of vision, and dancer "no-touch" policies.

SOBs enjoy Constitutional protection and must be allowed to exist and operate regardless of feelings about them. If the regulations were to be so onerous or so burdensome that they preclude or inhibit them being able to even exist, they would likely be declared unconstitutional. The Committee made it clear, both during the hearings and afterwards, that it was not the intention of the Committee to propose any ordinance that would be subject to a successful court challenge because it either directly or indirectly (or for that matter inadvertently) eliminated the opportunities for such businesses to exist in the City of Houston. Therefore, the challenge is to keep SOBs from infringing on the rights of citizens without denying SOBs a reasonable opportunity to operate in the City.

This report is not intended as a legal treatise on the regulation of SOBs, although the Committee was guided in its deliberations at various points from advice by the Legal Department and received numerous legal comments from counsel for the regulated businesses. This report is intended to be reviewed from a lay perspective for the use of the members of the City Council and members of the public in understanding the reasons that the amendments and additions to the Ordinance have been proposed. This report is intended only as a summary. The Committee has developed extensive files in connection with its work that are available for review.

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On May 24, 1996, the Mayor's Office announced the members of the newly re-created committee, now titled the " Sexually Oriented Business Ordinance Revision Committee." Council Members Jew Don Boney, Jr. and Helen Huey served as co-chairs. In addition, Council Members Castillo, Driscoll, Roach, Robinson, Sanchez and Saenz served as members.

HISTORY OF THE ORDINANCE

The existing Ordinance had its basis in the work of the 1983 City Council Committee on Sexually Oriented Businesses that resulted in the adoption of Ordinance 83-1812. The history of the Committee's work is documented in the report filed with the City Secretary in connection with Ordinance 83-1812 . This ordinance adopted a land use program that was controlled through permits and various incidental regulations for SOBs. Its focus was on regulating adult modeling studios, adult entertainment parlors, adult massage parlors and other similar businesses. Ordinance 83-1812 did not extend land use controls to premises that had alcoholic beverage permits and licenses, to adult bookstores or to adult movie theaters because the state enabling law upon which the Ordinance was predicated did not then authorize land use controls on those forms of adult businesses. See former Art. 2372w Tex. Rev. Civ. Stat. Ann..

In 1985 the Texas Legislature revised the state enabling law to delete the exemption for premises that held alcoholic beverage permits and licenses. Following the revision of the state enabling law, the Committee reconvened to consider adding the so-called "topless bars" to the land use control structure of the Ordinance. The Committee reconsidered its prior work and took additional evidence relating in the adoption of Ordinance 86-323 which extended land use controls to the topless bars and placed the Ordinance into substantially its present form. The work of the Committee in the submission of Ordinance 86-323 is extensively documented in the Legislative Report filed with the City Council at the time of its adoption.

The genesis for the 1991 proposal amending the Ordinance related to circumstances virtually identical to those that arose in 1985. The Legislature in its 1989 session again amended the state enabling law. The 1989 amendments deleted the exemption from land use controls that had formerly existed in the state law for adult bookstores and adult movie theaters. However, some of the evidence received from the public in 1983 and 1986 related to adult bookstores and adult movie theaters. For this reason the Committee drew upon its 1983 and 1986 works in the preparation of the amended Ordinance draft and regarded the 1983 and 1986 evidence and experiences as pertinent to its 1991 work.

The scope of the Committee's recent work evolved as a result of increasing community concern regarding the proliferation of Sexually Oriented Business under the existing regulations.

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In addition, the Houston Police Department urged the City Council to consider means to control serious violations that were increasingly repetitive at numerous SOB establishments. Because of these requests and concerns the current Committee was established to review and strengthen the existing ordinance.

A DESCRIPTION OF THE COMMITTEE'S WORK

General. The Committee was re-established in the summer of 1996 to review ideas on strengthening the current Ordinance. The Committee has conducted its business in public meetings. These meetings were posted on the City Hall bulletin board and were typically attended by the Committee Members, City support staff and interested members of the public and/or the regulated businesses. The Committee also conducted three of its meetings as public hearings at which members of the industry and the general public testified. Along with the City Hall posting, notification of these public meetings was published in the newspaper and letters were sent to civic associations, individuals who had requested participation, and current SOB permit holders. The mailing list consisted of more than 1,000 names and was maintained in the office of Council member Huey and the Mayor's Citizens Assistance Office. Proponents and opponents of the regulation of SOBs were encouraged to speak openly of their ideas and viewpoints.

In addition to these public hearings, a significant number of people chose to voice their opinions through written correspondence to the mayor, city council, and/or legal department. The authors of these letters consisted of civic association presidents, topless club owners, City of Houston citizens, SOB dancers, state elected officials, advocates of various organizations and other concerned citizens. There are approximately two hundred and seventy-five letters on file. Most urged for the strengthening and enforcement of the current ordinance. While others stressed First Amendment rights, some urged industry cooperation, and others voiced concerns about the growing number of unlicensed SOBs.

Findings and Conclusions Based upon these proceedings, the committee has made additional findings and conclusions to supplement previous legislative reports.

First, because of the criminal activities that are associated with SOBs, the Committee determined the necessity of licensing all SOB entertainers and managers. Requiring an entertainer or manager to be licensed would establish a foundation for documenting those who have previous convictions for prostitution, public lewdness and other similar offenses. In addition, licensing could help eliminate underage entertainers because they would be required to prove that they are eighteen or older in order to obtain the license.

Second, the Committee found that there exists a serious predicament in the enforcement of public lewdness, prostitution, indecent exposure, and other criminal activities. Vice officers testified that because they do not engage in inappropriate behavior (such as removing their

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clothing), convictions are difficult to achieve. The officer's non-participation is perceived by the entertainer that he is working under cover. The entertainer proceeds with caution, avoiding lewd behavior that might normally occur. In addition, when a patron is charged along with the entertainer, it is difficult to obtain a conviction because of the sensitivity of the relationship between the two accused.

Third, the Committee was shown a video by the HPD Vice of a bookstore "glory hole." These exist in small rooms or booths in which individuals are admitted and permitted to use one or more arcade devices. The enclosed booths are joined to the neighboring booth by a hole in the wall. These "glory holes" are used to promote anonymous sex and thus facilitate the spread of sexually transmitted diseases.

Fourth, the Committee found that sexually oriented businesses that did not have clear lines of vision encouraged lewd behavior or sexual contact. Many businesses are designed with areas that are out of the view of managers and are conducive to illegal behavior. Entertainers are cognizant of these areas where violations can occur unobserved by management or law enforcement personnel who are conducting open inspections. For example, high back chairs are used as barricades to shield illicit behavior. In addition, testimony revealed that private, secluded, dimly lit areas have the same effect. Testimony revealed that once the entertainer felt comfortable with the patron, ruling out that he was an undercover officer, he would be asked to move to a more private area. In some cases he would be asked to pay a fee to enter the "VIP" room by either purchasing a membership or purchasing an expensive bottle of champagne. HPD cannot always afford these admittance fees in the course of investigations and often cannot access and monitor these specific areas.

Fifth, the Committee considered the issue that multifamily tracts were being counted as one tract in the residential quota, where in actuality, many families were living independently upon one tract. Through the Planning and Development Department a new formula was established based on average homeowners' property size that would account for the piece of land. These new figures were used to achieve a residential formula of eight single family tracts for each acre of multi-family track. In addition, those lots platted for residential development, but currently unimproved, were added to the residential tract formula.

Sixth, inadequate lighting prevents managers and police officers from monitoring illegal activities. Often the lighting is so dim that an investigator cannot observe the activities from one table to the next. Vice officers testified that smaller businesses use lighting as a way to camouflage illegal activities. As a measurement for responsible lighting it was suggested that the requirement be similar to those minimum requirements established by the Uniform Building Code for 'exit' signs.

Seventh, the committee determined that enterprises that had locked rooms, were often used as fronts for prostitution. An entertainer would simply request the patron to remove his clothing. Those who objected were deemed to be Vice officers therefore restricting the usual services of the entertainer. The more money that a customer showed, the greater the 'services'.

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Eighth, in keeping with the theme of family preservation, the committee was urged through public and expert testimony to include public parks in distancing restrictions. A "public park" is defined as a publicly owned or publicly leased tract of land, whether situated in the city or not, designated, maintained and operated for public use for recreational purposes by the city or any political subdivision of the state and containing improvements, pathways, access or facilities intended for public recreational use. The term "public park" shall not include public roads, rights-of-way, esplanades, traffic circles, easements or traffic triangles unless such tracts or areas contain and provide improvements or access to a recreational use by the public. Additionally, members of the Committee felt that the testimony supported inclusion of "private parks" as a protected land use. The Legal Department was asked to consider possible inclusion of this category in the final draft Ordinance.

Ninth, repeated testimony requested that notification of a pending Sexually Oriented Business Permit be given to surrounding neighbors of proposed sights. It is within the framework of the current case law to require a SOB applicant to post signs on the proposed site in addition to publishing an intent to apply for a permit in the local newspaper. Testimony revealed a great deal of concern over the general public's lack of warning of the SOB application until it has been approved and opened.

Tenth, the committee found that continuing the amortization provisions of the previous Ordinances would be preferable to grandfathering the sexually oriented businesses that do not comply with the amended Ordinance. Grandfathering would allow nonconforming uses to continue under the new ordinance in perpetuity, or until market forces wiped out the business. Grandfathering creates a monopolistic position for non-conforming property uses and prevents the municipality from exercising its power to protect its residents. Under the amortization provisions of the previous Ordinance, a business regulated as to location had six months to come into compliance. However, if such a business believed that six months was an inadequate period in which to recoup a reasonable return on invested capital, that business would have the opportunity to request an extension of the compliance period. In light of this recourse, and taking into account the present, ongoing and serious detriment that such businesses pose for the community at large, the Committee determined that an appropriate balancing of interests justified continuation of the amortization provisions.

HPD Vice Review:

The Houston Police Department's Vice Division played a major role in providing the City with statistics, details and testimony regarding their experiences with SOBs. In addition to written reports, three undercover vice officers testified at the August 29th hearing. Currently, the licensed SOBs are broken down as follows:

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36 Topless Clubs
9 Adult Theaters
9 Nude Clubs
4 Video Stores
28 Modeling Studios
18 Adult Bookstores

In addition to the above list, there are approximately 18 adult theaters, bookstores and video stores with injunctive relief under federal court order in pending litigation styled, 4330 Richmond Avenue Incorporated, et al. v. The City of Houston. The City cannot enforce the SOB ordinance against the enterprises while the litigation is pending.

Between July 1, 1995 and August 31, 1996, the Houston Police Vice Division recorded 517 arrests in SOBs resulting in 355 convictions, or a conviction rate of 69%. Topless clubs experienced 289 dancer arrests with a conviction rate of 59%. In addition two managers were arrested but not convicted. There were six patrons of adult theaters taken into custody, resulting in a conviction rate of 83%. Dancers in all nude clubs accounted for 31 arrests, of which 71% were convicted. Thirty-six patrons of adult video stores were arrested resulting in an 86% conviction. The modeling studios' record consisted of four arrests and one conviction. One hundred and forty-nine patrons of adult bookstores were arrested with 125 convictions (84%).

Of the 36 topless clubs, the number of arrests per club ranged from 0 to 50. While seventeen clubs had less than 10 arrests in the last two years, one club had 50. Prostitution, public lewdness, narcotics, and indecent exposure made up these violations. Auto thefts are also on the rise in topless bar vicinities. This is due largely to the fact that a thief knows that he has about an hour and a half to steal the car before the owner comes back.

Topless clubs make up the majority of arrests in the Vice Division's enforcement experience. When the officer goes under cover in a club, he must assume the identity of a patron. Employees explicitly ask for badges, weapons, handcuffs, and go as far as feeling around the patron looking for these items. Once they feel comfortable that the patron is not a police officer, they will often ask him to move to a more secluded area, or possibly the VIP room of the club. The entertainer explains that she can do better dances in these areas and a 'lot more things' because they aren't watched as closely. This is when the opportunity for sexual or lewd activities occurs.

The Vice Division representatives testified that licensing and criminal background checks will assist in the regulation of the entertainers behavior. Often, the same dancer is arrested under a different or "stage" name. A license will ensure an individuals true name, thus avoiding the use of stage names. This will ensure that individuals who are arrested and convicted are properly identified in the event of future criminal arrests.

Modeling studios, tanning salons, encounter parlors and similar SOBs require the patron to disrobe on entry. Performance is based specifically on the amount of money a patron is willing to

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spend. This takes place behind locked doors. Vice officers' testimony revealed that in their opinion, these businesses were merely fronts for prostitution. Vice officers elaborated on schemes of credit card fraud contributed to these enterprises. Often the charged amounts are altered or bogus charges are sent through for payment. When the client complains, he is threatened with the disclosure of the type of enterprise that he was in.

Vice officers testified that "bookstores are nothing more than just blatant open sexual contact between people with complete anonymity." With professionally cut 'glory holes', random sexual activity between males is rampant. One officer went as far as testifying that in his eleven years with Vice he does not recall ever seeing anyone go into a booth, watch the movie for thirty minutes and walk out.

The HPD Vice officers felt that the following ordinance change suggestions would be helpful in the enforcement and regulation of sexually oriented businesses:

1.) licensing of persons involved in a SOB - manager, owners, dancers, waiters, bartenders
2.) minimum age 21 (this requires a state law change)
3.) premises need to be well lit inside
4.) no touching
5.) models in modeling studios should not be allowed to remove all their clothes
6.) make it a violation for models to ask patrons to remove all clothes
7.) require bookstores and arcades to be well lit, no dark corners, no booths, no access between video booths, and no "glory holes"
8.) entertainers to be considered employees rather than contractors
9.) all investors and shareholders to be disclosed and licensed
10.) public display of licenses
11.) 6 foot distances between performer and patron
12.) no private viewing areas
13.) devices used as barriers limited to four foot heights
14.) illumination of one candle foot at floor level minimum
15.) no locked interior doors in modeling or tanning studios
16.) regulate escort services
17.) prohibition against use of inanimate objects by SOB employees to depict sexual conduct
18.) prohibition against warning systems
19.) redefine "multi-unit center"
20.) restrict transfer of permit/license
21.) develop time line for revocation/suspension hearing
22.) amend terms "knowingly" and "negligence"
23.) owners, managers and employees of a SOB shall have their license immediately available

Although not all of these items were determined by the Legal Department as legally defensible under the extant enabling statute and case law, they were taken into consideration.

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PUBLIC HEARING SUMMARY

The initial Public Hearing was held on July 15, 1996 in the City Council Chamber. Council Member Boney outlined the intentions of the current committee as:

a. review the ordinance
    1. enforcement issues
    2. effectiveness of the ordinance
    3. operating procedures
b. review all SOBs, regulated and licensed, unlicensed and illegal
c. licensing of employees
d. visibility issues
e. revision of land policies
f. balance SOBs' constitutional right and the right of the communities

The public testimony proceeded as follows:

According to members of the industry, policies for public lewdness cases are made in a personal and participative way. In other words, Vice officers encourage lewd behavior, even to the extent of participating, in order to "get a case." Industry representatives generally agreed that employee licensing is necessary, though some prefer the Police Department, others prefer the Health Department. Depending on the quality of an arrest, three or five within twelve months should be sufficient for revocation/suspension of SOB license. In addition, it is felt that there lacks effective police enforcement of unlicensed tanning salons and massage parlors.

Dr. Devinney, professor of Abnormal psychology, testified that sexual deviants are attracted to communities because of Sexually Oriented Businesses. There are some deviants who cannot get sexual satisfaction unless they pay for it. While others are not satisfied unless they take or steal it. In addition, there are some sexual deviants who cannot have sexual satisfaction without forbidden partners such as children, invalids or elderly. SOBs located in residential or even retail areas attract sexual deviants because they have their entertainment, then they come out and have a fertile field for solicitation. Therefore, they do not belong in or near residential communities.

Because of the adverse secondary effects caused by Sexually Oriented Businesses, citizen responses urged the increase of distancing of SOBs from schools, churches and licensed day cares. In addition, they perceived a need to decrease the current residential formula of 75% to 25%. They also requested notification to area residents of proposed SOBs, either by posting a large sign on the property or individual mail outs. In addition, they urged that billboard advertising be illegal.

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The second public hearing occurred on July 29, 1996. Attorneys representing the SOB industry requested that a hearing panel be developed to deal with permitting issues. In addition, the panel should consist of non-law enforcement individuals, and contain several different hearing officers.

Testimony indicated that although many SOBs follow the rules, most industry representatives are not against stronger regulations in regards to licensing the entertainers. Often the dancers are transient. The establishment of a license issued through HPD would create a data base of information.

Furthermore, a great deal of discussion was given to a "no touch" policy. Owners and dancers alike stated that touching was part of the entertainment. Plexiglass barriers, mini-stages, and six foot distancing were all criticized.

A third public hearing was scheduled for the public to comment on the draft ordinance prior to final council approval, and was held January 6, 1997.

REVIEW OF WRITTEN CORRESPONDENCE

More than two hundred seventy-five letters were received regarding the sexually oriented business ordinance. These letters came from property owners, SOB employees, concerned citizens, parents, educators, civic association, and business owners. While not all suggestions could be incorporated into this summary, each letter was carefully reviewed and passed to other members of the committee. These documents are on file in the Legal Department.

Approximately one hundred seventy five letters were the result of a letter writing campaign promoted by 'Adults for Legal Freedom'. The principal theme of these letters was the over- regulation of the adult business industry. They feel that this industry attracts tourism, pays considerable tax revenues, and creates jobs, and therefore is a valuable asset to the city. In addition, they believe the reworking of this ordinance is for political reasons only.

Letters came in urging the extension of distancing between a SOB and neighborhoods, schools, licensed daycares, churches, medical clinics, government offices, historic districts, public parks, hospitals, and distancing between sexually oriented businesses. It was asked that new residential projects with preliminary approval from the planning commission be included in the residential formula. Also, concerns arose over the representation of multifamily dwellings in the residential radius computations.

Notification of the public that a Sexually Oriented Business has applied for an application was a relatively new issue brought before the committee members. Suggestions ranged from 90

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day notices by property signs to postcards being mailed to all residents in the area. Notification by newspaper, certified mail, and public hearings were also brought forth.

With regard to entertainers, recommendations were to prohibit touching, prohibit asking customers to undress, install an 8' high stage, require 6 feet distances from patron, and plexiglass barriers, license all dancers, increase minimum dancing age, require criminal background checks, no licenses issued to convicted felons, and require license to be worn at all times when inside an enterprise.

Other correspondence recommended that SOB permits should be renewed annually, repeated violations should be ground for denial, prohibit locked interior doors, require sufficient illumination of the facility, and to hold owner/manager accountable for activity occurring on the premises.

While opinions and suggestions varied. Most people agreed with the proposition that sexually oriented businesses would continue to exist, and expressed concern to create a solution in which they could coexist without infringing on the rights of the citizens of the city.

COMMITTEE RECOMMENDATIONS

A. Adult Arcade Ordinance Changes.

1. It is recommended that the Police Department's concerns regarding "adult arcades" or "peep shows" be addressed by amending art. II of Ch. 28 of the Code of Ordinances to eliminate problems of sexually transmitted disease and criminal sexual conduct in such operations. At present, art II prohibits enclosed booths for viewing sexually oriented entertainment but regulates only establishments whose "arcade devices" are intended for the viewing of five or fewer persons. The recommended amendment would make devices intended for viewing by less than one hundred persons come under the purview of art. II. In addition, no adult arcade or adult mini-theatre shall be configured in such a manner as to have any opening in any partition, screen, wall or other barrier that separates viewing areas for arcade devices or adult mini-theatre devices from other viewing areas for arcade devices or adult mini-theatre devices. This provision shall not apply to conduits for plumbing, heating, air conditioning, ventilation or electrical service, provided that such conduits shall be so screened or otherwise configured as to prevent their use as openings that would permit any portion of a human body to penetrate the wall or barrier separating viewing areas. This should eliminate the

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problem of enclosed booths and "glory holes," in such establishments. In addition, it shall be the duty of the owners and operator and it shall also be the duty of any agents and employees present in an adult arcade or adult mini-theatre to ensure that the premises is monitored to assure that no openings are allowed to exist in violation and to ensure that no patron is allowed access to any portion of the premises where any opening exists in violation.

2. It is recommended that responsibilities for hearing appeals from permit decisions of the Director be considered by a hearing officer, rather than the city's General Appeals Board, which is the present appellant body under art. II of Ch. 28 of the Code of Ordinances. This recommendation would only impact article II of Chapter 28, as all other appeals regarding sexually oriented businesses are presently heard by a hearing official. The hearing officer shall be an official appointed by the mayor and confirmed by city council. If, after the hearing officer determines, based upon the nature of the violation, that the ends of justice would be served by a suspension in lieu of a revocation, he may suspend the operation of the permit for a period of time to be stated in the order of suspension, not to exceed two (2) months. The General Appeals Board has never heard such an appeal is principally concerned with Building Code matters, rather than regulation of sexually oriented businesses.

3. In addition, it is recommended that the fees associated with the processing of applications should be brought up to date to reflect current actual costs.

B. Procedural Changes--Sexually Oriented Business Enforcement.

1. It is recommended that the appellate procedures in art. III of Ch. 28 of the Code of Ordinances be revised to provide for a panel of hearing officers, appointed by the Mayor and confirmed by the City Council, consisting of licensed attorneys, serving on rotation, who will consider all appeals relating to sexually oriented businesses and licenses. Decisions by such hearing officers will be final and subject to immediate judicial review. The availability of an intermediate appeal to the City Council from decisions of the hearing officer should be eliminated. Although the need for an intermediate appeal from permit decisions to the City Council at one time appeared necessary, it now appears that due process requires only one administrative hearing prior to judicial review. This change will eliminate delay and will prevent City Council from being inundated with the large number of appeals anticipated due to implementation of increased regulations.

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2. It is recommended that the Chief of Police be required by ordinance to report to the Mayor and the City Council, on a monthly basis, all violations of sexually oriented business regulations and related state laws, with respect to all licensed facilities and licensed persons.

3. It is further recommended that the Legal Department, through the City Attorney, should have authority to initiate all administrative actions regarding suspension or revocation of any permit or license under the various ordinances. The city attorney shall execute a monthly report summarizing revocation actions filed, currently pending or decided during the reporting period. This authority currently rests with the Chief of Police in his capacity as Director.

4. It is recommended that sexually oriented business permits involved in administrative hearing or procedures regarding denial, suspension or revocation be prohibited from being transferred to another entity during the pendency of the administrative process.

5. It is recommended that the Chief of Police continue as Director under Ch. 28 of the Code of Ordinances for purposes of permitting, investigation and enforcement requirements, with the exception noted above that the Legal Department will be responsible for initiating administrative enforcement actions.

C. Land Use and Related Changes – Sexually Oriented Businesses.

1. Information from the Planning Department indicates that the present distance requirements with respect to churches, schools and day care centers could be substantially increased, perhaps to as much as 1500 feet from the present 750 feet, and that the radius for counting residential tracts could be increased to 1500 feet from the present 1000 feet, all without unduly restricting availability of conforming locations for sexually oriented businesses to operate. The Committee recommends that these changes be instituted to protect such land uses from the adverse secondary effects of SOBs.

2. It is recommended that multi-family dwellings situated on a single tract be considered for additional protection under the residential test. Under the present ordinance, a sexually oriented business may not operate at a location if 75 percent or more of the tracts within a 1,000 foot radius of the business are residential in character. However, many multi-family dwellings are located on single tracts. Although it may not be possible to count each unit in a multi-family development as a separate residential "tract" for purposes of the residential restrictions of the ordinance, it is recommended that a ratio of eight single family tracts for each acre

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of multi-family tract be considered to provide additional consideration for protection of residential neighborhoods that include multi-family developments.

3. Signage restrictions under the present ordinance apply essentially only to single use, freestanding sexually oriented businesses and not to "multi-tenant centers." As a practical matter, this allows some sexually oriented businesses to utilize large signage and otherwise prohibited exterior decorations by the simple expedient of including two or more small non-sexually oriented businesses on the same premises. It is recommended that the signage and exterior appearance provisions of the ordinance be strengthened to eliminate this practice.

4. In keeping with the theme of family preservation, the Committee recommends the inclusion of "public park", and, if legally definable, "private parks" to the protected land uses. Public and expert witnesses testified that the inclusion of the was necessary to continue their rejuvenation. The term 'residential' shall also include any unimproved tract designated for tax appraisal purposes as residential by the Harris County Appraisal District. In addition, it shall include any tract, that, based upon the records of the planning official has been subdivided or platted for residential use, but that is not yet designated for tax appraisal purposes as residential.

5. The committee recommends that each applicant , following the filing of the application and payment of the filing fee, place signs at the premises intended as the site for the SOB (at least 24 inches x 36 inches in size) that provide notification and information specifically stating "Sexually Oriented Business Permit Application Pending."

6. The committee recommends that each applicant give notice of the application by publication at his own expense in two consecutive issues of a newspaper published in Houston, Texas.

D. Conduct and Operations - Sexually Oriented Business Entertainers and Managers

1. The committee recommends that all entertainers and managers of SOBs hold permits issued by the vice division of the police department. The permit application shall include name, address, date of birth, photo identification, a list of criminal charges pending, convictions and time in jail. Crimes justifying a denial of a permit are limited to offenses relating to criminal sexual conduct and criminal activities known to be prevalent in SOBs.

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2. The committee recommends the issuance of two photographic permits, a personal card and an on-site card. Each manager or entertainer shall conspicuously display his personal card upon his person at all times while acting as an entertainer or manager of or in an enterprise. The on-site card shall remain in the charge of the on-site manager of the enterprise to hold while the manager or entertainer is on the premises.

3. The committee recommends that is shall be unlawful for any entertainer to touch a customer or the clothing of a customer while engaging in entertainment or while exposing any specified anatomical areas or engaging in any specified sexual activities.

E. Amortization

Beginning in 1983, prior to the adoption of the current series of City regulations regarding sexually oriented businesses, the City Council Committee studying the issue concluded that the nature of the adverse secondary effects produced by the operation of sexually oriented businesses could only be addressed by enforcing regulations against existing businesses (i.e., "amortization"), rather than allowing businesses existing at the time of the ordinance passage to exist essentially in perpetuity (i.e. "grandfathering"). The City Council legislative report, which was subsequently adopted by the full City Council concluded, "During the hearings, it became evident to the Committee that the problems created by sexually oriented businesses had been allowed to persist for so long that merely addressing the problem 'from here on out' would not be adequate. Prospective legislation would do little or nothing to alleviate the current serious problem caused by businesses already existing. The Committee therefore concluded that existing businesses should come under the ordinance; for this reason the Committee rejected grandfathering of existing businesses and determined that amortization would be the appropriate approach." (Houston City Council on the Proposed Regulation of Sexually Oriented Businesses Report, December 1, 1983, pg. 29).

This position was reconfirmed when the City Council revisited regulation of sexually oriented businesses in 1986 and 1991. Each subsequent revision of the City's sexually oriented business ordinances included an amortization provision, designed to give all existing affected sexually oriented businesses an initial six-month period for compliance, including relocation, if necessary, and an opportunity to justify an additional extension for lawful operation before a hearing examiner appointed by the director under the ordinance. Records of the amortization hearings indicate that many affected businesses were able to obtain extensions of up to 5 1/2 years following the initial six-month compliance period. The average extension, historically, has been about 2 to 3 years. The factors considered in granting additional extensions of time included:

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(1) the amount of the owner's investment in the existing enterprise through the date of passage and approval of the Ordinance;

(2) the amount of such investment that has been or will be realized through the 180th day following the effective date of the Ordinance;

(3) the life expectancy of the existing enterprise;

(4) the existence or nonexistence of lease obligations, as well as any contingency clauses therein permitting termination of such leases.

Amortization, as opposed to grandfathering, of existing sexually oriented businesses in Houston was specifically upheld by the federal district court in the case of *SDJ, Inc. V. City of Houston*, 636 F.Supp. 1359 (S.D. Tex. 1986), affirmed 837 F.2d 1268 (5th Cir. In *SDJ*, the court held that "It is generally accepted that preexisting non-conforming uses are not to be perpetual." 636 F.Supp. at 1371. The Court noted that Texas follows the generally accepted rule that nonconforming uses, subject to zoning or similar regulations, are not to be perpetual, and that amortization to allow for the recoupment of investment in an existing land use is an appropriate measure to balance the property owners' rights against the proper exercise of the City's police power to regulate non-conforming uses. See, *e.g., City of University Park v. Benners*, 485 S.W.2d 773 (Tex. 1972).

"Grandfathering" essentially contemplates the indefinite continuance of non-conforming businesses or land uses following the passage of zoning or similar land use ordinances, notwithstanding that such businesses or uses clearly violate the provisions of the ordinance. The effect of "grandfathering" is to continue such non-conforming uses indefinitely, although new land uses may be subject to the newly enacted restrictions. A number of authorities hold that established non-conforming uses that are grandfathered must be allowed to continue the use, notwithstanding transfer or change in ownership. See, Section 25-183.50, McQuillin, Municipal Corporations. These authorities hold that only if a non-conforming use is abandoned altogether can the zoning or other ordinances be enforced against the particular property or business use. *Id.* While these authorities may not necessarily preclude termination of non-conforming rights upon transfer of ownership under Texas law, it is altogether possible that non-conforming sexually oriented businesses could find ways to structure sale of assets or ownership interests in such a manner as to perpetuate the entity "owning" the sexually oriented business to avoid termination of non-conforming rights. In any event, most non-conforming sexually oriented businesses would likely enjoy the opportunity for a very long continuation in business under any "grandfathering" scheme.

In contrast, amortization has been determined by the prevailing majority of courts in this country to be a reasonable means of accommodating the need to protect the public from

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adverse land uses, while at the same time giving consideration to the rights of business owners to recoup business investments, prior to feeling the effects of a restrictive ordinance. The problem with "grandfathering" is that it perpetuates non-conforming uses for an indefinite period, thus preventing the effective exercise of the City's police powers to protect its residents. As noted by the Supreme Court of Texas, "There are strong policy arguments and a demonstrable public need for the fair and reasonable termination of non-conforming property uses which most often do not disappear but tend to thrive in monopolistic positions in the community.. We are in accord with the principle that municipal zoning ordinances requiring the termination of non-conforming uses under reasonable conditions are within the scope of municipal police power. That property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made. Otherwise, a lawful exercise of the police power by the governing body of the City would be precluded." *City of University Park v. Benners*, *supra*, 485 S.W.2d at 778.

The adult bookstores and theaters that challenged the 1991 City of Houston sexually oriented business amendments as requiring them to change operation or relocate claimed in the pending federal lawsuit that the City was legally required to grandfather them at their present locations. The City has vigorously contested this contention, which is not in accord with the settled law governing the matter. In additions, all prior City Council committees and City Councils considering implementation of new sexually oriented business ordinance revisions have concluded that amortization is necessary to provide protection to all residents of the City, while recognizing the ability of business owners to remain in operation without relocating for a reasonable period of time. Although the City has occasionally experimented, on a small scale, with "grandfathering" in the past, such provisions have been limited to relatively small numbers of businesses such as automotive salvage yards. In no such case has the City Council documented extensive adverse secondary effects on surrounding neighborhoods, such as have been presented to this Committee and prior City Council committees regarding the operation of sexually oriented businesses.

As a practical matter, the "grandfathering" of existing sexually oriented businesses under any proposed ordinance revision would allow such businesses to continue to operate in violation of new regulations indefinitely. However, persons proposing to operate new sexually oriented businesses would have to comply with the full force of more stringent regulations, and residents and neighborhoods presently adjacent to existing sexually oriented businesses would have to essentially live with the continuing effects of such businesses on their localities for an indefinite period. While such a situation would not necessarily give rise to any legal cause of action on the part of such new businesses or existing neighborhoods, the potential for the perception of uneven treatment with respect to the protected position of existing sexually oriented businesses is readily apparent.

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Historically, the City's amortization program has significantly reduced the adverse secondary effects of sexually oriented businesses in a relatively short time-frame, while still terminating existing nonconforming businesses in a legally permissible fashion. Further, the City's position in pending litigation involving amortization of adult bookstores is best served by maintaining an amortization policy consistent with past practice, rather than experimenting with grandfathering. In conclusion, although "grandfathering" remains technically available as a legal option for implementation of proposed sexually oriented business amendments, it clearly poses significant legal and policy disadvantages, as noted above. The Committee therefore recommends that existing SOBs rendered nonconforming be allowed to recoup investment through an amortization process.

SECTION BY SECTION ANALYSIS

The Amended Ordinance incorporates a substantial number of procedural and administrative changes that reflect ten years of operating experience with the Original and two Amended Ordinances and a better understanding of the ways in which enforcement of the ordinance could be improved. This portion of the Report briefly outlines on a section-by-section basis the major changes that have been made and the reasons for those changes.

Section 28-81. Definitions. General Comment. As a general matter, definitions in Section 28-81 have in many cases been reworded to conform more closely with definitions already used in other municipal ordinances. In addition, "adult mini-theatre" has been added throughout this amended ordinance.

Section 28-81. Definitions. "Adult mini-theatre." In the previous Ordinance, no mention was made of an "adult mini-theatre." This definition has been added to incorporate theatres that are intended for the viewing of five (5) to one hundred (100) patrons.

Section 28-81. Definitions. "Mini-theatre device." In the previous Ordinance, no mention was made of a "mini-theatre device." This definition has been added to incorporate any coin or slug operated or electrically or electronically or mechanically controlled machine or device that dispenses or effectuates the dispensing of 'entertainment,' that is intended for the viewing of more than five (5) persons but less than 100 persons in exchange for any payment of any consideration. It is not intended to include any conventional motion picture screen or projections that are designed to be viewed in a room containing tier or rows of seats with a viewer seating capacity of 100 or more persons.

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Section 28-81. Definitions. "Owner or owners." This definition has been expanded to include the major stockholders/controllers of a corporation. Although requests came in to list all stockholders, it does not require the disclosure of non-controlling parties.

Section 28-81. Definitions. "Specified anatomical areas." In the previous Ordinance, no mention was made of "specified anatomical areas" in this particular section. As a matter of consistency throughout the ordinance, it has been added here.

Section 28-92 (e). Application. The adult arcade or adult mini-theatre permit fee was established eleven years ago and analysis reveals that with the increase in administrative costs, this figure is no longer viable. Therefore, the increase from $75.00 to $275.00.

Section 28-92 (f). Application. In an effort to clarify the application process, the submission of the applicant must be submitted by hand delivery by 'the intended operator.'

Section 28-92 (h). Application. Where a premises is so configured and operated as to constitute both an adult arcade and an adult mini-theatre, then the operator may apply for and obtain a combined permit authorizing operation as both an adult arcade and an adult mini-theatre.

Section 28-93 (a). Issuance or denial by police chief. For purposes of consistency throughout the ordinance, the notice of issuance or denial of the permit has been expanded to twenty days with a possible extension totaling thirty days.

Section 28-93 (g). Issuance or denial by police chief. All fees must be paid with either a certified check, cashier's check or money order.

Section 28-94. Term. Permit terms have been restructured to read as follows: "Each permit shall be valid for a period of one (1) year and shall expire on the anniversary of its date of issuance, unless sooner revoked, or surrendered. Each permit shall be subject to renewal as of its expiration date by the filing of a renewal application with the police chief. Renewal applications must be filed at least twenty (20) days prior to the expiration date of the permit that is to be renewed and shall be accompanied by a fee of one hundred dollars ($100.00).

Section 28-95. (b). Transfer upon change. The original transfer fee was set over ten years ago. The Vice department recently analyzed the current costs for transfer. The transfer application fee has changed to $100.00 to reflect these costs.

Section 28-98. Conduct in adult arcades or adult mini-theatres. The terms "indecent exposure" and "lewd conduct" have been added here to be consistent throughout this Ordinance.

Section 28-99 (b). Appeals. "Secretary of the general appeals board" has been deleted and replaced by "hearing officer" because it was determined that the transfer of this duty will streamline the appeals into an efficient, professional, and impartial process. In the event it is not

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Conducted by:

PLANNING DEPARTMENT
CITY OF PHOENIX

May 25, 1979

ADULT BUSINESS STUDY

INTRODUCTION

A necessary premise for regulating adult businesses by zoning is that a land use relation or impact results from this form of business. Many zoning ordinances throughout the nation now have provisions based on one of two basic approaches to control the location of adult businesses. One approach, sometimes known as the Detroit Model, divides or prevents the concentration of adult businesses in an area. A certain distance from residential neighborhoods, churches, and schools is also maintained. Another approach, or the Boston Model, fosters the concentration of adult businesses in one area of the City.

The latter approach has resulted in the more noteworthy problems. For instance, in Boston's concentrated adult business area there is control of signs, upgrading of streets and sidewalks, renovation of store fronts, and even the construction of a new park. This scheme has not affected the high number of stabbings, murders, and muggings which take place in the district.

Also, at one time, New York City had concentrated adult business districts. However, the police department reported that crime complaints were almost 70% higher on police posts with adult businesses, as opposed to posts without them. The reports showed higher rates of rape, robbery and assault. In one adult business concentration around Times Square, sales taxes dropped by 43% in a two-year period, due to the loss of 2.5 times as many retail jobs as the rest of the City.

New York soon dropped its original adult business ordinance and adopted an amendment which was patterned after the Detroit model. The new ordinance also went one step further than any other in the nation when suggestion was made to amortize all nonconforming adult businesses within one year. Thus, up to 80% of the existing sex businesses were terminated.

In the Phoenix Zoning Ordinance an amendment concerning adult businesses became effective on November 8, 1977. It too is patterned after the Detroit model.

Briefly, the amendment in Section 417 states that:

1. No adult business is to be within 1,000 feet of any use in the same category.

2. An adult business is not permitted within 500 feet of a school or a residential zone unless approved by City Council and area residents. A petition which is signed by 51% of the residents in the 500-foot radius who do not object must be filed and be verified by the Planning Director. After the petition is completed the City Council may consider waiving the 500-foot requirement.

Adult businesses are being treated as a land use issue by their relationship to impacts on their surrounding properties and on adjacent neighborhoods. Are the crime impacts noted in Boston and New York's districts directly related to the adult business being there, or to some other societal variables in the neighborhood? Are they identifiable, and thus a probable cause for negative neighborhood reactions to nearby adult businesses?

The Phoenix Ordinance was based on two hypotheses: first, that there are direct impacts which uniquely relate to this class of land use; and second, that there are indirect, but equally potent, attitudinal concerns which result from proximity to an adult business. Examples of the former are possible traffic congestion, unusual hours of operation, litter, noise, and criminal activity. Illustrating the latter is substantial testimony that has indicated that many neighborhood residents dislike living near an area containing an adult business. Also, financial institutions take nearby adult businesses into account when financing

residential properties. Finally, people's perceptions of criminal activity is reinforced by a greater incidence of sexual crimes in areas or commercial districts containing adult businesses.

In this study we will show that there is a relationship between arrests for sexual crimes and locations of adult businesses. This relation will correlate with concerns which have been expressed by residents of nearby residential neighborhoods of the nature of crimes associated with adult businesses. Sex crimes appear to generate substantial fears for the safety of children, women, and neighborhoods in general. Their association with adult businesses generates negative images (as well as real or portential hazards) and results in a lowering of the desirability and livability of an impacted neighborhood.

This study specifically shows that there is a higher amount of sex offenses committed in neighborhoods in Phoenix containing adult businesses as opposed to neighborhoods without them. In this project three study areas were chosen -- neighborhoods with adult businesses, and three control areas -- neighborhoods without adult businesses which were paired to certain population and land use characteristics. The amount of property crimes, violent crimes, and sex offenses from the year 1978 are compared in each study and control area.

THE STUDY AND CONTROL AREAS

Three different study areas containing adult businesses were selected to collect crime data. The east side of Central Avenue was chosen for the location of two study areas, while the west side has the third study area. Appendix I describes a more detailed process of how each study area was derived.

A control area has no adult business, but generally speaking, has similar population characteristics of a matched study area in terms of:

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1. Number of residents
2. Median family income
3. Percentage of non-white population
4. Median age of the population
5. Percentage of dwelling units built since 1950
6. Percentage of acreage used residentially and non-residentia

Appendix II states a more detailed process of how each control area

Adult business locations are based on information furnished by the Department and verified by the Planning Department.

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TABLE I

THE STUDY AND CONTROL AREA LOCATIONS

STUDY AREA	CONTROL AREA
I	I
Roosevelt Street - Oak Street 16th Street - 32nd Street	Starting at 47th Avenue, east on Osborn Road, South on 35th Avenue, west on Thomas Road, South on 39th Avenue, West on Roosevelt Street, North on 43rd Avenue, West on McDowell Road, and North on 47th Avenue, to the point of beginning.
II	II
Oak Street - Osborn Road 32nd Street - 40th Street	Osborn Road - Campbell Avenue 32nd Street - 40th Street
III	III
Missouri Avenue - Campbell Avenue 19th Avenue - 27th Avenue	Missouri Avenue - Campbell Avenue 27th Avenue - 35th Avenue

Figure 1, following shows the boundaries of the three study and control areas.

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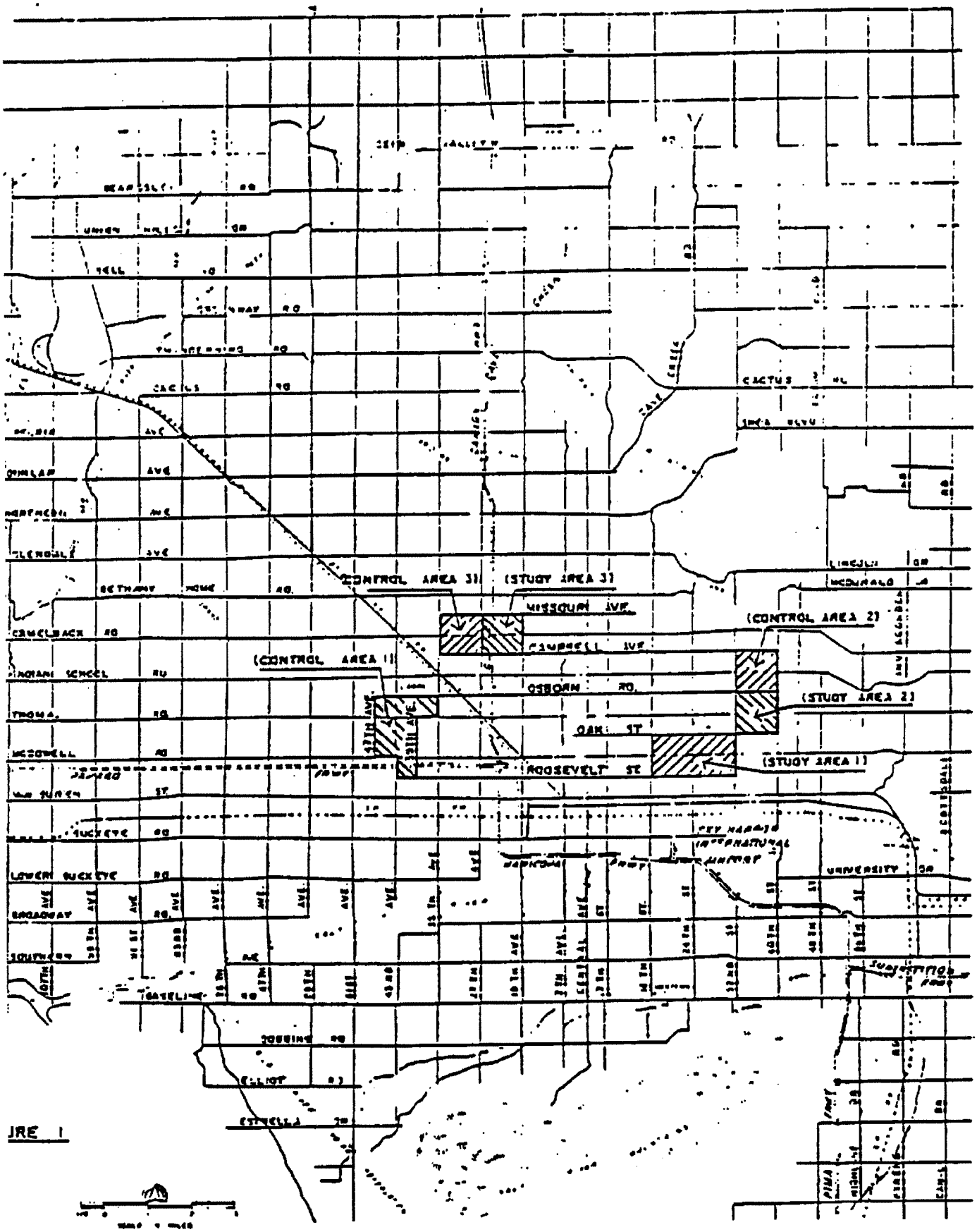

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Study Area I contains two square miles and one of the City's larger concentrations of adult businesses. These locations are: 1702 E. McDowell Road; 2339 E. McDowell Road; 2433 E. McDowell Road, and 3155 E. McDowell Road.

The matching population characteristics of Study and Control Area I are listed below in Table II. (Appendix III provides a more detailed process of how this data was derived.)

TABLE II

POPULATION CHARACTERISTICS OF STUDY AND CONTROL AREA I

	% Non-White	Building/ 1950-1970	Income	Median Age	Land Use Commercial/Residential	
Study I	24%	57%	$7,675	29	31%	69%
Control I	24%	93%	$9,885	26	38%	62%

The only substantial population characteristic differences in these two areas are in the age of homes built between 1950 and 1970. The concentrated adult business district has a little over half of its homes built after 1950. Whereas the control area has almost 93% of its housing built after 1950.

Study Area II is one square mile on the east side of the City, and contains only one adult business within the square mile, at 3640 East Thomas Road. Its control area is to the north side of the Study Area.

The comparison of population characteristics are shown in Table III.

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TABLE III

POPULATION CHARACTERISTICS OF STUDY AND CONTROL AREA II

	% Non-White	Building/ 1950-1970	Income	Median Age	Land Use Commercial/Residential	
Study II	7.4	88.0	$10,779	36	18%	82%
Control II	4.4	92.5	$12,013	38	11%	89%

Study Area III also contains one adult business at 2103 W. Camelback Road. It is one square mile located on the west side of the City. Its Control Area is directly to the west. The comparison of population characteristics are shown below:

TABLE IV

POPULATION CHARACTERISTICS OF STUDY AND CONTROL AREA III

	% Non-White	Building/ 1950-1970	Income	Median Age	Land Use Commercial/Residential	
Study III	8.2	83%	$9,829	29	29%	71%
Control III	8.8	93%	10,559	28	28%	72%

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TABLE V

PROPERTY, VIOLENT, AND SEX CRIMES IN ADULT BUSINESS AREAS AND THEIR CONTROL AREAS 1978

	STUDY I		CONTROL I		STUDY II		CONTROL II		STUDY III		CONTROL III	
	#	#/1000 pop.*	#	#/1000 pop.*	#	#/1000 pop.*	#	#/1000 pop.*	#	#/1000 pop.*	#	#/1000 pop.*
Property Crimes	1616	130.05	1176	88.48	753	107.5	363	62.2	780	125.8	575	116.8
Violent Crimes	89	7.16	66	4.96	21	3.0	21	3.6	39	6.29	36	7.3
Sex Offenses	127	10.22	12	.90	43	6.1	13	2.2	71	11.5	14	2.84
Rape	14	1.13	5	.38	5	.71	1	.17	5	.80	2	.41
Indecent Exposure	107	8.61	6	.45	37	5.3	10	1.7	60	9.7	9	1.83
Lewd & Lascivious	2	.16	0	0	1	.14	1	.17	4	.64	1	.20
Child Molest	4	.32	1	.08	0	0	1	.17	2	.32	2	.41

Property Crimes - Burglary, Larceny, Auto Theft

Violent Crimes - Murder, Rape, Robbery, Assault

Sex Offenses - Rapes, Indecent Exposure, Lewd and Lascivious, Child Molest

* 1978 Estimates of population at the enumeration district level were derived by the Planning Department Research Section.

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CONCLUSIONS

Table V Property, Violent, and Sex Crimes in Selected Study Areas--1978[1] is a tabulation of the number of crimes committed and the rate of those crimes per 1,000 people living in each area. This table is on the following page.

There appears to be a significantly greater difference between the study and control areas for sex crimes than for either property or violent crimes. The following table illustrates a comparison of the ratio of the crime rate of the study area to the control area:

TABLE VI

CRIME RATES AS A PERCENTAGE OF STUDY AREA TO CONTROL AREA

Study Area	Property Crimes	Violent Crimes	Sex Crimes	Sex Crimes (Less Indecent Exposure)
I	147%	144%	1135%	358%
II	173	83	277	160
III	108	86	405	178
Average	143%	104%	606%	232%

It is observed that there are about 40% more property crimes and about the same rate of violent crimes per 1,000 persons in the Study Areas as compared to the Control Areas.

On the other hand there is an average of six times the sex crime rate in the Study Areas as compared with the Control Areas. Although the majority of sex

[1] Table V Property, Violent, and Sex Crimes in Selected Study Areas--1978, was derived from information provided by the City of Phoenix Police Department's Crime Analysis Unit and Planning and Research Bureau. The data from these two sections was compiled by adding the number by type of crimes committed in police grids, which are quarter mile neighborhoods. Crimes are based on arrest records and do not reflect ultimate convictions. It has been assumed that conviction rates will be proportional arrest rates.

crimes are Indecent Exposure, the fourth column illustrates that the remainder of the sex crimes also exhibit a significantly higher rate in the study areas. A detective from the police department stated that most indecent exposure crimes were committed on adult business premises. An example of this finding is in Study Area I. In that location, 89% of the reported indecent exposure crimes were committed at the addresses of adult businesses.

Where there is a concentration of adult businesses, such as in Study Area I, the difference in sex offense rates is most significant. As stated earlier in the report this location has four adult businesses which are less than 1000 feet away from each other and less than 500 feet away from a residential district. There is also a higher number of sex offenses committed--84 more crimes than in Study Area II, and 56 more crimes than in Study Area III. Similarly, when compared to its Control Area, the sex crime rate, per 1,000 residences is over 11 times as great in Study Area I. In the remaining study areas, which each contain a single adult business, their rates are four and almost three times as great.

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APPENDIX I

ESTABLISHMENT OF STUDY AREA BOUNDARIES

The process of defining the Study Area Boundaries was conducted in the following manner:

1. Locations of adult businesses in Phoenix were plotted.
2. The primary concentration of adult businesses was identified.
3. Preliminary decision was made to choose three study areas based on concentration and geographic isolation from each other.
4. Establishment of boundaries for each Study Area so that the adult businesses were approximately centered in each study area, and so that each Study Area had an area of at least one square mile, but not more than two square miles.

APPENDIX II

ESTABLISHMENT OF CONTROL AREA BOUNDARIES

The process of defining the Control Area boundaries was conducted in the following manner:

1. Identification of potential control areas based on the absence of adult businesses.
2. Delineation of possible Control Areas equal in size to the Study Areas.
3. Determination of population and land use characteristics of each possible control area using the same weighted-proportionality method used for the Study Areas (See Appendix III for Population Characteristics and methodology).
4. Selection of a Control Area to match each Study Area as closely as possible in size, number of residents, and all other selected characteristics listed in Appendix III.

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APPENDIX III

METHODOLOGY OF WEIGHTING POPULATION CHARACTERISTICS OF STUDY AND CONTROL AREAS

The characteristics used in weighting the similarities between the Study and Control areas were:

1. Percentage non-white population
2. Percentage of dwelling units built since 1950
3. Median income
4. Median age of the population
5. Percentage of acreage used residentially

Information about the above characteristics was available at the Census Tract level. Since the Study Area boundaries did not always align with Census Tract boundaries, it w necessary to "average" Census Tract values to simulate the characteristics of the Study Areas. The contribution of each Census Tract characteristic value was mathematically weighted, proportional to the amount of population that the Census Tract contributed to the Study Area population. Number 5, or the percentage of acreage used residentially, was attributed proportionally to the geographic area rather than the population.

The weighting of each Study and Control Area is tabulated in the following table:

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WEIGHTING OF POPULATION CHARACTERISTICS BY CENSUS TRACT FOR STUDY AND CONTROL AREAS

Census Tract	% Non-White Population	% Dwelling Units Built Since 1950	Median Family Income	Median Age of Population	% of Acreage Used Residentially
Study I					
1115	8.5	67	$8,741	32	82
1116	14.2	54	8,191	30	80
1133	45.0	50	5,451	27	58
1135	25.0	61	8,990	27	57
Control I					
1100	13.0	98	10,992	24	88
1101	18	100	11,202	26	45
1122	25	90	8,751	27	74
1123	30	99	10,179	22	52
1126	35	72	8,361	29	68
Study II					
1114	7.9	85	11,119	33	79
1109	6.9	91	10,469	38	85
Control II					
1109	6.9	91	10,469	38	92
1083	2.3	94	13,345	38	85
Study III					
1073	7.8	82	9,996	32	74
1090	8.7	83	9,609	26	68
Control III					
1072	9.2	90	10,570	27	66
1091	8.5	96	10,550	29	78

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A F F I D A V I T

STATE OF ARIZONA)
) ss.
County of Maricopa)

CATHERINE FREITAS, being first duly sworn, upon her oath, deposes and says:

The following is my testimony:

Q: What is your name?
A: Catherine Freitas.

Q: Where do you reside?
A: I live in Phoenix, Arizona.

Q: What is the highest level of education you have achieved?
A: I have a Bachelor's Degree in Business Administration from the University of Hawaii at Manoa.

Q: How are you currently employed?
A: I am working as an escort at the Sunset Strip.

Q: What type of business is the Sunset Strip?
A: The Sunset Strip is a licensed escort bureau with the City of Phoenix which offers incall services.

Q: What are incall escort services?
A: A customer, typically a man, comes to the business where he is entertained by a woman in a private room. Sometimes there will be more than one woman involved. The entertainment is of an adult nature.

Q: When did you start working there?
A: The beginning of June 1995.

Q: Who hired you?
A: I was hired by Holly Wilde, the owner.

Q. How long have you worked as an escort at an escort bureau?

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A: A little less than one year.

Q: What other escort bureaus have you worked for?
A: Just one other, Temptations.

Q: What was the location of Temptations during the time that you were working there?
A: 3912 E. Miami in Phoenix.

Q: When did you begin working at Temptations?
A: December 9, 1994.

Q: When did you leave?
A: I left around the beginning of June 1995.

Q: What position were you hired to fill?
A: Escort-dancer.

Q. Who hired you?
A: Steve Budge.

Q: Whom did you understand Steve Budge to be at that time?
A: The business' owner.

Q: Were you hired as an employee or an independent contractor?
A: An independent contractor.

Q: Did you receive any training or instruction on the operation of the business?
A: Yes.

Q: Who provided the training and instruction?
A: Steve Budge and Melissa.

Q: Who is Melissa?
A: Melissa was Steve Budge's wife and a manager. She also worked at Temptations as an escort-dancer. I believe that they are now divorced.

Q: What were the training and instruction provided?
A: I was shown a blue plastic board, about legal size, which contained the shows which were available. There were generally four shows available, 15, 30, 45, and 60 minutes. The prices for these shows ranged from $40.00 to $200.00. In each case, there was a $20.00 room fee.

The first level of show would include nude dancing. The second level would include nude dancing with explicit posing. The third level was explicit nude posing with the model able to touch the customer. The fourth level was explicit nude posing with mutual touching.

I was told by Steve himself that there was to be no

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"sucking or fucking," but that if the girls did releases, he did not know about it and would deny knowing about it if the girl were caught.

I did not know what he meant by a "release," so I asked him what he meant by that term and he said that it was a hand-job. That term I understood.

Q: How much did Steve indicate the escort would receive from the room and show fee?

A: The escort received nothing from the room fee, and anywhere between 16% and 33% of the show fee depending upon the type of show. Steve also told me that the girls could make as much as $1,000.00 on one shift. This was almost entirely from tips, but also included what the business paid the escort from the show fee.

Q: What percentage of the tips did the escort retain?

A: 100% for all shows.

Q. Did these rates continue in effect the entire time that you were at Temptations?

A: No.

Q: How did they change?

A: Toward the end of my time there, the escorts received nothing from the show fee for a 15 minute show. Also, and again toward the end of my time there, Steve was considering adding a topless show for which the model would receive none of the show fee.

Q: Did Steve or Melissa tell you when you were first hired how much an escort could expect to receive from a customer for a release?

A: Yes.

Q: How much?

A: $100.00.

Q: Did you understand there to be a policy on accepting less than $100.00 for a release?

A: Yes.

Q: What was it?

A: Releases were not to be done for less than $100.00 without the approval of management.

Q: Was this approval ever given?

A: Yes.

Q: Under what circumstances?

A: A long-time customer could get a release for $80.00 or, in some cases, less.

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Q: How would an escort know who a long-time customer was?
A: Steve seemed to have a very good memory of the customers and for how long they had been customers. He could see who the customers were when he was on the premises by viewing a monitor of the lobby. When the escort brought Steve the show fee, Steve would tell her that a particular customer pays $80.00, or some lesser amount, for a release.

Q: Did an escort ever refuse to do a release?
A: Yes.

Q: What would happen in that case?
A: If the customer was someone that Steve did not believe was associated with law enforcement, he would send another escort into the room who he knew would do the release.

Q. How would a regular customer typically indicate his desire for a release?
A: The regular customer would either put $100.00 on a table next to the escort where she could see it, or would hand it directly to the escort, usually at the very beginning of the show.

Q: And that was enough to indicate that he wanted a release?
A: Yes.

Q: What training did you receive on the law?
A: Steve showed me many pages of what he said was the law, but I did not receive a copy. He said I was free to look at it at any time, and I did review some of it. I asked him to explain it to me in lay terms. He told me where I could not touch myself, that I couldn't have sexual intercourse or oral sex with the customers, or engage in sadomasochistic abuse. He seemed to know the law very well.

Q: Do you recall the time when the Phoenix Police Department attempted to close down a number of incall escort bureaus?
A: Yes.

Q: When was it?
A: It was in March of this year.

Q: How is it that you happen to recall the event?
A: The Police attempted to shut down Temptations, and I was called by the business and left a message not to come in until further notice.

Q: How long did it take to get that notice?
A: Two or three days.

Q: Were there any changes in the operation of the business after you returned?
A: Yes.

Q: What were they?
A: Steve said that no releases were to be given unless it was to a customer that had received one before, because that would mean that the customer was probably not a police officer or an informant. He asked the managers to check to make sure that customers receiving releases were regular customers.

Q: What was the effect on business of these changes?
A: The girls' incomes started to fall drastically. There was talk among some of the girls of working elsewhere, for example at Sunset Strip. It was believed that the split was 60-40 there in favor of the model, which was higher than at Temptations.

One girl tried to have a meeting to organize all the girls so that pressure could be put on Steve to run the business differently. According to the girl that tried to organize the meeting, Steve found out about it, approached her, and convinced her not to go forward with the idea. She was very upset and told me that if something happened to her, that Steve had done it.

After this, I approached Steve myself and asked if it would be possible for all the girls to work on percentages, so that there wouldn't be the same pressure on the girls to perform acts of prostitution in order to make money.

He said that if this happened that business would really fall off because this is what customers expected at his business. He also said that if I didn't like it that I could go somewhere else, but that if I did, that I was kidding myself that no one else was doing this. He added that he had been to every other club in town and could get an act of prostitution at any of them for the right price.

Q: You were not successful then in changing the manner in which the escorts were compensated?
A: No, but about this time, he came up with a system to allow releases to continue.

Q: What was that system?
A: The escort was to wait until the customer had taken off all of his clothes and had touched his penis. The customer was then asked to repeat the statement that he was not a cop or affiliated with law enforcement in any way. The escort would then ask the customer, while he was masturbating: "Would you like help with that?" After all of this, the $100.00 price could then be given.

Q: How were the private rooms monitored in which the escort met with the customer?
A: The rooms were monitored for sound. Also, the doors to

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the rooms had vents that someone on the outside could look through to see what was going on inside.

Q: Was anyone ever caught having sexual intercourse with a customer?
A: Yes.

Q: How do you know that?
A: The girl that was caught told me.

Q: What happened to her?
A: Steve found out about it and was going to fire her, but then gave her another chance.

Q: When did this happen?
A: In April or May of this year.

Q: Are you aware of any other incidents of Temptations' escorts having sexual intercourse with customers?
A: Only based upon what Steve told me.

Q: What did he tell you?
A: In a phone conversation with me soon before I left, he named two girls that he said he knew had had sexual intercourse with a customer.

Q: Did this have something to do with why you left?
A: Yes.

Q: What was the connection?
A: It seemed to me that he was now condoning sexual intercourse.

Q: Were there any other reasons why you left?
A: Yes, Steve had also started to mention expanding the outcall operation. Except for the compensation, the arrangement with the escorts was to be the same. The women would be expected to perform acts of prostitution, but if they were caught, then Steve knew nothing about it. The amount for the escort was to be lowered, however, to $25.00 per hour.

I also had a conversation with a limousine driver that Steve had used as a driver. This person told me that Steve had told him that all the girls could be expected to perform acts of prostitution, including sexual intercourse.

Q: Who were the managers while you were there?
A: Melissa Budge, John Williams, Joe, Brett and Andre.

Q: Do you know how the managers were trained?
A: Yes.

Q: How were they trained?

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A: Steve trained all the managers and told them exactly what to do.

CATHERINE FREITAS

SUBSCRIBED AND SWORN TO before me this 29th day of November, 1995, by Catherine Freitas.

Notary Public

My Commission Expires:
My Commission Expires Dec. 14, 1998

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PHOENIX POLICE DEPARTMENT REPORT

ORIGINAL PAGE NO. 1 DR NO.: 80991354

REPORT DATE: 19980613 TIME: 2332

TYPE OF REPORT: PROSTITUTION OFFENSE: 301

PROSECUTION DESIRED: YES

LOCATION: 004030 E ELWOOD ST BEAT: 0431 GRID: AG37
SECRET SEDUCTIONS

DATE/TIME OF OCCURRENCE: SAT 061398 2230

REPORTING OFFICER(S): [redacted] [redacted] UNIT: I52

PREMISES: ADULT ONLY STORE/MOVIE OCCUPIED: YES

**** SUSPECT INFORMATION ****

INDEX SUSPECT-01:

NAME: [redacted]. TAFFYE JO

RACE: W SEX: F AGE: DOB: 061070 HT: 501 WT: 110
HAIR: BLN EYES: BLU SSN: [redacted]
HOME: 0[redacted] ROAD APT/SUITE: [redacted]
TEMPE AZ ZIP CODE:
WORK: 004030 E ELWOOD ST APT/SUITE:
PHOENIX AZ ZIP CODE:
BUS.NAME [SECRET SEDUCTIONS] PH: EXT.
OCCUPATION: DANCER
LEVEL OF FORCE : OFFICER PRESENCE

CLOTHING DESC & MISC:
BLACK DRESS. PLAID UNDERWARE

DISSEMINATION IS RESTRICTED TO CRIMINAL JUSTICE AND AUTHORIZED LICENSING AGENCIES ONLY. SECONDARY DISSEMINATION TO NON-C.J. OR AUTHORIZED LICENSING AGENCIES IS PROHIBITED

REL/TO: Mays City Atty

DATE: AUG 2 8 1998

BY/OFF: ORGANIZED CRIME BUREAU

**** VICTIM INFORMATION ****

VICTIM -01:

NAME: CITY OF PHOENIX

**** NARRATIVE ****

SERIAL NUMBER: [redacted]

ADDITIONAL DETECTIVES: SGT [redacted]

DEFINITIONS: PLAY WITH YOURSELF = STREET SLANG FOR MASTURBATION.

ON 061398. TAFFYE [redacted] COMMITTED AN ACT OF PROSTITUTION BY MASTURBATING HERSELF. WHICH SHE ADVISED WAS INCLUDED IN THE 100.00 DOLLARS THAT HAD BEEN GIVEN TO HER BY UNDERCOVER DETECTIVE [redacted] FOR A PRIVATE DANCE SHOW.

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ON 061398. I WAS WORKING WITH THE VICE ENFORCEMENT UNIT CONDUCTING A COVERT INSPECTION OF THE BUSINESS KNOWN AS "SECRET SEDUCTIONS". THE REASON FOR THIS INSPECTION WAS TO CHECK THE COMPLIANCE WITH THE STATE AND CITY CODES IN AN UNDERCOVER CAPACITY.

I ENTERED THE BUSINESS AND WAS GREETED BY A FEMALE (LATER IDENTIFIED AS SHANNON MICHELLE [redacted]). WHO ASKED ME TO FOLLOW HER TO ANOTHER ROOM WHERE I COULD WAIT DUE TO EVERYONE BEING BUSY AT THE MOMENT. AFTER A FEW MINUTES I WAS THEN GREETED BY A WHITE FEMALE IN A SHORT BLACK DRESS WHO GREETED ME AND TOLD ME HER NAME WAS "TAFFYE". TAFFYE (LATER IDENTIFIED AS TAFFYE JO [redacted]). THEN ASKED ME TO FOLLOW HER TO ANOTHER ROOM. WHERE SHE SAT DOWN AND BEGAN TO TALK WITH ME.

TAFFYE SAID THE ROOM FEE WOULD BE SIXTY DOLLARS AND THAT THE MINIMUM TIP WOULD BE ONE HUNDRED DOLLARS. SHE WENT ON TO SAY THAT THERE WAS NO SEX ALLOWED AND THAT THERE WERE NO HAND JOBS EITHER. TAFFYE SAID THAT SHE WOULD DANCE NUDE FOR ME AND THAT DEPENDING ON THE TIP THE DANCE'S GOT BETTER. WE THEN HAD SOME SMALL TALK ABOUT MY MARRIAGE AND ABOUT SOME OF THE PROBLEMS I WAS HAVING WITH MY WIFE. TAFFYE THEN ASKED ME IF I WOULD LIKE HER TO DANCE FOR ME. AND I TOLD HER THAT I WOULD. SHE THEN TOOK ME TO ANOTHER SMALLER ROOM THAT HAD TWO WALLS COVERED WITH MIRRORS AND HAD A LARGE CUSHION CHAIR AND STOOL. TAFFYE THEN COLLECTED THE SIXTY DOLLARS FOR THE ROOM AND TWO FIFTY DOLLAR BILLS FROM ME FOR HER TIP. SHE THEN SAID THAT SHE WOULD BE RIGHT BACK AND FOR ME TO GET COMFORTABLE. THEN LEFT THE ROOM.

I THEN TOOK OFF MY SHIRT AND SAT ON THE CHAIR AND WAITED FOR HER TO RETURN. A SHORT WHILE LATER TAFFYE WALKED BACK INTO THE ROOM AND TOLD ME NOT TO BE NERVOUS DUE TO THE WAY I MUST HAVE LOOKED. SHE THEN SAT DOWN IN FRONT OF ME AND WE BEGAN TO TALK. I TOLD HER THAT I WAS HAVING PROBLEMS WITH MY WIFE BUT THAT I DIDN'T WANT TO CHEAT ON HER. TAFFYE AGAIN SAID THAT THERE WAS NO SEX ALLOWED. I TOLD HER THAT I DIDN'T WANT THAT BUT THAT SHE WAS REALLY BEAUTIFUL. I TOLD HER THAT I WAS REALLY NERVOUS THAT I DIDN'T WANT TO FEEL LIKE I WAS CHEATING ON MY WIFE. I THEN ASKED HER IF SHE WAS GOING TO DANCE NUDE FOR ME. TAFFYE SAID THAT SHE WOULD IF THAT IS WHAT I WANTED. I TOLD HER I DID AND SHE ADVISED THAT I COULD ALSO GET NUDE AS WELL. I TOLD HER THAT I DIDN'T FEEL REAL COMFORTABLE WITH THAT AND TOLD HER THAT I WOULD TAKE OFF MY PANTS BUT THAT I WOULD LIKE TO KEEP MY UNDERWARE ON. TAFFYE SAID THAT IT WOULD BE OK AND THEN SHE BEGAN TO UNDRESS.

TAFFYE SAID THAT I COULD TOUCH HER DURING THE DANCE AND THEN SHE BEGAN TO DANCE FOR ME NUDE. DURING THE DANCE SHE RUBBED HER BREASTS AGAINST MY FACE AND INTO MY GENITAL AREA. SHE WOULD CARESS HER BREASTS AND ON SEVERAL OCCATIONS WOULD RUB HER VAGINA. AFTER THE LAST TIME SHE DID THIS I ASKED HER IF SHE THOUGHT THAT "PLAYING WITH YOURSELF" WAS CHEATING. SHE SAID THAT SHE DIDN'T AND THAT THE DANCERS EVEN ENCOURAGE THE GUYS TO MASTURBATE THEMSELFS. I TOLD HER THAT I WAS TALKING ABOUT HER AND THAT IF SHE COULD PLAY WITH HERSELF. SHE THEN BEGAN TO RUB HER VAGINA AGAIN ONLY MORE IN A CIRCULAR MOTION. SHE STOOD IN FRONT OF ME AND AGAIN TOLD ME THAT I COULD TOUCH HER. I THEN PUT MY HANDS ON HER THIGHS AND ON

HER HIPS. SHE THEN SAID THAT SHE COULD SIT ON THE STOOL FOR ME SO THAT I COULD GET A BETTER LOOK.

TAFFYE SAT DOWN ON THE STOOL AND SPREAD HER LEGS APART FULLY EXPOSING HER VAGINA TO ME. SHE THEN PUT ONE FOOT EACH ON MY KNEE'S AND BEGAN TO MASTURBATE HERSELF. TAFFYE WOULD RUB HER CLITORIS AND ON NUMEROUS OCCATIONS STUCK ONE OF HER FINGERS INTO HER VAGINA. TAFFYE CONTINUED THIS AND LAYED BACK ON THE STOOL. AS TAFFYE WAS MASTURBATING SHE BEGAN TO MOAN AND LOOK AT ME WHILE DOING SO. TAFFYE MASTURBATED FOR APPROX. TEN MINUTES OF THE HALF AND HOUR SHOW.

AS TAFFYE WAS MASTURBATING I ASKED HER IF I NEEDED TO GET MORE MONEY OR IF HER PLAYING WITH HERSELF WAS INCLUDED IN THE 100.00 DOLLARS THAT I HAD GIVEN HER. SHE SAID THAT IT WAS OK BUT THAT IF I WANTED TO TIP HER MORE. THAT I COULD. SHE WENT ON TO TELL ME THAT SHE WOULDN'T DO ANY MORE THEN SHE WANTED TO FOR THE TIP I HAD GIVEN TO HER.

THE SHOW THEN ENDED AND TAFFYE AND MYSELF GOT DRESSED. I ASKED IF I COULD CALL AND HAVE ANOTHER SHOW WITH HER IN THE FUTURE. TAFFYE THEN GAVE ME A CARD AND WROTE HER NAME ON IT TELLING ME TO CALL ANYTIME. I THEN LEFT THE BUSINESS AND CONTACTED THE OTHER DETECTIVES. THE OTHER DETECTIVES THEN WENT BACK INTO THE BUSINESS A SHORT TIME LATER AND CONDUCTED AN INSPECTION OF IT. THE PURPOSE OF THIS WAS ALSO TO IDENTIFY TAFFYE.

IT IS REQUESTED THAT IS1 TAFFYE. BE CHARGED WITH ONE COUNT OF PROSTITUTION. P.C.C. 23-52.A.1. A CLASS ONE MISDEMEANOR. FOR MASTURBATING HERSELF AFTER BEING GIVEN 100.00 DOLLARS.

THE SIXTY DOLLARS AND THE ONE HUNDRED DOLLARS WERE NOT RECOVERED AND NOT IMPOUNDED.

VICTIM RECEIVED RIGHTS INFORMATION: NO MAIL-IN SUPPLEMENT:

INVOICES:

END OF REPORT DR NO: 80991354

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3300 Amnicola Hwy.
Chattanooga, Tennessee 37406

Phone: (423) 698-9
FAX: (423) 698-9

Chattanooga Police Department

J.L. Dotson
Chief of Police

SPECIAL INVESTIGATIONS DIVISION

DEAR MR. KNOBLETT,

SPECIAL INVESTIGATIONS DIVISION PERFORMED A LONG-TERM UNDERCOVER VICE INVESTIGATION OF CINEMA 1 LOCATED AT 4100 ROSSVILLE BLVD. WE FOUND THAT THE BUSINESS WAS IN VIOLATION OF THE ADULT ENTERTAINMENT ORDINANCES. THESE VIOLATIONS WERE BLATANT AND COMMON. OUR INVESTIGATION OF THE ACTIVITY AT CINEMA 1 LEAD TO A PADLOCKING OF THE BUSINESS THROUGH THE DISTRICT ATTORNEY'S OFFICE. I THEREFORE RECOMMEND THAT THE RENEWAL OF THE BUSINESS' ADULT ENTERTAINMENT LICENSE BE DENIED.

SINCERELY,

GERALD DOSSETT

SPECIAL INVESTIGATIONS

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2-~~1045~~

SEP 26 '02 12:20PM
Chattanooga, Tennessee 37406
Phone: (423) [illegible]
FAX: (423) 698-9[illegible]

Chattanooga Police Department

J.L. Dotson
Chief of Police

FROM THE DESK OF GERALD DOSSETT
SPECIAL INVESTIGATIONS DIVISION

DEAR MR. NOBLETT,

THIS IS A BRIEF SYNOPSIS OF OUR OFFICE'S INVESTIGATION OF THE CINEMA ONE THEATER LOCATED AT 4100 ROSSVILLE BLVD. FROM JULY 1999 UNTIL JANUARY 2000 VICE MADE 14 UNDERCOVER VISITS. FOUR OF THESE VISITS WERE TAPED. THE FOLLOWING DATES ARE FROM OUR UNDERCOVER VISITS IN 1999:

JULY 14, 21, 26, 27, 28, AND 30; AUGUST 24, 26, AND 27; SEPTEMBER 2, 4, 8, AND 12. ONE VISIT WAS MADE JANUARY 5, 2000. MICHAEL JENKINS, KIRK EIDSON AND MYSELF MADE THE UNDERCOVER VISITS. THE INVESTIGATION WAS SUSPENDED AT THAT TIME DUE TO DEPARTMENT REORGANIZATION.

THE INVESTIGATION WAS RESUMED IN OCTOBER 2001. THE FOLLOWING UNDERCOVER VISITS WERE MADE:

NOVEMBER 7, 15, 28, 2001; DECEMBER 19, 2001; JANUARY 14, 27, 2002; APRIL 24, 2002; JUNE 7, 2002.

THE RESULTS OF OUR INVESTIGATION LED US TO OBTAIN A NUISANCE ABATEMENT ORDER THROUGH THE DISTRICT ATTORNEY'S OFFICE. WE NOW ARE ACTING IN COOPERATION WITH YOUR OFFICE TO DENY THE RENEWAL OF THE BUSINESS' ADULT ENTERTAINMENT LICENSE. I WILL FURTHER ASK THAT DAVID LAMAR FRANKLIN AND ANY SHAREHOLDERS OF CINEMA 1 INC. BE NAMED PERSONALLY IN THE DENIAL TO PREVENT FURTHER OFFENSES UNDER ANOTHER BUSINESS NAME AT A DIFFERENT LOCATION.

SINCERELY,

GERALD DOSSETT
DETECTIVE SPECIAL
INVESTIGATIONS

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July 21, 1999 1245-1345 HRS

ON JULY 21, 1999 I WENT INTO CINEMA ONE ADULT BOOKSTORE. I WENT INTO THE BUSINESS AT APROXIMATELY 1245 HRS. I WENT INTO THE "MINI MOVIE OR PEEP SHOW" PORTION OF THE BUSINESS. AS ONE ENTERS THE BUSINESS, THE PEEP SHOW AREA ENTRANCE IS IN THE REAR LEFT CORNER OF THE ROOM. I ENTERED THE PEEP SHOW AREA. THE ONLY LIGHT IN THAT PORTION OF THE BUSINESS IS THE LIGHT FROM THE TELEVISIONS PLAYING MOVIES IN CUBICLES. THERE ARE APROXIMATELY 20 CUBICLES IN THIS AREA. WHILE IN THE PEEPSHOW AREA I COUNTED EIGHTEEN PATRONS ALL MALE. PEOPLE USUALLY WALK AROUND IN THE AREA STOP AT A CUBICLE TO VIEW PORTIONS OF A MOVIE PLAYING IN A CUBICLE AND THEN MOVE ONTO ANOTHER CUBICLE. ANYBODY WALKING IN THE ARE CAN SEE INTO THE CUBICLES. THE CUBICLES DON'T HAVE DOORS. SOME CUBICLES HAVE A "L" SHAPE. IN THE "L" SHAPE CUBICLES YOU HAVE TO ENTER THE CUBICLE TO SEE AROUND THE CORNER AND VIEW THE MOVIE. WHILE I WAS IN THIS AREA I COUNTED EIGHT MEN MASTURBATING INSIDE CUBICLES. THE MEN HAD THEIR PENIS OUT IN THEIR HAND STROKING IT BACK AND FORTH. IN ONE CUBICLE I SAW TWO MEN MASTURBATING. EACH MAN WAS STROKING HIS OWN PENIS. IN ONE CUBICLE I SAW A DRIED FLUID ON THE PLEXIGLASS THAT COVERED THE TELEVISION. IN MY OPINION, THE FLUID LOOKED LIKE DRIED SEMEN. I LEFT THE BUSINESS AT APPROXIMATELY 1345 HRS.

G. DOSSETT 760

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JULY 27, 1999-CINEMA ONE

ON JULY 27, 1999 I ENTERED CINEMA ONE ADULT BOOKSTORE AT APPROXIMATELY 2235 HRS. I THEN PAID TO GET INTO THE MINI-MOVIE OR PEEPSHOW PORTION OF THE BUSINESS. I ENTERED THE PEEPSHOW AREA AND BEGAN WALKING AROUND IN THE AREA. I SAW TWO MEN PLAYING WITH EACH OTHER'S PENIS IN ONE CUBICLE. I CONTINUED TO WALK AROUND AND THE TWO MEN BEGAN TO KISS A SHORT TIME LATER. I THEN WALKED BY THE CUBICLE AND I SAW ONE-MAN PERFORMING FELLATIO ON THE OTHER MAN. I SAW FOUR MEN MASTURBATING IN SEPARATE CUBICLES (ALONE IN CUBICLES). SHORTLY AFTER 2300 HRS THERE WERE APPROXIMATELY 20 MEN IN THE PEEPSHOW AREA. I COULD SEE TWO MEN IN A CUBICLE THAT WAS NOT PLAYING A MOVIE. THE ROOM WAS ALMOST TOTALLY DARK. THE ONLY LIGHT IN THE PARTICULAR CUBICLE CAME FROM THE DIM LIGHT IN THE MAIN AREA. ONE MAN WAS ON HIS KNEES AND THE OTHER MAN WAS STANDING. THE MAN ON HIS KNEES LOOKED AS IF HE WAS PERFORMING FELLATIO ON THE MAN THAT WAS STANDING. I COULD NOT ACTUALLY SEE THE PENIS IN HIS MOUTH BECAUSE IT WAS TOO DARK. BUT THE MOTIONIONS HE WAS MAKING LED ME TO BELIEVE HE WAS PERFORMING FELLATIO. I LEFT THE ESTABLISHMENT AT APPROXIMATELY 2325 HRS.

G. DOSSETT 760

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July 1999

June 1999

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July 1999

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Monday	Tuesday	Wednesday	Thursday	Friday	Sat/Sun
June 28	29	30	July 1	2	3
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					11
12	13	14	15	16	17
		Cinema One ✓ 1420 hrs to 1515 hrs			18
19	20	21	22	23	24
		Cinema One ✓ 1245-1345 G.D. 1640-1720 M.J.			25
26	27	28	29	30	31
Cinema One ✓ 1356 hrs to 1457 hrs	Cinema One ✓ 2235 to 2325 HRS	Cinema one ✓ 1407 hrs to 1572 hrs Cinema One ✓ 2126 to 2216		Cinema One ✓ 073099	August 1

2-1049

2-1044 2-1042

CINEMA ONE 082499

ON AUGUST 24, 1999 I (DOSSETT 760) WENT TO CINEMA ONE AT APPROXIMATELY 2230HRS. I PAID TO GET INTO THE MINI MOVIE SECTION OF THE BUSINESS. I ENTERED THE MINI MOVIE SECTION AND STARTED TO WALK AROUND. WHILE THERE I OBSERVED TWO MEN MASTURBATING IN CUBICLES ALONE. THE MEN WERE IN TWO SEPARATE CUBICLES. THERE WERE APPROXIMATELY 15-20 MALES IN THE MINI MOVIE AREA OF THE BUSINESS DURING THE TIME I WAS THERE. I ALSO OBSERVED ONE MAN SITTING IN A CUBICLE PERFORMING ORAL SEX ON A MAN STANDING IN FRONT OF HIM. WHILE THE SITTING MAN WAS PERFORMING ORAL SEX ON THE STANDING MAN ANOTHER MAN WALKED UP AND PULLED OUT HIS PENIS. THE SITTING MAN BEGAN TO PLAY WITH THE SECOND STANDING MAN'S PENIS WHILE HAVING FELATIO WITH THE FIRST STANDING MAN. SOON AFTER THAT THE SITTING MAN BEGAN TO SWITCH BACK AND FORTH BETWEEN THE TWO STANDING MEN PERFORMING FELATIO. THE ACT WAS DONE IN A CUBICLE (WITH OUT A DOOR) IN PLAIN VIEW OF ANYONE WALKING BY. ALSO THE THREE MEN DID NOT STOP WHEN SOMEONE ENTERED THE ROOM. ONE MALE PUT HIS HAND ON HIS PENIS AND GESTURED FOR ME TO COME IN A CUBICLE WITH HIM. I LEFT AT APPROXIMATELY 0015 HRS.

G. DOSSETT 760

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CINEMA ONE 082699

ON AUGUST 26, 1999 I (DOSSETT 760) WENT TO CINEMA ONE AT APPROXIMATELY 0110 HRS. I WENT IN AND PAID TO GET INTO THE THEATER PORTION OF THE BUSINESS. I WALKED IN AND SAT DOWN. THERE WERE THREE OTHER PEOPLE IN THE THEATER. A COUPLE WAS SITTING IN THE COUPLES SECTION OF THE THEATER, AND A SINGLE MALE WAS SITTING TOWARD THE FRONT OF THE THEATER. ALL THREE PEOPLE LEFT A VERY SHORT TIME AFTER I ENTERED THE THEATER. I THEN PAID TO GO TO THE MINI MOVIE SECTION OF THE BUSINESS. I BEGAN TO WALK AROUND IN THE MINI MOVIE SECTION OF THE BUSINESS. I COUNTED FIVE MEN MASTURBATING IN SEPARATE CUBICLES ALONE. I ALSO SAW ONE MAN SITTING PERFORMING FELLATIO ON A MAN STANDING IN FRONT OF HIM. AT APPROXIMATELY 0130 HRS A WHITE MALE (5'10, 170, BROWN HAIR) BEGAN TO SWEEP THE FLOOR. HE SWEPT THE UNOCCUPIED CUBICLES AND THE HALL. HE THEN MOPPED THE UNOCCUPIED CUBICLES AND THE HALL. AS SOMEONE LEFT A CUBICLE HE WOULD MOP IN THAT CUBICLE. ALL OF THE CUBICLES WERE NOT MOPPED. HE THEN CAME AROUND AND SPRAYED A FEW SQUIRTS OF A LIQUID IN EACH STALL. THE MAN MOPPED WITH A CHEMICAL THAT BURNED MY NOSE AND AFFECTED MY EYES. THE WALLS WERE NOT CLEANED WHILE I WAS THERE. I THEN WAS TOLD THAT THE BUSINESS WAS CLOSED AND ASKED TO LEAVE AT 0200HRS. I LEFT AT THAT TIME.

G. DOSSETT 760

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August 1999

August 1999

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September 1999

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Monday	Tuesday	Wednesday	Thursday	Friday	Sat/Sun
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23	24	25	26	27	28
	Cinema 1 ✓ 2330 to 1215 hrs G.D.	Cinema 1 0110 to 0200 hrs G.D. Cinema 1 0100 to 0205 hrs M.J.	Cinema 1 ✓ ~~012099~~ 082799 0120 to 0220hrs	Cinema 1 ✓	29
30	31	September 1	2	3	4
			Cinema 1 ✓ 090299 1450hrs to 1555hrs		Cinema One ✓ 2145 - 2330hrs ~~0445~~ M.J.
					5

8/26/99

CINEMA ONE 091299

ON 091299 I, OFFICER DOSSETT, WENT TO 4100 ROSSVILLE BLVD (CINEMA ONE). I PAID $5.41 AND ENTERED THE MINI MOVIE SECTION OF THE BUSINESS AT APPROXIMATELY 2015 HRS. I OBSERVED 3 MALES MASTURBATING ALONE IN SEPARATE CUBICLES. I ALSO OBSERVED TWO MEN KISSING IN A CUBICLE. I WAS IN THE MINI MOVIE SECTION FOR APPROXIMATELY 55 MIN. THERE WERE APPROXIMATELY 15 MEN IN THE MINI MOVIE SECTION DURING THE TIME I WAS IN THE BUSINESS.

G. DOSSETT 760

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September 1999

August 1999

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September 1999

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Monday	Tuesday	Wednesday	Thursday	Friday	Sat/Sun
August 30	31	September 1	2	3	4
			Cinema One 1450 to 1555 hrs M.J.		Cinema One 2145 hrs to 2330 hrs M.J.
					5
6	7	8	9	10	11
		2400 ✓	Cinema One 1450 hrs to 1550 hrs ✓ 1450 - 1550		
					12 ✓ Cinema One 09/2/99 G.D.
13	14	15	16	17	18
					19
20	21	22	23	24	25

Chattanooga Police Department
Special Investigations Unit

Report of Investigation

Case Subject Name: Cinema One **Case File Number:** 155
Complaint Number: n/a
Investigation Action: Open Case: x Supplement: ☐ Close Case: ☐
Date Prepared: 110801 **Prepared by:** Dossett 760
Other Officers:
Subject of Report: Cinema One opening report.

On October 22, 2001 Special Investigations Division received a complaint from the Chattanooga-Hamilton County Health Department. The health department forwarded this division a complaint that they received that states that sexual activity was taking place in the Cinema One Adult Theater.

A decision was made that we would monitor the activity at the Cinema One Adult Theater. Our goals in this investigation are to establish if there is sexual activity happening in public areas of this establishment, to determine if this activity is common practice, to establish if any violation of state law or city ordinances are occurring and to help determine if there is any risk to the community with the assistance of the health department or any other public agency.

The first phase of this investigation will consist of undercover visits to the establishment. The results of the first phase will determine whether further police action is necessary.

INDEXING: Cinema One Adult Theater

; SUISS #: ; Alias: ; DOB: ; Race: ; Sex: ; Height: ;Weight: ; Eyes: ; Hair: ;
Drivers License #: ; SSN #:
Address: 4100 Rossville Blvd
Telephone #:
Vehicle:

Date: 110801 Signature:(Officer) Harold L Dossett

Approved: Date: 110801 Signature:(Title and Name) Sgt J Clemmons

018382

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Chattanooga Police Department
Narcotics Division

Report of Investigation

Case Subject Name: CINEMA ONE **Case File Number:** 155
Complaint Number:
Investigation Action: Open Case: ☐ Supplement: ☒ Close Case: ☐
Date Prepared: 110701 **Prepared by:** DOSSETT 760
Other Officers: Sgt. ATKINSON, Det. WOLFF
Subject of Report: VICE

ON NOVEMBER 07, 2001, AT APPROXIMATELY 1215 HOURS, DETECTIVE WOLFF AND MYSELF WENT TO CINEMA ONE THEATER LOCATED AT 4100 ROSSVILLE BLVD. AFTER PAYING THE MINI MOVIE ENTRY FEE WE WENT TO THE MINI MOVIE SECTION OF THE BUSINESS. WHILE IN THIS AREA DETECTIVES OBSERVED SEVERAL WHITE MALES MASTERBATING. THE MEN MASTERBATING HAD THERE PENIS' OUT IN THEIR HAND, IN PUBLIC VIEW WHILE MASTERBATING. I OBSERVED TWO WHITE MALES PERFORMING ORAL SEX ON OTHER MEN. DETECTIVES STAYED APPROXIMATELY THIRTY FIVE MINUTES.

Date:_____ Signature:(Officer)_____

Approved: Date: _____ Signature:(Title and Name) _____

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Wolff Lee
From: Atkinson Janice
Sent: Wednesday, November 28, 2001 11:04 AM
To: Wolff Lee
Subject: Investigative Report Form.doc

Chattanooga Police Department
Special Investigations Unit

Report of Investigation
Page 1

Case Subject Name: Cinema One Theater **Case File Number:** 155
Complaint Number:
Investigation Action: Open Case: x Supplement: Close Case:
Date Prepared: 11-16-01 **Prepared by:** Wolff
Other Officers: Dossett,Batts,Atkinson, Floyd, Narramore
Subject of Report: Vice

On November 15, 2001 at approx. 2200 hrs. this Investigator along with Detective Dossett went to the Cinema One Theater located at 4100 Rossville Blvd. Upon entering the business, a seventeen dollar fee was paid by both Detectives to a white male who was behind the counter. We then went thru a metal door, which took us into an area that consisted of several rooms. Observed while in the rooms were numerous male parties involved in masturbation. Some of the male parties masturbated themselves while other male parties masturbated each other. One incident that was observed in one of the rooms was a white male engaging in oral sex with another white male. When this investigator walked into the room, the male looked up and he was asked if he minded being watched. He stopped and appeared to pull a hair from his mouth and stated that he did not mind but did not want a room full. He then continued with the oral sex. Also observed was several other male parties engaged in oral sex with each other in other parts of the Theater. This investigator saw six male parties engaged in oral sex and four male parties engaged in masturbation. This investigator went into a room where a movie was showing female and male oral sex. At that time I was approached by a male party who asked if he could do that to me. Both Detectives were inside the business for approx. one hour. The conditions of the business was dirty and the floor was sticky with an unknown substance. Some of the male parties ejaculated on the floor and or wall. This activity was monitored electronically.

INDEXING:

; SUISS #: ; Alias: ; DOB: ; Race: ; Sex: ; Height: ;Weight: ; Eyes: ; Hair: ; Drivers

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Chattanooga Police Department
Narcotics Division

Report of Investigation

Case Subject Name: CINEMA ONE **Case File Number:** 155
Complaint Number:
Investigation Action: Open Case: ☐ Supplement: ☒ Close Case: ☐
Date Prepared: 112801 **Prepared by:** DOSSETT 760
Other Officers: Sgt. ATKINSON, Det. WOLFF
Subject of Report: VICE

ON NOVEMBER 28, 2001, AT APPROXIMATELY 1640 HOURS, DETECTIVE WOLFF AND MYSELF WENT TO CINEMA ONE THEATER LOCATED AT 4100 ROSSVILLE BLVD. DETECTIVES ENTERED THE THEATER THROUGH THE FRONT DOOR AT WHICH TIME WALKING UP TO THE COUNTER TO PAY THE COVER CHARGE. THE CASH REGISTER WAS BEING RUN BY A WHITE FEMALE. DETECTIVE WOLFF AND DOSSETT PAID THE MALE SIX DOLLARS AND FIFTY CENTS A PIECE. AFTER PAYING THE MINI MOVIE ENTRY FEE WE WENT TO THE MINI MOVIE SECTION OF THE BUSINESS. WHILE IN THIS AREA DETECTIVES OBSERVED AT LEAST SIX WHITE MALES MASTERBATING, AND THERE WERE THREE BLACK MALES MASTERBATING IN MOVIE STALLS. THE MEN MASTERBATING HAD THERE PENIS' OUT IN THEIR HAND, IN PUBLIC VIEW WHILE MASTERBATING. I OBSERVED ONE WHITE MALE PERFORMING ORAL SEX ON OTHER MAN.

DETECTIVES STAYED APPROXIMATELY THIRTY FIVE MINUTES. DURING THIS TIME THE CONDITIONS OF THE BUSINESS WAS DIRTY AND THE FLOORS HAD A UNKNOWN STICKY LIKE SUBSTANCE ON IT.

Date:_____ Signature:(Officer)_____

Approved: Date: _____ Signature:(Title and Name) _____

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Chattanooga Police Department
Narcotics Division

Report of Investigation

Case Subject Name: CINEMA ONE **Case File Number:** 155
Complaint Number:
Investigation Action: Open Case: ☐ Supplement: ☒ Close Case: ☐
Date Prepared: 122001 **Prepared by:** DOSSETT 760
Other Officers: Sgt. ATKINSON, Det. WOLFF, FLOYD
Subject of Report: VICE

ON DECEMBER 19, 2001, AT APPROXIMATELY 1430 HOURS, DETECTIVE WOLFF AND MYSELF WENT TO CINEMA ONE THEATER LOCATED AT 4100 ROSSVILLE BLVD. DETECTIVES ENTERED THE THEATER THROUGH THE FRONT DOOR AT WHICH TIME WALKING UP TO THE COUNTER TO PAY THE COVER CHARGE. THE CASH REGISTER WAS BEING RUN BY A WHITE MALE. DETECTIVE WOLFF AND DOSSETT PAID THE MALE SIX DOLLARS AND FIFTY CENTS A PIECE. AFTER PAYING THE MINI MOVIE ENTRY FEE WE WENT TO THE MINI MOVIE SECTION OF THE BUSINESS. WHILE IN THIS AREA DETECTIVES OBSERVED AT LEAST FIVE WHITE MALES IN DIFFERENT ROOMS MASTERBATING, AND THERE WERE TWO BLACK MALE MASTERBATING IN MOVIE STALLS. THE MEN MASTERBATING HAD THERE PENIS' OUT IN THEIR HAND, IN PUBLIC VIEW WHILE MASTERBATING. I OBSERVED TWO WHITE MALES PERFORMING ORAL SEX ON OTHER MEN. I SAW AT LEAST ONE WHITE MALE MASTERBATE AND EJACULATED ON THE FLOOR AND WALL.

DETECTIVES STAYED APPROXIMATELY FORTY FIVE MINUTES, DURING THIS TIME THE CONDITIONS OF THE BUSINESS WAS DIRTY AND THE FLOORS HAD A UNKNOWN STICKY LIKE SUBSTANCE ON IT.

THE VISIT WAS VIDEO TAPED BUT THE TAPING ON THE VISIT FAILED.

INDEXING:

; SUISS #: ; Alias: ; DOB: ; Race: ; Sex: ; Height: ;Weight: ; Eyes: ; Hair: ; Drivers License #: ; SSN #:

Address:
Telephone #:
Vehicle:

Date: 12/2001 **Signature:(Officer)** [signature] 760

Approved: Date: 12/20/01 **Signature:(Title and Name)** [signature] 0182

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Chattanooga Police Department
Narcotics Division

Report of Investigation

Case Subject Name: Cinema One Theater **Case File Number:** 155
Complaint Number:
Investigation Action: Open Case: ☐ Supplement: ☒ Close Case: ☐
Date Prepared: 011402 **Prepared by:** Wolff
Other Officers: Sgt. Atkinson, Det. Dossett, Floyd
Subject of Report: Vice

On January 14, at approximately 1745 hours, this investigator along with detective Dossett went to Cinema One Theater located at 4100 Rossville Blvd. Detectives entered the theater through the front door at which time walking up to the counter to pay the cover charge. The counter was being run by a white female and a white male. Detective Dossett paid the male six dollars and fifty cents and detective Wolff paid the female six dollars and fifty cents. After paying the cover charge we then went thru a metal door, which took us into an area that consisted of several rooms. While in this area detectives observed three white males in different rooms masterbating, and one black male standing in the hallway masterbating. Detectives Wolff asked all three parties if they minded being watched all three stated no they did not care. Detective Wolff observeded one of the males ejaculate onto the TV screen during this time.Detectives observed three different white males performing oral sex on three other males. Detective Wolff entered one room where one act was taking place and asked if they minded being watched they stated no. The male that was receiving the oral sex stated that this guy could suck a dick. Detective Wolff asked the other four if they mined being watched they all stated no.

Detectives stayed approximately forty five minutes, during this time the conditions of the business was dirty and the floors had a unknown sticky like substance on it.

INDEXING:

; SUISS #: ; Alias: ; DOB: ; Race: ; Sex: ; Height: ;Weight: ; Eyes: ; Hair: ; Drivers License #: ; SSN #:

Address:
Telephone #:
Vehicle:

Date:_____ **Signature:(Officer)**_____

Approved: Date: _____ **Signature:(Title and Name)** _____

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Chattanooga Police Department
Narcotics Division

Report of Investigation

Case Subject Name: CINEMA ONE **Case File Number:** 155
Complaint Number:
Investigation Action: Open Case: ☐ Supplement: ☒ Close Case: ☐
Date Prepared: 012902 **Prepared by:** DOSSETT 760
Other Officers: Det. WOLFF
Subject of Report: VICE

ON JANUARY 27, 2002, AT APPROXIMATELY 1830 HOURS, DETECTIVE WOLFF AND MYSELF WENT TO CINEMA ONE THEATER LOCATED AT 4100 ROSSVILLE BLVD. DETECTIVES ENTERED THE THEATER THROUGH THE FRONT DOOR AT WHICH TIME WALKING UP TO THE COUNTER TO PAY TO ENTER THE MINI MOVIE SECTION OF THE ESTABLISHMENT. A WHITE MALE WAS RUNNING THE CASH REGISTER. DETECTIVE WOLFF AND DOSSETT PAID THE MALE SIX DOLLARS AND FIFTY CENTS. AFTER PAYING THE MINI MOVIE ENTRY FEE WE WENT TO THE MINI MOVIE SECTION OF THE BUSINESS. WHILE IN THIS AREA DETECTIVES OBSERVED AT LEAST THREE WHITE MALES AND TWO BLACK MALES IN DIFFERENT ROOMS MASTURBATING, AND ONE MAN FONDLING ANOTHER MAN IN A STALL. ALL PEOPLE MASTURBATING HAD THEIR PENIS' OUT MASSAGING THEIR PENIS WITH THEIR HAND. I OBSERVED THREE SEPARATE INSTANCES OF ONE MAN PERFORMING ORAL SEX ON ANOTHER MAN. THERE WERE APPROXIMATELY 15-20 PEOPLE IN THE MINI-MOVIE SECTION OF THE BUSINESS. ALL WERE MALE. WE STAYED IN THE BUSINESS FOR APPROXIMATELY 30 MINS. BEFORE LEAVING.

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; SUISS #: ; Alias: ; DOB: ; Race: ; Sex: ; Height: ;Weight: ; Eyes: ; Hair: ; Drivers License #: ; SSN #:

Address:
Telephone #:
Vehicle:

Date: 1/29/02 Signature:(Officer) [signature] 760

Approved: Date: 1-29-02 Signature:(Title and Name) Sgt. Adams 760 01838

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Chattanooga Police Department
Narcotics Division

Report of Investigation — Page 1

Case Subject Name: CINEMA ONE — **Case File Number:** 155
Complaint Number:
Investigation Action: Open Case: ☐ Supplement: ☒ Close Case: ☐
Date Prepared: 042402 — **Prepared by:** DOSSETT 760
Other Officers: Det. WOLFF, ATKINSON
Subject of Report: VICE

ON APRIL 24, 2002, AT APPROXIMATELY 1328 HOURS, DETECTIVE WOLFF AND MYSELF WENT TO CINEMA ONE THEATER LOCATED AT 4100 ROSSVILLE BLVD. DETECTIVES ENTERED THE THEATER THROUGH THE FRONT DOOR AT WHICH TIME WALKING UP TO THE COUNTER TO PAY TO ENTER THE MINI MOVIE SECTION OF THE ESTABLISHMENT. A WHITE MALE AND FEMALE WERE RUNNING THE CASH REGISTER. DETECTIVE DOSSETT PAID THE MALE $13 DOLLARS. AFTER PAYING THE MINI MOVIE ENTRY FEE WE WENT TO THE MINI MOVIE SECTION OF THE BUSINESS. WHILE IN THIS AREA DETECTIVES OBSERVED AT LEAST TWO WHITE MALES IN DIFFERENT ROOMS MASTURBATING, AND TWO MEN PERFORMING ORAL SEX WITH TWO OTHER MEN IN TWO DIFFERENT STALLS. ALL PEOPLE MASTURBATING HAD THEIR PENIS' OUT MASSAGING THEIR PENIS WITH THEIR HAND. THERE WERE APPROXIMATELY 10-15 PEOPLE IN THE MINI-MOVIE SECTION OF THE BUSINESS. I OBSERVED TWO FEMALES IN THE MINI MOVIE SECTION. ONE FEMALE WAS KISSING, FONDLING AND BEING FONDLED BY A MALE IN A STALL. WE STAYED IN THE BUSINESS FOR APPROXIMATELY 45 MINS. BEFORE LEAVING. THE VISIT WAS VIDEO TAPED. THE VIDEO RECORDED OPERATED FOR APPROXIMATELY 22 MINS. THE BATTERY FAILED AFTER THAT PERIOD OF TIME.

INDEXING:

; SUISS #: ; Alias: ; DOB: ; Race: ; Sex: ; Height: ;Weight: ; Eyes: ; Hair: ; Drivers License #: ; SSN #:
Address:
Telephone #:
Vehicle:

Date: 042402 — Signature:(Officer) [signature] 760
Approved: Date: 042402 — Signature:(Title and Name) [signature] Sgt. H. Timm 380
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Chattanooga Police Department
Special Investigations Unit

Report of Investigation

Case Subject Name: CINEMA ONE **Case File Number:**
Complaint Number: N/A
Investigation Action: Open Case:X Supplement: ☐ Close Case: ☐
Date Prepared: 110802 **Prepared by:** DOSSETT 760
Other Officers: WOLFF
Subject of Report: INSPECTION OF CINEMA ONE

ON NOVEMBER 8, 2002 DETECTIVE LEE WOLFF AND MYSELF MADE AN INSPECTION OF CINEMA ONE. WE WALKED IN THE BUSINESS AND IDENTIFIED OURSELVES. WE THEN WENT TO THE MINI MOVIE SECTION. IT WAS IN OPERATION WITH APPROXIMATELY 10 CUSTOMERS IN THE SECTION. WE FOUND MARK DYESS FONDLING CLARENCE SMITH'S EXSPOSED PENIS IN ONE OF THE BOOTHS.

THE BUSINESS HAD MONITORS OVER THE CASH REGISTER THAT SHOWED THE MINI MOVIE SECION. THE MINI MOVIE SECTION WAS DARK. THE VISIT WAS MADE AT 1415 TO 1425.

A LETTER WAS DELIVERED TO THE BUSINESS FROM THE CITY ATTORNEY'S OFFICE.

INDEXING: MARK DYESS

; SUISS #: ; Alias: ; DOB: ; Race: ; Sex: ; Height: ;Weight: ; Eyes: ; Hair: ; Drivers License #: ; SSN #:
Address: 601 CHICKAMAUGA AVE 5 ROSSVILLE GA
Telephone #: 314-2217
Vehicle:

INDEXING: CLARENCE SMITH

; SUISS #: ; Alias: ; DOB: ; Race: ; Sex: ; Height: ;Weight: ; Eyes: ; Hair: ; Drivers License #: ; SSN #:
Address: 6737 HARBOR CIR
Telephone #: 344-6022
Vehicle:

Date:_____ Signature:(Officer)_____

Approved: Date: _____ Signature:(Title and Name) _____

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Chattanooga Police Department
Special Investigations Unit

Report of Investigation

Case Subject Name:CINEMA ONE **Case File Number:**
Complaint Number: N/A
Investigation Action: Open Case:X Supplement: ☐ Close Case: ☐
Date Prepared:112102 **Prepared by:** DOSSETT 760
Other Officers: WOLFF, ATKINSON, FLOYD, YATES, PENNEY, POLAND, HENNESSEE
Subject of Report: INSPECTION OF CINEMA ONE

ON NOVEMBER 21, 2002 DETECTIVES FROM THE CHATTANOOGA POLICE DEPARTMENT MADE AND UNDERCOVER VISIT AND INSPECTION OF CINEMA ONE. OFFICERS PENNY, POLAND AND HENNESSEE WENT INTO THE ESTABLISHMENT AT APPROXIMATELY 2012 HOURS. THEY PAID $19.67 TO ENTER THE MINI MOVIE SECTION. ONCE IN THE MINI MOVIE SECTION JAMES HUITT PROPOASITIONED ALL THREE DETECTIVES FOR ORAL SEX. HUITT THEN TOUCHED PENNY'S CHEST AND GROIN AREA.

OTHER DETECTIVES WENT INTO THE BUSINESS AND SAW RAY COX IN THE THEATER SECTION OF THE BUSINESS WITH HIS PENIS EXPOSED. DETECTIVES ALSO FOUND A USED CONDOM IN THE MINI MOVIE SECTION OF THE BUSINESS. I. D. WAS CALL OUT AND THE CONDOM WAS PHOTOGRAPHED AND COLLECTED.

THE MINI MOVIE SECTION OF THE BUSINESS WAS DARK AND I ASKED THE OWNER DAVID FRANKLIN TO TURN ON THE LIGHTS AND HE COULD NOT. HUITT WAS ARRESTED FOR SEXUAL BATTERY. MEASUREMENTS WERE MADE OF THE BOOTHS AND THE LAYOUT OF THE BUSINESS WAS SKETCHED.

INDEXING: HUIETT JAMES

; SUISS #: ; Alias: ; DOB: 053152 ; Race: W ; Sex: M ; Height: 510 ;Weight: 240 ; Eyes: ; Hair: ; Drivers License #: ; SSN #:
Address: 4417 SENECA DR
Telephone #: 821-1668
Vehicle:

INDEXING: RAY COX

; SUISS #: ; Alias: ; DOB: 083142 ; Race: W ; Sex: M ; Height: ;Weight: ; Eyes: ; Hair: ; Drivers License #: 006514984 GA ; SSN #:
Address: 9360 SWEETBROW TRACE JONESBORO GA
Telephone #:
Vehicle:

Date:_____ **Signature:(Officer)**_____

Approved: Date: _____ **Signature:(Title and Name)** _____

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An Analysis of the Relationship Between Adult Entertainment Establishments, Crime, and Housing Values

Submitted to the Consumer Services Committee
Minneapolis City Council

by

Marlys McPherson
Executive Director

and

Glenn Silloway
Research Associate

The Minnesota Crime Prevention Center, Inc.
121 East Franklin Avenue
Minneapolis, Minnesota 55404

October, 1980

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An Analysis of the Relationship Between Adult Entertainment Establishments, Crime, and Housing Values

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An Analysis of the Relationship Between Adult Entertainment Establishments, Crime, and Housing Values

Preface

This study examines two separate but related issues: 1) the relationship of bars to crime, and 2) the impact of adult entertainment establishments on neighborhood deterioration.

The first issue is specific in its focus and is limited to studying the impact of alcohol-serving establishments on crime in the immediate geographical area (a six-block radius) around the bar. This relationship between bars and crime is analyzed in three sections in the first chapter of this report. These analyses investigate:

1. The general relationship between bars and crime, taking type of neighborhood into account;
2. The effect of eliminating the liquor patrol limits in 1974; and
3. The characteristics of "nuisance" bars as compared with "non-nuisance" bars.

The second issue is broader, and more complex to answer. The study looks at all adult entertainment establishments . . . saunas, rap parlors, adult theaters, etc., in addition to bars. It examines their relationship to neighborhood deterioration as measured by crime and housing value. For this part of the study, "neighborhoods" are defined as census tracts. Other factors affecting neighborhood deterioration are controlled for in order to measure the independent effects of adult entertainment establishments. The research questions involve establishing whether or not there is an association between adult entertainment and neighborhood deterioration at the census tract

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level, and then determining whether the evidence supports the hypothesis that adult entertainment precedes neighborhood deterioration.

The second chapter of the report presents the analysis of these issues in four sections:

1. A summary of the policy issues that motivate the study,
2. The research questions and study design derived to investigate these policy issues,
3. The analysis and results of the study, and
4. The summary conclusions.

This study was commissioned by the Minneapolis City Council in winter, 1980 to provide some empirical basis for policy decisions regarding the licensing and zoning of adult entertainment establishments. The research questions were derived through discussions with the members of the Council's Consumer Services Committee, and with members of the committee appointed to assist the research, including John Bergquist, manager of the Department of Licenses and Consumer Services, Roger Montgomery of the Police Inspection Unit, and Mary Wahlstrand of the City Attorney's office. Numerous other city employees were generous with their time and helpful in their suggestions.

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4

CHAPTER I

BARS AND CRIME

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5

Section A

General Relationship Between Bars and Crime

1. Introduction: The Research Question

The hypothesis investigated in this section is that bars are significantly associated with crime. This portion of the study examines the general association of bars to crime as well as the association of certain types of bars to crime, while controlling for neighborhood setting. The general hypothesis in this context can be reinterpreted as specific research questions:

a. Are selected crimes distributed non-randomly in areas surrounding bars as a group? Do they cluster around bars?

b. Do these distributions provide evidence of an association between types of bars and crime, i.e., do the crimes tend to cluster around the various types of bars?

c. Do these observed distributions change when controls (factors other than bars or crimes) are taken into account?

2. Methodology

a. Variables and Data Sources

The major independent variable is all licensed alcohol-serving (on-sale) establishments in Minneapolis. This variable is measured by identifying the location (address) of each bar. The license categories established by the city -- beer, wine, or liquor bars, and Class A, B, or C entertainment -- are subdivisions of the independent variable and are considered separately in some analyses below. Bars are also classified into two categories according to the volume of food service business they do.

The data source for identifying bar locations was the records of the License Department of the City of Minneapolis. According to these

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records, there were 203 liquor licenses, 21 wine licenses, and 143 beer licenses issued in 1979. Each of these businesses is also licensed for a certain entertainment level. The data source for classifying bars according to volume of food business were the observations of members of the License Department and the Minneapolis Police Department. 215 of the 367 licensed establishments could be classified in this way. The remaining 152 bars are dropped from any analysis based on food categories.

The dependent variable is the density of crime in areas surrounding the bars. The crimes that are measured for the analysis are street robbery and assault. These crimes are reasonable in that we might expect to find a relation between alcohol consumption and these personal crimes. No theory connecting crime and drinking in public places exists, but we have sufficient experience with the effects of alcohol on aggressive behavior to make the connection. In addition, bars serve as gathering places where outbursts of aggression have handy targets. Finally, neither observed relationships (as in the adult entertainment portion of this study, which shows a low overall relationship between bars and residential burglary, for example) nor logic argue for the inclusion of other crimes. One important candidate may be vandalism, but reported vandalism rates are so unreliable by present measurement techniques that it could not be included.

Crime counts were made at the address level using the offense report data automated through the Minneapolis Police Department's Integrated Criminal Apprehension Program (ICAP). These counts were aggregated into frequencies for each crime and for each area

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surrounding a bar for a one-year period from May 1, 1979 to April 30, 1980. Assaults and street robberies were considered both separately and together in various analyses.

Finally, the analysis takes into account the type of neighborhood as a control variable. "Neighborhood" is here defined as a census tract, and it is measured by the percent of owner-occupied homes by tract. It was necessary to use the census tract as the unit of measurement for this variable because the address level data necessary to construct the exact distance decay areas was not available at an affordable price. Percent owner-occupied, taken from the 1970 census, is known to be highly related to other indicators of socio-economic status such as income, and in addition it is believed to indicate in some degree the important properties of stability and salience of neighborhood identity on the part of residents. The actual measure used is a Z-score, dividing the variable into three categories (low = -.5 standard deviations or less, medium = -.5 to .5, high = .5 or greater).

b. Unit of Analysis

The units of analysis are the areas around each bar, and the subdivisions of that area. These units of analysis are not existing civil divisions, like census tracts, but rather are created by specialized processing software which uses the address-level crime data provided by ICAP to first aggregate the data into uniform areas around each bar and then perform standard analyses on the densities of crimes found in these areas for each bar or group of bars. This technique is known as distance decay analysis.

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Distance decay analysis determines the degree to which crime is uniformly distributed geographically about a particular site. Where crime is not uniformly distributed around a site but displays a pattern of being densely distributed near the site and gradually becoming less dense as distance from the site increases, then it may be the case that the site is associated with crime. There are three tests to determine whether a site is statistically associated with crime:

1. Is a distance decay curve present, that is, does the density of crime decrease as we move away from the site?
2. Is there a significant chi-square statistic demonstrating that the areas around sites vary from normal density?
3. Is there a significantly negative slope to the curve as measured by a signs test?

Only if all three tests are positive do we consider a site associated with crime. Thus, this study uses a conservative test in order to be confident that the relationship between crime and bars actually exists.

The sub-areas constructed around each bar by the distance decay software are six approximately concentric rings of 1/10 mile in width each, for a total area with a 6/10 mile radius.[1] The technique compares the proportion of the total crimes in each ring to the proportion of land area within each ring to get a measure of the density in crime in each concentric ring. These measures (six for each distance decay) are then tested by the three tests outlined above to see if the density of crime is non-random and if it is concentrated at the middle of the area (the "node") where the bar is.[2]

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[1]The technique is most easily described with concentric rings as the units of analysis. The actual unit of analysis used in this study was city-blocks.

[2]See Appendix A.1 for a further description of distance decay analysis.

3. Analysis and Findings

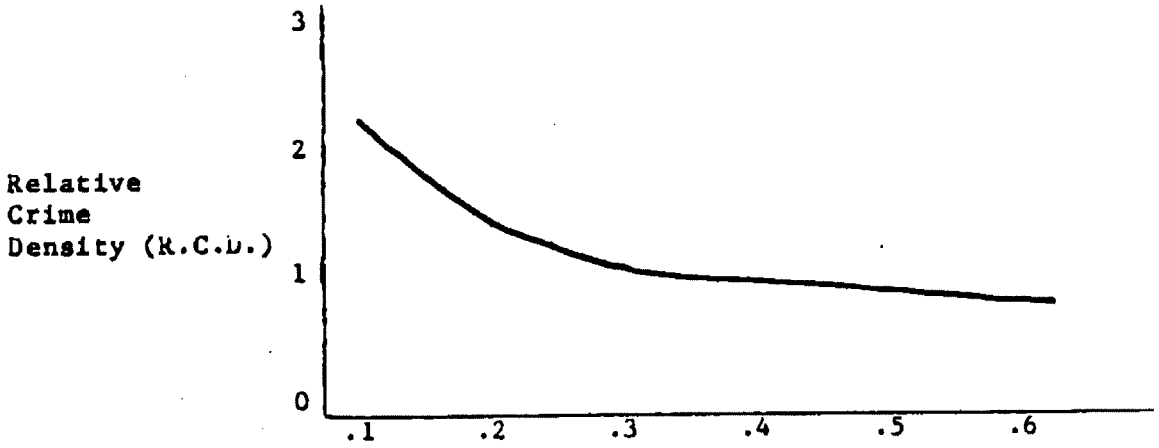
a. Are selected crimes distributed non-randomly in areas surrounding bars as a group? Do they cluster around bars?

This analysis looks at the general association between bars and selected types of crime. Separate distance decay analyses were performed on the 367 bars and a summary analysis was prepared for all bars. This was done for each of the crimes separately and for the two crimes combined.

The summary analysis of bars and assaults in Figure I.1 demonstrates a classic distance decay curve. As can be seen in Figure I.1, as distance from the bar increases the density of assaults decreases. Both the chi-square and the signs test are significant. As a group, bars in Minneapolis are significantly associated with assaults. This, of course, does not mean that every bar is associated with assault.

Figure I.1

Distribution of Assaults Around Bars



x^2 = 2325.6 Sig. .05 Slope negative .03

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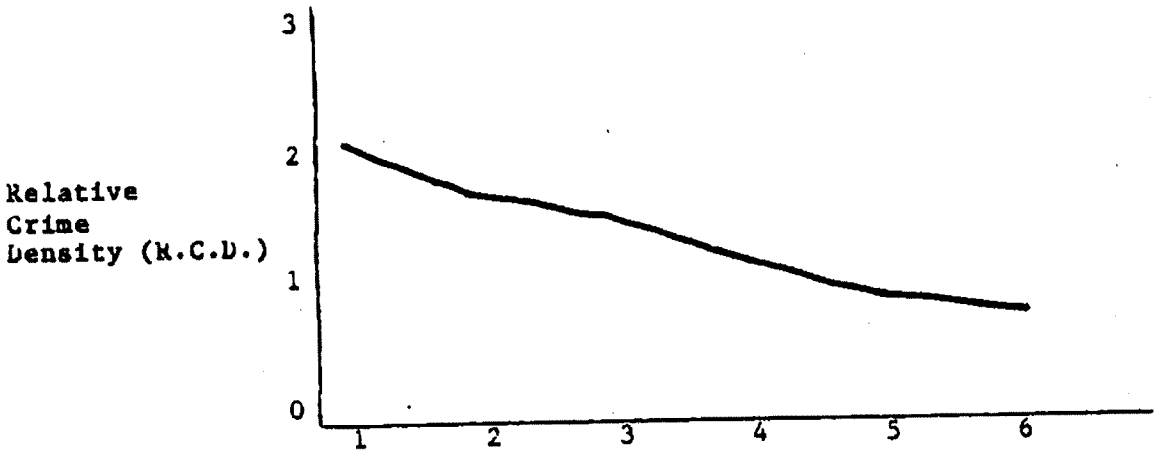
The association of Minneapolis bars and street robbery is demonstrated in Figure I.2. Once again, there is a fairly strong distance decay curve which indicates a concentration of street robbery around bars that decreases as distance from the bar increases. Both the chi-square and the signs are significant. In general, bars in Minneapolis are significantly associated with street robbery.

Figure I.2

Distribution of Street Robbery Around Bars



X^2 = 1968.4 sig. 05 Slope negative .03

Because bars are associated with both assaults and street robberies separately, we may expect that they will be associated with the two crimes combined. This is the case as presented in Figure I.3. Again, the chi-square and signs test are both significant. It is the case that bars are associated with the crimes of assault and street robbery both separately and combined.

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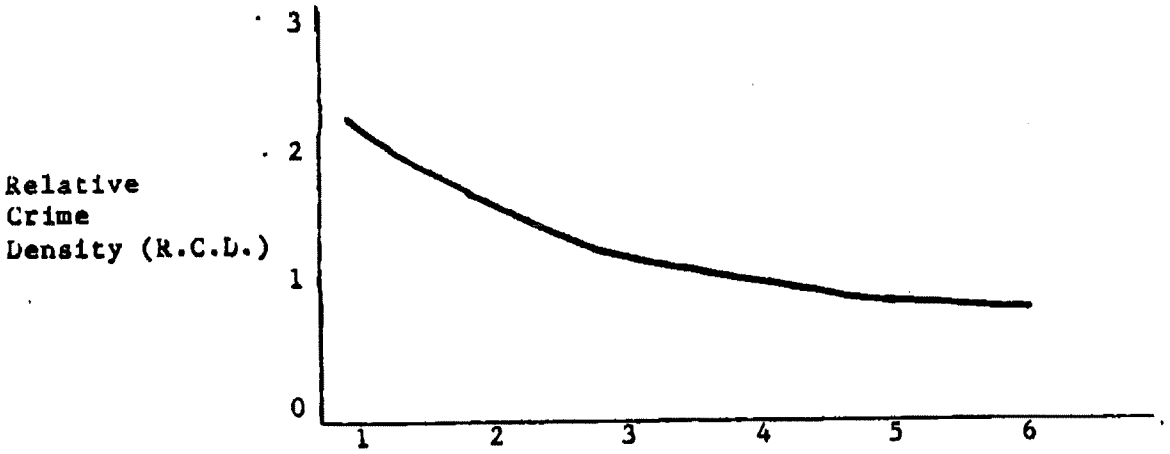
Figure I.3

Distribution of Assaults and Street Robbery Around Bars



x^2 = 4122.0 Sig .05 Slope negative .03

b. Do these distributions provide evidence of an association between types of bars and crime, i.e., do the crimes tend to cluster around the various types of bars? Do these observed distributions change when controls (factors other than bars) are taken into account?

Despite the relationship between bars and crime in general, it is quite possible that this relationship does not exist for some categories of bars but does hold for others.

Bars are licensed according to the type of alcohol allowed to be served. The city has three categories: liquor, beer (3.2), and wine. The level of entertainment allowed in a licensed establishment also is licensed by the city and is used to categorize bars. There are three classes of entertainment defined by license categories: "C" (juke boxes, machines, T.V.); "B" (single performer plus those permitted under "C"), and "A" (live bands, shows, dancing, plus those permitted under "B" and "C").

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In addition, the city staff expressed interest in the effect of volume of food business on crime. The assumption to be tested is that bars with lower food volume have lower associations with crime than bars with greater food volume. The two categories of food volume are: high = greater than 50 percent food; low = less than 50 percent food volume. This section looks at bars and their association with crime in each of these three categorizations: alcohol, entertainment, and food.

Because many other studies on crime have found that the type of neighborhood has a great influence on crime, it was decided to add neighborhood type as a control variable. Therefore, the study analyzes the relationship of all bars with the selected crimes while controlling for the environment in which a bar exists.

(1) Bars by sub-type and crime

Summary distance decays were run for each of the six license categories of bars, plus two categories of food volume in the businesses, measuring the density of the combined crimes of assault and street robbery.[1] The results of these eight summary distance decays are reported in Figure 1.4.

Wine and Class B entertainment bars, and bars which have more than 50 percent of their total volume in food service do not show significant associations with the distribution of the selected crimes in the surrounding areas. All other categories do exhibit significant

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[1]Separate analyses for each crime were performed, but the results were similar and therefore the combined measure was used.

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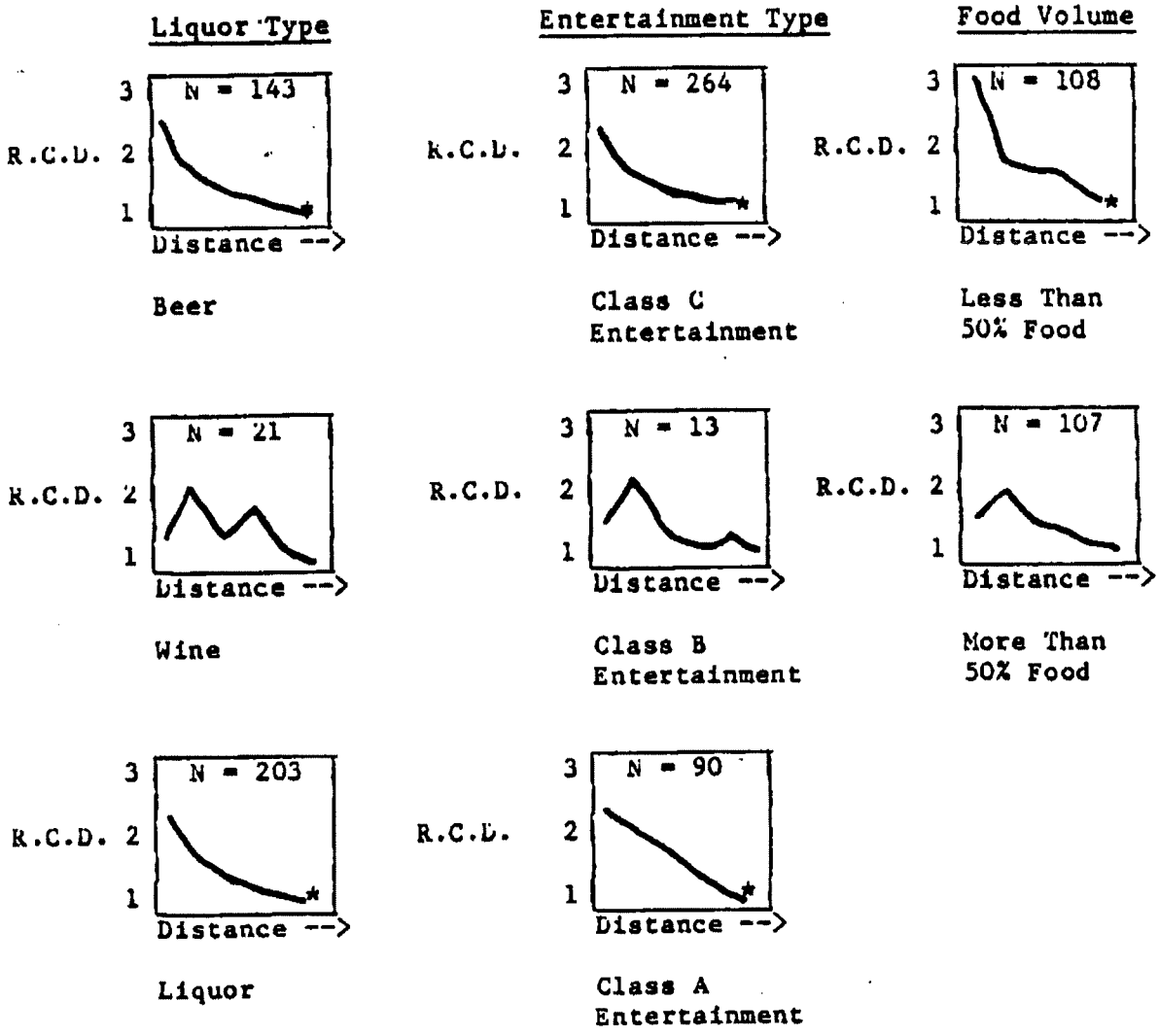
Figure I.4

Distribution of Crime Around Bars by Categories of Bars



*These distance decay curves are significant according to the three tests outlined in the text.

tendencies toward clustering around the bars as types.[1] In the cases of wine and Class B bars, these results may be due to the spatial

[1]The results for wine and Class B bars may be questioned by some because of the small number of bars in those categories. However, the technique aggregates the number of crimes in surrounding areas to get a density measure, and it would be sensitive to low N if the number of crimes in a ring were small. In these cases, all rings in the aggregated measures count over several hundred crimes (some crimes are counted more than once), so the number is adequate.

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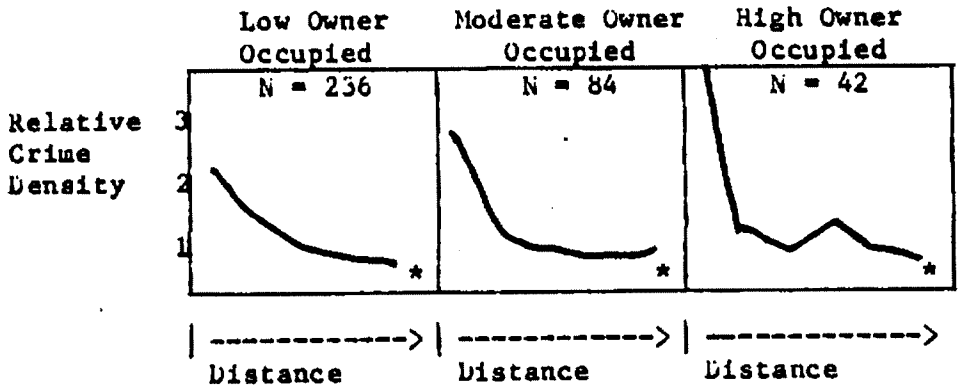
distribution of the bars in the city and the way the distance decay technique aggregates events within these distributions. Wine bars are also bars with high food volume which may in fact account for a lower crime association. Class B bar effects cannot be accounted for in any simple way by the kind of entertainment permitted since bars with both fewer (Class C) and more (Class A) entertainment options are significantly associated with crime.

(2) Crime around bars controlling for neighborhood type

Figure I.5 reports three summary distance decays for all bars within the three types of neighborhoods as identified by percent owner occupied housing.

Figure I.5

Distribution of Crime Around all Bars Within Types of Neighborhoods



*Indicates significant distance decay.

As Figure I.5 shows, the measured densities of the crimes of assault and street robbery are signficantly associated with the location of bars in all three types of neighborhoods.

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This finding is especially interesting in the cases of the moderate and high owner-occupied neighborhoods where the possibly confounding impact of the downtown bars has been eliminated. The low owner-occupied cell contains all of the bars from the downtown area where few people own the homes they live in. This concentration of bars may exaggerate the impact of bars on crime because we know that: 1) assaults and street robberies are concentrated in highly commercialized areas, such as the Central Business District, which suggests that the observed relationship between bars and these crimes may be due to some characteristic of the commercial area other than bars, and 2) the aggregating technique used in the distance decay analysis overweights crimes around extreme clusters of bars, such as is found downtown.

however, these considerations are not present in higher owner-occupied neighborhoods, which tend to be lower crime areas and removed from concentrations of bars like that found in downtown. The fact that a greater density of crime around bars remains in these areas gives us somewhat more confidence that the finding of a relationship between bars and crime really exists. Concentrations of bars or the fact that bars are in commercial zones still could be confounding these results, but this is substantially less likely when the downtown bars are eliminated from the analysis.

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4. Summary: General Relationship Between Bars and Crime[1]

What is the general relationship between bars and crime? Does the relationship hold when other variables associated with crime are controlled?

a) An aggregate analysis of all 367 bars in Minneapolis shows that bars as a group are associated with the crimes of assault and street robbery.

b) This relationship between bars and the selected crime types remains when type of neighborhood (as measured by percent owner-occupied housing) is controlled.

c) Bars whose food volume accounts for over 50 percent of total volume, bars with wine licenses, and bars with Class B entertainment licenses are not associated with the crimes of assault and street robbery.

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[1]Additional distance decay results showing groups of bars cross-classified by type of license or food volume and type of neighborhood are provided in Appendix A. Those results support the ones reported here.

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Section B

The Effect of Changing the Liquor Patrol Limits: New Bars and Crime

1. Introduction: The Research Question

Liquor patrol limits have had a long and controversial history in Minneapolis. Initially established in 1887, the patrol limits restricted liquor licenses to be located within certain boundaries. The original liquor patrol boundaries were drawn closely around the central city so that Minneapolis Police Department foot patrolmen could reach the ends of the limits. (An indication that the presumed relationship between bars and crime is indeed an old idea.) There were several unsuccessful attempts during the 1950's to extend the patrol limit boundaries, with the issue ultimately bound up with the larger issue of the economic and physical redevelopment of the downtown area.[1] City voters finally approved a charter amendment to extend the patrol limit boundaries in 1959.[2]

The liquor patrol limits continued to be a political issue throughout the 1960's. In 1974, voters approved a charter amendment abolishing the liquor patrol limits altogether. The restriction that on-sale liquor establishments can be located only in seven-acre

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[1]Many groups argued that the narrow confines of the patrol limits would guarantee that another skid row would develop, similiar to the one along Washington Avenue that was cleared in the 1950's and that resulted in many liquor licenses being forced to relocate. Therefore, one of the principal arguments was to extend the limits to permit a wider dispersal of the bars.

[2]The boundaries in effect after 1959 extended the patrol limits to Franklin on the south, Lyndale on the west, Broadway on the north and the Mississippi River on the east, along with a section in Northeast Minneapolis along University Avenue.

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commercial zones remained in effect, however. As a result of Minneapolis' liquor licensing restrictions, major portions of the city remained without liquor bars until 1974 (with the exception of several "distressed" licenses issued outside of the limits).

One of the purposes of this study is to examine the effect on crime of the 1974 rescission of the liquor patrol limits. If bars are associated with higher incidences of certain kinds of crimes, as has been hypothesized, then one would expect to find significant increases of crime around those liquor bars established outside the old patrol limits.

2. Methodology

a. The Research Design

In order to answer the question about the effect on crime of the elimination of the liquor patrol limits, "before" and "after" analyses of the amount and distribution of the crime of assault were conducted. The logic of the design is illustrated below (Figure I.6).

Figure I.6

Before and After Research Design for Assessing Impact of Abolishment of Liquor Patrol Limits

Before (One year period, July 1, 1974 - June 30, 1975)		After (One year period, May 1, 1979 - April 30, 1980
Amount (number) of assaults within six blocks of the site	Introduction of a bar to the site	Amount (number) of assaults within six blocks of the bar
Distribution of crime as indicated by distance decay analysis of sites	Introduction of a bar to the site	Distribution of crime as indicated by distance decay analysis of sites

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As indicated, the design looks at crime in areas outside the patrol limits before new liquor licenses were established and then compares it with crime after those liquor licenses have been in existence for a period of time. An area with a radius of six blocks around each new bar site was selected for the unit of analysis. This is the same unit as was used to examine the general relationship between bars and crime. If those liquor licenses granted after 1974 have an effect uppon crime, it would be expected that the amount or distribution of crime (or both) around those sites would change between the two time periods.

b. The Data

Bars located outside the old liquor patrol limits were identified by mapping the 1980 liquor licenses and identifying bars located outside the boundaries in effect in 1974. The City License staff then provided the dates on which licenses were granted for these locations. A total of twenty-three bars were identified that met the following criteria: 1) had been granted licenses at locations outside the patrol limits after the 1974 change, and 2) existed before the 1979 data collection period. A list of these bars can be found in Appendix A.

The crime variable used in this analysis was number of assaults reported to the Police Department.[1] As suggested previously, the

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[1]The general relationship between bars and crime was explored using data on assaults and street robberies. The same definition of the dependent variable, crime, would have been used for this analysis except that address-level data on street robbery was unavailable for the 1974-75 period. But, as the previous analysis indicates, both assaults and street robberies show similar patterns.

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hypothesized relationship between bars and the crime of assault is supported on logical grounds. The data on assaults comes from two sources. For the "before" period, crime data for July 1, 1974 through June 30, 1975 was taken from the Crime in Minneapolis study in which address-level crime data was coded from police offense reports.[1] The Minneapolis Police Department's ICAP (Integrated Criminal Apprehension Program) system provided data for the "after" time period of May 1, 1979 through April 30, 1980.

c. The Analysis

In order to test the hypothesis that on-sale liquor licenses granted outside the old patrol limits are associated with a disproportionate increase in crime, both the number of assaults and the distribution of assaults within the six-block radius area of each of the 23 new liquor license sites were analyzed for the two time periods. Distance decay analyses were performed to analyze the distribution of crimes in the areas around each of the sites. For a complete discussion of the distance decay technique, see Appendix A. If the distribution of crime around the sites changed significantly during the five-year period, one would expect to find a random distribution of assaults in 1974-75 (as indicated by the distance decay curve) and a non-random distribution (i.e., a significant chi-square and negative slope in the distance decay curve) for the 1979-80 data.

3. Analysis and Findings

a. Amount of Crime

The results of the comparative analysis (1974-75 to 1979-80) of the number of assaults in the immediate vicinity of the 23 liquor

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[1] D. Frisbie, et al., Crime in Minneapolis, Minneapolis: Minnesota Crime Prevention Center, Inc., 1977.

licenses granted outside the old patrol limits does not show an unexpected increase. That is, on the average, assaults in the areas surrounding these sites did not increase at a greater rate than for the city as a whole. These results are presented in Table I.1. In general it cannot be said that the introduction of bars into new areas of the city resulted in an increase in the amount of crime (assaults) in those neighborhoods, although this was true for some particular bars.

Table I.1

Comparison of the Number of Assaults, 1974-75 to 1979-80

	1974-75	1979-80	Percent Change
Areas surrounding the 23 new liquor license sites	2,124*	2,384*	+12%
Minneapolis city-wide totals	4,156	5,614	+35%

*Note that the crime counts in the cells for the 1974-75 and 1979-80 new liquor licenses are not actual crime counts for those areas, but reflect the aggregating procedure used by the distance decay technique. The percent change for the new licenses can be compared to the percent change for the city as a whole. The temporal change within a row is also a valid comparison, as the areas are the same at both times.

b. Distribution of Crime

Comparative analysis of the distribution of assaults within the six-block radius area surrounding the 23 new liquor license sites suggests an apparent tendency toward a greater concentration of assaults in the immediate one-block area where the bars are located. As Table I.2 illustrates, in 1974-75 none of the sites had significant distance decay curves (defined in terms of a significant chi-square

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and a significant negative slope). In other words, the assaults did not cluster around the sites, but were more randomly distributed throughout the area. In 1979-80, however, six of these sites had significant distance decay curves, and an additional seven sites showed an increased concentration of assaults within the block of the bar although the increases were not sufficient to achieve significance.

Table I.2

Comparison of Distance Decay Analyses of New Liquor License Sites, 1974-75 to 1979-80

	1974-75	1979-80
Number of Significant* Distance Decay Curve Analyses for the 23 sites	0	6
*Significant chi-square at .05 level and significant negative slope.		

Table I.3 provides additional confirmation of a greater concentration of assaults within the immediate block where new liquor licenses are located. As this Table suggests, while the increase in assaults for the six-block areas where the 23 new licenses are located (12 percent) was less than the city-wide average (35 percent), the percent increase in assaults within one block of the bar sites was considerably higher (69 percent).

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Table I.3

Change in the Distribution of Assaults Around New Liquor License Sites, 1974-75 to 1979-80

	1974-75	1979-80	Percent Change
Number of assaults within one block area of the 23 new liquor license sites*	110	186	+69%
Number of assaults within six-block radius area of the 23 new liquor license sites*	2,124	2,384	+12%
Minneapolis city-wide totals	4,156	5,614	+35%

*Note that the crime counts in the cells for the 1974-75 and 1979-80 new liquor licenses are not actual crime counts for those areas, but reflect the aggregating procedure used by the distance decay technique. The percent change for the new licenses can be compared to the percent change for the city as a whole. The temporal changes within rows are valid as the areas are the same at both times.

Finally, a comparison of the summary distance decay curve for the 23 sites in 1974-75 to the summary curve for those same sites with liquor licenses in 1979-80 shows that the concentration of assaults within the first .1 mile band has increased significantly. The relative crime density for the first .1 mile band has increased from 1.86 in 1974-75 to 2.81 in 1979-80. This comparison is illustrated in Table I.4.

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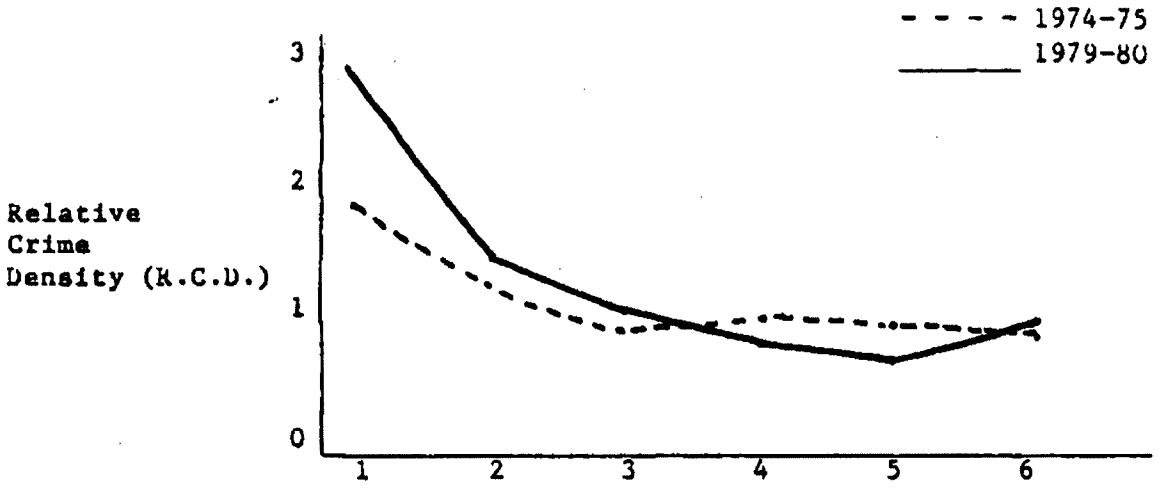
Table 1.4

Comparison of Summary Distance Decay Curves
1974-75 to 1979-80



The x^2 for both curves is significant at .001 level; both curves have significant negative slopes

From these results we may conclude that although there was some change in the amount and distribution of crime around some of the bar sites, in general the introduction of bars in areas outside the liquor patrol limits has not had the effect of increasing the amount of crime in the neighborhoods around these sites. However, there was a fairly uniform effect of increasing the concentration of assaults within one block of the bar sites. This indicates that bars may have an affect on crime, but the area is geographically limited to the immediate surrounding area. It may be that groupings of bars (concentrations) have a wider range effect on distribution of crime, but we were unable to test this hypothesis given the limited number of such concentrations among the new licenses issued.

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4. Summary Findings

What is the effect on crime of the 1974 rescission of the liquor patrol limits?

a. Twenty-three liquor licenses were granted outside the old liquor patrol limits between 1974 and 1979. An analysis of the numbers of assaults in the areas surrounding these sites shows that, on the average, assaults did not increase at a greater rate than for the city as a whole.

b. In general, there was an increased concentration of assaults within one block of the bar sites where liquor licenses were granted outside the patrol limits.

Section C

Characteristics of "Nuisance" Bars

1. Introduction: The Research Question

There are a number of bars in Minneapolis that generate "nuisances" and crime-related problems for the citizens of the city. These nuisances are in the form of relatively minor crimes such as vandalism, noise, litter, and discomfort of local residents. Yet, nuisance situations often are more obvious to citizens and cause them more concern and worry than serious crimes, such as assault and robbery. Although this was not part of the contract, several city officials expressed interest in knowing whether bars which generate nuisance situations differ systematically from bars which do not generate nuisances. If there are systematic differences between nuisance bars and non-nuisance bars, are these differences controllable through licensing restrictions? A third purpose of this portion of the study was added: to conduct some preliminary and exploratory analyses of the characteristics of nuisance-generating bars.

2. Methodology

a. The Research Design

Members of the City staff and the City Council suggested a number of factors that could be important in explaining why some bars generate nuisance situations and others do not. The factors suggested included: 1) the volume of food business, 2) proximity to a primarily residential area, 3) the type and availability of parking,[1] 4) the

[1]City staff and Council members expressed concern that bars that do not have off-street parking can create nuisances. It is assumed that customers parking in front of houses and in front of other businesses create conflict situations which result in disturbances and nuisances.

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type of entertainment,[1] 5) the type of liquor license, 6) the type of clientele, and 7) bar management practices. The data on the first six of these characteristics was collected through on-site observational visits to a sample of 40 Minneapolis bars.[2]

The research design is based on comparing two samples of bars, 20 bars identified as generating nuisances and 20 non-nuisance bars, on the six characteristics identified above. Although nuisances often result in calls-for-service to the police, at present the Minneapolis Police Department does not have an automated record keeping system for these calls that provides easy access to this data. Because the city has tens of thousands of calls each year, a study of all bars and their relationship to nuisances was outside the scope of this study. Instead a sample of bars believed to generate nuisances and a sample of bars that do not were selected for the comparative analysis.

A chi-square statistic was used to determine if there was a statistically significant difference between the two samples of bars on the characteristics.

Members of the Minneapolis City Council were asked to identify bars in their wards which generate complaints to their offices as well as to identify "exemplary" bars. Members of the Police License Inspection Unit were asked to identify bars in these two categories as well. From these nominations, 20 bars from each type of bar (nuisance and non-nuisance) were selected from their nominations. A list of

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[1]Entertainment at a bar has been cited as a potential source of nuisances because of the number and type of people it attracts.

[2]Given the observational method selected and the relatively short time spent at each bar, we were unable to collect data on the variable of management practices.

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the 40 bars included in the two samples can be found in Appendix A. On-site observations using a structured data collection instrument were made at the 40 bars by MCPC, Inc. staff. A copy of the data collection instrument used is also included in Appendix A.

b. Definition of the Variables and Data Sources

(1) Volume of food. The 40 bars were categorized according to whether their food business constituted over 50 percent of their gross business sales. Most of this data came from the Police Inspection Unit with supportive data from on-site observation.

(2) Proximity to residential neighborhood. The bars were categorized according to their proximity to residential areas using the following classifications: 1) within a block, 2) between one and two blocks, and 3) greater than two blocks distance. The data was collected by on-site observation.

(3) Type and availability of parking. The sampled bars were categorized according to the type of parking available for their customers: 1) street parking only, 2) metered street parking, 3) other parking lots available in the vicinity, and 4) the bar provides its own adequate-sized parking lot. The data was collected through on-site observation and inspection.

(4) Type of entertainment. The 40 bars were categorized two different ways according to type of entertainment. The first category consists of the types of entertainment license issued to bars by the City's Licensing Department: Class C, Class B, Class A (see p. 10 above for a discussion of these classifications). The second category is the type of entertainment actually present (as opposed to that for which they were licensed), based upon the on-site observations. The

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categories used were the following: 1) none, 2) single performer, and 3) band (and/or major disco-type sound system).

(5) Type of liquor license. The City issues liquor licenses based upon the type of alcohol which can be served. There are three classifications: 1) beer (3.2 alcoholic content), 2) wine, and 3) liquor. There are very few wine licenses in Minneapolis and neither of our samples included any bars with wine licenses, so for this portion of the study the two remaining types of alcohol were used: 1) beer, and 2) liquor.

(6) Type of clientele. The city has little direct control over the type of clientele a bar attracts; thus, this aspect of bars is not directly affected by city policies. Although the analysis of clientele may be interesting, the value to policy makers may be quite limited.

The factors describing clientele included age, class, residence and social pattern. Information about these variables was collected by on-site observation and was analyzed. As might be imagined, the measurements on this set of variables were subject to considerable error. Since only one visit was made to each bar, and the measurements were taken according to the judgments of one observer, the results obtained were considered to be too unreliable. Therefore, they are not included in this report.

(7) Game rooms. Although information on game rooms was not a part of the original data collection instrument, this information was collected. The criteria used to classify bars on whether or not they had a game room was: 1) the games constituted a clearly defined

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area of the establishment, and 2) the games were an important attraction for the bar. Bars with one or two machines were not classified as having a game room.

3. Analysis and Findings

a. Volume of Food

The data on the relationship between volume of food and type of bar (nuisance or non-nuisance) is presented in Table I.5.

Table I.5

Relationship of Volume of Food Business to Type of Bar

	Less Than 50% Food		More Than 50% Food	
Nuisance Bars	69%	(20)	0%	(0)
Non-Nuisance Bars	31%	(9)	100%	(11)
Total	100%	(29)	100%	(11)

$x^2 = 15.172$ 1df
sig. .001

As this Table indicates, none of the bars with over 50 percent food business were nuisance bars, while the majority of the bars with low food volume tended to be nuisance bars. This difference is statistically significant. It suggests that if a bar does a large volume of food business it is less likely to generate nuisances than if it does a small volume of food business.

b. Proximity to Residential Neighborhood

Table I.6 shows the results of the analysis for the relationship between proximity to residential neighborhood and type of bar.

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Table I.6

Relationship of "Proximity-to-Neighborhood" and Type of bar

	Within 1 block	1-2 blocks	2 or more
Nuisance Bars	63% (10)	22% (2)	53% (8)
Non-Nuisance Bars	37% (6)	78% (7)	47% (7)
Total	100% (16)	100% (9)	100% (15)

$x^2 = 3.844$ 2df
sig. .15

The results are more ambiguous than was the case for volume of food. Although there is a tendency for bars closer to residential areas to be nuisance bars, this result is not statistically significant at a level which justifies reaching general conclusions.

c. Type and Availability of Parking

The results of the analysis of the relationship between the type of parking available and type of bar are shown in Table I.7.

Table I.7

Relationship Between Type of Parking Available and Type of Bar

	Street	Meter	Other Lot	Own lot
Nuisance Bars	69% (9)	33% (1)	71% (5)	29% (5)
Non-Nuisance Bars	31% (4)	67% (2)	29% (2)	71% (12)
Total	100% (13)	100% (3)	100% (7)	100% (17)

$x^2 = 6.424$ 3df
sig. .10

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These results are ambiguous, but the tendency exists for nuisance bars to rely on street parking, while non-nuisance bars tend to have their own lots. These results are significant at the .10 level.

To carry the analysis further, a comparison was made between bars that have their own lot available and those that do not (i.e., they rely on all other types of parking). This involved combining the first three categories. The results of this comparison are clearer and statistically significant. Table I.8 indicates that bars without their own lots are much more likely to be nuisance bars, while bars with their own parking lots are less likely to be associated with nuisances.

Table I.8

Relationship Between Ownership of Parking Lot and Type of Bar

	Other Parking Facilities		Bar Owns Lot	
Nuisance Bars	65%	(15)	29%	(5)
Non-Nuisance Bars	35%	(8)	71%	(12)
Total	100%	(23)	100%	(17)

$x^2 = 5.013$ 1df
sig. .05

d. Type of Entertainment

Using the first definition of this variable, type of entertainment license issued by the City, the results in Table I.9 are obtained.

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Table I.9

Relationship Between Type of Entertainment License and Type of Bar

	C	B	A
Nuisance Bars	53% (10)	33% (1)	50% (9)
Non-Nuisance Bars	47% (9)	67% (2)	50% (9)
Total	100% (19)	100% (3)	100% (18)

$x^2 = .386$ 2df
no sig.

As this table indicates, there is not a significant relationship between the type of entertainment license a bar has and whether or not it is a nuisance bar.

When the alternative entertainment classification scheme (observed type of entertainment) is used, the results are slightly different. These results appear in Table I.10.

Table I.10.

Relationship Between Observed Type of Entertainment and Type of Bar

	None	Single	Band
Nuisance Bars	44% (12)	25% (1)	78% (7)
Non-Nuisance Bars	56% (15)	75% (3)	22% (2)
Total	100% (27)	100% (4)	100% (9)

$x^2 = 4.111$ 2df
sig. .112

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This data shows some tendency for the bars with higher levels of entertainment to be associated with nuisance bars, but this is not a statistically significant finding.

e. Type of Liquor License

Table I.11 contains the data on this variable and its association with whether or not a bar is nuisance-generating.

Table I.11

Relationship Between Type of Alcohol and License and Type of Bar

	Beer		Liquor	
Nuisance Bars	33%	(2)	53%	(18)
Non-Nuisance Bars	67%	(4)	47%	(16)
Total	100%	(6)	100%	(34)

$x^2 = .784$ 1df
no sig.

According to these results from the sample of bars, the type of liquor license a bar has is not related to whether or not it generates nuisances. bars with one type of alcohol license are not more likely to be nuisance bars than bars with another type of license.[1]

f. Game Rooms

Table I.12 shows that the relationship between game rooms and type of bar is significant. Bars with game rooms are more likely to generate nuisances than bars that do not have game rooms.

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[1]The sampling procedure makes this result dubious since the city-wide distribution of beer licenses versus liquor licenses is 143 versus 203, quite different proportions than 6 versus 34.

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Table 1.12

Relationship between Game Rooms and Type of Bar

	No Game Room		Game Room	
Nuisance Bars	32%	(8)	80%	(12)
Non-Nuisance Bars	68%	(17)	20%	(3)
Total	100%	(25)	100%	(15)

$x^2 = 8.640$ 1df
sig. .01

4. Summary of Findings

Are there any systematic, significant differences in the characteristics of bars which generate crime-related nuisances when compared to bars that do not generate nuisance complaints?

a. Bars which do less than 50 percent volume of business in food tend to be nuisance bars.

b. There is no statistically significant relationship between a bar's proximity to a residential neighborhood and whether or not it is a nuisance bar.

c. Bars which do not have their own parking lots tend to be nuisance bars.

d. Bars with a higher level of entertainment (e.g., bands) tend to be nuisance bars, but the finding is not statistically significant.

e. There is no relationship between the type of liquor license a bar has and whether or not it is a nuisance bar.

f. Nuisance bars are more likely to have game rooms than are non-nuisance bars.

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CHAPTER II

ADULT ENTERTAINMENT ESTABLISHMENTS AND NEIGHBORHOOD DETERIORATION

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Introduction

The general purpose of this section is to examine the impact of adult entertainment establishments on neighborhood quality. The study is empirical, and uses statistical techniques to examine the relationships between concentrations of adult entertainment establishments and measures of neighborhood quality. On the basis of this analysis of data, inferences about whether adult entertainment establishments are associated with neighborhood decline and whether the establishments follow or precede neighborhood decline can be made.

The concerns represented here are neither unique to Minneapolis[1] nor new to the city.[2] There is widespread recognition of the importance of the use of city policy to encourage healthy, viable neighborhoods, and there is a suspicion that adult entertainment businesses -- bars, saunas, adult bookstores, and the like -- may be undesirable in such neighborhoods.

Two fairly common measures of neighborhood quality are used in this report: the crime rate, and a measure of housing value. While neither of these measures is perfect, each of them embodies real concerns of residents of the city. These measures consistently reflect our intuitive ideas of a "good" neighborhood; that is, relatively high quality housing (as reflected in housing value) and low crime rates are better than low quality housing and high crime.

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[1]See, for example, City of Los Angeles, "Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles" (Los Angeles: Department of City Planning, 1977).

[2]For a number of years the city has attempted various approaches to controlling the effects of adult entertainment. The liquor patrol limits, zoning regulations, licensing of saunas, and so forth, are all part of this effort.

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In this study "Adult entertainment establishments" include all types of alcohol serving establishments, plus businesses which commercialize sex -- saunas, "adult" theaters and bookstores, rap parlors, and arcades. The various combinations of these establishments will be considered for their impact on the measures of neighborhood quality. They are considered the independent variables.

The entire analysis in this report is conducted at the level of the census tract. All of the measures used here were available at that level or could be easily aggregated to that level. The census tract is not necessarily the best level of analysis for all the purposes of this study, but the others are either impractical due to cost or availability. For example, block-level analysis is possible given available data, but the cost of acquiring that data and running analyses on about six thousand cases was prohibitive in this study. Though there are problems with the census tract level of analysis, it is a common and useful way to measure phenomena that are of interest at a geographical area larger than the site.

The remainder of this chapter is divided into four sections. Section A summarizes the policy issues that motivate the study. Section B then gives the empirical research questions to be examined here that follow from these policy issues. This second section briefly reports the research design followed in answering the research questions. Section C provides the results of the study in written and tabular form. Section D is a summary of the study results in light of the policy issues identified in Section A. Appendix B describes and justifies the methods used in this portion of the study.

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Section A

Policy Issues

The central issue is whether the city can and should use its zoning and licensing powers to regulate the concentration and combinations of adult entertainment establishments. It has been well established in law that zoning is a valid use of the state's police power to protect the "health, safety, morals and general welfare" of a community.[1] Likewise, the licensing function is an established way to regulate the existence and condition of a business. The more narrow question is whether these powers can be exercised to regulate adult entertainment without infringing on other guaranteed rights of proprietors and customers, such as the First Amendment right to free speech.

In Young vs. American Mini Theaters, Inc.,[2] the Supreme Court held that a Detroit ordinance that caused the dispersal of adult theaters from certain other "regulated" land uses, including adult bookstores and theaters, and on-sale liquor establishments, was constitutional. It was held that, in principle, the ordinance did not deprive proprietors and customers of the right to distribute or consume certain ideas, specifically those with explicit sexual content. Further, the particular limits placed on adult businesses by the law were seen as justified by a "compelling state interest" to preserve the city's neighborhoods. The ordinance represented a rational

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[1] Village of Euclid V. Ambler Realty Co., 272 U.S. 365, cited in Fredric A. Strom, Zoning Control of Sex Businesses (New York: Clark Boardman Co., Ltd., 1977), p. 21

[2] 427 U.S. 50

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response to the problem of neighborhood decline based on the testimony and evidence of expert witnesses.[1]

The conditions laid down in Young vs. American Mini Theaters are narrow, and the legal issues are complex. It is not the intention of this report to enter the legal thicket in search of optimum solutions. The relevant point raised by the Detroit decision is that one of the conditions that must be satisfied to sustain the use of zoning powers to regulate adult entertainment businesses is that there must be a demonstrable public interest to be served by such regulation. Among the considerations raised by the Young case are the concerns that a concentration of adult entertainment businesses in a neighborhood may have an adverse effect on property values, result in an increase in crime, or undermine the stability of businesses and residents in the area. These are among the concerns that are empirically examined in this study, as indicated by the primary measures of relative neighborhood deterioration, housing values and crime rates.

This study looks at the effects of both sexually-oriented and alcohol serving adult entertainment establishments on neighborhoods in Minneapolis. Alcohol-serving establishments and movie theaters are subject to both licensing and zoning restrictions, while many sexually-oriented businesses are subject only to zoning restrictions (as of July 1, 1980).[2]

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[1] Ibid.

[2] Licensing of certain sexually oriented businesses, e.g., saunas and rap parlors, has proved difficult since the licensing can be avoided simply by changing the ostensible purpose of the business. Also, several past attempts to use license violations to revoke licenses have been challenged successfully in court.

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Discussions with Council members and City staff produced several specific policy questions that can be pursued in this research:

1. Do different types of alcohol-serving establishments have different impacts on neighborhoods?

This is a complex question since City Council and License Staff members have raised numerous ways to classify bars. The legal definitions embodied in licensing requirements are included in the classification scheme, used here, e.g., liquor, wine, or beer, class A, B, or C entertainment. A further consideration raised is the extent to which a business is based on serving food and how this may alter the effects of the establishment on the neighborhood.

2. Do particular combinations or concentrations of adult entertainment establishments have particular impacts on neighborhoods?

This question asks whether the location of adult entertainment establishments in clusters will have different or greater impacts on neighborhoods than will similar establishments separated by a significant amount of distance. As of July 1981, the zoning code will regulate sexually-oriented businesses to 500 foot intervals between them and with 500 foot intervals between the businesses and other priority uses like residences or churches. One assumption in the regulation is that concentration of these establishments will exacerbate their negative impacts on neighborhoods. This assumption requires empirical support.

3. Does the location of a bar or sexually-oriented business in an area precede the decline of a neighborhood or does it follow it?

There is some evidence that adult entertainment businesses locate in areas that are already in decline, or perhaps are undergoing rapid change in character with relatively few stable residents or

businesses. The problem then is to determine if adult businesses further or contribute to the cycle of decline that is already in existence.

Given the severe limitations in the quality and availability of data on neighborhoods for most years, some of these policy questions are very difficult to answer. However, they can be translated into research questions that can be investigated empirically. There can be no absolute certainty in answering questions of this sort, but information can be produced that will place policy decisions on firmer grounds.

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Section B

The Research Design

The policy concerns expressed in the previous section must be translated into research questions amenable to appropriate statistical techniques. This section discusses the research questions identified above and provides an outline of the techniques used in answering them.[1]

1. Introduction: The Research Question

a. Are the location and number of adult entertainment establishments and the various sub-types within this general category associated with measures of neighborhood decline?

This portion of the research utilizes simple correlation analysis to establish whether or not adult entertainment establishments of various types are empirically associated with measures of neighborhood deterioration at the census tract level.

b. Do these relationships between adult businesses and deterioration change after controlling for the impacts of other variables known to be associated with deterioration?

If the the simple relationships described in a. are established, it is reasonable to ask if they remain after the effects of other variables that may be associated with neighborhood decline are controlled. Two related statistical techniques are used in this portion of the analysis. First, the simple correlations are re-analyzed while "holding constant" some other variables thought to be related to the measures of neighborhood quality. Second, multiple regression analysis is performed to determine if any or all combinations of the adult entertainment establishments are associated with measures of

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[1] Methodological issues and discussion of the choices of techniques are contained in Appendix B.1.

neighborhood quality when considered together with other control variables. The regression equations permit some estimate of the impacts of adult entertainment establishments on neighborhoods in comparison with other variables, using the regression coefficients.

c. Does a concentration of these establishments have a disproportionate impact on neighborhood decline? That is, are the observed relationships non-linear?

The relationship established in a. and b. may reveal that changes in neighborhood deterioration increase at a greater or lesser rate than increases in the concentration of adult entertainment establishments. If this is the case, the relationships are non-linear, and it may be possible to identify the point at which further increases in the concentration of adult uses will have disproportionately great impacts on surrounding areas. The simple relationships are tested using one-way (bivariate) analysis of variance techniques to identify significant departure from linearity. The multi-variate regression analyses are tested through examination of residuals.

d. Do the relationships observed in the data, either over time or cross-sectionally, permit the inference that adult entertainment establishments precede or accelerate neighborhood decline?

For policy concerns, it is important to determine whether adult entertainment establishments precede or follow neighborhood deterioration. This will be impossible to prove empirically. However, circumstantial evidence can be developed which is consistent with our suspicions about neighborhood decline. In the present case, the statistical technique of path analysis is used to determine whether adult businesses precede or follow signs of deterioration. We hypothesize that deterioration does follow the location of such

businesses, (in the sense that adult businesses contribute to the existing cycle of decline in the neighborhood), even though it may be the case that adult businesses are attracted to areas already in the process of decline (the businesses follow decline).

It is also possible to examine hypotheses about causal relationships using longitudinal data. Observations of actual changes in variables over time were made, comparing 1979 to 1970 measurements, but these observations were unsatisfactory due to measurement error and lack of sufficient data points. Therefore, these cross-time measurements and the analyses of them are not reported in this document.

2. Variables and Data Sources

Numerous data sources were used to obtain measures of the many variables used in this study.[1] Measurements were taken at two points in time for as many variables as possible. Generally, the years for which measurements are available are 1970 and 1979, although some variables were measured for different years if data was not available for one of these years. These can best be discussed as independent, dependent, and control variables.

a. Independent Variables

The independent variables are all on-sale liquor serving establishments of all types and classes, plus sexually-oriented businesses.

(1) On-sale liquor establishments - Establishments may be licensed to sell beer only, wine and beer, or liquor, wine, and

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[1]Appendix B.2 contains a complete list of variable names and their descriptions and/or measurement.

beer. We will refer to these simply as beer, wine, or liquor. Wine licenses are issued to businesses whose total volume is expected to be at least 60 percent food service. These businesses also obtain different types of licenses depending on the kind of entertainment provided on the site. As discussed in Chapter I, a Class C license permits only juke boxes, machines, T.V. and the like. The Class B license permits a single performer to play an instrument, plus the entertainments permitted under the C license. The Class A license permits any of the entertainment allowed under the first two licenses, plus live bands, shows, dancing, and so forth. Table II.I shows the numbers of bars in each category for 1970 and 1979, excluding the downtown tracts.[1]

Table II.1: Number of Bars by Category, 1970 and 1979[2]

	1970			1979		
	Class A	Class B	Class C	Class A	Class B	Class C
beer	10	3	175	5	2	128
Wine*	0	0	0	1	0	17
Liquor	28	3	58	47	3	62
Total	38	6	233	53	5	207

*"Wine" was not a license category in 1970.

[1]Downtown tracts 45, 46.01, 46.02, 44, 47, 53, and 54 were eliminated from most analysis because they are not, properly speaking, residential areas. There are numerous households in the area, but the predominance of commercial and other non-residential uses, combined with the high concentration of adult businesses, distorts the analysis performed here. See Tables II.7 and II.8 for some results including downtown.

[2]Counts here differ from those in the previous section because downtown tracts are excluded. The 1979 citywide total, including downtown is 367. In this study, the total is 265.

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(2) Adult sexually-oriented businesses - These businesses include adult (x-rated) movie theaters, adult book stores, saunas and rap parlors, plus bars which provide live sexually-oriented entertainment. The 1980 data is complete, but information on sexually-oriented businesses that were not licensed in the period around 1970 (e.g., sexually-oriented entertainment in bars) cannot be reliably measured at this point and were omitted from the analysis. Table II.2 provides counts of these businesses for 1970 and 1979, again omitting downtown.

Table II.2: Number of Sexually-Oriented Businesses by Category, 1970 and 1979

	1970	1979
Saunas, etc.*	11	14
Adult bookstores	UNK	7
Adult theaters	1	6
Bars with sexually-oriented entertainment	UNK	5

*License records are available beginning with 1973.

The source for saunas and theaters are License Department records for the different years. Complete up-to-date counts of these businesses plus adult bookstores, rap parlors, and so forth, were also obtained from the Office of the Zoning Administrator. Bars with live sexually-oriented entertainment in 1979-1980 were identified by members of the Minneapolis Police Department and License Department staff.

b. Dependent Variables

The main dependent variables used in this study are mean housing value and an index of crime rate per 1,000 population, at the census

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tract level. These variables are generally recognized to be good indicators of neighborhood deterioration.

(1) Housing value - For 1970, mean housing value is the owner estimated single-family housing value in the 1970 census, averaged for each tract.

For 1979, the mean housing value is the average assessed value of the single family housing in each census tract. The Property Management System of the City of Minneapolis is the source of this information.

Though neither of these measures perfectly reflects the arm's length market value of housing, each should provide an unbiased estimate of housing value in each tract for that year, thus producing valid measures of variation from tract to tract.

(2) Crime rate - Adequate census tract level data on crime rates is not available for 1970. The substitute measure used here is an index of crime using data from a one year period extending from the middle of 1974 to the middle of 1975. This data was collected by staff of the Minnesota Crime Prevention Center as part of a study of crime in Minneapolis.[1]

Crime data for 1979 and 1980 was collected from the files of the Minneapolis Police Department's Integrated Criminal Apprehension Program, for which the Minnesota Crime Prevention Center provides technical assistance. A crime index was constructed from this data using commercial robbery and burglary, residential burglary, personal robbery, rape and assault. The index is an aggregated tract-level measure of the number of crimes per 1,000 population.

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[1]Douglas W. Frisbie, et al, Crime in Minneapolis, Minneapolis: Minnesota Crime Prevention Center, Inc., 1977.

Finally, other measures of neighborhood quality were considered for inclusion in the list of dependent variables, including measures of commercial vacancy rates and area condition estimates. Some analysis was performed using these variables, and will be reported where appropriate.

c. Control Variables

Certain third variables believed to have an impact on neighborhood quality were also measured for 1970 and 1979. These variables are used in the analysis to determine the extent to which the associations of adult entertainment establishments with neighborhood quality are actually due to the control variables rather than the independent variables themselves. It is possible that both the location of adult businesses and the level of housing value or crime rate are caused by some third variable. Control variables can be held constant with statistical techniques to see how the variables of major concern are related when the controls can no longer make a difference. Statistically speaking, these variables are used to identify spurious relationships or to help confirm the effects of an independent variable. Because a large number of these third variables are used, the data sources and variable definitions will be presented only in summarized fashion.

(1) 1970 Data - The major sources used for measuring 1970 control variables were the 1970 census and the Polk Company's Minneapolis City Directory. Tract level measures of neighborhood characteristics like residential stability and percent of owner occupied dwellings were taken from the census. The Polk directory provided information on commercial structures in 1972.

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(1) 1970 Data - The major sources used for measuring 1970 control variables were the 1970 census and the Polk Company's Minneapolis City Directory. Tract level measures of neighborhood characteristics like residential stability and percent of owner occupied dwellings were taken from the census. The Polk directory provided information on commercial structures in 1972.

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(2) 1979 Data - The 1979 data was obtained from several sources. Data on residential units, including age, type, condition, number, gross building area, lot size, and tax status (i.e., homestead or not) were collected from the Property Management System.[1]

The bulk of the commercial property descriptions were taken from the Polk city directory for 1978. In addition, estimates of 1978 household income and tract population were taken from Polk data.

Measures of household occupancy and turnover rates were taken from the Minneapolis quarterly report on vacancy and turnover for January 1, 1980 to March 31, 1980 produced by the Minneapolis Planning Department. The original source of this data was the NSP billing tapes.

3. Level of Analysis

All variables have been measured at the census tract levels. This means that observations for a given variable have been aggregated within a tract for the appropriate time period, and a summary measure produced. For example, the measure of all alcohol serving businesses for 1979 is a count of all types and classes of on-sale licenses issued by the city for that year, by census tract.

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[1]Programming and tape creation for PMS data were performed by the City's Management Information Service.

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Section C

Analysis and Findings

1. Simple Relationships

- Are the location and number of adult entertainment establishments and the various sub-types within this general category associated with measures of neighborhood decline?

Based on previous related research and discussions with interested persons, we expected to find that a high concentration of such businesses is associated with an increased crime rate and decreased housing values.[1] The simple correlation coefficients confirm these expectations.

Table II.3: Pearson Correlation Coefficients: Adult Entertainment Establishments and Measures of Neighborhood Quality, 1979

	Mean Housing Value 1979	Crime Rate Index, 1979-80
All adult businesses	-.1320	.1926*
Sexually-oriented businesses	-.1533*	.2440*
Alcohol-serving businesses	-.1208	.1380
Beer	-.2531*	.1683*
Wine	.1079	-.0441
Liquor	.0267	.0760
Class A	.0584	.0405
Class B	-.0691	.2415*
Class C	-.1409	.1421

*Correlations are significant at the .05 level or better.

As Table II.3 shows, several categories of adult businesses have a statistically significant relationship with the measures of neighborhood deterioration. Concentrations of sexually-oriented businesses and beer bars show relatively strong relationships with both housing value and the crime rate in the expected directions.[2] The

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[1] See Minnesota Crime Prevention Center, "Neighborhood Deterioration and the Location of Adult Entertainment Establishments in St. Paul," Minneapolis: MCPC, Inc., 1978.

[2] See Appendix B.1 for a breakdown of the crime rate into four of its component crimes and their associations with adult establishments.

relationship between the location of adult entertainment businesses and crime is generally stronger than that between these businesses and housing value. Most of the observed correlations are very weak.

The relationships in Table II.3 vary among the sub-types of adult establishments: some of the types are more closely related to the neighborhood variables than others. It is possible that these differences are due entirely to differences between the types of establishments, but that seems to be only a part of the issue. It is likely that other variables are affecting the relationship.

Included among these other variables, the effects of city policy, business decisions, and the general environment of the adult business are likely to make a difference in the way the business is related to housing value and crime. The classification of the businesses that is used here already reflects the licensing procedures of the city, but other policies, especially zoning regulations, may have an impact. Zoning regulations affect the size and type of commercial area within which different types of adult businesses may locate, with possible consequences for their impacts on neighborhoods. One business decision that Council members suggested might affect an establishment's relationship with crime and housing value is the proportion of the business that is devoted to food service. Businesses that are actually restaurants that happen to have alcohol licenses may be different than those that are primarily bars. The residential environment of the adult business may be characterized by many variables that could have an impact.

In this study, these concerns are measured and taken into account through the use of statistical controls. The zoning policy issue is

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summarized in a measure of the proportion of commercial units found in each tract. The restaurant vs. bar distinction is based on a measure of the proportion of a business that is food-related, with those that are greater than 50 percent food considered primarily restaurants.[1] The residential environment is characterized by a measure of average household income in a census tract. Income is very highly related to other measures of residential area type.

The simple relations between these control variables and the types of adult entertainment establishments suggest that they might make a difference in the relationships between types of adult businesses and crime or housing value.[2] The next section presents some analyses that explicitly use these control variables to examine the relationship between adult business and neighborhood deterioration more closely.

Summary Findings: Simple Relationships

(1) Concentrations of beer licensed bars and sexually-oriented businesses are significantly related to lower housing values. Most types of adult businesses are negatively related to housing values, even if they are not significant.

(2) A summary measure of all adult businesses, sexually-oriented businesses, beer and Class B entertainment licensed alcohol-serving businesses are significantly related to high crime rates. All but one type of adult business are positively related to the crime rate.

(3) Overall, the relationship between adult business concentrations and neighborhood deterioration measures are weak.

2. Complex Relationships

- Do the observed relationships change after controlling for the impacts of other variables known to be associated with neighborhood quality?

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[1]Members of the Police Department and the Licensing staff supplied the list of licensed establishments that are primarily in food service.

[2]See Appendix b.1 for a presentation and discussion of these results.

This section is in two parts. The first part presents first order partial correlations between concentrations of adult businesses and measures of neighborhood quality, controlling for the policy relevant variables of food percentage of business and commercial characteristics of bar locations, in addition to controlling for the effects of type of residential area on the relationships. In the second half of this section, even more stringent statistical tests are reported which permit an estimation of the amount of impact of various combinations and concentrations of adult businesses on neighborhood quality, while simultaneously controlling for the effects of other variables.

a. Partial Correlation

Table II.4 shows how the simple relationships between adult entertainment establishments and neighborhood quality measures change when the effects of other variables that measure important policy and environmental factors are controlled.

The partial correlations in the third and fourth columns of Table II.4 show the effects of controlling for food business on the relationships between adult entertainment business types and the neighborhood deterioration measures.[1] Bars that are devoted primarily to serving alcohol are more strongly related to lower housing value and higher crime rates. With the effects of restaurant-type businesses removed, more of the relationships are significant, and nearly all of them are in the direction expected, i.e., concentrations of bars

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[1]Sexually-oriented establishments and all adult business partial correlations are not reported in this case because there is no indication that sexually oriented businesses serve food.

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are associated with lower property values and higher overall crime rates. Liquor bars and Class C entertainment licensed bars, in particular, are significantly related to crime and/or housing value when food business is controlled.

Table II.4: Partial Correlation Coefficients: Adult Entertainment Establishments and Neighborhood Quality, 1979

	Simple Correlations		Partial Control for food		Partial Control for Percent Commercial		Partial Control for Mean Income	
	House Value	Crime Index	House Value	Crime Index	House Value	Crime Index	House Value	Crime Index
All adult	-.1320	.1926*	-	-	-.0707	-.0147	.0738	-.0861
Sexually-oriented	-.1533*	.2440*	-	-	-.1415	.2314*	-.1089	.2153*
Alcohol-serving	-.1208	.1380	-.2865*	.1751*	-.0405	-.0700	.1023	-.1398
Beer	-.2531*	.1683*	-.2254*	.1618*	-.2423*	.1418	-.2036*	.0879
Wine	.1079	-.0441	-.2800*	-.0029	.1627*	-.2154*	.2219*	-.2034*
Liquor	.0267	.0760	-.1592*	.1039	.1022	-.1482	.2254*	-.1859*
Class A	.0584	.0405	-.1137	.0645	.1191	-.1514	.2334*	-.1975*
Class B	-.0691	.2415*	-.1310	.2494*	-.0441	.1898*	.0360	.1420
Class C	-.1409	.1421	-.3217*	.1667*	-.0856	-.0560	.0303	-.1066

*Significant at the .05 level or better.

The controls for commercial area (the fifth and sixth columns in Table II.4) and mean income (seventh and eighth columns) also change the simple relationship dramatically, and the two variables are fairly similar in their effects on the relationships of particular types of adult businesses to neighborhood deterioration.

When the percentage of all units in a census tract that are commercial is used as a control, the overall relationship between adult businesses and deterioration is reduced almost to zero. However, when the various sub-categories of adult businesses are investigated, some fairly strong relationships remain.

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Sexually-oriented businesses continue to be related to higher crime rates, and beer bars continue to be related to lower property values, even when commercial business concentrations are controlled. Beer bars are likely to be nearer to residential areas than wine or liquor bars are, in part because of zoning requirements. The fact that sex businesses are significantly related to crime even after the commercial concentration is controlled possibly suggests that these businesses may have an impact on crime rates independent of other commercial businesses.[1]

On the other hand, the control for commercial characteristics raises the relationships between liquor or Class A bars and crime from zero to almost significant levels. In the case of the liquor bars, this probably reflects the zoning restrictions which requires that they locate in "seven-acre" commercial zones. Wine licensed businesses' relationships to neighborhood deterioration change from insignificant to significant, but in the opposite directions expected, i.e., wine bars are associated with <u>higher</u> housing values and <u>lower</u> crime rates when commercial concentration is controlled. This finding is suspect because of the small number of establishments involved.

Controlling for income (columns 7 and 8) produces strong relationships between liquor, wine, and Class A entertainment bars and <u>higher</u> housing values, and between these types of adult businesses and <u>lower</u> crime rates. These relationships are opposite to what would be

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[1]See Appendix B.1: information in Tables 7 and 8 in Appendix B.1 also suggests that the relationship of sex businesses to crime is due to the type of area these businesses are in. Specifically, sex businesses are significantly related to commercial vacancies. They are also highly related to commercial crime even though they are not, at the tract level, associated with high commercial concentrations.

expected if all concentrations of bars were associated with neighborhood decline. They suggest that income -- or the social conditions in neighborhoods that income represents -- accounts for a large proportion of the simple relationship between these alcohol-serving businesses and neighborhood quality. One inference is that a bar may be an amenity if the neighborhood is already of higher socio-economic type as indicated by income. Generally, the observed relationships are similar to those observed when commercial land use was the control, only more pronounced. As with the commercial control variables, beer bars and sexually-oriented businesses continue to be related to the deterioration measures in the same direction, although not as strongly, when income is controlled. The effects of these establishments are relatively constant, or independent of changes in mean income in surrounding tracts.

One possibility that these partial correlations do not take into account is that the control variables themselves are related to each other and have effects on the relationships between adult businesses and neighborhood measures in combination. This possibility will be explored using multiple regression in the following section.

b. Multiple Regression: Adult Entertainment Establishments and Crime[1]

The objective of this section is to determine whether adult businesses have an impact on neighborhood quality when other factors -- the control variables described above -- are considered simultaneously,

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[1]See Appendix B.1 for a description of the methods used in this portion of the analysis, and for some further results. Unless otherwise noted, the regressions do not include downtown census tracts.

and if these establishments do have an impact, how great is this relative to the other variables.

A set of multiple regressions using the crime index as the dependent variable are reported in Table II.5 The regression coefficients indicate how much change in the dependent crime variables is associated with a change of one unit of the independent variables. For example, in Regression #1, the regression coefficient, b, indicates that the crime rate per 1,000 population drops 28.20 crimes, on the average, for each tract in which all the bars serve 50 percent or more of their volume in food (since the measure of food volume is a proportion). Care must be taken when interpreting the regression coefficients because the units they are associated with are not always comparable. The b for the income variable is very small, but it is more significant than the food service variable. For the purposes of this report, the significance of the coefficients and the beta weights provide the key information. If a coefficient is significant (.05 or less), then the beta weight provides a way to compare the strengths of the relationships between the independent variables (type of adult business) and the measure of crime rate.

Consistent with the partial correlations discussed in the section above, only the sexually-oriented businesses have significant coefficients and are associated with a <u>higher</u> crime rate. Both liquor bars and Class A bars are associated with <u>lower</u> crime rates when other factors are taken into account. No other type of adult businesses are significantly related to the crime index when they are considered simultaneously with the control variables.

Table II.5: Multiple Regression: Adult Entertainment Establishments and Crime, 1979, with Controls

		Regression #1: Control variables and crime.				Regression #2: Controls plus all adult businesses and crime.				Regression #3: Controls plus all adult businesses and crime, including downtown.			
		.b	error of b	sig.	beta	.b	error of b	sig.	beta	.b	error of b	sig.	beta
Control Variables	% serving food	-28.20	10.81	.010	-.191	-26.42	10.99	.018	-.1787	-76.23	58.09	.192	-.1022
	% of area units commercial	.6556	.2966	.029	.208	.7057	.3020	.021	.2242	5.850	.9756	.000	.6745
	Mean income	-.00638	-.00114	-0-	-.513	-.0066	.0012	.000	-.5315	.0076	.0054	.165	.1251
Independent Variables	All adult					-.8835	.9669	.363	-.0735	.3936	3.201	.903	.0121
	Sexually-oriented												
	Bars												
	Beer												
	Wine												
	Liquor												
	Class A												
	Class B												
	Class C												
Summary Statistics	R			.658				.661				.594	
	R^2			.433				.437				.353	
	Significance			-0-				.000				.000	

Table 11.5 Continued: Multiple Regression: Adult Entertainment Establishm

		Regression #4: Controls plus sexually-oreinted busisnesses and crime.				Regression #5: Controls pl bars and crime.			
		.b	error of b	sig.	beta	.b	error of b	sig.	be
Control Variables	% serving food	-26.51	10.65	.014	-.1794	-24.85	10.98	.026	-.1
	% of area units commercial	.6365	.2917	.031	.2023	.7388	.3002	.015	.23
	Mean income	-.0062	.0011	.000	-.4963	-.0067	.0015	.000	-.5
Independent Variables	All adult Sexually-oriented	9.151	4.080	.027	.1564				
	Bars					-1.517	1.008	.135	-.1
	Beer								
	Wine								
	Liquor								
	Class A								
	Class B								
	Class C								
Summary Statistics	R			.676				.666	
	R^2			.457				.444	
	Significance			.000				.000	

The first regression shows the relationships between the three control variables of food, commercial concentration, and mean income. All of them are significantly related to the crime index, although the beta weights suggest that mean income is associated with the greatest changes in neighborhood quality. Both mean income and the percent of bars predominantly in the food business (50 percent food service or greater) have negative signs which indicate that higher incomes and more bars that are primarily food businesses are in lower crime areas. Crime increases as the percent of an area that is commercial increases.[1] These coefficients are about the same size and have the same signs in all the regressions in Table II.5 except for number 3, which includes downtown tracts.[2] This indicates that the estimates for these control variables are fairly reliable, at least with respect to the adult businesses.

The sub-types of the adult businesses that do have significant relationshps with crime -- liquor bars, Class A entertainment bars, and sexually-oriented businesses -- are shown in Table II.5.

The presence of sexually-oriented businesses in a census tract is not as strongly related to the crime rate in the tract as any of the control variables, as indicated by the beta weight. Yet, these

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[1]In part, this is an artifact of the data: the crime index is defined to include commercial crimes which happen only in commercial areas, by definition. However, redefining the index to exclude commercial crimes does not change the regressions very much overall. And the greater changes in the commercial variables represent an important loss of information.

[2]The inclusion of the downtown tracts shows the way these tracts change the relationships among the variables.

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businesses do have a significant relationship with crime: the regression coefficient, b, suggests that the addition of one sexually-oriented business to a census tract will increase the overall crime rate index by 9.15 crimes per thousand people per year, after the control variables are taken into account.[1]

Liquor bars and Class A entertainment bars are also significantly related to crime, but not in the expected direction. After the effects of the control variables are taken into account, these types of adult businesses are significantly associated with lower crime rates. This confirms the evidence drawn from the partial correlations, above. In the case of liquor bars, each one is associated with a decrease in the crime rate of 2.7 crimes per thousand per year, and the beta indicates that this bar variable is about as strong in its associations with the crime rate as the restaurant control variable. Class A entertainment bars produce an even stronger relationship, on the average, with a decrease of 5.15 crimes for each additional bar of this type in a tract.

In literal terms, when the environment of a bar, as described by the commercial and residential variables, and its internal business procedures, as described by the food control variable, are taken into account, bars of some types may be an amenity to a neighborhood in terms of crime. But, common sense argues that bars are not very likely to produce safety from crime in a neighborhood. The more realistic interpretation of these results is that the associations between liquor bars and Class A entertainment bars and crime are

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[1]The citywide average crime rate index by tract is approximately 48.62.

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greatly affected by their surroundings. In other words, the environment of the bar produces the conditions that spawn crime, not the bar itself.[1] Nevertheless, the bar may be a focal point for whatever crime disturbances do occur -- these data do not necessarily contradict that point.

c. Multiple Regression: Adult Entertainment Establishments and Housing Value

Table II.6 contains regressions that evaluate the impact of the control variables -- food in bars, commercial concentration, and mean income -- plus the impact of adult business on housing value. The only type of adult entertainment establishment that is significantly related to housing value is the wine bar.[2] Higher concentrations of wine license bars in a tract are associated with lower housing values. This finding is probably spurious: there are relatively few wine licenses in the city, which exaggerates the impact of each one on the measure of housing value. Since several of these licenses are in businesses like the restaurant in the Art Institute, the fact that they are in neighborhoods with low housing values is due to the location of the business prior to acquisition of the license. The wine license per se is almost certainly not "causing" deterioration. This conclusion is further bolstered by the fact that wine licenses were

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[1]This interpretation is also supported by the partial correlations. The food control, as discussed, produced relations in the expected direction. However, the residential and commercial environmental controls changed the relations between these types of bars and crime from weakly positive to significantly negative.

[2]The inclusion of downtown tracts, as usual, changes these values. The adult businesses then become significantly related to housing value. See regression #3 in Table II.6.

Table II.6: Multiple Regression: Adult Entertainment Establishments and Housing Values, 1979

		Regression #1: Control only, with housing value.				Regression #2: Controls plus all adult businesses and housing value.				Regression #3: Controls plus all adult housing values: includes downtown.			
		.b	error of b	sig.	beta	.b	error of b	sig.	beta	.b	error of b	sig.	beta
Control Variables	% serving food	36123.31	4438.19	0	.5449	36985.71	4507.3	.000	.5579	38683.7	4464.3	.000	.5386
	% of area units commercial	77.63	121.79	.525	.0550	101.99	123.80	.412	.0723	-237.73	74.96	.002	-.2846
	Mean income	3.199	.466	0	.574	3.090	.4769	.000	.5546	2.333	.4186	.000	.3981
Independent Variables	All adult					-425.76	396.43	.285	-.0789	-648.93	246.59	.010	-.2074
	Sexually-oriented												
	Bars												
	Beer												
	Wine												
	Liquor												
	Class A												
	Class B												
	Class C												
Summary Statistics	R	.724				.728				.768			
	R^2	.525				.529				.588			
	Significance	-0-				.000				.000			

Table II.6 Continued: Multiple Regression: Adult Entertainment Estal

		Regression #4: Controls, including crime index, plus adult, and housing value.				Regression #5: Controls sexually-oriented busines and housing value.			
		.b	error of b	sig.	beta	.b	error of b	sig.	
Control Variables	% serving food	33611.6	4409.59	.000	.5070	35823.3	4451.0	.000	
	% of area units commercial	192.13	120.96	.115	.1361	80.94	121.88	.508	
	Mean income	2.247	.5155	.000	.4033	3.162	.4682	.000	
	Crime Index	-127.73	36.65	.001	-.2848				
Independent Variables	All adult	-538.62	379.74	.159	-.0998				
	Sexually-oriented					-1627.88	1704.80	.342	
	Bars								
	Beer								
	Wine								
	Liquor								
	Class A								
	Class B								
	Class C								
Summary Statistics	$\hat{R}$			.758				.727	
	R^2			.575				.528	
	Significance			-0-				.000	

not issued in the 1970 sample, so neighborhood deterioration was probably well underway before any business acquired a wine license.

In summary, adult entertainment establishments do not appear to have a very strong relationship to changes in housing value when other variables are taken into account. The relationships are weaker than the ones found for crime as the measure of neighborhood quality. Although housing value is negatively associated with adult businesses, these coefficients are statistically insignificant, and therefore no conclusions should be drawn. Similarly, the measure of commercial concentration is insignificantly associated with housing value. Since adult businesses must locate in commercial concentrations, it may be reasonable to interpret the lack of a relation between adult businesses and housing value as a reflection of the lack of association between commercial concentrations and housing values.

Overall, one reasonable interpretation of the patterns in these regressions is that housing value may be high or low whether or not there are concentrations of adult businesses. The direction of the relationship probably depends on particular businesses in particular neighborhoods. In part this depends on the kind of neighborhood surrounding the commercial establishments, as the consistent relationships in the other control variables, such as mean income, demonstrate. In other words, when mean income is low, a relatively high crime rate probably exists given the strong negative relationship between income and crime, regardless of whether bars or other commercial businesses are present.

Summary Findings: Complex Relationships

Controlling for the effects of policy relevant and environmental variables changes the relationships between many of the types of adult establishments and neighborhood deterioration measures.

(1) The effects of beer bars on housing values is negative and significant regardless of which controls are used, as long as they are used one at a time.

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

(3) Controlling for those businesses that are basically restaurants changes the simple relationship between several types of bars and crime or housing value very strongly in the expected direction. It appears that primarily alcohol-serving businesses are much more strongly related to low housing values and high crime rates than are food service businesses.

(4) The impact of zoning policy can be weakly discerned in the relationships when commercial concentration is controlled. Commercial areas themselves have some independent impacts on crime and housing value as indicated by the changes caused by controls. Wine, liquor, and Class A entertainment bars, which are all more likely to be required to locate in highly commercial areas, have stronger -- though not always significant -- relationships, especially with crime.

(5) When mean income by census tract is controlled, liquor, wine, and Class A entertainment bars have a positive association with neighborhood quality, i.e., they are associated with higher housing values and lower crime rates.

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

(7) Liquor bars and Class A entertainment bars appear to decrease crime when the controls are taken into account. This is taken as evidence that the neighborhood residential and commercial characteristics are really determinative regarding the crime rate. The bars reflect their surroundings.

(8) Only wine bars have significant associations with housing value, appearing to decrease that value. However, the small number of licenses and the types of establishments that have wine licenses suggest that this finding is spurious.

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3. Tests for Linearity

There are two reasons to be concerned about whether or not the relationship here are linear. First, non-linear relationships would mean that increases in concentrations of adult businesses would have effects on neighborhoods in geometric proportion, which could mean that concentrations are especially undesirable. Second, discovery of a non-linear relationship would indicate that the methods used in the previous section are improper, as they are based on the assumption of linearity.

The analysis of variance tests performed on the two-variable regressions of adult entertainment and neighborhood measures show no significant departures from linearity. The inspection of residuals from multiple regressions reveal no clear-cut interactions or curvilinear relationships.[1] Therefore, the linear methods and assumptions, and conclusions drawn from them, are appropriate for this study.

4. Causal Analysis

This section addresses the following question:

- Do the relationships observed in the data, either over time or cross-sectionally, permit the inference that adult entertainment establishments precede or accelerate neighborhood decline?

In order to provide answers to this question, we must make use of special techniques and make assumptions about what causes what. If the data are consistent with the assumptions, then there is circumstantial evidence that the causal relations assumed are correct.

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[1] See Appendix B.1 for further discussion.

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The major technique used here to assess causality is path analysis.[1] This approach makes use of Pearson and partial correlations to test some assumptions about the causal impacts of adult entertainment establishments on neighborhood quality. To perform this anlaysis, summary variables for neighborhood quality in 1970 and 1979 were created. These variables take into account many factors describing neighborhoods other than adult businesses, mean housing value, or the crime rate.[2] These summary variables are used as controls. In the analysis presented here, only the 1979 factor scores are considered.

The central hypothesis tested is that adult entertainment establishments have a direct causal impact on neighborhood quality measures, but that they also follow from neighborhood quality. That is, these businesses are in a cycle where they are more likely to locate in areas where there is already some deterioration, and then contribute to further decline of the area. This hypothesis is consistent with both our intuitive notions about the matter, and with

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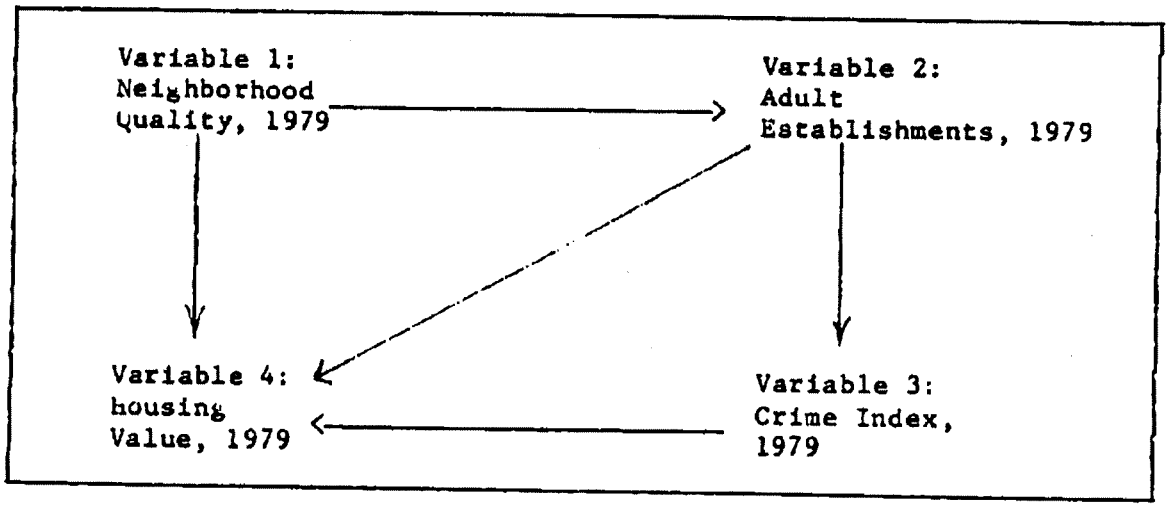
[1]See Appendix B.1. (Section D, p. B-11) for further discussion of the technique.

[2]These summary variables were created from a set of 12 variables describing the residential and commercial characteristics of neighborhoods, including density, stability of residents, percent owner occupied, commercial vacancies, and so forth. The technique used was an R-factor analysis with Quartimax rotation. A single factor accounting for 82 percent of the shared variance of the variable set was used to develop factor scores for each census tract. This new variable was used in the path anlaysis. A 1970 factor was found that accounted for 100 percent of the shared variance of the variables.

some evidence developed in an earlier study in St. Paul.[1] Using arrows to indicate the direction of causality, Figure II.1 represents this hypothesis. Causally speaking, Figure II.1 assumes that 1) the overall measure of neighborhood quality is casusally prior to all the other variables; 2) that characteristics of adult establishments are caused by the general quality of the neighborhood; 3) that crime is caused by both general quality and adult businesses; and 4) that housing value is dependent upon all of the other variables. Table II.7 contains the relevant predictions and actual values of the correlation coefficients obtained from the data.

Figure II.1: Path Diagram of the Hypothesis that Adult Establishments Contribute to On-Going Processes of Deterioration in Census Tracts



[1]Minnesota Crime Prevention Center, "Neighborhood Deterioration and the Location of Adult Entertainment Establishments in St. Paul" (Minneapolis: MCPC, Inc., 1978). Using different methods, the St. Paul study found that the location of bars was related to both prior measures of neighborhood deterioration, and to subsequent ones. It concluded that adult businesses may be part of a cycle of decline in which they contribute to or accelerate an on-going process.

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The model in Figure II.1 says that there should be a direct relationship between adult entertainment establishments and housing value, even when the general effects of neighborhood quality are taken into account. According to the logic of the path analysis, this means that a number greater than zero should describe the relationship even after general neighborhood quality is controlled. This relationship is shown in Table II.7 in prediction #3. However, the observed partial correlation in Table II.7 is -.0044 (Actual Value #3), which is too close to zero to accept the prediction as being accurate. The actual value suggests that when the general effects of the neighborhood quality index are taken into account, adult business concentrations have no relationship to housing value. In other words, the general character of the neighborhood is responsible for both housing values and concentrations of adult establishments.

Table II.7: Path Analysis Predictions and Actual Empirical Values[1]

Predictions

(1) Pearson's r, variables 2 and 4: $r_{24} = (r_{12})\ (r_{14})$

(2) Pearson's r, variables 2 and 3: $r_{23} = (r_{12})\ (r_{13})$

(3) Partial correlation, variables 2 and 4, controlling for 1: $r_{24.1} > 0$.

(4) Partial correlation, variables 2 and 3, controlling for 1: $r_{23.1} > 0$.

Actual Values

(1) $r_{24} = -.1320 = (r_{12})\ (r_{14}) = -.130$

(2) $r_{23} = .1926 = (r_{12})\ (r_{13}) = .25$

(3) $r_{24.1} = -.0044$

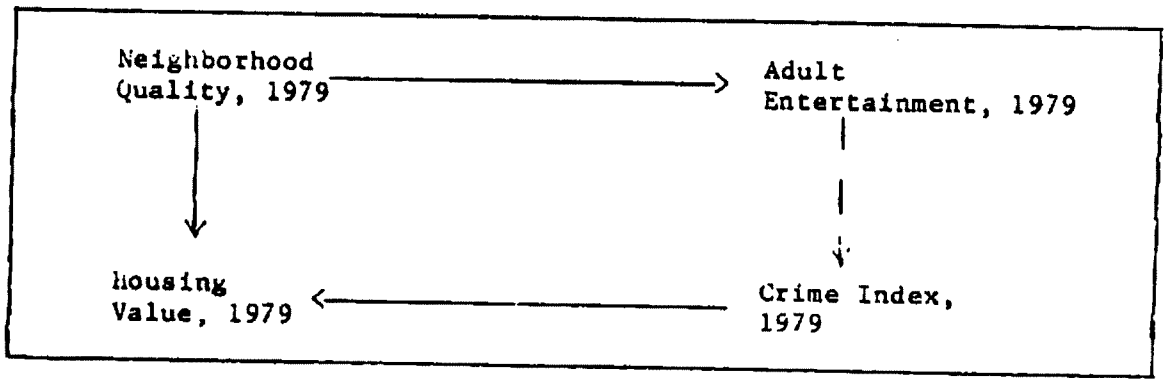
(4) $r_{23.1} = -.0761$

[1]The logic of predictions in path analysis is discussed in Appendix B.1.

The predictions for adult businesses and crime (predictions #2 and #4) are not so clear cut. The predicted correlations in Table II.7 are similar to the actual ones ($r_{23.1} = -.0767 > 0$). Conservatively, we must conclude that some small direct relationship between adult businesses and the crime index remains, even though the magnitudes involved are very small. Alternatively, since the partial correlation between adult businesses and crime, controlling for the neighborhood quality index, drops toward zero, we might also conclude that the neighborhood quality index is responsible for both the crime index and the presence of adult entertainment. This is similar to the case of housing value. However, the evidence suggests that a direct connection between crime and adult businesses is possible, but slight.[1]

Figure II.2 shows the revised model that seems to reflect the data more adequately than Figure II.1. The dotted line between adult entertainment and crime indicates that a weak direct link between

Figure II.2: Revised Causal Path Model of Adult Entertainment and Measures of Neighborhood Decline



[1]It should be noted that for all predictions an analysis of regression coefficients for these variables generally confirms the results reported here. The regression for crime, with both the quality index and adult business as independent, suggests that the adult variable loses significance, and its coefficient drops toward zero.

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Section D

Summary and Conclusions

This portion of the study of adult entertainment in Minneapolis has produced several tentative conclusions.

(1) Different types of adult entertainment businesses are different in their relationships to crime and housing value. Some types of these businesses have significant relationships with crime or housing value; others do not. Neighborhood stabilization policies should attempt to take these differences into account.

Sexually-oriented businesses and beer bars are significantly related to both crime and housing value. In addition, a summary measure of all adult businesses and Class B entertainment bars are [illegible]ly related to crime, using simple bivariate statistical techniques.

[illegible]cking factors which reflect business decisions, urban [illegible]ions, or neighborhood environment into account changes the [illegible]ctionships between adult businesses and neighborhood deterioration a great deal.

The evidence suggests that past policies or residential developments may have greatly affected current observations of the relationships between types of adult businesses and crime or housing value. By law the liquor bars have to be located in seven-acre commercial zones, and therefore they are more likely to be statistically related to commercial crimes (since they are in proximity to more commercial establishments) than residential crimes. Wine licenses are by law only given to establishments that primarily serve food, and the partial correlations reflect this fact. When average income is taken into account, some types of bars -- such as liquor bars and Class A entertainment bars -- even <u>appear</u> to have desirable effects,

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adult businesses and crime remains. The link between housing value and crime disappears completely. These results are consistent with other findings here which indicate almost no relationship between housing value and adult businesses remains when any of a number of different controls are used. Even though the crime rate index does have a slightly stronger direct relationship with adult business ($r = -.076$), it, too, is very weak and tends to disappear when other variables are considered.

Summary Findings: Causal Analysis

(1) The assumption that concentrations of adult entertainment businesses have a direct impact on property values is not born out in the path analysis. Controlling for general neighborhood quality indicates that, at the census tract level, adult businesses as a group do not lower housing value.

(2) The assumption that crime has a direct link with adult businesses is confirmed in this path analysis, but very weakly.

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i.e., the neighborhood crime rates are lower. This is a result which actually indicates that the type of surrounding neighborhood determines a great deal of the relationship between adult businesses and measures of deterioration.

(3) Evaluation of the data using the technique of path analysis suggests that adult entertainment variables are not causally prior to crime rate and/or housing value.

The path analysis is a technique which can be used to test the compatibility of a hypothesis about the causal relationships among a set of variables with empirical data. The hypothesis tested here was intended to answer the question whether adult entertainment preceded or followed neighborhood deterioration. Specifically, it was assumed in the path model that adult entertainment was likely to locate in areas that were already in decline, and then contribute further to that decline. This assumption is very weakly supported in the case of crime, but it is clearly not supported in the case of housing values. Adult entertainment establishments do concentrate in areas that are relatively deteriorated, but they do not appear to cause that deterioration. At most, they contribute very weakly towards its continuation.

(4) Sexually-oriented businesses have a greater number of significant relationships to high crime rates and low property values than any other type of adult entertainment establishment in this study.

The relationship between sex businesses and higher crime rates is especially strong. The association between these businesses and lower housing values disappears, however, when other factors are taken into account. In addition, these businesses are quite strongly related to percentage of vacant commercial properties, which is often used as a measure of a declining commercial area. These associations

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alone are not evidence that a sexually-oriented business locating in an area causes other businesses to leave, or property values to go down. Alternatively, these associations may indicate that sex businesses locate where property values have already fallen and demand for commercial space is weak enough to permit them to compete successfully for space.

(5) The most general finding is that while adult businesses appear to be located in areas of higher crime and lower property values, this is not because they have caused these undesirable conditions. Once in place, they may contribute to the maintenance of such conditions in a neighborhood.

The central thrust of the findings in this study is that adult entertainment establishments do tend to be located in areas of higher crime and lower property values than other parts of the city. The conditions which encourage the businesses to locate in an area may also be the ones that cause lower property values and higher crime rates. This is especially clear for the sexually-oriented businesses. For alcohol-serving businesses, it is less consistent. The license types are apparently not related to neighborhood decline, but there is some evidence that other properties of bars -- such as extensive food service -- may change or modify the impact of a licensed establishment on a neighborhood. These characteristics, such as management procedures, cannot be studied in an approach like the one taken here. The final implication of the study is that these establishments appear to have very localized impacts: even though we know of some bars that are associated with significant amounts of crime or angry neighbors, they do not, on the average, show up in this analysis of census tracts.

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CHAPTER III

EMPIRICAL FINDINGS AND POLICY RECOMMENDATIONS

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In a sense, this study is an evaluation of the effects of past policy decisions. Directly or indirctly, some of the assumptions underlying those policies have been examined, with an eye toward specifying policies for the future that will help achieve the goals of the city.

One very general finding of the study is that the relationships between adult entertainment establishments and crime or housing values show the effects of past policy decisions. For example, the combination of the old liquor patrol limits and zoning requirements which restrict liquor licensed bars to large commercial areas are reflected in the fact that most of this type of business is located downtown, or in a few commercial areas of the city. Likewise, beer licensed bars are permitted in smaller commercial zones and they have not been restricted by the liquor patrol limits. Thus they are less concentrated than liquor bars, and they are, on the average, closer to residential areas.

The purpose of this chapter is to draw upon the findings that are strongest and most consistent in both portions of the study and relate them to policy concerns. The two portions of the study used different methods, different measurements, and different data sources to investigate a related set of research questions. Wherever these different approaches converged on similar findings, we can have more confidence that they are providing an accurate picture of the relationships as they actually exist, even though some of the statistical results may be weak.

Below are several tentative policy recommendations we make to the City Council, based on the results of the study. The recommendations are stated, and the rationale for them follows.

1. Establishments which intend to serve alcoholic beverages as a complement to food service should be viewed favorably in licensing decisions, other things being equal.

2. Applications for wine licenses also should be viewed favorably, assuming current requirements about volume of food business necessary to qualify for these licenses are maintained.

Certain categories of alcohol-serving establishments are not significantly related to crime, either in immediately surrounding areas as measured by the distance decay analysis, or in the neighborhood as measured at the census tract level. These are wine-licensed bars and establishments that do more than 50 percent of their business in food service. The common characteristic here is the food service aspect. Because of current licensing requirements, wine bars do a high percentage of their business in food service (the wine license requires that the vendor have at least 60 percent of his/her business volume in food service). Restaurant-type businesses are not associated with crime or lower housing values. If the Council issues wine licenses without the food service requirement at some point in the future, the relationship between wine licenses and crime or housing value would have to be re-evaluated.

3. The City should avoid locating sex businesses in residential areas.

4. The current policy of avoiding concentrations of sex businesses can neither be supported nor contradicted.

Sex businesses do have significant and consistent positive correlations with the crime rate index and a negative correlation with the mean single family housing value, measured at the census tract level.

The relationship with crime remains when commercial concentration and average household income are taken into account. The small number of these businesses, plus their distribution, means that no large concentrations of them exist. The large majority of census tracts that have sex businesses have only one. The two-or-three-establishment c[illegible]ent[illegible]tions that exist, such as along Lake Street, cannot be ana-
[illegible]d a[illegible] from their generally commercial surroundings using the
[illegible]hniques in this study. These sex businesses are statistically
[illegible]elated [illegible] high c[illegible]rcial vacancies and high commercial crime rates,
[illegible]at they locate in less desirable commercial areas.

5. [illegible]dult enter[illegible]nment business (including bars) should be per-
[illegible]mitted only in loc[illegible]s that are at least 1/10 mile from residential
[illegible] (about 5

6. [illegible]dult entertainment establishments and other kinds of late
[illegible] b[illegible]s[illegible]d not be placed adjacent to each other.

[illegible]ntertainment establishments, if any, occur
[illegible]e vicinity of the business. They do not extend far into surrounding neighborhoods. This general finding is supported by
[illegible] portio[illegible]dy: the distance decay analysis suggests in
[illegible]laces the[illegible] crime is concentrated in the areas immediately surrounding bars, and the census tract analysis reveals only weak relationships between adult entertainment and crime or housing value at the neighborhood level.

The intent of recommendation (6) is to avoid mixed commercial uses that may have undesirable effects. For example, the location of a bar next door to a movie theater or late-night laundromat may result in patrons of the non-adult businesses interacting with patrons of adult businesses, possibly increasing their chances of victimization.

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7. The circumstantial evidence generated by the study suggests that, although concentrations of adult businesses may not have disproportionate effects, they can raise the total level of crime or reduce housing values more than single establishments. So, all things being equal, concentrations of adult establishments should be encouraged only if a concentration of crime and housing value effects is also desirable.

8. Concentrations of adult business in declining areas should be avoided.

One policy issue is whether the concentration or the dispersal of adult businesses will have better overall effects on the quality of life in the city. The information the study generates on this issue is fragmentary, but several patterns emerge.

- Concentrations are not disproportionately related to crime or housing value, e.g., five bars located right together have no greater <u>total</u> impact on assaults than five similar bars in widely separated, but similar, areas.

- Concentrations are weakly related to lower housing values and higher crime rates at the census tract level, e.g., the impact of five bars located together will be greater than the impact of one, two, three, or four similar bars located in the same area.

- Controlling for other characteristics of the neighborhood, like percent commercial or average income, reduces or reverses the relationship and deterioration. Thus, the impact of concentration of adult businesses at the tract level may depend on the kind of neighborhood in which they are located.

- There is no <u>direct</u> evidence in the study that shows that adult businesses have <u>greater</u> impacts on deterioration in declining areas, but the possibility cannot be eliminated. Further, other studies of

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urban development suggest that adult businesses may be seen as a barrier to upgrading neighborhoods.[1]

- Dispersal, as observed in the removal of the liquor patrol limits, has not had any area-wide impacts that raised the crime rate higher than would have been expected anyway.

9. Adult entertainment establishments should be located in large commercial zones in various parts of the city.

The intent of this recommendation is to locate adult businesses in a number of large community-level commercial areas in different parts of the city, not to create a singular concentration of adult businesses like Boston's infamous "combat zone." Rather, the intent is to confirm what is really current city policy, with some extensions. It is already the case that adult businesses, especially liquor licensed bars, are quite concentrated downtown. In addition, zoning restrictions already ensure that many adult business land uses will be in highly commercialized areas. What is recommended here is to continue and accentuate this policy, consistent with the other recommendations made here.

Concentrating bars (and probably other adult uses as well) in large commercial zones will neither raise nor lower crime rates appreciably. There have been numerous indications in this study that it is the commercial areas of town where assaults and street robberies occur. This confirms what has been found in other studies. Because bars are all located in commercial areas, by definition, it is difficult to separate out the crime effects due only to bars from those due to commercial areas. however, we believe that the independent impact of

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[1]Phillip L. Clay, Neighborhood Renewal, Lexington, Mass: Lexington Books, 1979, pp. 47, 64-65, 82.

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commercial areas is quite great, and could not be appreciably affected by removing bars. This is also confirmed by previous studies.[1]

Such a concentration would improve the efficiency of some city efforts, such as police patrol, and it would also make the achievement of some of the other recommendations made here, like separating adult uses from residential areas, more practicable. It is important to emphasize that this recommendation should be seen as a complement, not a replacement to other recommendations made here.

10. In the long run, policies which foster or supplement attitudes and activities that strengthen the quality of the neighborhood are more likely to have desired impacts on crime and housing value than simple removal or restriction of adult businesses.

There is no evidence in either portion of the study that adult businesses cause neighborhood deterioration, although other measurement or analysis techniques may reveal such a connection. On the basis of this study, the alternative hypothesis that general neighborhood quality determines the kind and quality of businesses to locate in the neighborhood seems more plausible.

11. The study tends to support the position that adequate off-street parking or equivalent spaces on non-residential streets adjacent to the establishment should be required for issuance of licenses to serve alcohol.

12. Type of entertainment, specifically game rooms, may have a relationship to the nuisances generated by an establishment.

13. Individual differences among alcohol-serving establishments should be taken into account in licensing decisions.

14. Parking, entertainment, clientele, and management practices of adult entertainment businesses should be investigated further.

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[1] Crime in Minneapolis, op.cit., p. 174. The proportion of assaults where the victim was either intoxicated or leaving a bar was 12.5% in 1975.

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The part of the study that analyzes the relationship between certain characteristics of bars and whether or not they are "nuisance" bars has pointed to several factors that may help to explain the differences among individual bars in their effects on crime and other measures of neighborhood quality. The "nuisance bar" portion of the study was developed in response to the concern of several Council members expressed during the course of the research. The nuisance study should be considered preliminary, but it does tend to confirm the expectations of Council members and staff regarding the effect of parking, and possibly other characteristics as well. We believe that these characteristics can be studied in a systematic and straightforward way. Currently, licensing decisions are made on a case-by-case basis, using some of the kinds of information for each case that further study would classify and evaluate more systematically. The efforts of the Council to use this kind of information in licensing decisions appears to be justified.

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APPENDIX A

Supplementary Materials for Chapter I: Bars and Crime

APPENDIX A.1

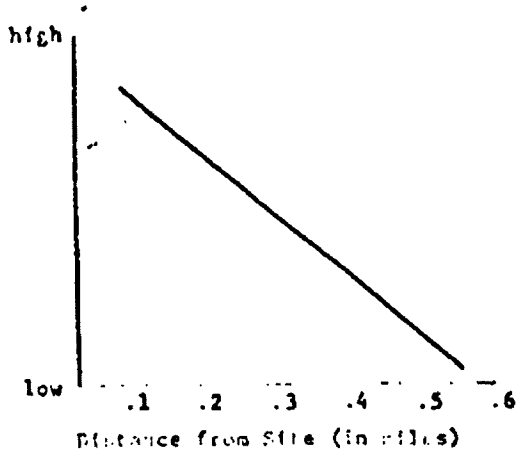
Distance Decay Methodology

Distancy decay is a method for analysis of crime at a limited level and a means for deriving crime impact statements. The method described is based on the distributional characteristics of crime which can be attributed to the geographic location of individual sites. The approach proposed here focuses on the types of crime patterns which can be derived from the analysis of the geography of crime with respect to individual sites. We have taken as a priori the assumption that for some types of crimes, and some types of sites, there is a distinct geographic pattern that can be derived for the distribution of crime around these sites. Further, we assume that given the derivation of such a distribution, the actual impact of the site on crime can be derived and transformed into a crime impact assessment of individual sites, and sites of a similar character. It is important to note that these assumptions are only valid if there is some theoretical interpretation that can assign meaning to the observed associations.

The approach taken for this evaluation is derived from distance decay analysis common to urban geographic studies. Distance decay analysis is a methodology which measures the density of events in relationship to the location of a single site or node. The assumption tested by distance decay analysis is that the closer one gets to the node, the more events, or crimes, occur. Thus, the node is theoretically assummed to be a point from which events or crimes emanate or are drawn toward. In order to develop a distance decay analysis, one generates a distance decay curve as shown in Figure 1.

Figure 1

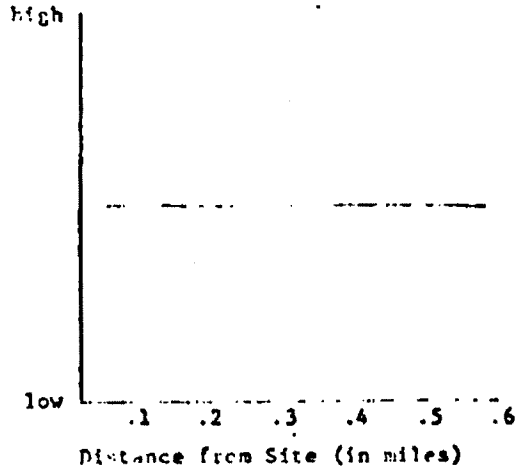
An Interpretive Guide to Distance Decay Curves[a]



Relative Crime Density

DISTANCE DECAY PATTERN

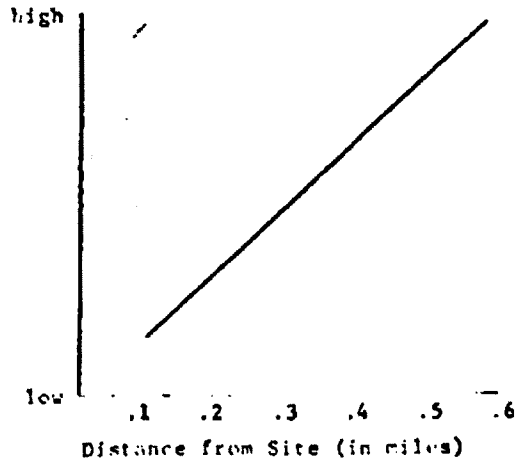
Crime density decreases as distance from site increases.



Relative Crime Density

NO DISTANCE DECAY PATTERN

Crime density is constant as distance from site increases.



Relative Crime Density

INVERSE DISTANCE DECAY PATTERN

Crime density increases as distance from site increases.

[a]These are pure types. Actual curves may display some amount of random variation and/or curvilinearity.

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The uses of a Distance Decay Analysis are:

a) to ascertain whether the crime density changes systematically as one approaches a specific geograhic location,

b) to ascertain the direction of this change, i.e., whether the crime rate increases or decreases as the site is approached, and

c) to estimate the magnitude of the change in the crime density as one approaches the site.

As with any statistical technique, the distance decay analysis will produce misleading results if it is used improperly. As noted above, the analysis is meaningful only if some theoretical assumption about the relationship of the nodes to the events in the areas around them can be made, and the measurement conform to these assumptions. Otherwise, associations produced by this technique may be spurious in the same way that other kinds of statistical associations may be spurious. For example, if a bar is next door to a fast food outlet where teenagers hang out and cause trouble, the distance decay analysis using only bars to define the nodes would assign crimes actually related to the fast food outlet to that bar. If the fast food outlet were explicitly taken into account, weighting procedures to overcome this problem could be developed, and an evaluation of the theoretically suggested relationship of bars and crime could be made. Individual distance decays should be carefully assessed to determine that the results are actually due to the measured node and not to some other unmeasured factor(s) within the distance decay area.

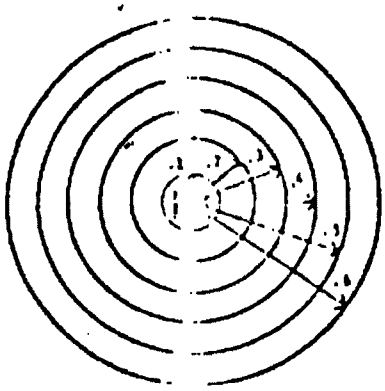
The distribution of crimes around the various nodes can be aggregated to perform a single distance decay analysis for a class of nodes as defined by some theoretical or policy-relevant criterion. Distance decays of this sort should be interpreted similarly to distance decays for individual sites, remembering that the analysis is producing an averaged result which may be valid for a class of nodes, but not necessarily for all individual nodes within the class.

Aggregated distance decays follow a similar procedure to the single node distance decays as described below with one difference. The aggregation procedure used is to identify the total number of events (e.g., crimes) occurring in each ring of each individual distance decay, then adding these to get a total number of events for the aggregate analysis, and then proceeding as usual for calculating the density of events and testing this distribution for significance. The counting procedure thus introduces an implicit weighting function wherever the areas around nodes overlap: any event which lies within two or more areas will be counted two or more times in the aggregating procedure. This is only one of many weighting procedures, and it is one which heavily weights crimes counted numerous times, especially if they are counted as members of the same or adjacent rings in the aggregate analysis.

Figure 2, below, and its associated text, provide a step-by-step guide to the distance decay analysis.

Figure 2: nstructing a Distance Decay Cur

CONSTRUCTING A DISTANCE DECAY CURVE



Distance of .6 mile study area around the site of interest.

Site

1. Count the number of crimes within each band.
2. Transform each count into a crime proportion by dividing by the sum of all crimes within .6 miles of the site of interest.
3. Transform each crime proportion into a relative crime rate by dividing by the proportion of the total area in that band (see table below).
4. Plot the resulting crime rates for each band against the distance for site.

DISTANCE DECAY CRIME WORK SHEET

DISTANCE TO SITE (miles)	COUNT OF CRIMES[1]	CRIME PROPORTION[2]	AREA PROPORTION	RELATIVE CRIME RATE[3]
0 through .1			.0278	
.1+ through .2			.0833	
.2+ through .3			.1389	
.3+ through .4			.1944	
.4+ through .5			.2500	
.5+ through .6			.3056	
SUM OF CRIMES:				

[1]Count of crime incidents within band.

[2]Count of crime incidents within band divided by sum of incidents for all bands.

[3]Crime proportion divided by area proportion.

The relationship between crime density distance is assumed to be of the form:

$$D = F(\text{distance})$$

where D is the density of crime, and F denotes the function relating distance to density. For our purposes, it is unnecessary to derive

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the empirical function F, which can easily be derived using simple or polynomial regression techniques. Our primary concern is with deriving the characteristic slope of F, or F'. We can simplistically observe that if $F' < 0$ then a distance decay effect is present. If $F' \geq 0$ then a distance decay effect is not present. Our analysis has focused on determining the degree to which we can assert that $F' < 0$.

Two tests have been employed to derive indications of the randomness of F'. The first is a classic chi-square statistic which reports whether events in the space are uniformly distributed. A significant chi-square is taken to indicate nonuniformity in the space.

The second test is the signs test applied to the difference between distance decay coefficients in a band of lesser radius and a band of greater radius. Since we have six bands, we are making five comparisons and trying to assess the degree to which the coefficients vary in relation to each other. Where the signs of all five comparisons are negative (i.e., each band's coefficient is less than that of the band immediately inscribed to it), then we can assign a probability of $1/2^5$ to the observed slope of the overall distance decay curve.

Where all three tests, the distance decay curve, the chi-square, and the signs test indicate significant negative slopes, a distance decay effect is assumed to be observed in the data.

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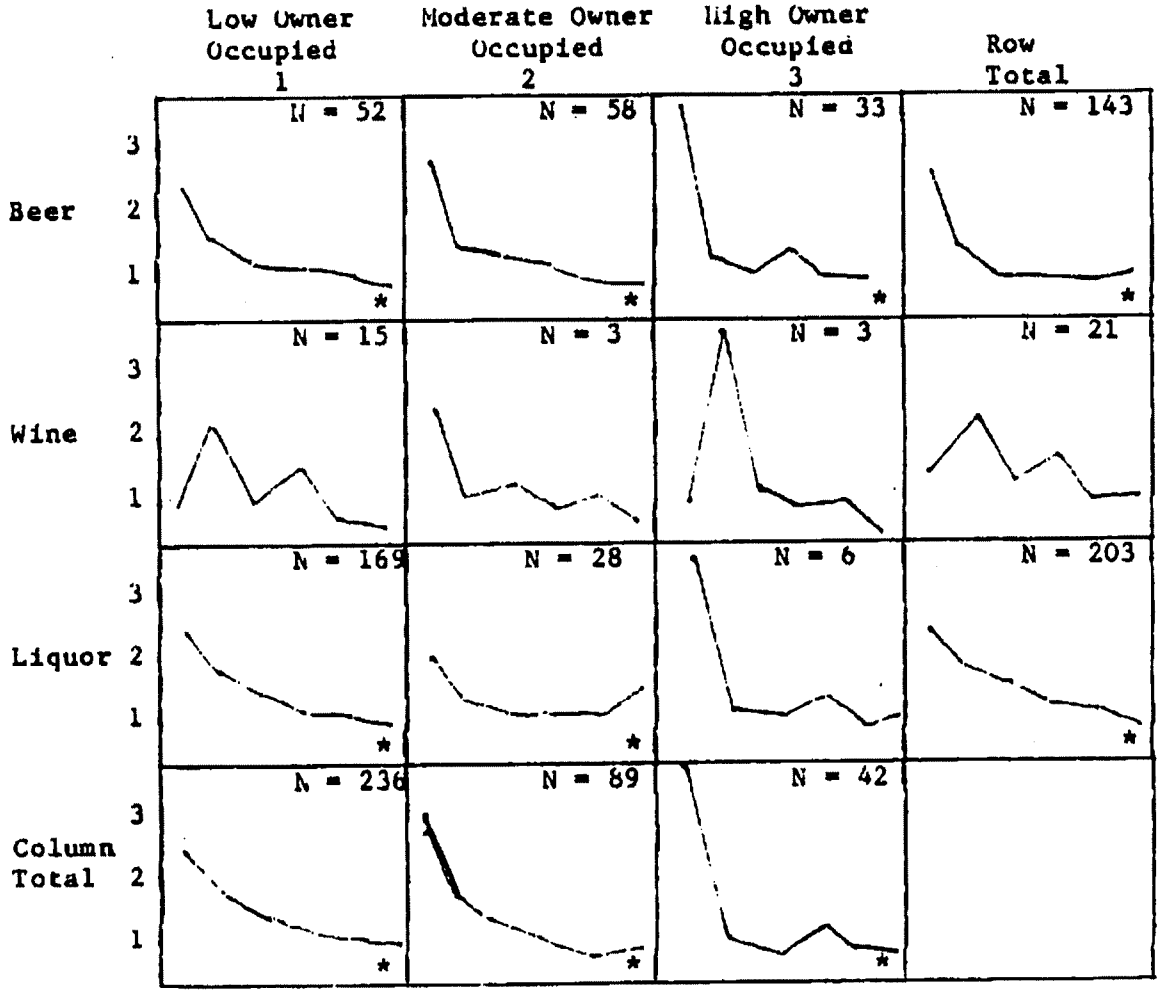
Appendix A.2

Results of Summary Distance Decay Analyses for Detailed Categories

Figure A.2.1

Distribution of Crime Around Bars by Types of Liquor Licenses, Controlling for Neighborhood



* = significant
N = number of bars

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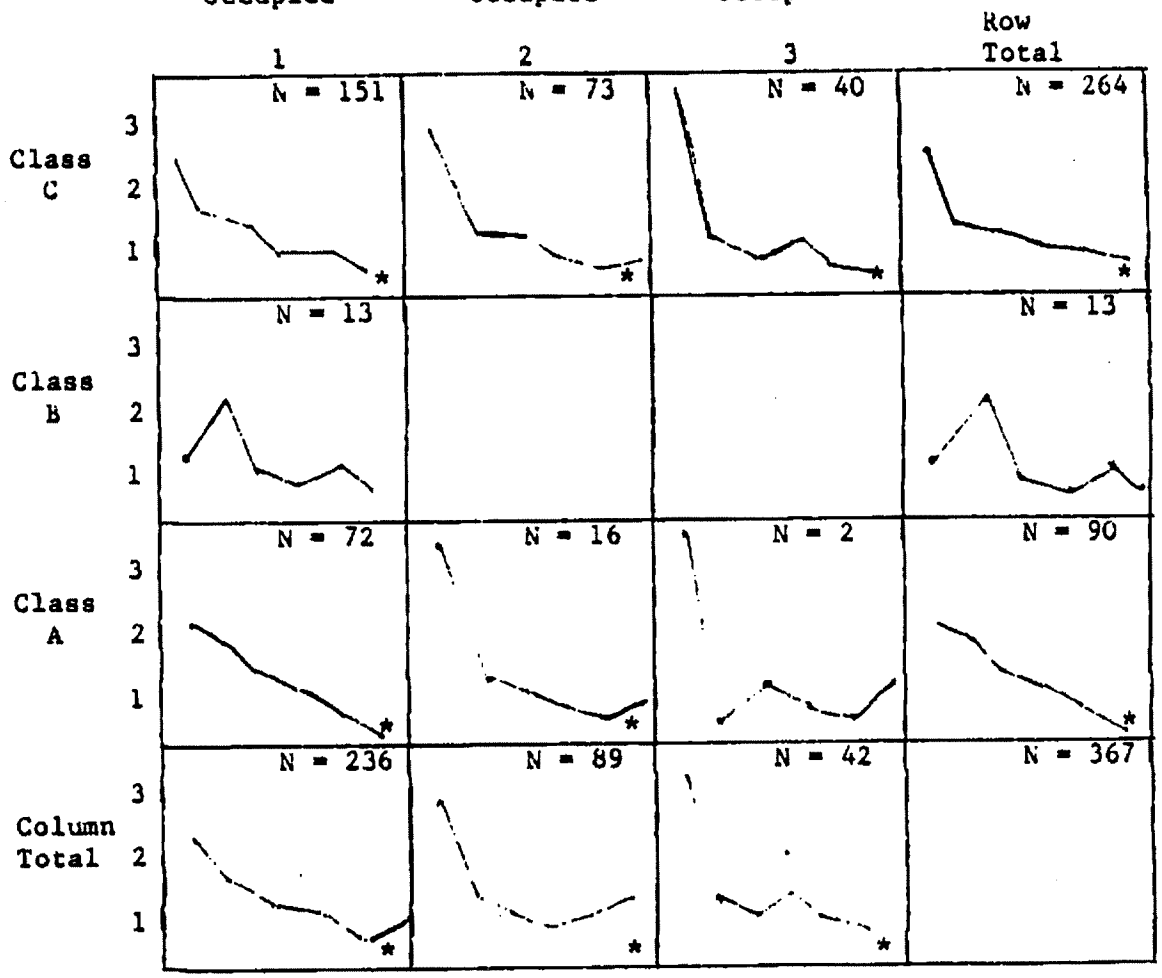
Figure A.2.2

Distribution of Crime and Bars by Type of Entertainment Categories, Controlling for Neighborhood



* = significant
N = number of bars

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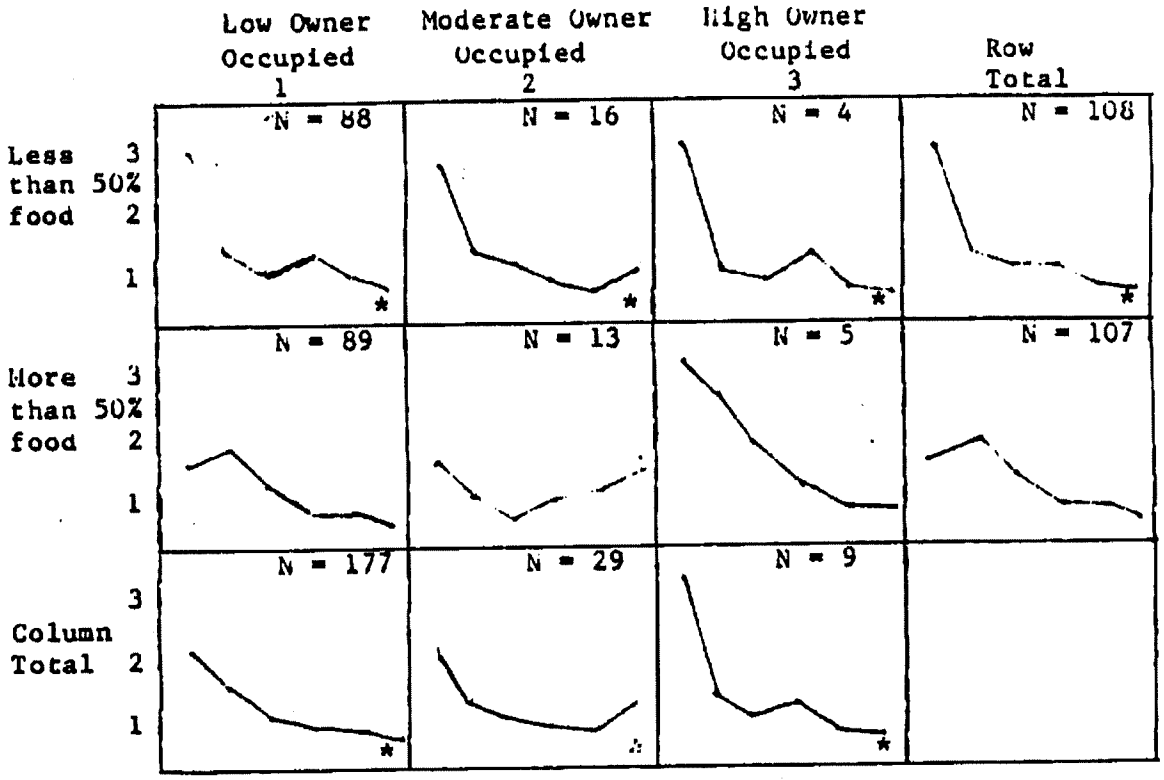
Figure A.2.3

Distribution of Crime Around Bars by Volume of Food, Controlling Neighborhood



* = significant
N = number of bars

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Appendix A.3

Crime Concentration Values for Category Analysis

Values for Figure A.2.1, Type of Liquor License and Neighborhood

Cell 1	2.38	1.50	1.08	.96	.86	.84
Cell 2	2.67	1.29	1.06	.98	.83	.90
Cell 3	3.49	1.19	.93	1.16	.81	.80
Row Total	2.52	1.42	1.07	.97	.85	.86
Cell 4	1.15	2.08	1.07	1.37	.70	.67
Cell 5	2.32	1.14	1.16	.92	1.0	.82
Cell 6	.90	3.60	1.09	.89	.90	.41
Row Total	1.21	2.04	1.07	1.34	.71	.68
Cell 7	2.19	1.63	1.29	1.01	.84	.71
Cell 8	1.93	1.17	.96	.92	.79	1.11
Cell 9	4.37	1.18	1.03	1.10	.75	.77
Row Total	2.20	1.62	1.28	1.01	.84	.71
Column 1 Total	2.18	1.63	1.25	1.02	.84	.72
Column 2 Total	2.52	1.27	1.04	.96	.83	.93
Column 3 Total	3.59	1.26	.95	1.14	.80	.78

Values for Figure A.2.2, Type of Entertainment Categories and Neighborhood

Cell 1	2.31	1.40	1.18	1.01	.86	.79
Cell 2	2.40	1.25	1.09	.97	.84	.95
Cell 3	3.54	1.28	.95	1.15	.81	.77
Row 1 Total	2.35	1.38	1.16	1.01	.86	.81
Cell 4	1.56	2.15	1.07	.87	.90	.77
Cell 5	None					
Cell 6	None					
Row 2 Total	Same as Cell 4					
Cell 7	2.11	1.86	1.39	1.07	.79	.61
Cell 8	3.33	1.40	1.18	.92	.74	.86
Cell 9	5.14	.68	1.25	.73	.57	1.13
Row 3 Total	2.15	1.84	1.38	1.07	.79	.62
Column Values	Same as I					

Values for Figure A.2.3, Volume of Food and Neighborhood

Cell 1	2.69	1.57	1.29	1.10	.75	.68
Cell 2	2.47	1.39	1.23	.96	.71	.91
Cell 3	4.25	1.25	.99	1.16	.78	.72
Row 1 Total	2.88	1.56	1.29	1.10	.75	.69
Cell 4	1.57	1.69	1.24	.99	.92	.73
Cell 5	1.36	.88	.68	.87	.94	1.27
Cell 6	2.88	2.24	1.16	.82	.75	.74
Row 2 Total	1.57	1.68	1.23	.99	.92	.74
Column 1 Total	2.13	1.64	1.26	1.04	.85	.71
Column 2 Total	2.01	1.18	1.01	.93	.81	1.06
Column 3 Total	3.90	1.50	1.03	1.07	.77	.72

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Appendix A.4

Liquor Licenses Granted Outside the Liquor Patrol Limits Between 1974 and 1979

Name	Address	Date Liquor License Granted
1. Ames Lodge #106	1614 Plymouth Avenue	5/28/76
2. Artist's Quarter	14 East 26th Street	12/20/74
3. Black Forest	1 East 26th Street	10/6/76
4. CC Club	2600 Lyndale Avenue South	7/25/75
5. Calhoun Beach Club	2730 West Lake Street	2/25/77
6. Campus Club	300 Washington S.E.	8/25/77
7. Howie's	2119 West Broadway	10/10/75
8. Improper Fraction	710 Washington S.E.	4/25/76
9. Jimmy's	3675 Minnehaha Avenue	2/28/75
10. Martini's and Bagels	3025 West Lake Street	3/17/78
11. Minnikahda Club	3241 Zenith	12/12/75
12. Occie's	2951 Lyndale Avenue South	2/28/75
13. Poodle	3001 East Lake Street	2/4/75
14. Popeye's	3601 East Lake Street	3/27/75
15. Rainbow Cafe	2916 Hennepin Avenue	3/27/75
16. Society of Fine Arts	2400 3rd Avenue South	7/25/75
17. Stardust Lanes	2520 26th Avenue South	8/8/75
18. Stub n' Herbs	227 Oak Street S.E.	2/14/75
19. Sunny's	2944 Chicago Avenue	2/28/75
20. Uptown bar and Cafe	3016 Hennepin Avenue	2/13/76
21. Waldo's	4601 Lyndale Avenue North	11/27/74
22. Walker Art Center	Vineland Place	4/30/76
23. Williams Pub	2911 Hennepin Avenue	3/28/75

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Appendix A.5

List of Bars in the Nuisance Study

Bars Identified as Nuisance Bars	Bars Identified as Non-Nuisance Bars
Addison's	Arthur's
Beanie's	Black Forest
Carousel	Cedar Inn
Dollie's	Charlie's
Duffy's	Duff's
Jimmy's	Dusty's
Longhorn	Elsie's
Moby Dick's	Famous Bar
Moore on University	Hub Cap
Mousey's	Jax
Mr. Arthur's	LaFamilia
Mr. Z's	Lake Inn
New Wonder Bar	Monte Carlo
Occie's	Nye's
Poodle	Parkway
Rainbow Bowl	Sebastian's
Spring Inn	Sunny's
Uncle Sam's	The First Story
Union	Williams Pub
Waldo's	Zurbey's

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Appendix A.6

Collection Instrument for Nuisance Bars

NAME: Arthurs ADDRESS:

1. Is the volume of food business more or less than 50 percent of the bar's total volume?

   _____ < 50 percent = 0

   _____ ≥ 50 percent = 1

2. What is the proximity of the bar to a predominantly residential area?

   _____ Within 1 block = 0

   _____ 1-2 blocks = 1

   _____ Greater than 2 blocks = 2

3. What is predominant parking situation?

   _____ Street parking = 0

   _____ Metered parking = 1

   _____ Other lots available = 2

   _____ Own lot = 3

4. What predominant type of clientele frequent the bar?

   Age

   _____ 19 - 29 = 0

   _____ 30 - 45 = 1

   _____ 46+ = 2

   Race

   _____ White = 0

   _____ Mixed = 1

   _____ Minority = 2

   Social Pattern

   _____ Single = 0

   _____ Couples = 1

   _____ Groups = 2

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APPENDIX B

Supplementary Materials for Chapter II: Adult Entertainment and Neighborhood Deterioration

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Appendix B.1

Methods used in the Research on Adult Entertainment

A. Simple Relations

The Pearson correlation, as reported, only establishes that a relationship exists, to what degree, and whether it is positive or negative. What degree of confidence we can have that the observed association is not due to chance (significance) can be easily calculated. These coefficients are appropriate for exploring a set of data when theoretical expectations are absent or minimal. They cannot be interpreted as indications of causal order, especially in the absence of a theory. They are used in this report to establish benchmarks for more complex analyses building up toward testing of causal assumptions.

Some simple, bivariate correlations are presented here to substantiate and extend the discussion in the main text.

To begin, the overall crime rate index reported in the main text hides some important differences due to type of crime. Table 7 shows four of the crimes that make up the crime index and their simple correlations with the different types of adult businesses. Table 7 shows a fairly great range of correlation between type of adult establishment and type of crime. In particular, note the significant positive correlation between beer bars and residential burglary as compared with the significant negative relation of liquor and Class A bars with residential burglary. These figures illustrate the impact of zoning policy. The relatively high correlations between sex businesses and commercial crimes may indicate that these businesses

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are located in relatively undesirable commercial areas, an interpretation substantiated by the fact that sex businesses are significantly related to percent of commercial vacancies as shown in Table 8.

Table 7: Pearson Correlation Coefficients: Adult Entertainment Establishments and Selected Crime Rates, 1979

		Assault Rate	Residential Burglary Rate	Commercial Burglary Rate	Commercial Robbery Rate
All adult businesses		.1889*	-.1010	.0937	.0317
Sexually-oriented businesses		.1876*	.0848	.3096*	.3003*
Alcohol-serving businesses		.1258	-.1239	.0315	-.0315
Beer		.1173	.2008*	.1210	.1054
Wine		-.0356	-.0225	-.0907	-.0629
Class A		.0951	-.2365*	-.0197	-.0869
Class B		.2487*	.1402	.1084	.1266
Class C		.1232	-.0518	.0565	-.0191
Beer	Class A	.0357	.0555		
	Class B	.2330*	.2701*		
	Class C	.0879	.1412		
Wine	Class A	.0195	.0333		
	Class B	N.A.	N.A.		
	Class C	-.0401	-.1066		
Liquor	Class A	.0456	-.1090		
	Class B	.1273	.0722		
	Class C	.1175	-.0873		

*Significant at the .05 level or better.

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Next, Table 8 gives the simple Pearson correlations between types of adult businesses and various measures of business and city policy effects. Specifically, the food service measurement and three different measures of commercial activity in a tract are related to adult businesses. Again, clear confirmation of the fact that different types of adult entertainment cluster in different areas in response to zoning policy is given. For example, liquor bars cluster in areas where the overall proportion of the tract that is commercial is high, but they are negatively related to number of non-manufacturing businesses. Both of these results may reflect the seven-acre zoning requirement for liquor bars, since many seven-acre zones include some manufacturing or wholesaling establishments.

Table 8: Pearson Correlation Coefficients: Adult Entertainment Establishments and Measures of Policy Infuence

	Proportion of business predominantly food	Proportion of Tract Commercial	Number of non-manufacturing businesses	Proportion of Commercial Property Vacant
All adult businesses	.2565	.4219*	.4030*	.2081*
Sexually-oriented businesses	-.0486	.0873	.0453	.2457*
Alcohol-serving businesses	.3212*	.3960*	.4290*	.1736*
Beer	-.1183	.0925	.2375*	.0422
Wine	.6163*	.2825*	.3994*	-.0042
Liquor	.3259*	.4023*	-.3318*	.1609*
Class A	.3076*	.3410*	.3063*	.1887*
Class b	.0927	.1603*	.1467	.1774*
Class C	.2678*	.3669*	.4569*	.0615

*Significant at the .05 level or better.

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Finally, Table 9 shows the relations between the measures of neighborhood deterioration -- crime and housing value -- and the control variables.

Table 9: Pearson Correlation Coefficients: Measures of Neighborhood Deterioration and Control Variables

	Mean housing Value	Crime Rate Index
Mean Income	.4686*	-.6216*
Food Business	.4856*	-.0676
Commercial Concentration	-.1631	.4840*

*Significant at the .05 level or better.

One general conclusion to these figures is that the various adult businesses relate to their environments differently. Sexually-oriented businesses appear to be related relatively strongly to several different measures of neighborhood quality, including commercial vacancies. These establishments apparently are not generally located in tracts that are heavily commercial as defined by the Polk index. Beer bars are similar in this respect, since they appear to be located in less commercial areas. Beer licenses also have a relatively strong association with residential burglary. Liquor bars, on the other hand, are located in heavily commercial areas, and exhibit lower correlations with housing value or residential burglary than beer bars. Finally, sexually-oriented businesses appear more likely to be located in tracts with high commercial crime rates, even though these tracts are not the ones with the highest concentrations of commercial uses.

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B. Statistical Controls

(1) Partial correlations: in this portion of the report, partial correlation is used to elaborate the patterns found among the simple correlations, and to demonstrate how the mutual effects of several variables operating simultaneously can alter a simple relationship. Statistically, partial correlations are correlations between the residual variances of two variables after the variance in each of them accounted for by one or more third variables has been removed. Thus, over-interpretation of partials may result if true causal connections are violated: the statistical operation removes the effects of control variables before it assesses the residual relationship between the two variables of interest. This is analogous to a causal assumption that the control variable precedes the other variables in causal ordering. In the section on causal inference we make use of this property to evaluate some assumptions about the causal ordering among the variables. In the present section, however, the partials are only used to examine the relationship between adult business and neighborhood quality when presumably relevant variables are controlled.

(2) Multiple regression: multiple regression permits us to move a step beyond the Pearson and partial correlations because it not only helps establish that an association exists between two (or several) variables, it also provides an estimate of how much change in one variable is associated with a change in a second variable. Thus it gives an estimate of the relative importance of the several independent variables in accounting for the variance of the dependent variable.

The independent variables used in the multiple regressions reported here and in the main text were selected in part by initial step-wise regressions which help identify those variables that account for the largest proportions of the variance in the dependent variables. This exploratory technique helped to identify the variables which were then used in the further simple multiple regressions reported.

Because this approach doesn't necessarily yield the most meaningful equations, mostly because of the implicit causal assumptions in the step-wise technique, additional criteria were used to select the independent variables. These included evidence from the partial correlation analysis, substantive considerations, and statistical requirements. The variables utilized in the partial correlation analysis are good candidates because we have reason to believe they are relevant to policy decision made about adult entertainment, and they obviously change the relationship between adult entertainment and neighborhood quality. In addition to these substantive considerations, the variables selected have been used in other studies for similar purposes. For example, income is frequently associated with housing choice, both for sociological (e.g., class preferences) and institutional (e.g., mortgage requirements) reasons.[1]

Finally, variables were selected to meet certain statistical requirements. The primary interest here was to avoid multicollinearity. Technically, this is a problem that occurs in multiple regression when a set of independent variables contain some relationships with high

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[1] J. Anthony, "The Effect of Income and Socio-Economic Groups on Housing Choice," cited in Michael Ball, "Recent Empirical Work on the Determinants of Relative Housing Prices," Urban Studies 10, 1973, p. 232. Also see p. 231 in Ball's article.

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correlations between them. The effect of this is to make the coefficients derived to estimate the association of an independent variable and the dependent variable unreliable, i.e., containing a high degree of error that results in different estimates from one sample to the next. If the objective of the research is to estimate the total relationship (k or k^2), multicollinearity is usually thought to pose no problem. However, we are interested here in comparing the effects of different variables on the dependent variables, so we want to avoid multicollinearity. The regressions reported in the main text use two variables that are correlated fairly high: mean houshold income and percentage of units in an area that are commercial. The simple Pearson correlation is -.6388, which may be high enough to cause trouble. In our judgment, the value of continuity in the presentation and analysis, and the intuitive value of both variables, out-weigh the danger of the multicollinearity.[1]

Some further multiple regressions using variables with little or no correlation among the independent variables were also run. The contribution of the adult entertainment variables is not improved. Other regressions were run which permitted the computer to select the variables according to the total amount of variance explained. In several of these, the adult variables achieved significance with respect to <u>crime</u>, but always with <u>lower</u> crime. These were rejected since they permit high multicollinearity among the variables, and thus the particular coefficients are uninterpretable.

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[1]Refer to the variables list and correlation matrix in Appendix B.2. By convention, correlations greater than .6 are considered possibly important sources of multicollinearity, to be avoided if possible.

Multiple regression produces several different coefficients and test values that must be understood in order to interpret the regression. The brief definitions to follow can serve as an introduction to these terms and as a justification for their use in this report. Only those terms useful in understanding the report are defined:

(1) b - the ordinary partial regression coefficient: The coefficient b is the estimate of the amount of change that occurs in the dependent variable for each unit change in the independent variable it modifies.

(2) Error of b - This is the standard error of b, the regression coefficient. It is the standard deviation of the dependent values predicted from that b and its independent variable, taking the number of cases into account. The standard error tells us how much uncertainty there is in predictions based on the regression coefficient. It is the basis for the significance test.

(3) Beta weights: This is the standardized regression coefficient. It is obtained by multiplying the ordinary regression coefficient by the ratio of the standard deviation of the independent variable to the standard deviation of the dependent variable. The point of doing this is to transform the dependent and independent variables into units of measurement that are directly comparable -- in this operation the unit of measurement for all variables becomes the standard deviation. Therefore any change of so many standard deviation units in one independent variable is associated with just so much change in similar units of the independent variable. The independent variables can thus be directly compared for the magnitude of

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their impact, which is a major point of interest in this report. When the beta weight approaches zero, there is little or no relationship between two variables.

(4) Significance: This is a test of the confidence we may have that a regression coefficient (standardized beta weights or ordinary b's) is actually different from zero. The closer to zero the significance test, the more confidence can be had that the regression coefficient is a good estimate of the relationship. The conventional minimum level of significance for accepting a relationship is .05, which is used in this report.

(5) R is the multiple correlation coefficient that measures the overall strength between the dependent variable and the combined independent (including control) variables. It is analogous to the simple Pearson correlation coefficient, and can be interpreted similarly.

(6) R^2 is the squared multiple correlation coefficient, and it measures the proportion of the variance of the dependent variable accounted for by the independent variables.

(7) Significance of R: describes the confidence we can have that the multiple correlation coefficient is sufficiently different from zero.

C. Tests for Linearity

Two tests for linearity were made on the results of the analyses described above: standard analysis of variance tests on the bivariate relationships between measures of neighborhood quality and adult entertainment establishments, and an examination of residuals for selected multiple regressions.

Some researchers suggested that concentrations of adult businesses may have disproportionate effects on measures of neighborhood quality.

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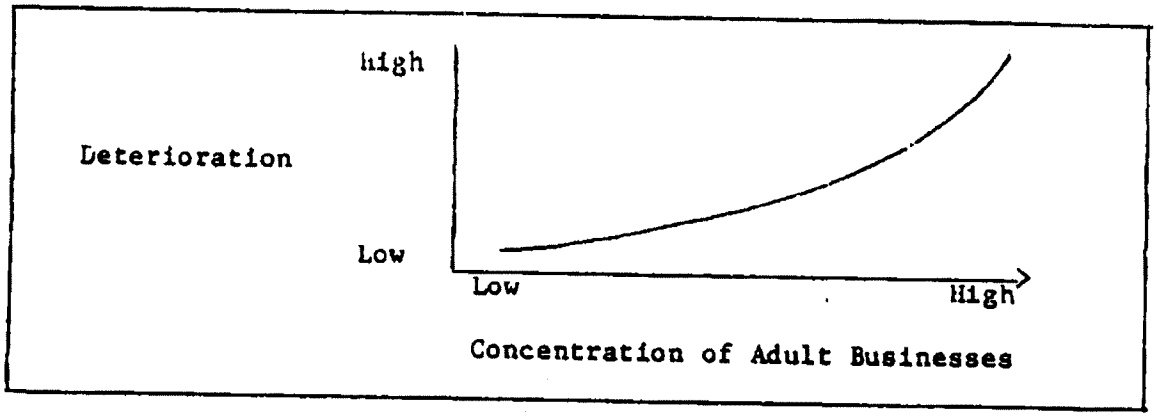
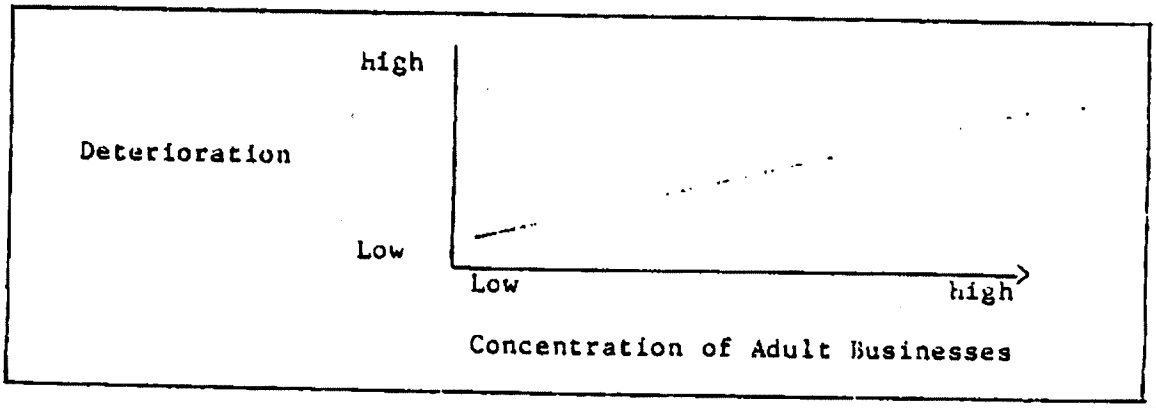
Figure A presents this "non linear" hypothesis. If the data do match this hypothesis, there are two consequences. First, it means that concentrations of adult business are increasingly bad for neighborhoods as concentration increases, and second, that the common statistical techniques, such as linear regression, must be modified.

Figure A: Graphic Representation of the Non-linear Hypothesis of the Relationship Between Adult Businesses and Neighborhood Deterioration



Fortunately, the analysis of variance tests for linearity made on the bivariate relationships, and inspection of regression residuals, confirm that the relationships are linear. Presumably, Figure B is closer to the form of the true relationship. Figure B indicates that adult businesses' effects on neighborhoods, if any, would increase in direct proportion to the number of establishments.

Figure B: Graphic Representation of the Non-linear Hypothesis of the Relationship Between Adult Businesses and Neighborhood Deterioration



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The analysis of variance test is an F-test that is based on a comparison of the correlation ratio, Eta^2, with the squared correlation coefficient, r^2. The formula for the test is:

$$F_{k-2,\ N-k} + \frac{(E^2 - r^2)\ (N-K)}{(1-E^2)\ (K-2)},$$

where N is the number of cases and k is the number of categories (greater than 2) into which the independent variable has been divided. If the relationship is not linear, the F-test should yield a significant result.[1]

Inspection of residuals in this study simply involved visual inspection of scatterplots of residuals for each case (tract) against the estimated value of the dependent variable for that case. More sophisticated tests were not deemed necessary given the lack of nonlinearity in the bivariate tests and no apparent deviations in the residuals scatterplots.

D. Analysis of Causality

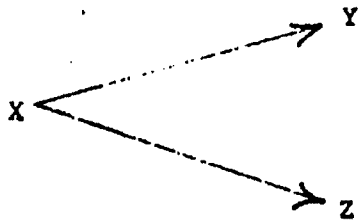
The path analysis technique used here is a way of comparing either regression coefficients or correlation and partial correlation coefficients to determine if the pattern of relationships in a data set are consistent with theoretical assumptions. The theoretical assumptions or hypotheses are a critical element in this technique: it is only by making these assumptions that causal inferences can be made. The results of the tests provide either falsification of the model being tested or circumstantial evidence to support it. Using this technique it is possible to compare several different models

[1]For example, see any edition of H. M. Blalock's Social Statistics.

(assumptions about causal relations in the data) to see which one is most consistent with the data.[1] The approach has the advantage that it is possible to make causal inferences with cross-sectional (one time only) measurements. Since the data available cannot provide enough observations over time to do reliable time-series analyses, this advantage is decisive in this report.

It is important to have some passing acquaintance with the path analysis technique used here. Figure C presents a simple model of the relationships between three (unknown) variables. The arrows represent causal connections we expect on the basis of some theory: logically, there are many different possible sets of relationships among these variables, but we have eliminated all but the one shown in Figure C. Next, the model has to be tested against empirical measurements to see if the hypotheses it represents are consistent with data.

Figure C: Simple 3-Variable Path Diagram, With Predictions



Predictions

$r_{yz} = r_{xy}\, r_{xz}$

$r_{yz.x} = 0$

---

[1]The standard introductory reference for the technique is H. M. Blalock, Causal Inferences in Nonexperimental Research (Chapel Hill: University of North Carolina Press, 1964).

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Specifically, the model in Figure C asserts that variable X is the cause of both Y and Z, but that there is no direct connection between Y and Z. Mathematicians have shown that these hypotheses translate into predictions about the behavior of simple and partial correlation coefficients, and regression coefficients. These predictions are shown beneath Figure C. The first prediction is that the simple correlation coefficient between Y and Z (r_{yz}) should equal the product of the correlations between X and Y and X and Z.[1] The second prediction is that the partial correlation between Y and Z controlling for X ($r_{yz.x}$) should be zero. In other words, the model says that any observed correlation between Y and Z is spurious; that is, it is due to the fact that X is related to both of them. The predictions reflect this hypothesis.

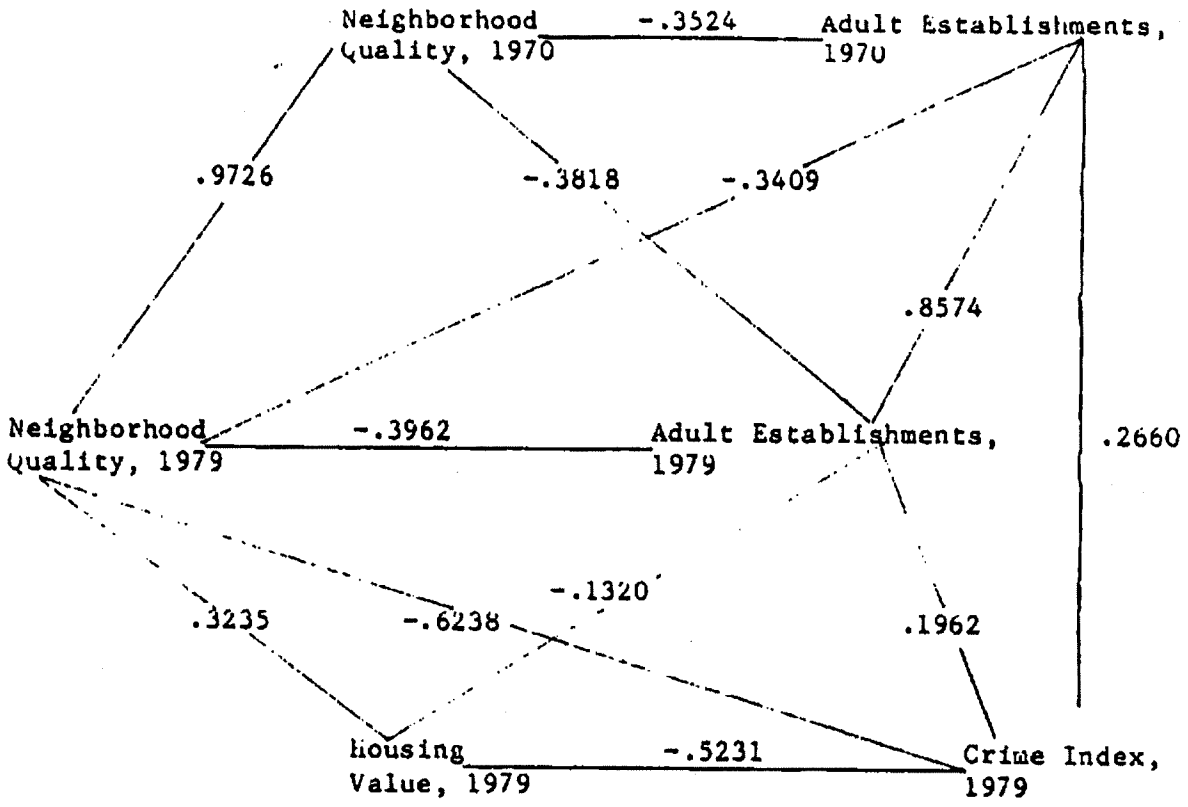
If the predictions do <u>not</u> match the evidence, then the hypothetical model can be rejected, or modifications can be made to fit the data better. When the model does fit the data, we can say that it is provisionally correct, until further evidence comes along that disconfirms it.

Figure D shows the pattern of simple Pearson correlations among the variables used in the path analysis in the text. Figure D includes the variables for overall neighborhood quality and adult establishments for 1970. These correlations form the basis for the path analysis.

---

[1]Assuming (1) the model is correct, and (2) the effects of measurement error are random and negligable.

Figure 5: Pearson Correlation Coefficients
Among Path Analysis Variables



The decision was made to use only the data for 1979 as (1) the measurements for 1970 were not identical to those for 1979, (2) there were too few observations to do a genuine time series analysis, and (3) the 1970 neighborhood quality meausre and the 1970 adult business measure were very highly correlated with their 1979 counter parts. This last point means that, in this context, we cannot assume that the measures' error terms are uncorrelated across time, making inference based on the relationships between them impermissable.

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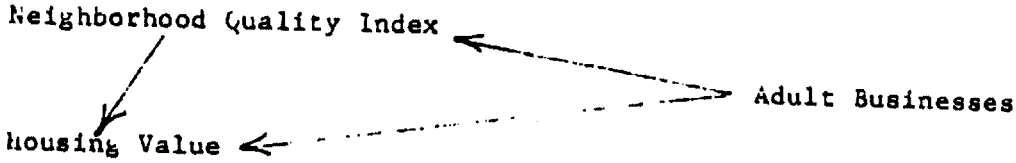
The correlations in Figure D are compatible with many sets of assumptions besides the ones used in the text. However, the assumptions used were chosen because they are reasonable and they do reflect the substantive issues at stake.

Among the alternative assumptions that could be made here, see Figure E. For instance, if adult businesses cause general neighborhood quality, which in turn causes housing value, as in the Figure shown here, then the correlation between the quality index and housing value should drop to zero. however, this test on the data only changes the observed relationship between the quality measure and housing value from .3235 to .2980. The hypothesis is clearly disconfirmed. This matches the expectations of common sense in this case.

Figure E: Some Alternative Causal Assumptions



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Appendix B.2

List of Variables for Neighborhood Deterioration Study

Variables 45 through 70 refer to 1979 data. Variables that begin with "PM" are taken from the Property Management System. Variables that begin with "P6" are from the 1978 Polk City Directory.

REL POS	VARIABLE NAME	VARIABLE LABEL
1	SEQNUM	
2	SUBFILE	
3	CASWGT	
4	TRACT	
5	V12	TOTAL NUMBER OF HOUSING UNITS
6	V17	TOTAL OWNER OCCUPIED
7	V20	TOTAL RENTER OCCUPIED
8	V111	PCT RESIDENTS STABLE 1965-1970
9	V112	PCT HOUSING UNITS OCCUPIED
10	V113	PCT OWNER OCCUPIED
11	DEMO1	TOTAL POPULATION
12	POLK2	TOTAL COML STRUCTURES PER CENT OF ALL
13	POLK6	TOTAL COML. UNITS CURRENT COUNT
14	POLK8	NET CHANGE COML. UNITS DURING PERIOD
15	POLK9	NO. COML. UNITS WITH CHG. OF OCCUPANTS
16	POLK11	VACANT COML UNITS CURRENT COUNT
17	POLK12	PER CENT OF TOTAL COML UNITS VACANT
18	POLK16	TOTAL NON-MFG. FIRMS CURRENT COUNT
19	XTRACT	X-COORDINATE OF TRACT CENTER
20	YTRACT	Y-COORDINATE OF TRACT CENTER

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REL POS	VARIABLE NAME	VARIABLE LABEL
21	DISTCBD	DISTANCE OF TRACT CENTER TO IDS TOWER
22	RATEF1	FREQUENCY OF CRIME - SEX RELATED CRIMES
23	RATEF2	FREQUENCY OF CRIME - STREET ASSAULT
24	RATEF3	FREQUENCY OF CRIME - STREET ROBBERY
25	RATEF4	FREQUENCY OF CRIME - RES BURGLARY
26	RATEF5	FREQUENCY OF CRIME - COMM BURGLARY
27	RATEF6	FREQUENCY OF CRIME - COMM ROBBERY
28	RATEF7	FREQUENCY OF CRIME - VANDALISM
29	RATEF8	FREQUENCY OF CRIME - AUTO THEFT
30	AREA	AREA IN SQUARE MILES OF TRACT
31	OWNVM	MEAN VALUE OWNER OCC RES UNIT
32	MEANI	MEAN FAM AND UNREL INCOME
33	HAGEPCT1	PCT RES STR BUILT 1969-70
34	HAGEPCT2	PCT RES STR BUILT 1965-68
35	HAGEPCT3	PCT RES STR BUILT 1960-64
36	HAGEPCT4	PCT RES STR BUILT 1950-59
37	HAGEPCT5	PCT RES STR BUILT 1940-49
38	HAGEPCT6	PCT RES STR BUILT BEFOR 1940
39	FACT01	CRIME RATES BY OFF - 1 2 3 7 8
40	FACT02	CRIME RATE BY OFF - 4 5 6
41	ZV17	Z SCORE % OWNER OCCUPPIED
42	ZDEM03	ZSCORE % POPULATION WHITE
43	ZMEANI	ZSCORE MEAN INCOME
44	NEIGH	3 TYPES OF NEIGHBORHOODS DERIVED FROM Z
45	FM8SF	TOTAL SINGLE FAMILY UNITS
46	FM8DT	TOTAL DUPLEX-TRIPLEX UNITS
47	FM8MF	TOTAL MULTI-FAMILY UNITS
48	FM8HSF	TOTAL HOMESTEAD SINGLE FAMILY UNITS
49	FM8HDT	TOTAL DU-TRIPLEX HOMESTEAD UNITS
50	FM8HMF	TOTAL HOMESTEAD MULTIFAMILY UNITS
51	FM8A1	% TOTAL SF BUILT BEFORE 1940
52	FM8A2	% TOTAL SF BUILT 1940-1959
53	FM8A3	% TOTAL SF BUILT AFTER 1960
54	FM8C1	%TOTAL SF WITH CONDITION 4,5,
55	FM8X1	SUM AREA CODES BY TOTAL SF UNITS
56	FM8X2	SUM SF BLD AREA BY TOTAL SF UNITS
57	FM8X3	GBA OF COMMERCIAL BY TOTAL COMMERCIAL

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REL POS	VARIABLE NAME	VARIABLE LABEL
58	FM8X4	SUM LOT AREA OF SF DUP TRIPLEX
59	FM8X5	SUM LOT AREA FOR UNITS WITH ALPHA NOT =C
60	FM8X6	SUM LOT AREA FOR UNITS WITH ALPHA = C
61	FM8X7	SUM LOT AREA FOR ALL UNITS
62	FM8X8	SUM MARKET VALUE SF BY TOTAL SF UNITS
63	FM8X9	SUM EMV COMMERCIAL BY TOTAL COMMERCIAL U
64	FM8X10	SUM BLD CODES BY TOTAL SF
65	V8111	NSP PCT STABLE
66	V8112	NSP PCT UNITS OCCUPPIED
67	P8LK2	% COMMERCIAL UNITS
68	P8LK6	SUM COMMERCIAL UNITS
69	P8LK8	CHANGE COMMERCIAL UNITS
70	P8LK9	% COMMERCIAL UNITS CHANG OF OCCUPANTS
71	P8LK11	VACANT COMMERCIAL UNITS
72	P8LK12	% VACANT COMMERCIAL UNITS
73	P8LK16	TOTAL NON-MANUFACTURING FIRMS
74	P8LKH	TOTAL HOUSEHOLDS
75	P8LKAH	AVE SIZE HOUSEHOLDS
76	P8LKIN	AVE HOUSEHOLD INCOME
77	BAR7A	BEER BAR 1970 CLASS C
78	BAR7B	BEER BAR 1970 CLASS B
79	BAR7C	BEER BAR 1970 CLASS A
80	BAR7D	WINE BAR 1970 CLASS C
81	BAR7E	WINE BAR 1970 CLASS B
82	BAR7F	WINE BAR 1970 CLASS A
83	BAR7G	LIQUOR BAR 1970 CLASS C
84	BAR7H	LIQUOR BAR 1970 CLASS B
85	BAR7I	LIQUOR BAR 1970 CLASS A
86	GMOV7	GENERAL MOVIE 1970
87	SUANA7	SUANA 1970
88	AMOV7	ADULT MOVIE 1970
89	DBK7	ADULT BOOKSTORE 1970
90	POOL7	POOLHALL 1970
91	BAR8A	BEER BAR 1980 CLASS C
92	BAR8B	BEER BAR 1980 CLASS B
93	BAR8C	BEER BAR 1980 CLASS A
94	BAR8D	WINE BAR 1980 CLASS C

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REL POS	VARIABLE NAME	VARIABLE LABEL
95	BAR8E	WINE BAR 1980 CLASS B
96	BAR8F	WINE BAR 1980 CLASS A
97	BAR8G	LIQUOR BAR 1980 CLASS C
98	BAR8H	LIQUOR BAR 1980 CLASS B
99	BAR8I	LIQUOR BAR 1980 CLASS A
100	GMOV8	GENERAL MOVIE 1980
101	SUANA8	SUANA 1980
102	AMOV8	ADULT MOVIE 1980
103	DBK8	ADULT BOOKSTORE 1980
104	POOL8	
105	PRBAR8	PROBLEM BAR 1980
106	FOOD8	OVER 50% FOOD8 1980
107	SEX8	SEUAL ENTERTAINMENT BAR 1980
108	OASLT8	OTHER ASSAULTS 1980 CRIMES
109	NASLT8	NONSTRANGER 1980 ASSAULTS
110	SASLT8	STRANGER TO STRANGER 1980 ASSAULTS
111	TASLT8	TOTAL ASSAULTS 1980
112	RAPE8	RAPES 1980
113	OCSC8	OTHER CRIMMINAL SEXUAL CONDUCT 1980
114	TCSC8	TOTAL CSC 1980
115	SROB8	STREET ROBBERRY 1980
116	PROB8	PERSONAL ROBBERY 1980
117	TPROB8	TOTAL PERSONAL ROBBERY
118	BROB8	BUSINESS ROBBERY 1980
119	RBURG8	BURGLARY OF RESIDENCE 1980
120	BBURG8	BUSINESS BURGLARY
121	PM8OO	# OWNER OCCUPPIED
122	PM8TRU	TOTAL RESIDENTIAL UNITS
123	PM8POO	% OWNER OCCUPPIED
124	EPOP8	EST 1980 POP FROM POLK
125	ASLT8R	1980 ASSAULTS PER 1000 POP.
126	RAPE8R	1980 RAPES PER 1000 POP.
127	PROB8R.	TOTAL PERSONAL ROBBERIES PER 1000 POP.
128	BROB8R	BUSINESS ROBBERIES PER 1000 POP.
129	RBURG8R	RESIDENT BURGLARIES PER 1000 POP.
130	BBURG8R	BUSINESS BURGLARIES PER 1000 POP.
131	CRIEX8	1980 TOTAL CRIMES ASLT THRU BBURG

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FFL POS	VARIABLE NAME	VARIABLE LABEL
132	RESPCT8	% AREA RESIDENTIAL 1980
133	COMPCT8	% AREA COMMERCIAL 1980
134	RAPE7	FREQ 1974 RAPES
135	ASLT7	FREQ ALL ASSAULTS 1974
136	RAPE7R	RAPES PER 1000 POP.
137	ASLT7R	ASSAULTS PER 1000 POP.
138	EPOP	1974 ESTIMATED POP FROM POLK
139	CRDEX8R	SUM OF RESIDENTIAL CRIMES 1979 DATA
140	FACTS7	
141	BEER	SUM OF 1980 BARS WITH BEER LIC.
142	WINE	SUM OF 1980 BARS WITH WINE LIC.
143	LIQUOR	SUM OF 1980 BARS WITH LIQUOR LIC.
144	BEER7	SUM OF 1970 BARS WITH BEER LIC.
145	WINE7	1970 WINE LIC.
146	LIQUOR7	SUM OF 1970 LIQUOR7 LIC.
147	SEXBIZ	SUM OF 1980 SUANAS,ADULT MOVIES, ADULT B
148	BARS	SUM OF ALL 1980 BARS
149	BARS7	SUM OF ALL 1970 BARS
150	HUPCTMF	PM8MF BY PM8SF+PM8DT+PM8MF
151	AREAMMF	PM8X5-PM8X4
152	CBAR	CONDENSED BARS VARIABLE 0&1 =1, GT 2 BAR
153	DENSE8	EPOP8 DIVIDED BY AREA
154	ADULT	BARS+SEXBIZ
155	TYPEA	1980 BARS WITH CLASS A LIQUOR LIC.
156	TYPEB	1980 BARS WITH CLASS B LIQ. LIC.
157	TYPEC	1980 BARS WITH CLASS C LIQ. LIC.
158	TYPEA7	1970 BARS WITH CLASS A LIQ. LIC.
159	TYPEB7	1970 BARS WITH CLASS B LIQ. LIC.
160	TYPEC7	1970 BARS WITH CLASS C LIQ. LIC.
161	RBURG7R	RATEF4*1000 BY DEMO1
162	BBURG7R	RATEF5*1000 BY DEMO1
163	BROB7R	RATEF6*1000 BY DEMO1
164	DV8111	V8111-V111
165	DV8112	V8112-V112
166	DPMSP00	PM8P00-V113
167	DEPOP8	EPOP8-DEMO1
168	DP8LK2	P8LK2-POLK2

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REL POS	VARIABLE NAME	VARIABLE LABEL
169	DF8LK12	F8LK12-FOLK12
170	DF8LKIN	F8LKIN-MEANI
171	DFM8X8	FM8X8-OWNVM
172	DRBURG	RBURG8R-RBURG7R
173	DBBURG	
174	DBROB	BROB8R-BROB7R
175	DRAPE	RAPE8R-RAPE7R
176	DASLT	ASLT8R-ASLT7R
177	DBARS	BARS-BARS7
178	DBEER	BEER-BEER7
179	DWINE	WINE-WINE7
180	DLIQUOR	LIQUOR-LIQUOR7
181	DTYPEA	TYPEA-TYPEA7
182	DTYPEB	TYPEB-TYPE7B
183	DTYPEC	TYPEC-TYPE7C
184	FOODPCT	FOOD8 BY BARS
185	FACTOR7	FACTOR SCORES FROM NEIGHBORHOOD VARIABLE
186	FACTOR8	1980 FACTOR SCORES FROM NEIGH. VAR.S

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2-~~1183~~

10. There is a high degree of turnover in individual adult entertainment businesses as evidenced on page 51 (Much of this change is probably due to Police enforcement.)

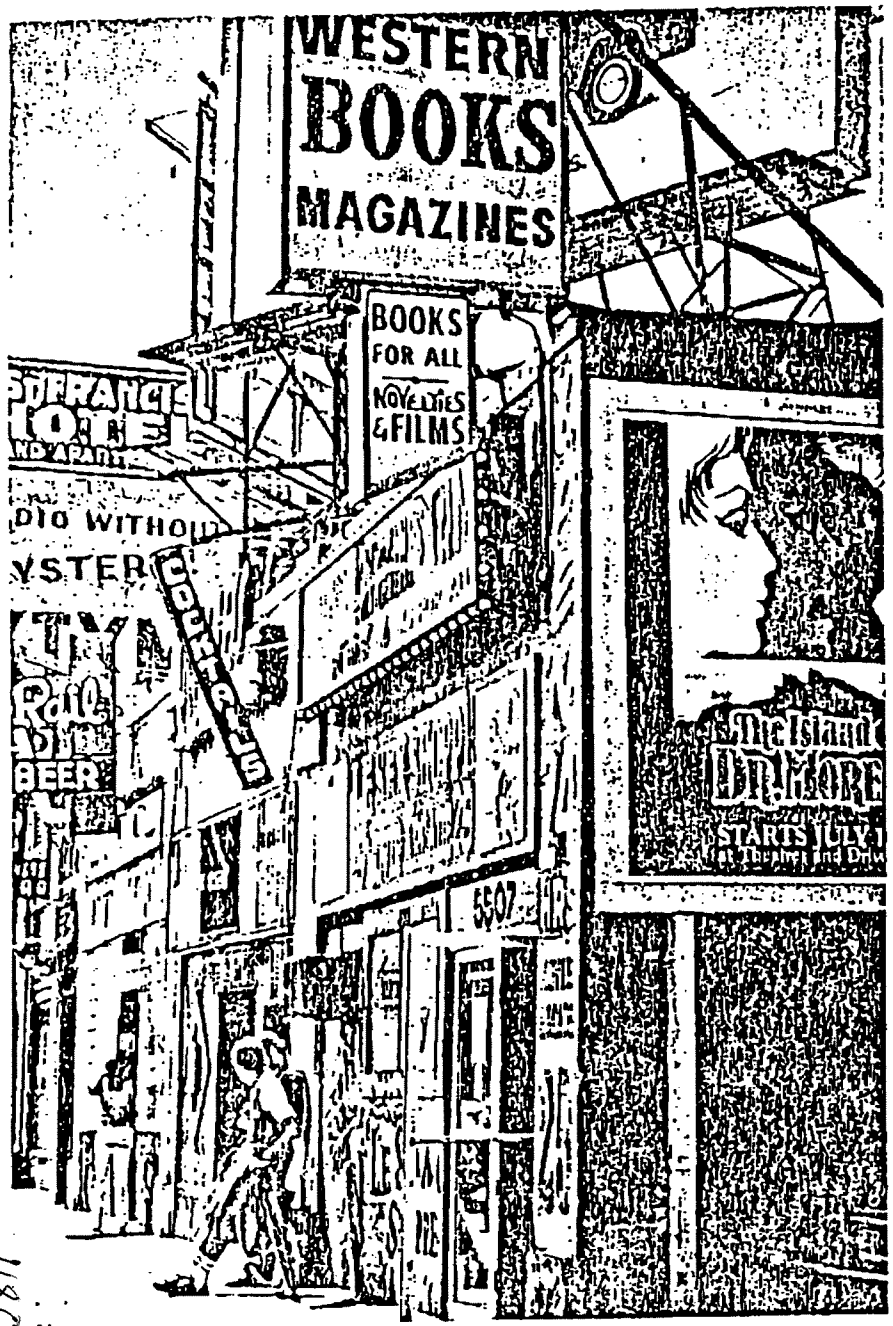
11. The Los Angeles City Council, both on its own initiative and at the urging of numerous citizens groups, has proposed a variety of approaches to limiting the possibly deleterious effects of "adult entertainment" business on neighborhoods.

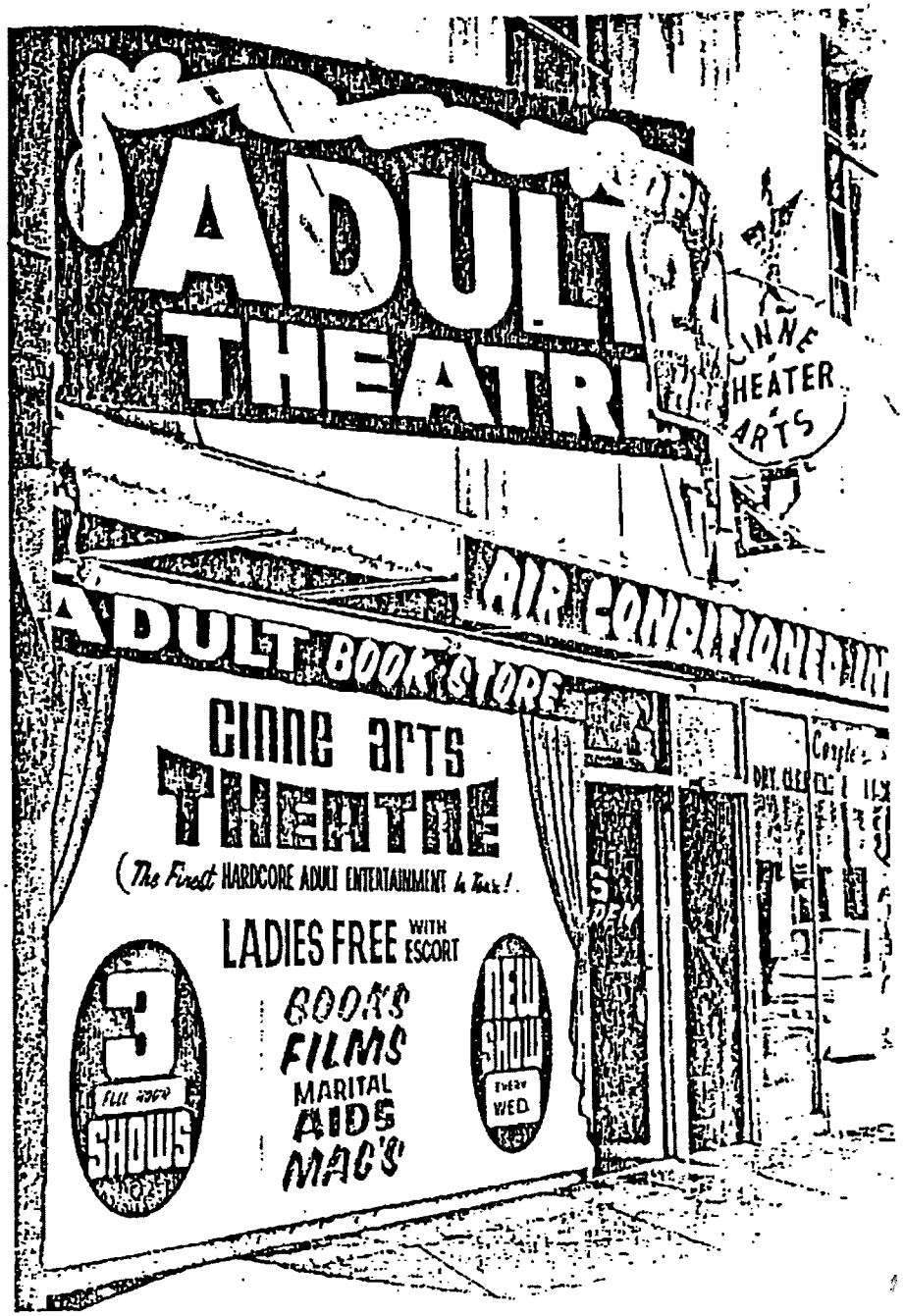
12. At least 10 cities have adopted ordinances similar to the Detroit dispersal ordinance. Several other cities have enacted other forms of regulations.

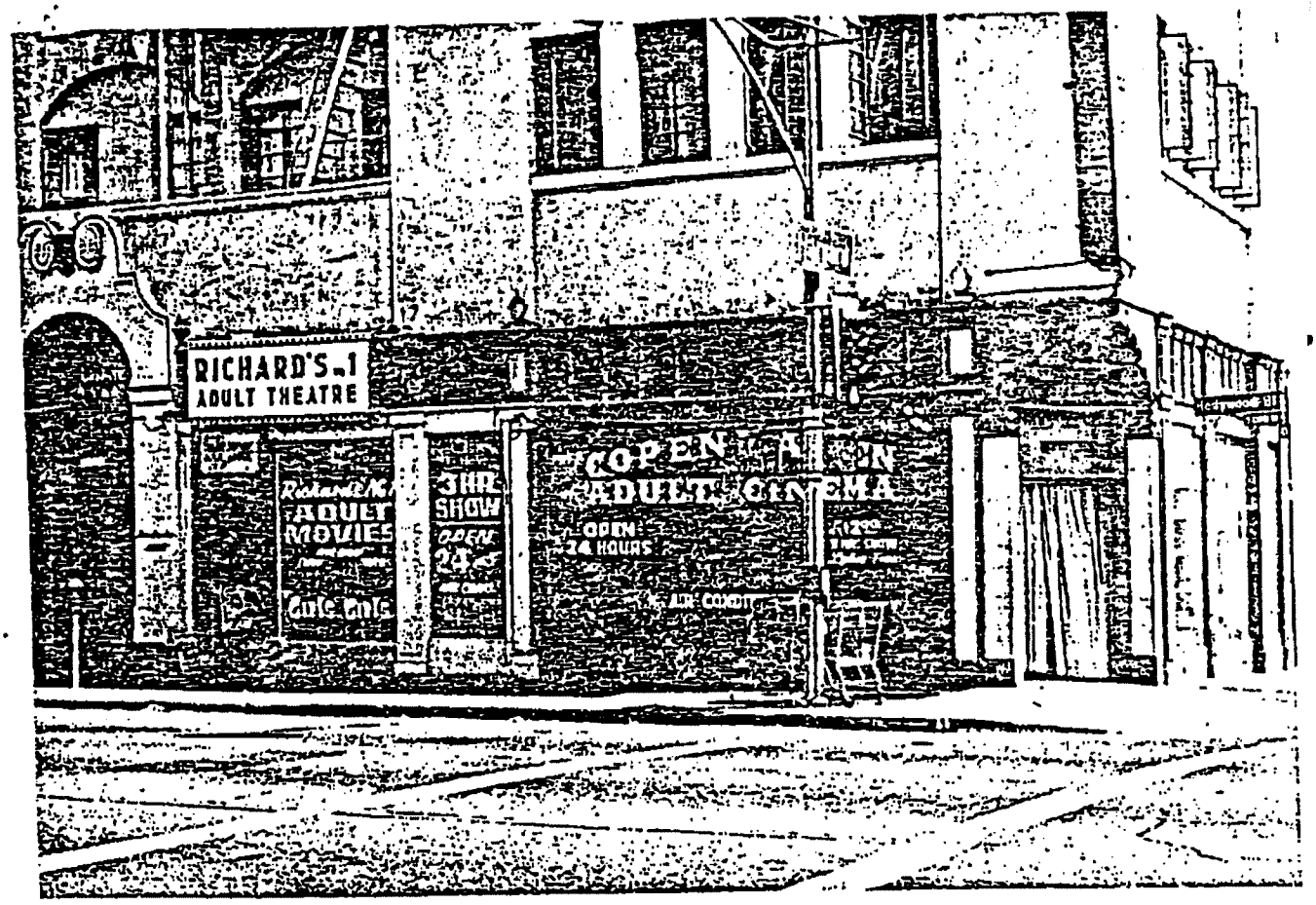
13. The Detroit ordinance does not regulate massage parlors. Of the cities with regulations, three have included massage parlors within the purview of their zoning ordinance.

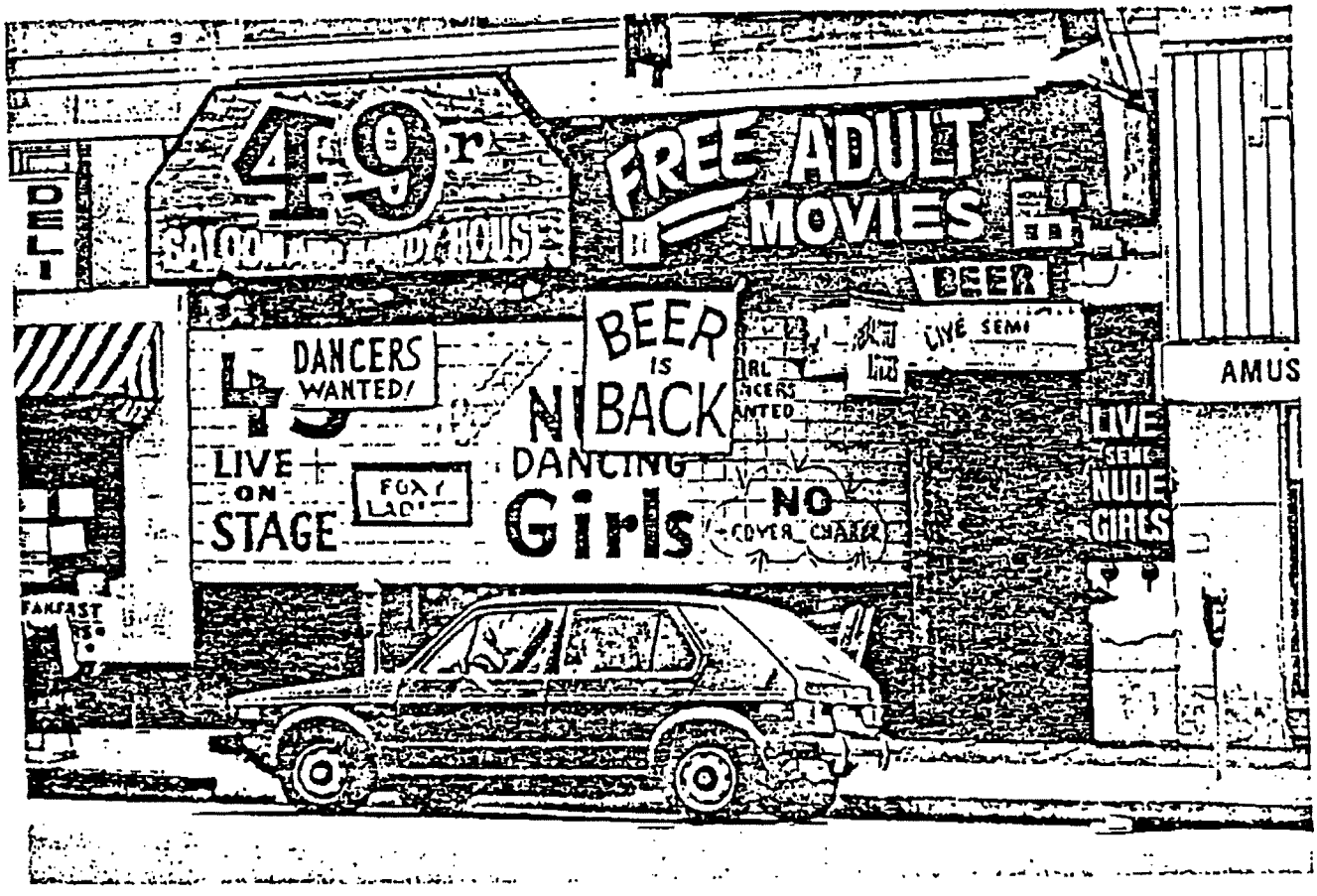
14. None of the cities surveyed call out or regulate adult motels as a part of their "adult entertainment" ordinance.

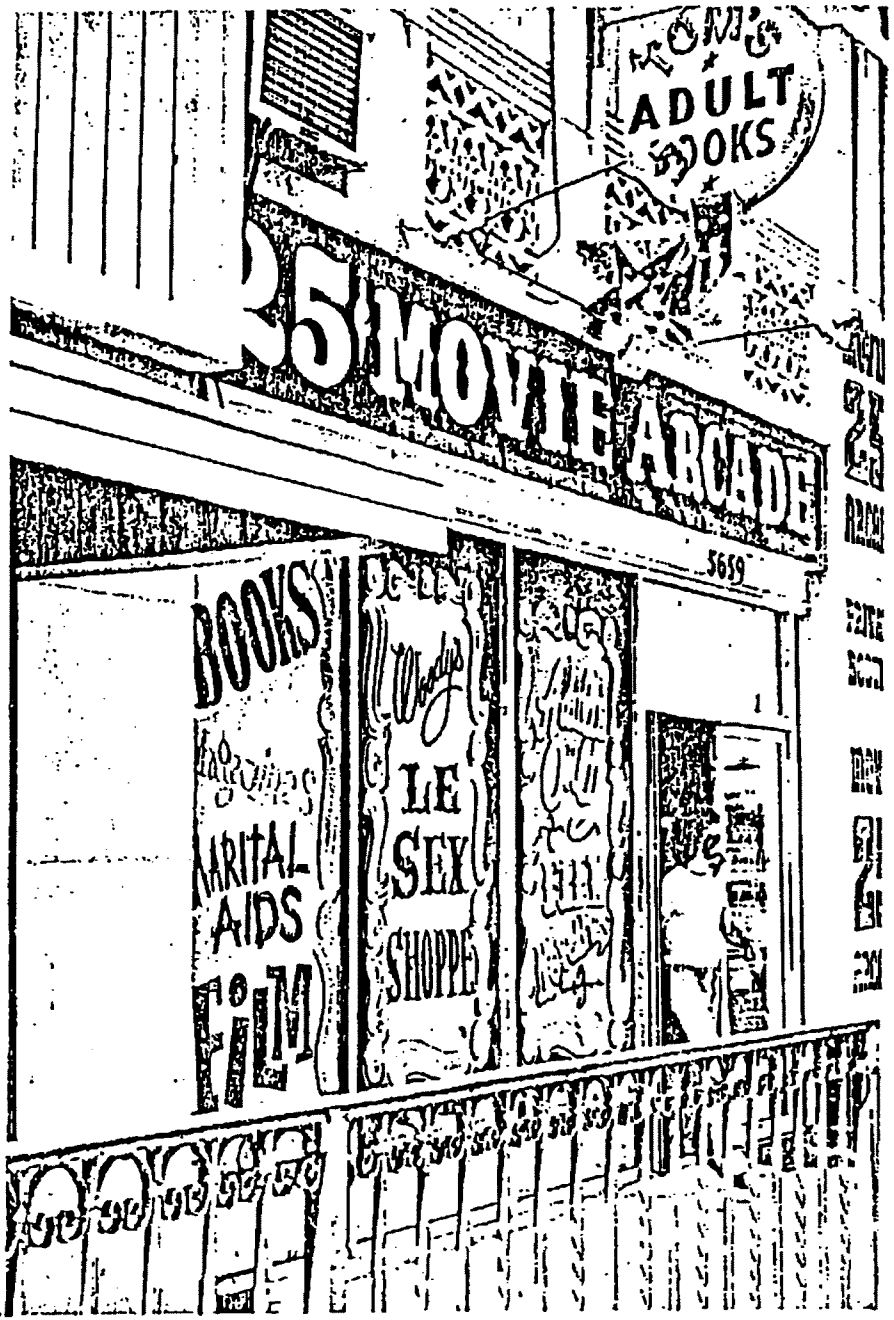
15. The Detroit Ordinance is prospective in its application and therefore does not include an amortization provision, i.e. provide for a time period for the removal of existing businesses. Although other such ordinances have included such provisions, none had been validated by the courts at the time of this study.

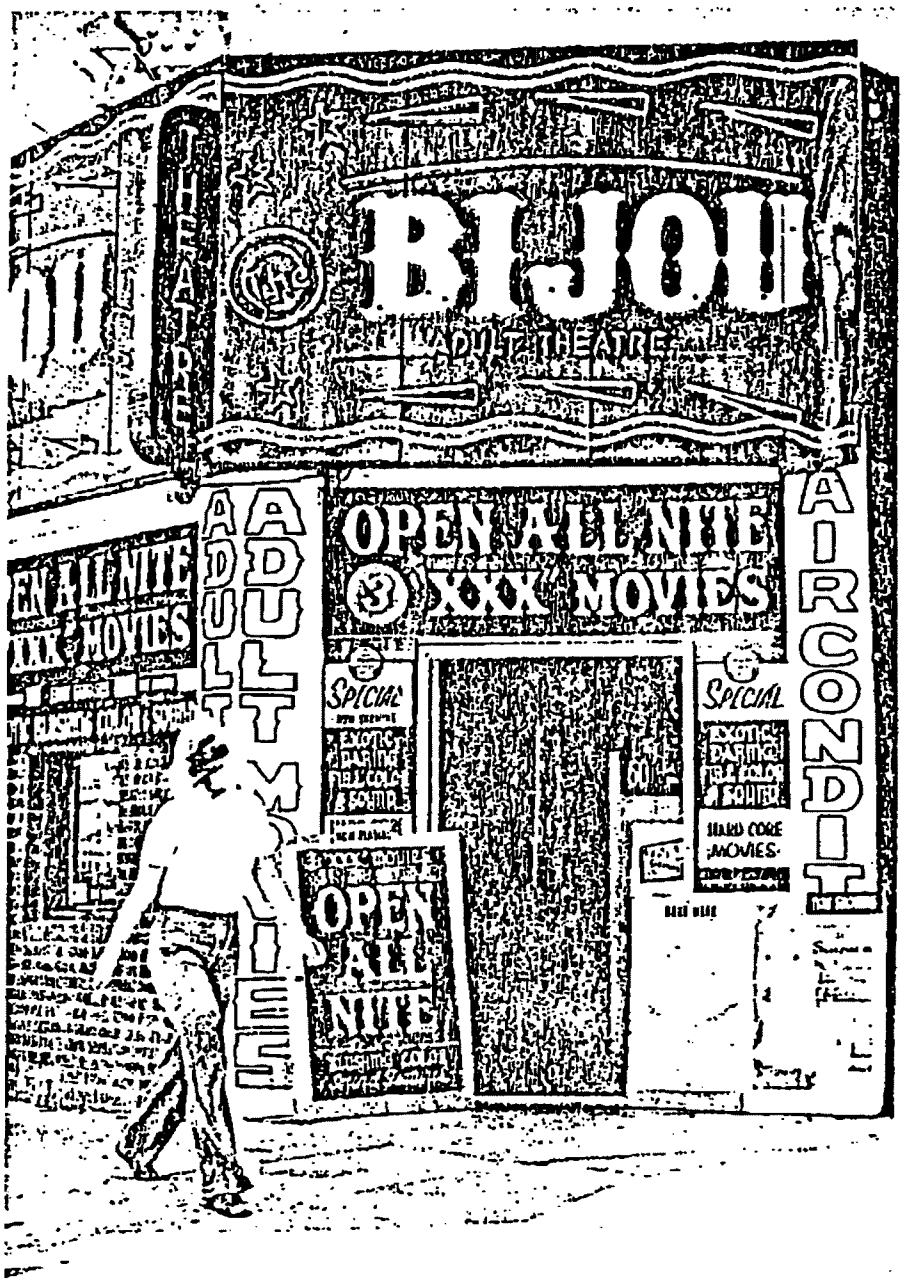

WESTERN
BOOKS
MAGAZINES
BOOKS FOR ALL
NOVELTIES & FILMS
BEER
5507


ADULT
THEATRE
CINNE ARTS
THEATRE
AIR-CONDITIONED
ADULT BOOKSTORE
CINNE ARTS
THEATRE
(The Finest HARDCORE ADULT ENTERTAINMENT In Town!)
LADIES FREE WITH ESCORT
3
FILM HARD SHOWS
BOOKS
FILMS
MARITAL
AIDS
MAG'S
NEW SHOW EVERY WED.

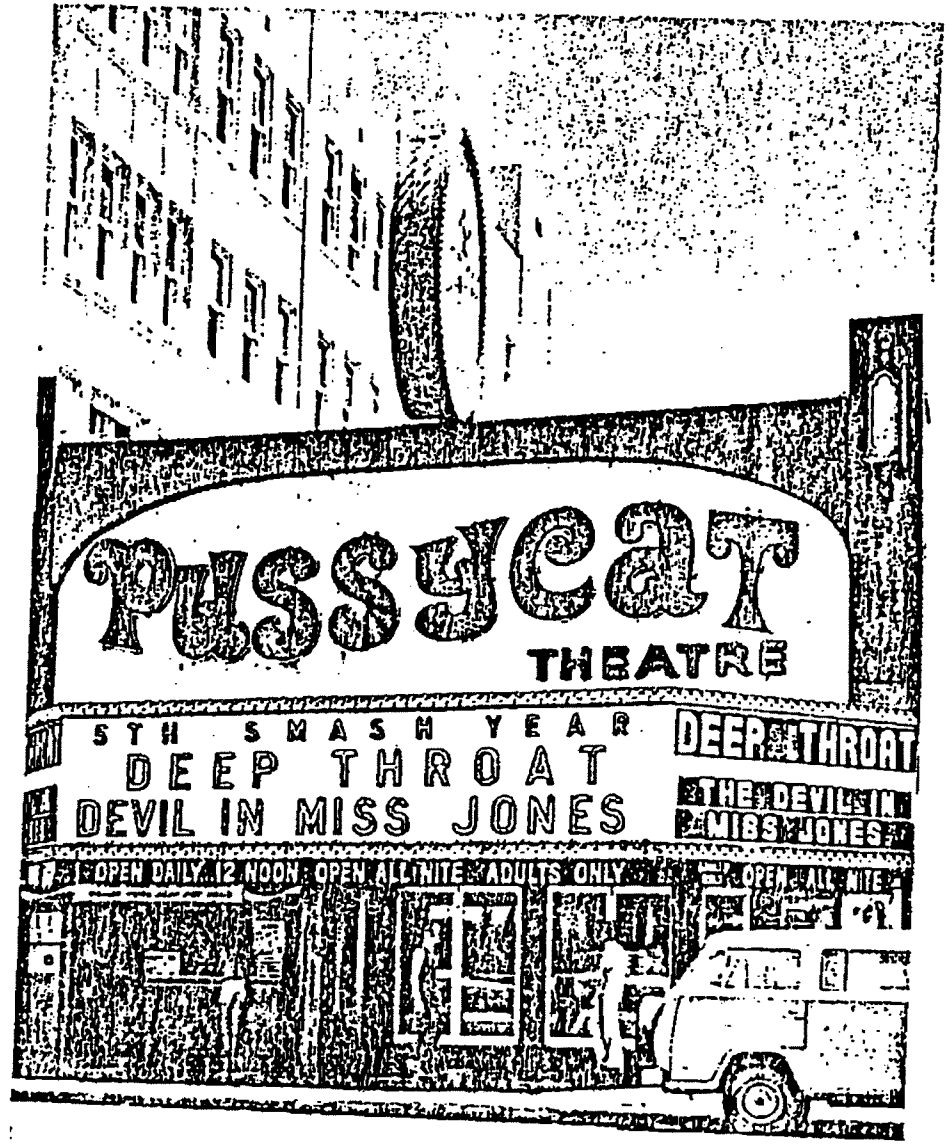

RICHARD'S #1
ADULT THEATRE
ADULT MOVIES
3 HR. SHOW
OPEN 24
COPENHAGEN
ADULT CINEMA
OPEN 24 HOURS


49er
FREE ADULT MOVIES
BEER
DANCERS WANTED!
BEER IS BACK
LIVE ON STAGE
DANCING Girls
NO COVER CHARGE
LIVE SEMI NUDE GIRLS
AMUS

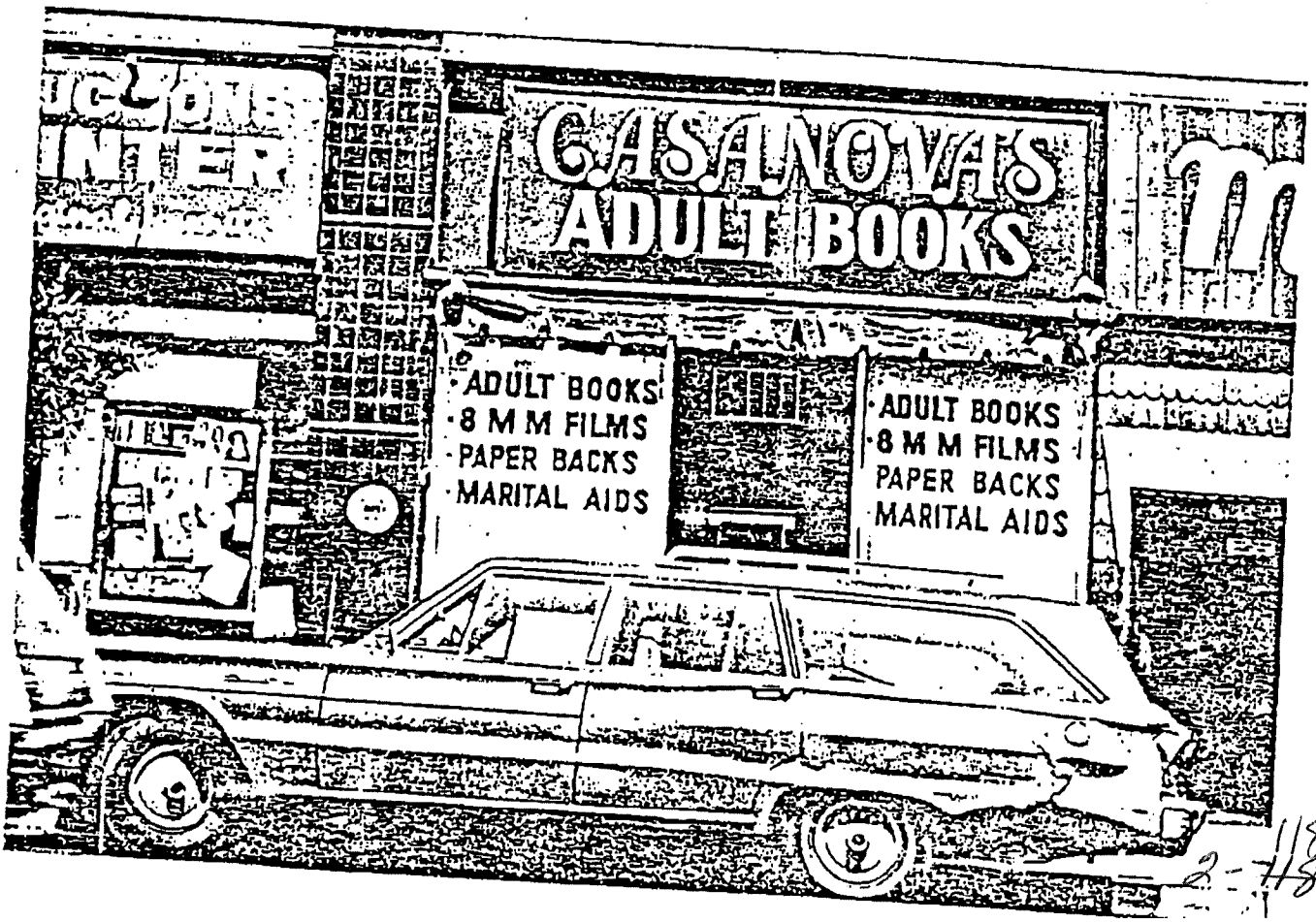

ADULT BOOKS
35 MOVIE ARCADE
5659
BOOKS
MARITAL AIDS
FILM
LE SEX SHOPPE


BIJOU
ADULT THEATRE
OPEN ALL NITE
XXX MOVIES
SPECIAL
HARD CORE MOVIES
AIR CONDIT
ADULT MOVIES
OPEN ALL NITE


LIVE
ON
STAGE
EROTIC DANCERS
THE CAVE
ADULT MOVIE
THEATRE
LL NEW EROTIC DANCERS
ADULT PLUS FOR LOVE OR MONEY
XXX A GOOD INVESTMENT


Pussycat
THEATRE
5TH SMASH YEAR
DEEP THROAT
DEVIL IN MISS JONES
DEEP THROAT
THE DEVIL IN MISS JONES
OPEN DAILY 12 NOON OPEN ALL NITE ADULTS ONLY
OPEN ALL NITE


PARIS HOUSE


CASANOVAS
ADULT BOOKS
·ADULT BOOKS
·8 M M FILMS
·PAPER BACKS
·MARITAL AIDS
·ADULT BOOKS
·8 M M FILMS
PAPER BACKS
MARITAL AIDS

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II.

PURPOSE AND SCOPE

On January 12, 1977, the Los Angeles City Council instructed this Department, with the assistance of other City agencies, to conduct a comprehensive study to determine whether the concentration of so-called "adult entertainment" establishments has a blighting or degrading effect on nearby properties and/or neighborhoods. The term "adult entertainment" is a general term utilized by the Planning staff to collectively refer to businesses which primarily engage in the sale of material depicting sex or in providing certain sexual services. These would include the following: adult bookstores; X-rated theaters; adult motels with X-rated entertainment; massage parlors; sexual therapy establishments (other than those operated by a licensed psychologist, psychiatrist, etc.); and nude, topless or bottomless bars and restaurants.

During the past few years, there has been increasing concern in Los Angeles over the proliferation of such sexually oriented businesses. The derivation of such concern is varied--religious, moral, sociological and economic. The positions advocated by the public range from a "laissez faire" attitude to outright moral indignation and demand for prohibition.

It should be noted at this time that the topic of newsracks, was not dealt with in this study. The primary reason for not considering newsracks is that, in addition to the absence of a specific Council request for this Department to deal with that subject, this matter has been and continues to be a topic of litigation in our state courts. Additionally, other public agencies, including the City Attorney, Bureau of Street Maintenance, and Building and Safety, are presently pursuing assignments regarding newsracks, and it is premature to determine whether newsracks could feasibly be studied as "adult entertainment" businesses, from a practical or constitutional standpoint.

In giving the Planning Department this assignment, the City Council essentially called for a fact-finding process to determine whether adult entertainment establishments, where they exist in concentration, cause blight and deterioration. When this question has been posed to the public, there have frequently been anguished retorts to the effect that "the answer is so obvious it is ridiculous to even ask the question," and "what is the City waiting for before it takes action to eliminate these scourges of society?"

On the other side of the spectrum, certain parties who are against the adoption of any regulations regarding "adult entertainment" question the legitimacy of the government's interest in the subject; and they have noted that magazines as "scurrilous" as those sold in adult bookstores are also available in the markets and drugstores where the likelihood of perusal by youngsters is obviously greater than within the confines of an adult bookstore (where no person under 18 years of age is allowed).

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In completing this study, the Planning Department has made every effort to ensure a fair and unbiased analysis of "adult entertainment." The staff has been instructed to objectively review information of a factual nature; and, although the personal feelings of organized groups and the public at large were forcefully expressed at the two public meetings and in the study questionnaires, the staff has maintained independence from such strong emotions in evaluating the data gathered.

As noted above, the staff has specifically been given the charge to determine whether the concentration of "adult entertainment" establishments has any blighting or degrading effect on the neighborhoods in which they reside. We did not consider the specific nature or content of the materials or services rendered, advertised or promised, for this would have constituted a censor-like role for the Department which was neither desired nor requested by the Council.

This study has focused on the Hollywood community as well as portions of Studio City and North Hollywood as those areas of Los Angeles having the greatest concentration of "adult entertainment" establishments. In order to assess the effect of the concentration of "adult entertainment" establishments in these areas, the staff has analyzed such factors as changes in assessed property values, and reviewed various crime statistics as well as other demographic and related data as available from the U.S. Census. In addition, the Department has reviewed various established approaches to the regulation of "adult entertainment" business, including legislation already enacted by other jurisdictions, and earlier efforts of the City of Los Angeles to regulate such businesses.

By means of two public meetings on the subject conducted by representatives of the City Planning Commission, and through the use of a mail survey questionnaire, the Department has also attempted to provide additional documentation relative to the actual or perceived impact of adult entertainment businesses on the community. Current information on crime statistics has been provided in a separate report prepared by the Los Angeles Police Department, major portions of which are herein included.

III.

METHODS CURRENTLY USED TO REGULATE "ADULT ENTERTAINMENT" BUSINESSES

A. APPROACHES TO THE REGULATION OF ADULT ENTERTAINMENT BY LAND USE REGULATION

Two primary methods of regulating "adult entertainment" businesses via land use regulations have developed in the United States: the concentration approach, as evidenced by the "Combat Zone" in Boston, and the dispersal approach, initially developed by Detroit.

1. Boston Approach

In Boston the "Combat Zone" was officially established by designation of an overlay Adult Entertainment District in November of 1974. The purpose of the overlay district was to create an area in which additional special uses would be permitted in designated Commercial Zones which were not permitted in these zones on a citywide basis.

The "Combat Zone" had existed unofficially for many years in Boston, as the area in question contained a majority of the "adult entertainment" facilities in the City. The ordinance was adopted in response to concern over the spreading of such uses to neighborhoods where they were deemed to be inappropriate. Other considerations included facilitating the policing of such activities and allowing those persons who do not care to be subjected to such businesses to avoid them.

Under the Boston ordinance, adult bookstores and "commercial entertainment businesses" are considered conditional or forbidden uses except in the Business Entertainment District. Existing "adult entertainment" businesses are permitted to continue as non-conforming uses, but, if discontinued for a period of two years, may not be re-established. Establishment of uses in areas of the city other than the "Combat Zone" requires a public hearing before the Zoning Board of Appeals.

The effectiveness and appropriateness of the Boston approach is a subject of controversy. There has been some indication that it has resulted in an increase in crime within the district and that there is an increased vacancy rate in the surrounding office buildings. Due to complaints of serious criminal incidents, law enforcement activities have been increased and a number of liquor licenses in the area have been revoked. Since the "Combat Zone" and most of the surrounding area are part of various redevelopment projects, however, the change in character of the area cannot be attributed solely to the existence of "adult entertainment" businesses.

In Los Angeles, the Police Department has investigated the effect of "adult entertainment" businesses in Hollywood and found a link between the clustering of these establishments and an increase in crime. (See Section V, pages 51 to 55). For this reason, and due to the enforcement problems created by such concentrations, the Police Department is not in favor of a concentration approach in the City of Los Angeles. Public testimony at hearings and through Planning Department questionnaires has indicated an overwhelming public disapproval of this approach for the City of Los Angeles.

2. Detroit Approach

The City of Detroit has developed a contrasting approach to the control of "adult entertainment" businesses. The Detroit Ordinance attempts to disperse adult bookstores and theaters by providing that such uses cannot, without special permission, be located within 1000 feet of any other "regulated uses" or within 500 feet of a residentially zoned area.

This ordinance was an amendment to an existing anti-skid row ordinance which attempted to prevent further neighborhood deterioration by dispersing cabarets, motels, pawnshops, billiard halls, taxi dance halls and similar establishments rather than allowing them to concentrate.

The ordinance was immediately challenged and eventually was upheld by the United States Supreme Court. (Young v American Mini Theaters 96 Supreme Ct. 771, 1976.)

In response to our request, data supplied by the City of Detroit Police Department indicates that the combination of the dispersal ordinance and a related ordinance prohibiting the promotion of pornography have been an effective tool in controlling adult businesses. To date, 18 adult bookstores and 6 adult theaters have been closed. There are 51 such businesses still in operation in Detroit and 38 pending court cases for various ordinance violations.

3. Variations Adopted by Other Cities

The success of the Detroit ordinance has spurred attempts by a number of other cities to adopt similar ordinances. The uses controlled and the types of controls established by these ordinances are summarized in Tables I and II, infra.

While the current study of the effect of "adult entertainment" businesses on neighborhoods in Los Angeles has encompassed all forms of "adult entertainment", the ordinances reviewed and the Detroit Ordinance specifically, are less encompassing in scope. Table I, on the following page, lists and reviews a number of ordinances, which regulate various specified adult uses.

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TABLE I

TABLE I

Number of Zoning Ordinances Regulating Specified Adult Entertainment Uses

(11 Ordinances Reviewed-1 not adopted)

USE	No. of Cities Regulating*
Adult Theaters	11
Adult Bookstores	9
Mini-theaters and coin operated facilities	5
Massage Parlors (includes "physical culture establishments)	
Modeling Studios/Body Painting	2
Pool/Billiard Halls	2
Topless Entertainment	2
Newsracks	1
Adult Motels	0

* (Numbers have incorporated-where appropriate-uses entitled "physical culture establishments" and "businesses to which persons under 18 could not be admitted".)

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The Detroit dispersal ordinance does not regulate massage parlors, nor does it require any existing business to close by amortization. Many of the more recent ordinances include amortization provisions and several of these are currently in varying stages of litigation.

Perhaps the most comprehensive ordinance proposed to date (although not adopted) is that of New York City. The proposed ordinance creates five classes of controlled uses, one of which is entitled "physical culture establishments" and is defined as a general class including any establishment which offers massage or other physical contact by members of the opposite sex. The ordinance would also apply to clubs where the primary activity of such club constitutes one of the five defined classes of adult uses.

The ordinance also provides for a special permit exempting individual adult uses from amortization requirements when the Board of Standards and Appeals makes findings regarding:

1. The effect on adjacent property;

2. Distance to nearest residential district;

3. The concentration that may remain and its effect on the surrounding neighborhood;

4. That retention of the business will not interfere with any program of neighborhood preservation or renewal; or

5. In the case of an adult bookstore or motion picture theater, the Board finds that the harm created by the use is outweighed by its benefits.

Locally, the cities of Bellflower and Norwalk have enacted ordinances requiring adult bookstores and theaters to obtain a conditional use permit. As a part of their study, the City of Bellflower surveyed over 90 cities in Southern California to determine how other cities were controlling adult bookstores. Of the cities which responded to the Bellflower survey, 12 require a conditional use permit for new bookstores. The conditions for obtaining such a permit generally include dispersal and distance requirements based upon the Detroit model. Bellflower also includes parking requirements and the screening of windows to prevent a view of the interior; it prohibits the use of loudspeakers or sound epuipment which can be heard from public or semi-public areas.

Other cities impose such controls as design review, prohibition of obscene material on signs and required identification of the business as "adult". Such controls are a possible alternative or addition to regulation of adult uses by location.

Exterior controls affect the aspects of adult businesses which are most offensive to some citizens. The basis for such controls stems from the recognition of privacy as a constitutional right and the right to be "left alone" as a part of that right.[1] (See Paris Adult Theatre I v Slayton, 93 S.Ct. 2628 1973.)

Table II, following, provides a comparison and description of ordinances from various cities which are regulating "adult entertainment" businesses by dispersal.

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1 The theory that there should be no first amendment bar to sign controls is discussed by Charles Rembar, in "Obscenity--Forget It", Atlantic Monthly, May 1977, pgs. 37-41.

ORDINANCES REGULATING ADULT ENTERTAINMENT USES BY DISPERSAL

CITY	USES CONTROLLED	DISTANCE FROM RESIDENTIAL	DISTANCE FROM CHURCHES SCHOOLS	CONCEN-TRATION	AMORTI-ZATION	APPEALS PROCEDURE	OTHER CONTROLS
Seattle	Adult theaters				yes-90 days		Allow only in BM, CM, & CMT Zones; terminate such uses in all other zones
Denver	Entertainment to which persons under 18 could not be lawfully admitted	500'					
allas	Adult shows or theaters	1000'	1000'				
leveland	Adult bookstores, adult movies and mini-motion picture theaters, pool or billiard halls			1/1000'			
troit	Adult bookstores, adult motion picture theater, mini-motion picture theaters, cabarets, hotels, motels, pawnshops, pool or billiard halls, public lodging houses, secondhand stores, shoeshine parlors, taxi-dance halls	500'		2/1000'		Waiver by petition of 51% of persons owning/ residing or doing business within 500'	Ordinance prohibiting promotion of pornography

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(cont'd.)

CITY	USES CONTROLLED	DISTANCE FROM RESIDENTIAL	DISTANCE FROM CHURCHES SCHOOLS	CONCENTRATION	AMORTIZATION	APPEALS PROCEDURE	OTHER CONTROLS
New York (not adopted)	Adult bookstores, motion picture theaters, "topless" entertainment facilities, coin-operated entertainment facilities, physical culture establishments	500'		2-3/1000'	1 year closest to R-zone first to go	Special permit exception must make findings	.Sign regulat .Applies to c .Adult use al a primary us
Oakland	Adult bookstores, adult movies, peep shows, massage parlors	1000'		1/1000'	1-3 yrs. if no use permit		All require C. permit
Kansas City	Adult bookstores and motion picture theaters, bath houses, massage shops, modeling studios, artists-body painting studios	1000'	1000'			Waiver, if petition of 51% of persons residing or owning property within 1000' of proposed use	Confined to ove lay C-X zone within C-2, 3,
Santa Barbara	Adult newsracks, bookstores, motion picture theaters		1000' (& from parks or recreation facilities)	1/500'			Public displa defined materia prohibited
ellflower	Adult bookstores, theaters or mini-theaters, massage parlors	1000'	1000' (& from parks or playgrounds)	1/1000'			By C.U. all bui ing openings, entries, windo covered or screened to p vent view int the interior
	Modal studios		500'				No loud speaker

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CITY	USES CONTROLLED	DISTANCE FROM RESIDENTIAL	DISTANCE FROM CHURCHES SCHOOLS	CONCEN-TRATION	AMORTI-ZATION	APPEALS PROCEDURES	OTHER CONTROLS
Atlantic City	Adult motion picture theaters, mini-theater, adult bookstores	500'		2/1000'		Waiver of 500' from residential with petitions signed by 51% of parties within 500'	Requires public hearing prior to grant of permit Licensing of massage parlors no treatment of a person of the opposite sex

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B. ALTERNATE OR SUPPLEMENTARY FORMS OF REGULATION CURRENTLY AVAILABLE UNDER STATE AND MUNICIPAL LAW

1. Red Light Abatement Procedure

Red light abatement is a mechanism authorized by state law which allows local government to control criminal sexual behavior by controlling the places in which such behavior occurs.

Sec. 11225 of the California Penal Code generally provides that every building or place used for illegal gambling, lewdness, assignation, or prostitution, or where such acts occur, is a nuisance which shall be enjoined, abated, and prevented. There are three basic steps involved in the City's application of the Red Light Abatement Procedures:

(a) A complaint is filed by the City Attorney based upon the declarations of police officers of instances of prostitution taking place on the premises.

(b) The City attempts to obtain a preliminary injunction to shut down the business until completion of the scheduled trial. If the City succeeds, the premises may only be re-opened as a legitimate business until the time of the trial.

(c) At the trial, the burden is on the City to prove that prohibited acts occurred on the premises. The remedy may be closure of the premises for all purposes for one year, placing the building in the custody of the court, or an order preventing the use of the premises for prostitution forever.

Complaints may be filed by citizens, and Sec. 11228 of the Code provides that in Red Light Abatement Actions "evidence of the general reputation of a place is admissible for the purpose of proving the existence of a nuisance".

This method has been used successfully by the City to abate adult entertainment establishments in Hollywood along Western Avenue. Although Red Light Abatement is directed at regulating sites, a Red Light Abatement conviction can affect the ability of an owner or operator to obtain a permit for a similar business at another site (see permit requirements supra). Due to the requirement of a court proceeding, however, this method of control is both time consuming and expensive.

2. Police Permit Requirements

Section 103 of the Los Angeles Municipal Code provides for the regulation and control of a variety of businesses by permits issued by the Board of Police Commissioners. Permittees are subject to such additional requirements as may be imposed by law or by the rules and regulations of the Board.

Those businesses for which the City of Los Angeles requires a police permit and which may also be oriented towards adult entertainment include:

- Arcades (Sec. 103.101)
- Bath and Massage (103.205)
- Cafe Entertainment and Shows (103.102)
- Dancing Academies, Clubs, Halls (103.105, 106, 106.1)
- Motion Picture Shows (103.108)

In some cases, the specific regulations applied to a business, if enforced, preclude adult entertainment activities as a part of, the operation of the business, with revocation of the operating permit an available remedy for violation of the regulation.

The most detailed regulations are applied to cafe entertainment (Sec. 103.102 LAMC) and are summarized as follows:

a. Businesses Subject to the Regulations

Operation of cafe entertainment or show for profit, and the operation of public places where food or beverages are sold or given away and cafe entertainment, shows, still or motion pictures are furnished, allowed or shown. The regulation does not apply to bands or orchestras providing music for dancing.

b. Cafe Entertainment Defined

"Every form of live entertainment, music solo band or orchestra, act, play, burlesque show, revue, pantomime, scene, song or dance act". The presence of any waitress, hostess, female attendant or female patron or guest attired in a costume of clothing that exposes to public view any portion of either breast at or below the areola is included with the purview of the ordinance.

c. Summary of Activities Prohibited

Allowing any person for compensation or not, or while acting as an entertainer or participating in any live act or demonstration to:

(1) Expose his or her genitals, pubic hair, buttocks or any portion of the female breast at or below the areola;

(2) Wear, use, or employ, or permit, procure, counsel or assist another person to wear use or employ, any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum or any portion of the female breast at or below the areola.

The above provisions do not apply to a theatrical performance in a theater, concert hall or similar establishment which is primarily devoted to theatrical performances.

The permit may also be revoked for conviction of the permittee, his employee, agent or any person associated with permittee as partner, director, officer, stockholder, associate or manager of:

(1) An offense involving the presentation, exhibition or performance of an obscene production, motion picture or play;

(2) An offense involving lewd conduct;

(3) An offense involving use of force and violence upon the person or another;

(4) An offense involving misconduct with children;

(5) An offense involving maintenance of a nuisance in connection with the same or similar business operation; or, if the permittee has allowed or permitted acts of sexual misconduct to be committed within the licensed premise.

Massage businesses have traditionally been regulated by licensing. The latest changes in the massage regulations became effective in November of 1976. The application for a permit now requires:

(1) detailed information regarding the applicant;

(2) name, address of the owner and lessor of the property upon or in which the business is to be conducted, and a copy of the lease or rental agreement;

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(3) requirement of a public hearing prior to issuance of a permit for the operation of a massage business.

Operating requirements for massage businesses include:

- a permit for each massage technician;
- regulation of the hours of operation;
- posted list of available services and their cost;
- a record of each treatment, the name and address of the patron, name of employee and type of treatment administered.

So-called "private" clubs or "consenting adult clubs" which have ostensibly been formed as an alternative to massage parlors had until recently been regulated via the requirement of a social club permit. In June 1977, however, the ordinance establishing such requirement was declared unconstitutional by a Los Angeles Muncipal Court due to unreasonable restrictions on the freedom of association. To date, it is unknown whether the City will appeal the ruling or amend the ordinance.

C. OTHER REGULATION OF ADULT ENTERTAINMENT BUSINESSES IN LOS ANGELES

Regulation of adult entertainment businesses has a long history in Los Angeles. In 1915 the "prevalence of sex evils arising out of massage parlors" caused the City Council then to enact Section 27.03 (L.A.M.C.) as "a safeguard against the deterioration of the social life of the community."[2] The ordinance provided:

> "(a) It shall be unlawful for any person to administer, for hire or reward, to any person of the opposite sex, any massage, any alcohol rub or similar treatment, any fomentation, any bath or electric or magnetic treatment, nor shall any person cause or permit in or about his place or business or in connection with his business, any agent, employee, or servant or any other person under his control or supervision, to administer any such treatment to any person of the opposite sex."[3]

This provision remained in the Code, in one form or another, until a similar Los Angeles County ordinance was declared invalid in 1972 due to the preemption of the criminal aspects of sexual activity by the State.[4]

In reaching its conclusion, the court referred to the discussion of the Los Angeles City ordinance in In Re Maki. This 1943 case upheld the constitutional validity of the ordinance, and, according to the court, established the primary purpose of such ordinance as the limiting of criminal sexual activity.

The late 1960's and early 1970's brought a proliferation of nude bars and sexual scam joints in the Los Angeles area. In 1969, the Cafe Entertainment regulations (Section 103.102 Los Angeles Business Code) was modified to include strict controls on nudity (see discussion infra).

A variety of Council motions were made to control other types of "adult entertainment" such as arcades, massage parlors, and newsracks. Many of these were initiated due to substantial citizen complaints, and some resulted in final ordinances. (See Table III pages 19a to 19d.)

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2 In Re Maki 56 CA 2d. 635, 1943.

3 Section 27.03.1 Los Angeles Municipal Code, 1938.

4 Lancaster v Municipal Court 6 C 3d 805, 1972.

Beginning in 1974, several Council motions were made generally calling for an investigation and preparation of an ordinance regulating adult theaters and bookstores. The advice of the City Attorney was sought, and at the suggestion of that Office, action was delayed pending the Supreme Court decision regarding the Detroit Ordinance. That decision was handed down in June of 1976. On July 13, 1976, a Council motion was introduced by Councilman Wilkinson requesting a study of concentrations of adult entertainment similar to that of Detroit.

Table III provides a generalized summary of the major Council files and actions relating to adult entertainment.

While not part of this study, a recently enacted ordinance controlling on-site sale of alcoholic beverages should be recognized as an attempt to control another adult-type use. Effective March 1, 1977, the Los Angeles Muncipal Code was amended to require a conditional use permit for the on-site sale of alcoholic beverages. (Council File No. 70-200, City Plan Case No. 22878). Although aimed at the regulation of anti-social activities in all establishments serving alcoholic beverages, the subject ordinance would, of course, also have a "spillover" effect with regard to those businesses which have adult entertainment as well as alcoholic beverages.

Generally, the ordinance would, in all cases, require issuance of a conditional use permit for any business selling alcoholic beverages for on-site consumption, rather than the previous practice of permitting them as a matter of right in certain zones. The advantage of the new procedure is that as a prerequisite of approval of an individual application, there must be a public hearing to determine whether the proposed use will have a detrimental effect upon nearby properties and the neighborhood in which it is being proposed. In the long run, the ordinance may prove to be an effective device to regulate uses (dispensing alcoholic beverages) which tend to have a deteriorating effect on an area, some of which may, coincidentally, also be adult entertainment businesses.

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TABLE III

CITY COUNCIL FILES RELATING TO ADULT ENTERTAINMENT

DATE	FILE NO.	SPONSORS	RECOMMENDATION	DISPOSITION
3/23/70		North Hollywood Chamber of Commerce	That topless and bottomless bars and pornographic film and literature be confined to the M-3 zone.	Disapproved by the Planning Commission.
3/71	C.F. 72-374	Councilman Snyder	Effort to control bath or massage parlors by modifying the definition of "physical therapy" in state law. And, City support for legislation that would make Physical Therapists, Chiropractors responsible for activities in their offices and prohibit treatment by unlicensed assistants unless the license holder is in the room.	Introduction of AB 823 modifying the definition of physical therapy - Died in Committee November 1972.
			Recommend modification of Board of Chiropractors Rules and Regulations.	State Board of Chiropractic Examiners adopted "Board Rule 316" which makes chiropractors responsible for the conduct of employees in their place of practice, and specifically prohibits sexual acts or erotic behavior involving patients patrons or customers.

TABLE III (cont'd.)

DATE	FILE NO.	SPONSORS	RECOMMENDATION	DISPOSITION
2/74	C.F. 72-374 S-1 S-2	Stevenson and Wilkinson	Study of the need and feasibility of regulating hours of operation, minimum requirement for practitioners - and health and safety conditions in massage parlors.	1/9/75 Board of Police Commissioners approved ordinance and adopted agreement with County to provide inspection of massage parlors.

TABLE II (cont'd.)

DATE	FILE NO.	SPONSOR	RECOMMENDATION	DISPOSITION
10/18/74	C.F. 74-4521	Snyder, Robert Stevenson, Ferraro	Provide by Ordinance that permits may not be granted to operate motion picture theaters which show "adult" films or bookstores which sell printed material which may not be sold to minors at locations which are within 1,500 feet of the nearest school, playground or church.	Police and Fire and Civil Defense Committee referred prepared ordinance to Planning Committee.
1/21/75	C.F. 74-1969		Police permit requirement for arcades becomes effective. Regulates 5 or more coin or slug operated machines. Revocation for non-compliance with health, zoning, fire requirements, obscenity convictions. Regulates hours of operation.	Regulation subsequently found unconstitutional by the Appellate Department of Superior Court, L.A. County.
/27/76		City Planning Commission	Planning Department report to City Planning Commission, at their request, regarding proposed regulation of massage parlors and adult bookstores in Los Angeles.	No action taken.
/9/76	C.F. 73-374 S-1A		Council adopts ordinance requiring permits to operate a massage business, act as a massage technician and gives a massage for compensation effective 4/17/76.	Ordinance now in effect.
'23/76	C.F. 74-4521 S-2	Wilkinson and Stevenson	Require public hearings prior to opening of an adult bookstore which has for sale sexually explicit material; limit the hours of operation.	Referred to Police, Fire and Civil Defense.

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TABLE III (cont'd.)

E	FILE NO.	SPONSOR	RECOMMENDATION	DISPOSITION
6/25/76	C.F. 74-4521	Wilkinson, Gibson, Nowell, Braude, Russell, Wachs, Stevenson, Bernardi, Farrell, Lorenzen	Request City Attorney to draft an ordinance following Young vs. American Mini Theaters guidelines.	Referred to Police, Fire and Civil Defense Committees.
6/28/76	C.F. 74-4521	Stevenson, Wachs	Preparation of zoning ordinance to prohibit sexual scam joints, adult bookstores and theaters, nude live entertainment within 500' from a private dwelling, church, school, public building, park or recreation center, of within 1000' of each other, to be retroactive, priority to the oldest establishments.	Referred to Police, Fire and Civil Defense Committees.
7/13/76	C.F. 74-4521	Wilkinson	Instruct the City Planning Department to prepare a report to the City Council regarding the extent of any possible degradation of neighborhoods in Los Angeles due to concentration of adult entertainment establishments.	Consolidation of above cases. After approval c full Council assigned to Planning Department with the cooperation of other involved agencies.
3/15/77	C.F. 74-1969		Police, Fire and Civil Defense Committee recommendation to amend Sections 103.101, 103.101.1 of the Municipal Code - (A revised ordinance to regulate arcades).	Adopted by full Council.
5/5/77	C.F. 77-860 S-49	File not available for review.	Support state legislation providing specific penalties for use of minors for pornography.	
/11/77	C.F. 77-1997	File not available for review.	Regarding prostitution enforcement laws.	

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IV.

METHODOLOGY AND ANALYSIS

Methodology

In complying with the City Council's instructions, the Department has utilized various available data sources, including property assessment data, U. S. Census data, and obtained other information germane to the subject in an effort to determine, on an empirical basis, the effects (if any) of adult entertainment facilities on surrounding business and other properties. The Department also reviewed sales data of commercial and residential property in areas containing concentrations of adult entertainment businesses and in "control areas" containing no such concentrations. The staff also attempted to secure information on the sales volume of commmercial properties, but was unable to obtain this information.

It should be emphasized that, in conducting this study, every effort was made by the Department to preclude the introduction of subjective judgment or other bias, except where the opinions of other individuals or groups were specifically solicited.* It was the Department's intent to base any conclusions entirely on relevant data and other factual information which became available during the course of conducting the study.

The procedure employed by the Department in conducting this study involved the following areas of emphasis:

1. A measure of the change from 1970-76 in assessed "market value" of land and improvements for the property occupied by and within an appropriate radius of five known "clusters" (nodes) of "adult entertainment" businesses. An identical measure of four "control areas" without concentrations of adult entertainment businesses was also made to determine if a significant difference in the rate of change in assessment values occurred in such areas between 1970 and 1976. Comparisons were also made with the entire community in which the concentration nodes were located.

2. An analysis of responses received from a mail survey questionnaire conducted by the Planning Department;

* Expert opinions were requested from realtors, realty boards, appraisers and lenders through letters and questionnaires. The Department also sent letters to local members of the American Sociological Association requesting their assistance in this study. Their replies were limited in number and not significant in terms of this study.

3. Review of available data from the U.S. censuses of 1960 and 1970, including the results of a "cluster analysis" and description of Hollywood based on such analysis prepared by the City's Community Analysis Bureau;

4. An analysis of verbal and written testimony obtained at two public meetings on this subject conducted on April 27 and 28, 1977 by representatives of the City Planning Commission;

5. A review of various approaches to the regulation of "adult entertainment" businesses, including legislation enacted by other jurisdictions;

6. An analysis of alternate forms of control, including existing Municipal Code provisions relative to this general subject;

7. A discussion of earlier efforts of the City to control adult entertainment in Los Angeles; and

8. A presentation of the Los Angeles City Police Department's report dealing with crime statistics and their relation to "adult entertainment" businesses in Hollywood.

9. The actual "last sales price" of commercial and residential properties in areas containing concentrations of "adult entertainment" businesses were compared with the assessed values of property in such areas. The results were then compared with "control areas" containing no concentration of such businesses. (It was found that the actual sales prices tended to parallel assessed values and that in other cases the comparison was inconclusive. No further discussion of this aspect of the study is contained herein.)

10. In an attempt to determine any possible effects of "adult entertainment establishments" on business sales volume, the Department reviewed sales data from a Dun and Bradstreet computer tape file for the years 1970 and 1976. However, this source of date could not be used since it did not contain directly comparable information for the two years indicated. (A substantial change in the number of member firms listed apparently occurred after 1970.) In addition, the Department requested sales information from the City Clerk's Business License File. The City Clerk advised that the generation of the information requested would require 100 man-days of work; consequently their information could not be obtained within the time constraints for completion of the study.

Items 5, 6, and 7, above, are the subject of Section III of this report, entitled "Methods Currently Used to Regulate Adult Entertainment Business". The Police Department's report is discussed herein as Section V. The Planning Department's analysis of topics 1 through 4 is described in detail, below.

A. CHANGES IN ASSESSED VALUATION BETWEEN 1970-76 IN FIVE SEPARATE AREAS CONTAINING HIGH CONCENTRATIONS OF ADULT ENTERTAINMENT BUSINESSES

In order to determine if there has been a significant change in assessed property values which may have been influenced by the proliferation of "adult entertainment" businesses, the Department has calculated the change in the assessed value of land and improvements for properties occupied by, and located within, a 1,000 to 1,800 foot radius of known concentrations of adult entertainment businesses. Five such areas were selected for analysis, as described below. The year 1970 was selected as the base period because of the availability of data for that year, and since that point in time corresponds approximately with the beginning of the proliferation of adult entertainment businesses in Los Angeles. The percentage change in the assessed "market" value of land and improvements for commercial and residential properties was calculated for the 1970 base year and for 1976.

Similar calculations covering the same time period were also prepared for "control areas" (containing no concentration of adult entertainment businesses) but which were similar, in terms of zoning and land use, or which were located in geographical proximity to the study area nodes. Four such control areas were selected.

1. Study and Control Areas

On the basis of field invesigations and other available data, the Department determined that there are five different areas within the City suitable for analysis, each containing a relatively high concentration of adult entertainment establishments. As shown in Exhibits "A" and "B" on the following pages, three of these concentrations (or "nodes" of activity) are located in Hollywood; one is in Studio City; and one is in North Hollywood. In each case, the focal point of the area selected for analysis was the intersection of two major streets, with the adult entertainment businesses located along the commercially zoned frontage of one or both of the streets forming the intersection. In four of the five areas selected, residentially zoned and developed properties are situated not farther than one-half block from the commercially-zoned frontage. (One node in Hollywood is entirely surrounded by commercial properties.)

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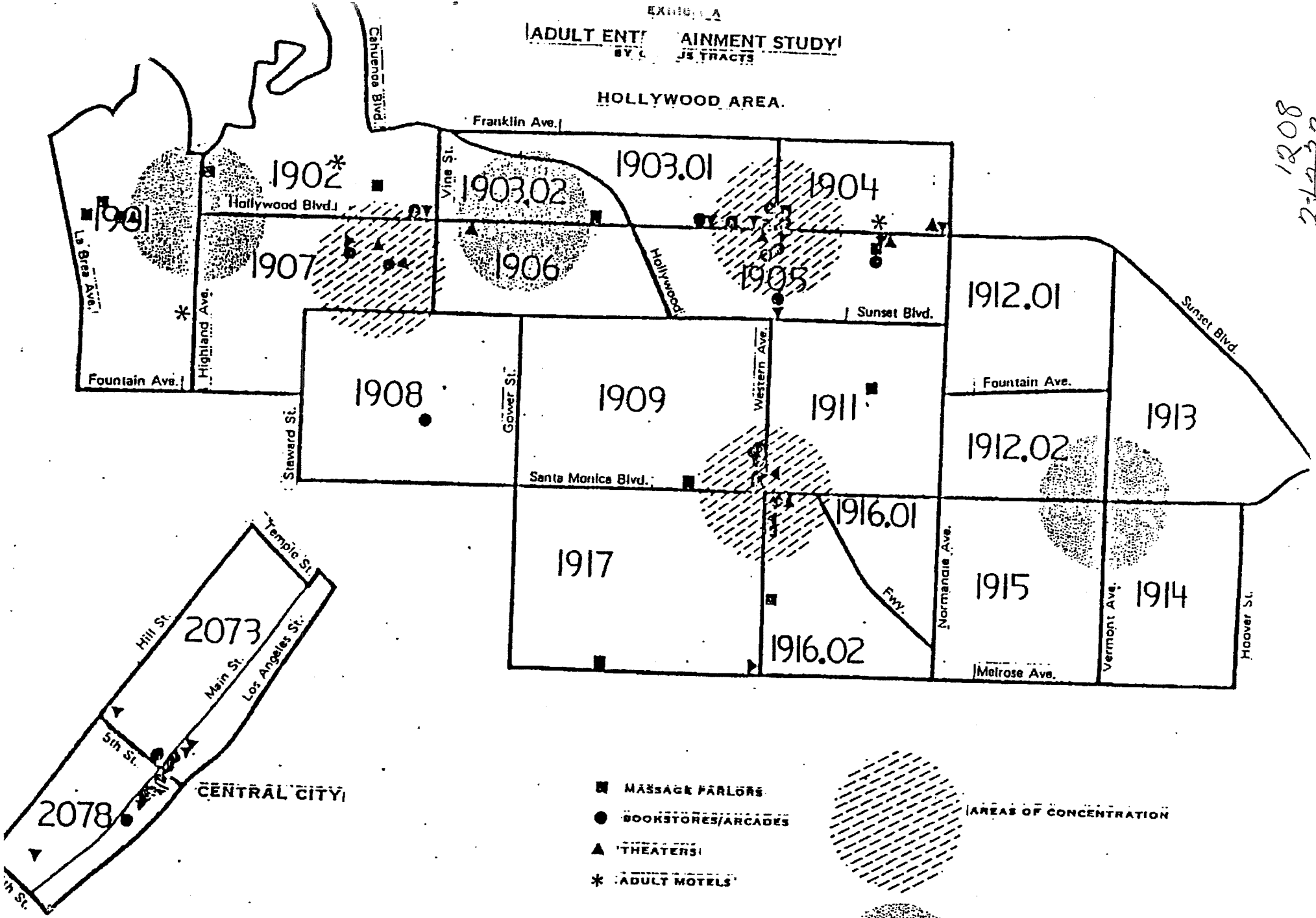
EXHIBIT A
ADULT ENTERTAINMENT STUDY
BY CENSUS TRACTS
HOLLYWOOD AREA.
CENTRAL CITY
1901
1902*
1903.01
1903.02
1904
1905
1906
1907
1908
1909
1911
1912.01
1912.02
1913
1914
1915
1916.01
1916.02
1917
2073
2078
Franklin Ave.
Hollywood Blvd.
Sunset Blvd.
Fountain Ave.
Santa Monica Blvd.
Melrose Ave.
Cahuenga Blvd.
Vine St.
Hollywood
La Brea Ave.
Highland Ave.
Steward St.
Gower St.
Western Ave.
Normandie Ave.
Vermont Ave.
Hoover St.
Fwy.
Temple St.
Hill St.
Main St.
Los Angeles St.
5th St.
MASSAGE PARLORS
BOOKSTORES/ARCADES
THEATERS
ADULT MOTELS
AREAS OF CONCENTRATION
CONTROL AREAS
0
1000
2000 FT

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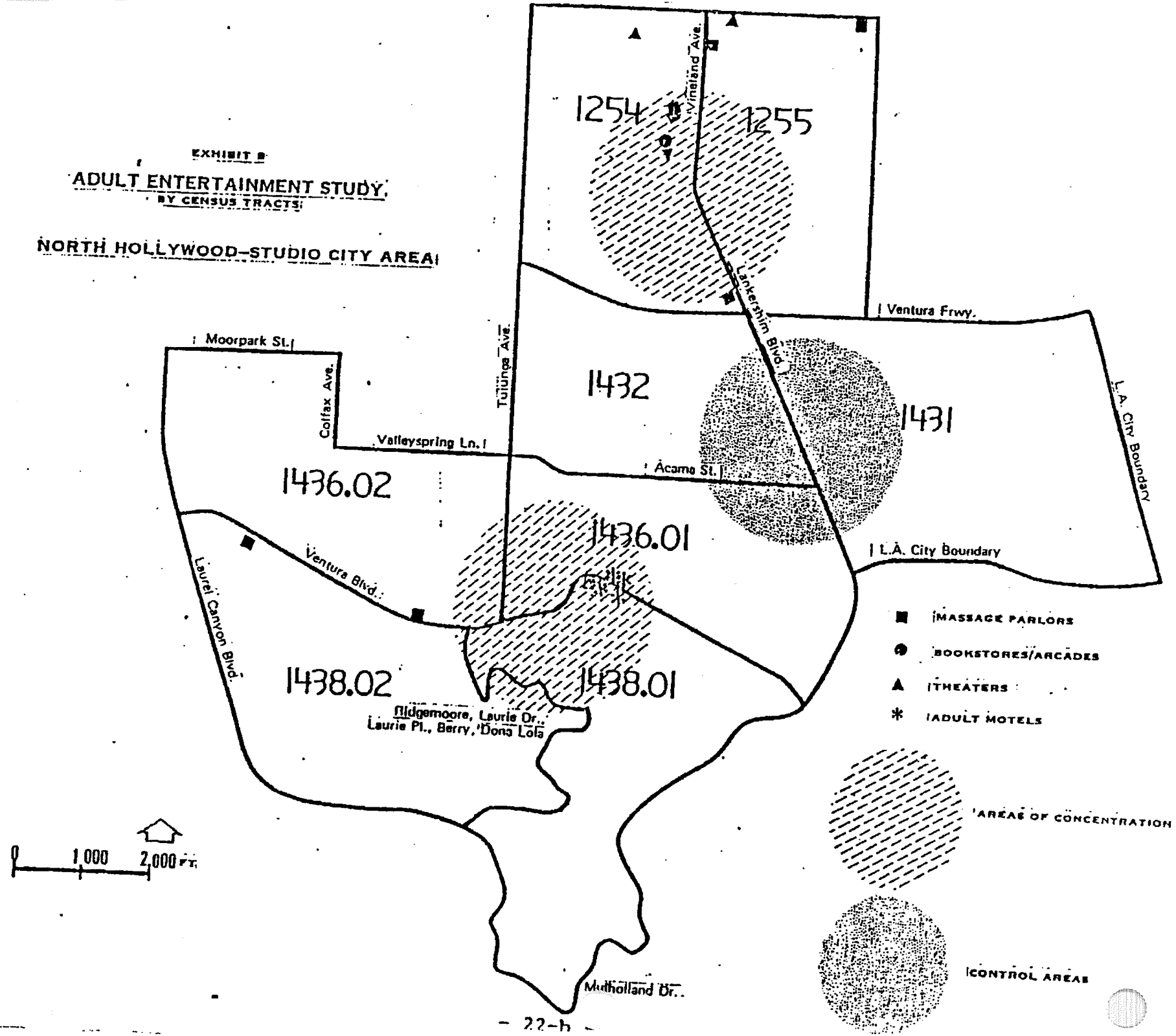
EXHIBIT B

ADULT ENTERTAINMENT STUDY
BY CENSUS TRACTS

NORTH HOLLYWOOD–STUDIO CITY AREA



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Although Main Street in downtown Los Angeles contains a relatively high concentration of sex-oriented businesses (primarily theaters, arcades and bookstores), this area was not selected for analysis since no residential properties are located in proximity thereto. In addition, Main Street has traditionally contained burlesque theaters, arcades, bars and similar types of establishments, and there has been no significant change in this generalized pattern of land use during the past ten years.

In the Hollywood area, the focal points of concentration are at the following three intersections: Santa Monica Boulevard and Western Avenue (containing 12 such businesses); Hollywood Boulevard and Western Avenue (9 such businesses); and Selmna Avenue and Cahauenga Boulevard (containing 7 such businesses). In Studio City, the focal point is east of the main intersection of Tujunga Avenue and Vineland Avenue (at Eureka Drive) which contains six adult entertainment businesses; and in North Hollywood the focus of concentration is at Lankershim Boulevard and Vineland Avenue (containing 4 such businesses)

In the Hollywood area, property within an approximate 1,000-foot radius of the above named intesections was included for purposes of analysis. In Studio City it was appropriate to include those properties situated within an approximate 1,500 foot radius of the intersection of Eureka Drive; in North Hollywood, property within an approximate 1,500 foot radius of the intersection of Lankershim Boulevard and Vineland Avenue was selected for analysis.

As also shown in Exhibit "A", three separate "control areas" were established in Hollywood, each originating at the intersection of two major streets and also encompassing all property within an approximate 1,000-foot radius of the street intersection. Control areas were established at: Santa Monica Boulevard and Vermont Avenue; Hollywood Boulevard and Highland Avenue; and Hollywood Boulevard and Gower Street. In the San Fernando Valley, Exhibit "B" indicates one control area, centered at the intersection of Lankershim Boulevard and Whipple Street, and encompassing property within a radius of approximately 1,500 feet of that intesection, relates to the two nodes of concentration in Studio City and North Hollywood. None of the control areas has adult entertainment businesses within its boundaries, with the exception of the area surrounding the intersection of Hollywood Boulevard and Gower Street which contains one such business.

Table IV, indicates the percentage change in assessed land and improvement value from July 1970 to July 1976 for the commercial and residential property encompassed by the applicable radius surrounding each of the five nodes of concentration, together with their corresponding control areas. For purposes of comparison, the same data is shown for the entire City and for the Community within which the study areas are located. Since concentrations of adult entertainment businesses could have a particular effect on the value of other business properties in an area, a separate tabulation is also shown for only commercially zoned land within each study and control area. (Table IV-A.)

As indicated in Table IV, the 1970-76 percentage change in total assessed "market" valuation of commercially and residentially zoned property (land plus improvements) increased in all three areas in Hollywood containing concentrations of adult entertainment businesses. However, there was some variance in the magnitude of the increase. Changes in the three study area nodes were 2.79, 8.71, and 3.41 percent; compared with increases in the three corresponding control area of 12.53, 1.94, and 5.09 percent, respectively.

The study area node located at Santa Monica Boulevard and Western Avenue increased by 2.79 percent, compared with a substantially greater increase of 12.53 percent in the "control area" associated with that node. Total assessed value within the study area surrounding the intersection of Selma Avenue and Cahuenga Boulevard increased by 3.41 percent while the associated control area increased by the slightly greater amount of 5.09 percent. In direct contrast to this pattern, however, the Hollywood and Western node registered an 8.71 percent increase, while its corresponding control area increased by only 1.94 percent.

TABLE IV

1970-76 Changes in Assessed Valuation of Commercial and Residential Land and Improvements for Five Areas Containing Concentration of Adult Entertainment Businesses, as Compared With "Control" Areas, Surrounding Community, and City of Los Angeles.

Property Within Approximate 1,000 to 1,800 Foot Radius of Intersection of Streets Shown:	No. of Entertainment "Sites" 1969-70	June 1977	Percentage Change in Assessed Valuation 1970-76 Land	Improvements	Total
Santa Monica Boulevard and Western Avenue (Hollywood)	6	12	-0.22	5.81	2.79
Santa Monica Boulevard and Vermont Avenue (Hollywood Control Area)	N.A.	0	-4.84	32.66	12.53
Hollywood Boulevard and Western Avenue (Hollywood)	6	9	3.51	13.21	8.71
Hollywood Boulevard and Highland Avenue (Hollywood Control Area)	N.A.	0	19.32	-7.83	1.94
Selma Avenue and Cahuenga Boulevard (Hollywood)	4	7	21.12	-12.54	3.41
Hollywood Boulevard and Gower Street (Hollywood Control Area)	N.A.	1	17.76	-8.61	5.09
Hollywood Community	N.A.	31	21.20	32.72	27.00
City of Los Angeles	N.A.	N.A.	35.08	38.92	37.15
Tujunga Avenue and Ventura Boulevard (Studio City)	1	6	67.11	63.10	64.93
Lankershim Boulevard and Vineland Avenue (North Hollywood)	2	4	15.88	9.65	12.61

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TABLE IV (cont'd.)

Property Within Approximate 1,000 to 1,800 Foot Radius of Intersection of Streets Shown:	No. of Entertainment "Sites" 1969-70	No. of Entertainment "Sites" June 1977	Percentage Change in Assessed Valuation 1970-76 Land	Improvements	Total
Lankershim Boulevard and Whipple Street (Valley Control Area)	N.A.	0	62.28	27.66	42.76
Sherman Oaks-Studio City Community	N.A.	10	69.25	60.44	64.33
North Hollywood Community	N.A.	5	28.59	33.15	31.07
City of Los Angeles	N.A.	212	35.08	38.92	37.15

TABLE IV-A

1970-76 Changes in Assessed Valuation of Commercially Zoned Land and Improvements for Five Areas Containing Concentration of Adult Entertainment Businesses as Compared With Commercially Zoned Land in "Control Areas", Surrounding Community, and City of Los Angeles.

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Property Within Approximate 1,000 to 1,800 Foot Radius of Intersection of Streets Shown:	No. of Entertainment "Sites" 1969-70	No. of Entertainment "Sites" June 1977	Percentage Change in Assessed Valuation 1970-76 Land	Improvements	Total
Santa Monica Boulevard and Western Avenue (Hollywood)	6	12	-0.47	8.53	3.4
Santa Monica Boulevard and Vermont Avenue (Hollywood Control Area)	N.A.	0	-12.53	4.13	-6.38
Hollywood Boulevard and Western Avenue (Hollywood)	6	9	-2.52	-0.45	-1.77
Hollywood Boulevard and Highland Avenue (Hollywood Control Area)	N.A.	0	25.01	-11.19	4.06
Selma Avenue and Cahuenga Boulevard (Hollywood)	4	7	21.93	-18.79	0.54
Hollywood Boulevard and Gower Street (Hollywood Control Area)	N.A.	0	17.07	-17.22	1.09
Hollywood Community	N.A.	31	13.43	-1.51	6.70
City of Los Angeles	N.A.	212	12.27	13.52	12.93
Tujunga Avenue and Ventura Boulevard (Studio City)	1	6	19.24	25.83	21.9
Lankershim Boulevard and Vineland Avenue (North Hollywood)	2	4	-0.76	3.91	1.92

TABLE IV-A (cont'd.)

Property Within Approximate 1,000 to 1,800 Foot Radius of Intersection of Streets Shown:	No. of Entertainment "Sites" 1969-70	No. of Entertainment "Sites" June 1977	Percentage Change in Assess. Valuation 1970-76 Land	Improvements	Total
Lankershim Boulevard and Whipple Street (Valley Control Area)	N.A.	0	82.28	-6.35	27.16
Studio City Community	N.A.	10	30.95	13.01	22.02
North Hollywood Community	N.A.	5	2.74	7.56	5.21
City of Los Angeles	N.A.	212	12.27	13.52	12.93

Sources/Notes - Tables IV and IV-A:

Actual assessment data from which percentage changes in Tables IV and IV-A were derived is shown in Appendix A. Assessment data was obtained from the City's Land Use Planning and Management System (LUPAMS) computer file. Data is as of July 1 for years shown. "Entertainment Site" means adult theatre, arcade, massage parlor, nude dancing establishment or similar use. Number of "entertainment sites" for 1969-70 was obtained from L. A. Police Department; for June 1977 from L. A. Police Department and L. A. City Planning Department. N.A. means not available. Property included within areas described is shown in Exhibits A and B.

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The percentage increase in assessed values within the three study areas, as well as the control areas, was considerably less in each case than percentage gains registered by the Hollywood Community or the City as a whole.

In the case of the study area nodes located in the San Fernando Valley, the pattern appears to be somewhat more spurious. The study area node containing adult entertainment businesses located in Studio City (centered east of the intersection of Tujunga Avenue and Ventura Boulevard) increased by 64.93 percent--the largest increase of any of the areas analyzed. In direct contrast, the "adult entertainment node" located at Lankershim Boulevard and Vineland Avenue increased by only 12.61 percent. The one "control area" associated with these two San Fernando Valley nodes increased by 42.76 percent -- a substantially greater gain than the North Hollywood node, but 22 percent less than the Studio City node. (Whether the sharp percentage increase shown for the Studio City node was the direct result of a recent reassessment cannot be readily determined.)

The increase in assessed value within the Studio City study area was virtually the same as that of the entire Sherman Oaks-Studio City Community but almost twice the percentage gain for commercial and residential properties in the entire City. The North Hollywood study area increased by a considerably lower percentage than the North Hollywood Community and the City as a whole.

With regard to commercial properties considered separately, Table IV-A reveals that the percentage change in assessed values of land and improvements combined was generally lower in all study areas than in their corresponding control areas. One notable exception, however, is the Santa Monica Boulevard and Western Avenue node which increased by 3.4 percent, while its corresponding control area (Santa Monica and Vermont) decreased by 6.38 percent. In Hollywood the change in assessed values of all study and control areas was less than in the entire Hollywood Community. In the San Fernando Valley the two study areas both increased less than the entire communities within which they are situated.

2. Conclusion - Changes in Assessed Valuation

On the basis of the foregoing, there would seem to be some basis to conclude that the assessed valuation of property within the study areas containing concentrations of adult entertainment businesses have generally tended to increase to lesser degree than similar areas without such concentrations. However, in the staff's opinion, there would appear to be insufficient evidence to support the contention that concentrations of sex-oriented businesses have been the primary cause of these patterns of change in

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assessed valuations between 1970 and 1976. However, responses to the Department's mail questionnaires from real estate representatives and appraisers have indicated that in their opinion, concentrations of adult entertainment businesses have, in some cases, had a direct negative impact on property values.

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B. PUBLIC MEETINGS

Two public meetings were conducted by representatives of the City Planning Commission in order to receive citizen input regarding the effects, if any, of contentrations of "adult entertainment" establishments on nearby properties and surrounding neighborhoods. Notice of the hearings was published in local newspapers, aired on radio, mailed to owners of commercial and multiple residential property within 500 ft. radius of the study areas and also to persons who had previously responded to the Department's questionnaire.

The first meeting was held in Hollywood on April 27, 1977 at Le Conte Junior High School. The second meeting was conducted in Northridge on April 28, 1977 at Northridge Junior High School. Both meetings were conducted by Planning Commission President Suzette Neiman and Planning Commissioner Daniel Garcia, with Deputy City Attorney Chris Funk also in attendance.,

Questionnaires were available at the meetings for the convenience of those wishing to submit their comments in writing.

Attendance was approximately 200 persons at the Hollywood meeting and 300 persons at the Northridge meeting. A combined total of 60 persons addressed the Commission. The following is a summary of the comments received by the Commission. (Tape recordings of the hearings are available for review under City Plan Case Number 26475, in the Planning Commission Office, Room 561-K, Los Angeles, City Hall, telephone (213) 485-5071.)

The most prevalent type of comment at the Hollywood meeting was an expression of fear of walking in areas where "adult entertainment" and related business are concentrated. This concern was expressed both by parents, reluctant to allow their children to be exposed to offensive signs and wares, and by women and elderly persons who feared walking in the areas either in the day or evening, because of the incidence of crime in the area. Specific instances of solicitation and other crimes were recited. Some proprietors testified that they felt their businesses have suffered, due to fear on the part of their customers. Other common statements concerned:

- Physical or economic deterioration of the area resulting from the influx of adult businesses.
- An increase in street crime.
- Offensive signs and displays.
- A need to use existing enforcement tools, such as "red light abatement" to control "adult entertainment" businesses.

- Representatives of La Cienega art gallery proprietors expressed concern over the recent establishment of an adult theater in the area and its incompatibility with gallery use.

A representative of the "Pussycat Theaters" organization informed the Commission that a survey taken by the theater operators indicated that the majority of patrons were middle class, that most were registered voters, and that many were married and had college educations. It was stated that a large number of the patrons were found to reside within a few miles of their theaters. The representative of this theater chain expressed concern at the "lumping" of all adult entertainment businesses into one classification. He felt that in terms of aesthetics, clientele, and effect upon the neighborhood, the theaters were not in the same classification as some other types of adult businesses. (The Commission requested the written documentation of the survey; however, it has not been received to date.)

Several speakers at the Northridge meeting expressed concern that the City even felt it needed to request their opinion on such a subject. They felt that their displeasure over the distribution and display of pornographic materials should be obvious. Citizens also indicated how they had been responsible for the closing of certain establishments in the San Fernando Valley by picketing and other means. Some speakers indicated that they were disturbed by the availability and display of obscene material in drug stores and supermarkets.

The following is a summary listing of specific relevant comments from the two meetings:

Hollywood Meeting (April 27, 1977)

- It was alleged that organized crime is in the sex service business and that this is a $64 million local business.
- Hollywood and particularly Hollywood Boulevard was once a cultural center; now there is a different class of people. This is a degeneration of Hollywood and Hollywood Boulevard.
- In Hollywood, due to fear for safety, people walk around in groups, not alone or as couples.
- Zoning is not the ultimate response to obscenity: there are public nuisance laws, red light abatement statutes, etc.
- There was concern about the effects on children; parents in Hollywood indicated that they did not allow their children to walk unescorted: there are too many muggings and attacks.
- There are problems brought on by the changing population of the area: street fights, acts of mischief and minor property damages have resulted.

- A local minister indicated concern for the elderly, and that children from 4 to 7 years old cannot ride their bikes without being accosted; he also indicated there had been 23 arrests for prostitution near a local elementary school; he further stated that residents have to go to other areas to shop.

- A representative of a local synagogue stated that the elderly were afraid to walk to religious services and that car pooling had been established.

- A representative of the Hollywood Businessmen's Association advised that 50 percent of the sex crimes reported (in the City) were in the Hollywood area; that since the Police have closed some sex establishments crime has dropped; that adult entertainment businesses have contributed to a deteriorating condition in Hollywood; that there is a 100 percent turnover in school attendance; that the business license ordinance should be modified to require an environmental impact report and proper sign controls for new establishments and that notice should be given to persons within one-half mile; he also reiterated that traditional businesses were leaving the area.

- It was indicated that property values had gone down; Vine and Selma was valued at $12.50 per sq. ft. years ago, but recently it was worth only $8.50 per sq. ft.

Northridge Meeting (April 28, 1977)

- A representative of the North Hollywood Chamber of Commerce indicated that adult entertainment businesses were an economic and social blight; that the Police Commission was no help; that they had proposed the M3 Zone for these uses; that we need more police and should make greater use of red light abatement; that the Alcoholic Beverage Control Department should do more.

- Claims were made that the Pussycat Theater in North Hollywood was a dangerous environment to women and children; that in the recent past 2 teenage girls had been accosted and a woman had been attacked and had to jump from a car.

- A beauty shop owner near a Pussycat Theater indicated she no longer stayed open in the evening because her customers were afraid.

- Adult entertainment businesses should be required to rent space in "Class A" buildings.

- Various persons objected to newsracks, obscene material, problems of congestion and ingress and egress.

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- The Miller vs. California court case was discussed: it was contended that this case established that "a community can set its own standards".

- Questions were posed as to whether economic and financial impact should be facts needed to develop an ordinance to control adult entertainment.

- Claims were made that adult entertainment business bring crimes and violence to the area.

- A speaker stated that both the Boston and the Detroit ordinances are unacceptable. "You cannot control pornography by zoning", and opposition to the zoning approach to obscenity was expressed.

- "California is the pornographic capital of the world."

- People are offended by pornographic material in department stores, drug stores, supermarkets, etc. The recent Los Angeles County newsrack ordinance was discussed.

- One person posed the question "why don't we have an Environmental Impact Report for pornographic businesses?"

- Church representatives and a teacher at the Christian School were concerned about their members and children being exposed to pornographic advertising displayed at the Lankershim Theater and Pussycat Theater. They are afraid to let their children out on the streets.

- It was stated that "we should use civil, public nuisance and red light abatement to control adult entertainment businesses."

Conclusion

In summary, the overwhelming majority of speakers felt that the concentration of "adult entertainment" businesses in their neighborhood was detrimental, either physically by creating blight or economically by decreasing patronage of traditional businesses; or socially by attracting crime. As a result of increased crime, nearby residents have become fearful and have been forced to constrain their customary living habits in the community.

Although the testimony obtained at the public hearings would from a subjective point of view, substantiate the conclusion that "adult entertainment" businesses have a deleterious effect on the surrounding community, the staff is of the opinion that legitimate questions may have been posed by the Pussycat Theater representative regarding a single classification for all "adult entertainment" uses. There would appear to be some basis to support the contention that certain types of such uses are more "objectionable" than others, and that negative effects of a particular type of business might be minimized, depending on how the business is operated and advertised.

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C. SURVEY QUESTIONNAIRE CONDUCTED BY DEPARTMENT OF CITY PLANNING

1. Description of Survey

In order to determine additional factual data relating to the subject, and to seek the comments and opinions of property owners, businessmen, realtors, real estate boards, real estate appraisers, representatives of banks, Chambers of Commerce, and others, the Department conducted a mail survey. Two questionnaires were developed. One was designed primarily for businessmen and residential property owners and is hereinafter referred to as the General Questionnaire. The second was designed for realtors, real estate appraisers and lenders and is hereinafter referred to as the Appraiser Questionnaire. A copy of the two questionnaires is contained in the Appendix. The completed questionnaires, together with other letters relative to this subject, are on file in Room 510, Los Angeles City Hall.

The General Questionnaire was mailed to all property owners (of other than property in single-family use) within a 500-foot radius of each of the five study areas. The questionnaire was also distributed to various community groups (including local and area Chambers of Commerce) and at the public meeting in Hollywood and in Northridge.

The Appraiser Questionnaire was mailed to all members of the American Institute of Real Estate Appraisers having a Los Angeles City address and to members of the California Association of Realtors whose office is located in the vicinity of the study areas.

Each of the two questionnaires contained spaces for a respondent to check answers to a series of questions relating to the overall effect (if any) of adult entertainment establishments on nearby properties. It should be emphasized that the Department intentionally structured the "objective response" portion of the questionnaires so as to reduce "bias" and to solicit the maximum range of responses to any specific question. For example, a respondent could check "positive", "negative" or "no effect" in response to the question... "What overall effect do you feel that adult entertainment establishments have on a neighborhood?"

In addition to the direct response portion of the questionnaire, information of a more subjective nature was also solicited. For example, after each question, space was provided for a respondent to list any comments or examples which might pertain to a specific question. The beginning of each questionnaire also invited the respondent to write comments in the space provided or on a separate sheet.

Between February 10 and April 30, 1977, a total of approximately 4,000 questionnaires were mailed (with return envelopes provided) or otherwise distributed to businessmen, real estate appraisers, realtors, representatives of banks and savings and loan institutions, the owners of multiple-unit residential property, and others. Of this number, 694 questionnaires were completed and returned to the Department (an overall 17.4 percent rate of return).

In addition, the Department received 197 non-solicited, completed questionnaires from property owners in Studio City. These questionnaires were distributed in a private mailing by a private individual. The subject mailing included a replica of the Department's appraiser questionnaire, together with written material alleging City intent to create an adult entertainment zone in Studio City (copy included as Appendix D-2). According to the subject individual's testimony at the public hearing on April 27, 1977, 11,000 replica questionnaires were mailed. Due to the prejudicial nature of the mailing, these questionnaires are not included in the study. However, the staff did tabulate the subject responses and the tabulation and summary are included in Appendix D-3. All persons responding to the above mailing were sent a memo from the Department, correcting the misinformation (copy included in Appendix D-1).

2. Results of Survey Questionnaires

A tabulation of the responses to the specific questions solicited in the objective portion in each of the two types of questionnaries is presented below. A summary of the comments follows:

GENERAL QUESTIONNAIRE

- RESPONSES -

$$\frac{\text{Total no. of responses}}{\text{Total no. of questionnaires}} = \frac{581}{3600} = 16\% \text{ return}$$

Question	Positive	Negative	No effect
1. What overall effect do you feel that adult entertainment establishments have had on a neighborhood:			
Effect on the business condition (sales & profits) in the area:	43(7.4%)	492(84.7%)	36(6.2%)
Effect on homes (value & appearance) in the area immediately adjacent to adult entertainment businesses:	37(6.9%)	472(81.2%)	26(4.5%)

	Positive	Negative	No effect
Effect on homes (value & appearance) in the area located 500 feet or more from adult entertainment businesses?	35(6.0%)	446(76.8%)	19(3.3%)

2. Do you believe the establishment of adult entertainment facilities in the vicinity of your business has had any of the following effects? (Please check all those effects which you feel have occurred.)

26 (4.5%) no effect	305 (52.5%) decreased property values
206 (35.5%) lower rents	
275 (47.3%) vacant businesses	13 (2.2%) increased property values
288 (49.6%) tenants moving out	16 (2.8%) lower taxes
224 (38.6%) complaints from customers	98 (16.9%) higher taxes
3 (-) less crime	489 (84.2%) decreased business activity
370 (63.7%) more crime	
1 (-) improved neighborhood appearance	8 (1.4%) increased business
416 (71.6%) deteriorated neighborhood appearance	312 (53.7%) more litter
8 (1.4%) other (please specify)	

3. (Not applicable for tally.)

4. Have you seriously considered moving your business elsewhere because of nearby concentrations of adult entertainment businesses?

167 (28.7%) Yes 165 (28.4%) No

5. Would you consider expanding in your current location?

83 (14.3%) Yes 177 (30.5%) No

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6. What types of adult entertainment establishments are there in your area (Please check appropriate boxes.)

410	(70.6%)	adult bookstores	179	(30.8%)	nude or topless dancing
310	(53.4%)	massage parlors	389	(67.0%)	adult theatres
190	(32.7%)	peep shows	240	(41.3%)	adult motels
237	(40.8%)	bars with X-rated entertainment			
3		other sex shops			

How far from your business is the nearest adult entertainment establishment?

(Not tabulated due to limited response.)

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Responses to the foregoing questions reveal that adult entertainment businesses are perceived by the majority of respondents as exerting a negative impact on surrounding businesses and residential properties.

Whether or not such negative impacts have actually occurred, or only perceived to have occurred, cannot be readily determined, empirically, on the basis of this survey. However, in terms of the attitudes of the respondents toward such businesses, the conclusion must be drawn that the overall effect on surrounding properties is considered to be negative.

Among the adverse effects of adult entertainment establishments cited by businessmen are:

- Difficulty in renting office space
- Difficulty in keeping desirable tenants
- Difficulty in recruiting employees
- Limits hours of operation (evening hours)
- Deters patronage from women and families; general reduced patronage

Of those businessmen indicating that they have not seriously considered moving because of nearby concentrations of adult entertainment business, the most frequent response was that they had been in the area a great many years, and to establish elsewhere would be too risky and/or that their investment was too great to move. A few respondents indicated that it is the adult entertainment businesses that should move, not they.

The few businessmen commenting that they would not consider expanding in their current location indicated that their business did not warrant expansion.

Several businessmen indicated that their businesses are relatively unaffected by nearly adult entertainment establishments. Among the businesses cited are a commercial art studio; a building trades contractor; a mail order business; a telephone answering service and a wholesaler.

Among the few positive effects cited by businessmen is the increase in business for certain non-adult entertainment businesses such as tourist-serving businesses (e.g. car rental agencies). "The bad effect it might have is cancelled out by the business it does attract; x-rated theaters attract tourists."

Many respondents commented on the crimes associated with adult entertainment establishments: prostitution, dope, theft, robbery, etc. A high percentage of respondents report they do not feel safe in such areas.

A high percentage of respondents commented on their concern for the effects of adult entertainment environment on the morals and safety of children.

A high percentage of respondents commented on the aesthetics of adult entertainment establishments: garish, sleazy; shabby, blighted, tasteless, etc. Also, many commented on the increased incidence of litter and graffiti.

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APPRAISER QUESTIONNAIRE

- RESPONSES -

Total no. of responses / Total no. of questionnaires = 81/400 = 20% return

Question	Response	
1. What effect does the concentration of adult entertainment establishments have on the market value of business property (land, structures, fixtures, etc.) located in the vicinity of such establishments?	increase in value	1 (-)
	decrease in value	71 (87.7%)
	no effect	5 (6.2%)
2. What effect does the concentration of adult entertainment establishments have on the rental value of business property located in the vicinity of such establishments?	increase in value	1 (-)
	decrease in value	55 (67.9%)
	no effect	4 (4.9%)
3. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of business property located in the vicinity (length of time required to rent or sell property; rate of lessee/buyer turnover; conditions of sale or lease, etc.)?	increase in rentability/saleability	3 (3.7%)
	decrease in rentability/saleability	48 (59.3%)
	no effect	3 (3.7%)
4. What effect does the concentration of adult entertainment establishments have on the annual income of businesses located in the vicinity of such establishments?	increased income	2 (2.5%)
	decreased income	59 (72.8%)
	no effect	7 (8.6%)
5. Have any business owners or proprietors considered relocating or not expanding their businesses because of the nearby concentration of adult entertainment establishments?	yes	23 (28.4%)
	no	4 (4.9%)
	not known	28 (34.6%)
6. In recent years, has the commercial vitality (sales, profits, etc.) of any area in the City of Los Angeles been affected in any way by the nearby concentration of adult entertainment establishments?	yes	45 (55.6%)
	no	29 (35.8%)
	not known	-

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7. What effect does the concentration of adult entertainment establishments have on the market value of private residences located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	2 (3.8%)	48 (90.6%)	3 (5.7%)	53
500 - 1000 feet	2 (3.6%)	51 (91.1%)	3 (5.4%)	56
More than 1000 feet	1 (3%)	29 (87.9%)	3 (9.1%)	33

8. What effect does the concentration of adult entertainment establishments have on the rental value of residential income property located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	2 (3.4%)	51 (87.9%)	5 (8.6%)	58
500 - 1000 feet	1 (2.6%)	33 (86.8%)	4 (10.5%)	38
More than 1000 feet	1 (2.8%)	27 (75%)	8 (22.2%)	36

9. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of residential property located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	1 (2.5%)	37 (92.5%)	2 (5%)	40
500 - 1000 feet	1 (2.6%)	35 (89.7%)	3 (7.7%)	39
More than 1000 feet	1 (2.8%)	28 (77.8%)	7 (19.1%)	36

10. In regard to the questions setforth above, please describe the effects which you believe the concentration of adult entertainment business has on each of the following:

Property values of surrounding:

	Decrease	Unknown	No effect	Increase
Commercial property	46 (56.8%)	32 (39.5%)	1	2 (2.5%)
Residential property	42 (51.9%)	38 (46.9%)	-	1
General	16 (19.8%)	65 (80.2%)	-	-

Rental values of surrounding:

	Decrease	No response	No effect	Increase
Commercial property	39 (48.1%)	42 (51.9%)	-	-
Residential property	37 (45.7%)	44 (54.3%)	-	-
General	12 (14.8%)	69 (85.2%)	-	-

Vacancies

Number	1	56 (69.1%)	1	23 (28.4%)
Length	1	72 (88.9%)	2 (2.5%)	6 (7.4%)
Rate of tenant turnover	-	49 (60.5%)	1	31 (38.3%)
Annual business income	24(29.6%)	53 (65.4%)	2 (2.5%)	2 (2.5%)
Complaints from customers and residents due to concentration Yes	24(29.6%)	57 (70.4%)		
Neighborhood appearance	24(29.6%)		3 (3.7%)	
Crime	1	1	-	48 (59.3%)
Litter	-	1	1	44 (54.3%)

Other (please specify)

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GENERAL QUESTIONNAIRE

- REALTOR RESPONSES -

Total no. of responses = 32

NOTE: Due to distribution, certain realtors received the General Questionnaire rather than the Appraiser Questionnaire. For analysis purposes, the subject responses were tabulated separately and analyzed together with the responses to the Appraiser Questionnaire.

Question

1. What overall effect do you feel that adult entertainment establishments have had on a neighborhood:

	Positive	Negative	No effect
Effect on the business condition (sales & profits) in the area:	-	31 (97%)	1
Effect on homes (value & appearance) in the area immediately adjacent to adult entertainment businesses:	-	31 (97%)	1
Effect on homes (value & appearance) in the area located 500 feet or more from adult entertainment businesses:	-	29 (91%)	2

2. Do you believe the establishment of adult entertainment facilities in the vicinity of your business has had any of the following effects? (Please check all those effects which you feel have occurred.)

1 (31.3%)	no effect
23 (71.9%)	lower rents
25 (70%)	vacant businesses
25 (70%)	tenants moving out
25 (70%)	complaints from customers
0	less crime
26 (81.3%)	more crime
29 (91%)	decreased property values
0	increased property values
3 (9.4%)	lower taxes
7 (21.9%)	higher taxes
23 (91%)	decreased business activity
0	increased business

1231
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30 (94%) deteriorated 27 (84%) more litter neighborhood appearance

___ Other (please specify)

3. (Not applicable for tally.)

4. Have you seriously considered moving your business elsewhere because of nearby concentrations of adult entertainment businesses?

10 (31.3%) Yes 15 (46.9%) No

5. Would you consider expanding in your current location?

10 (31.3%) Yes 12 (37.5%) No

6. What types of adult entertainment establishments are there in your area? (Please check appropriate boxes.)

27 (84.4%) adult bookstores

17 (53.1%) massage parlors

15 (46.9%) peep shows

12 (37.5%) bars with X-rated entertainment

13 (40.6%) nude or topless dancing

24 (75%) adult theatres

15 (46.9%) adult motels

How far from your business is the nearest adult entertainment establishment? (Not tabulated due to limited response.)

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D. U.S. CENSUS AND RELATED DATA

1. Cluster Analysis "Used by Community Analysis Bureau to Describe Various Parts of the City"

The last U.S. Decennial Census was conducted on April 1, 1970. With the proliferation of adult entertainment business it would seem appropriate to include as background information a description of the socio-economic and physical characteristics of the areas under study, as revealed by census data. Such a description may provide insight as to the underlying factors contributing to the concentration of sex-oriented business in the areas under study.

An excellent available source providing such a description is a 1974 report prepared by the City's Community Analysis Bureau (CAB) concerning the "State of the City".* In this document, the CAB has utilized a statistical technique known as "cluster analysis" to identify specific areas within the City which have common characteristics, as revealed by census data. In conducting this study, the CAB made use of 66 census data items (or variables) which were selected from the entire spectrum of socio-economic and physically descriptive data items available for all census tracts in the City.

The U.S. Census Bureau reports data on numerous geographical levels, the "census tract" being the smallest geographical area for which data is maintained and reported on a regular basis. There are 750 such census tract areas in the City, each containing a population of slightly fewer than 4,000 persons, on the average. The five study area nodes and four control areas under study herein are contained within portions of 25 census tracts.

The particular variables which most accurately describe a particular census tract were used by the Community Analysis Bureau in such a manner as to combine those areas which have the most similar characteristics. As a result of this procedure, thirty cluster groups were established throughout the City, each such cluster consisting of one or more census tracts, each census tract within a particular cluster being more similar to other parts of that cluster than to any other geographical section of the City.

* The State of the City - A Cluster Analysis of Los Angeles - City of Los Angeles Community Analysis Bureau, June 1974.

Description of Hollywood Area

The three study areas in Hollywood containing concentrations of adult entertainment businesses are included within portions of 11 census tracts. Their three associated "control areas" are partially contained within nine census tracts. These 20 tracts are all included within a larger area identified in the CAB's report as "Cluster 15", entitled "The Apartment Dwellers", consisting of 34 tracts. A description of this area, as quoted from the previously cited CAB report, is set forth below. The fact that this description is based on data which is now seven years old may not be disadvantageous, for the purposes of this study, inasmuch as adult entertainment businesses began to flourish in the 1969-70 period.

> " Cluster 15 is a lower income, predominately old apartment area located west of the Civic Center..."
>
> "The cluster represents a total population of 174,000, 46% male and 54% female. The median age is 40. The area is mostly White, but does have an above average ethnic mix--19% Spanish-American, 3% Japanese, 2% Chinese, 3% Black. It is a cluster of workers and senior citizens. One in five residents is over 65. Female participation in the labor force is the highest of the 30 clusters. The population under 18 is small. Many of the families are headed by women..."
>
> "...Close to seven out of ten labor active residents are white collar employed. Most completed high school and 15% completed college. At $8,700, median family income is below the average for the City. This lower income does not translate into an abnormally high poverty distribution. One in ten families and a smaller proportion of unrelated individuals are welfare recipients..."
>
> "...Residents of the cluster are centrally located to both the Downtown and its commercial-financial strip extension, Wilshire Boulevard. Many public transit routes service the area. Close to 40% of the households have no automobile. The presence of two or more cars is not common. Of the older apartment complexes many have no garage facilities..."

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"...Old apartments comprise 42% of the multiple units. One of the heaviest concentrations occurs east of Western Avenue and north of Olympic Boulevard. These are high density, closely packed, rectangular shaped, stucco units which line the streets approaching Wilshire Boulevard. South of Olympic Boulevard, the pattern remains one of multiple family units, but these are generally interspersed with homes or are the end product of converted two and three story frame houses. Hollywood is similar, but is has several single family residential areas and apartment encroachment appears to have more of an impact..."

"...Most of the cluster's 102,700 dwellings are renter occupied, including a majority of the homes. Median rent averages $108, but 17% of the multiple dwellings are available for less than $80..."

"...Single family residences are a small proportion of the total housing stock and like the area's apartments, many predate World War II. Few of the essentially single family residential neighborhoods have the kind of zoning protection which requires that new construction be single units. Replacement housing has tended to be large apartments. Homes averaged $26,000 in median value, which is more a factor of the land than the improvements. Much of the land west of Western Avenue adjoins the more expensive Hancock Park area..."

"...Cluster 15 has one of the highest population densities in the City, 19,080 persons per square mile, not exceptional for an apartment area. It also has the highest cluster average of elementary school transiency rates--46% for incoming students and 34% for students leaving. This mobility of the residents did not seem to affect the median sixth grade reading score. It was above the City average. The cluster has 8 park sites within its boundary and is also served by the more regional recreation areas of Echo Park, MacArthur Park and Griffith Park all of which are within access..."

"...The incidence of burglary per 100 improved parcels is high, a partial reflection of the large number of dwelling units per land parcel. One of the more disturbing aspects of the cluster is the suicide rate. Outside of Downtown, only three of the clusters had higher rates..."

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2. Use of 1970 Census Data to Describe Studio City and North Hollywood Areas

There are four census tracts which comprise the Studio City study area; two such tracts in North Hollywood; and three census tracts representing the "control area" for the San Fernando Valley. (One of the "control area" tracts also forms part of the Studio City study area.)

The CAB's cluster analysis reveals that these eight different census tracts are all quite dissimilar, inasmuch as the seven tracts are contained within six different "clusters". A detailed description of each of these six clusters would not be practical for purposes of this study. However, a summary of certain key variables attributable to the two study areas in Studio City and North Hollywood, and the one corresponding control area might be instructive, and is therefore presented in Table V following. For purposes of comparison, the data is also shown for the City as a whole.

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TABLE V
Comparison of 24 Variables from 1970 Census
Describing Studio City and North Hollywood Nodes
and Corresponding Control Area

VARIABLES	AREAS Studio City (Tujunga & Ventura)	North Hollywood (Lankershim & Vineland)	Control (Lankershim & Whipple)	AND VALUES Entire City
Population				
Population per sq. mile	5,742	8,265	5,893	6,041
% Persons 0-17	18.4	18.2	16.7	30.2
% Persons 65+	10.6	17.9	15.2	10.1
% White (non-Spanish)	92.0	85.3	90.7	60.3
% Black	0	0	0	17.2
% Spanish-American	6.5	13.7	7.7	18.4
% Families w/female head	10.6	16.4	16.4	16.2
Education				
% High School dropouts, 25 & older	22.1	38.6	25.3	38.1
% 25+ who have finished 4+ years college	22.0	10.2	18.3	13.9
Economics				
Approximate median family income	$15,672	$ 9,471	$12,575	$10,535
% White collar employed	80.4	60.6	77.3	57.4
% unemployed	7.8	6.1	9.1	7.0
% families in poverty	3.7	10.0	6.6	9.9
% families receiving welfare	4.3	7.6	4.7	9.9
% 1-unit structures	50.6	48.9	34.2	51.7
Approximate median value, owner occupied units	$39,141	$25,335	$35,530	$26,700
Approximate median monthly rent, renter occupied units	$ 135	$ 123	$ 129	$ 107
% of owner occupied, 1 unit, structures built before 1940	24.1	52.4	52.2	28.5
% of renter occupied, 2+ unit structures built before 1940	10.9	13.9	21.8	30.7

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TABLE V (cont'd)
Comparison of 24 Variables from 1970 Census
Describing Studio City and North Hollywood Nodes
and Corresponding Control Area

VARIABLES	AREAS---------AND---------VALUES Studio City (Tujunga & Ventura)	North Hollywood (Lankershim & Vineland)	Control (Lankershim & Whipple)	Entire City
Crime Rates				
Assaults per 100 population	.465	.374	.478	.857
Robberies per 100 population	.172	.267	.170	.454
Burglary per 100 improved parcels	13.86	10.94	13.5	14.96
Total Arrests per 100 population	4.23	4.26	4.10	8.26
Narcotic Arrests per 100 population aged 14-44	2.66	1.39	1.60	2.04

On the basis of the foregoing 1970 Census data, it is possible to develop a general description of the two study area modes containing adult entertainment businesses in the Valley. As indicated above, such a description must necessarily be based on data applying to entire census tracts, even through the study areas may encompass only portions of tracts.

Residents of the Studio City study area node in 1970 were predominantly an upper middle income group, with a relatively high percentage of college graduates. High school dropouts were considerably below the citywide norm. Eight out of ten employed persons were in "white collar" jobs. The percentage of families receiving welfare or in poverty status was considerably below the citywide percentage. The unemployment rate was slightly higher than that of the entire city.

The median value of owner occupied homes in the Studio City area was more than $12,400 higher than the City median. About one-half of the housing units were one-unit structures. Apartment rental rates were also higher than the city as a whole. The percentage of one-unit, owner occupied housing units built before 1940 (24.1 percent) approached the citywide median of 28.5 percent.

With regard to crime statistics (as of 1970), robberies per 100 population in the Studio City area were below the rate for the city as a whole (.172 and .454, respectively), although the number of burglaries per 100 improved parcels (13.86) was close to the citywide rate of 14.96. Total arrests per 100 population (4.23) were about one-half of the 8.26 rate which prevailed citywide.

The North Hollywood study area contrasts rather sharply with the above described Studio City area. In North Hollywood, median family income was $9,471 in 1970--lower than the citywide median of $10,535--and considerably lower than the $15,672 median income of residents in the Studio City study area. Sixty-one percent of employed persons were in "white collar" jobs in North Hollywood, compared with 80 percent in Studio City and 57 percent in the entire city. The percentage of families in a poverty status in North Hollywood was considerably higher than in Studio City (10.0 percent and 3.7 percent, respectively). The percent of families in North Hollywood receiving welfare was higher than in Studio City, but lower than in the entire city. Unemployment rates, however, were lower in North Hollywood than in Studio City and the entire City.

Housing values were considerably lower in North Hollywood than in Studio City, and slightly lower than average values throughout the entire city. Median montly rents were lower in North Hollywood than in Studio City but higher than in all of Los Angeles. Of all owner-occupied one-unit structures, 52.4 percent were built prior to 1940 in the North Hollywood study area, compared with only 28.5 percent in the entire city. Single-family homes in North Hollywood are older than in Studio City.

As revealed in Table V, 1970 crimes rates for the seven variables tabulated were lower in North Hollywood than in the city as a whole. Except for "robberies per 100 population" and "total arrests per 100 population" all other rates in North Hollywood were lower than in the Studio City study area.

Tabulation of U.S. Census Trends from 1960 to 1970

Time series (trend) data can often be of value in identifying underlying socio-economic or physical characteristics which may have contributed to the change in an area. During the course of this study, the staff prepared a tabulation of the 1960-70 change in selected socio-economic variables as reported in the U.S. Census, covering the five study areas, the four "control" areas, and the City as a whole. This was done in order to determine if changes in the study area nodes were significantly different than the "control areas", or from citywide norms.

A tabulation of this data is contained in Appendix E. A review of this data revealed that the 1960-70 trends in the variables selected (relating to population, economics and housing) were not significantly different for the study areas than for the "control areas". In general, numerical or percentage changes in the data were also similar to citywide trends and no firm conclusions of particular relevance to the study could be developed.

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V.

POLICE DEPARTMENT STUDY OF HOLLYWOOD

This section of the report considers the number and percentages of adult entertainment businesses in the City, changes in these businesses since 1975, and more specifically, crime rates in the Hollywood area as compared to crime rates, citywide.

The following information was compiled by the Los Angeles Police Department and shows the incidence of certain adult entertainment establishments as of two different time periods-- November of 1975 and December 31, 1976. The statistics show a decrease in massage parlors, bookstores, arcades and theaters and a slight rise in adult motels. This was during the same period of time that there was stepped-up surveillance and deployment of officers in areas where concentrations of adult entertainment establishments existed. (The Hollywood community is within the West Bureau.)

This information and that which follows involving the incidence of crime in the Hollywood area provides what may be a positive correlation between crime and the presence of adult entertainment facilities.

TYPE OF ACTIVITY	Nov. 1975	Dec. 1976	Percent of Change
Adult Motels	37	38	+2%
Massage Parlors	147	80	-45%
Bookstores/Arcades	57	45	-21%
Theaters	47	44	-6%
TOTAL	288	207	-28%

DECEMBER 31, 1976
LOS ANGELES CITY POLICE DEPARTMENT
BUREAU OF ACTIVITY AND PERCENTAGE

TYPE OF ACTIVITY	CENTRAL BUREAU	SOUTH BUREAU	WEST BUREAU	VALLEY BUREAU
Adult Motels	5(13%)	23(60%)	5(13%)	5(13%)
Massage Parlors	6 (7%)	4 (5%)	42(53%)	28(35%)
Bookstores/Arcades	6(20%)	1 (2%)	24(53%)	11(24%)
Theaters	7(16%)	1 (2%)	28(64%)	8(18%)
TOTAL	27(23%)	29(14%)	99(48%)	52(25%)

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The information in this section is an extract from a report to the Planning Department on "The Impact of Sex Oriented Businesses on the Police Problems in the City of Los Angeles*", prepared by the Los Angeles City Police Department. The City Council in instructing the Planning Department to conduct the Adult Entertainment study has also instructed other City agencies to cooperate with and contribute as necessary to the report process. In accordance with such instructions, the Police Department conducted an analysis of the relationship between the concentration of adult entertainment establishments and criminal activity in the Hollywood area as compared to the citywide crime rates for the period beginning 1969 and ending 1975. This period of comparison covers the years during which adult entertainment establishments appeared and proliferated in the Hollywood area.

Part I crimes are those criminal acts which most severely effect their victims; they include homicide, rape, aggravated assault, robbery, burglary, larceny, and vehicle theft. During the period of 1969 through 1975, reported incidents of Part I crimes in the Hollywood Area increased 7.6 percent while the City showed a 4.2 percent increase. Thus, Hollywood's Part I crimes increased at nearly twice the rate of the City's increase. In conformance to the overall trend, every Part I crime committed against a person, not against property, increased at a higher rate in Hollywood Area than in the citywide total. Street robberies and 484 Purse Snatches, wherein the victim was directly accosted by their assailant, increased by 93.7 percent and 51.4 percent, respectively; the citywide increase was 25.6 percent and 36.8 percent.

Suspects arrested for Part I criminal acts in Hollywood Area increased 16.2 percent while the City dropped by 5.3 percent. This reveals that Hollywood Area was 21.5 percent over the City's total in the apprehension of serious criminals during the seven year period.

Equally alarming as the increase in Part I arrests, is the increase in Part II arrests (described on Table VI, pages 53-54) in Hollywood Area as opposed to the rest of the City. Hollywood increased in this category by 45.5 percent while the City rose but 3.4 percent.

Prostitution arrests in Hollywood Area increased at a rate 15 times greater than the city average. While the City showed a 24.5 percent hike, Hollywood bounded to a 372.3 percent increase in prostitution arrests.

Similarly, pandering arrests in Hollywood Area increased by 475.0 percent, 3-1/2 times the city increase of 133.3 percent. (See note p. 54.)

*The complete report prepared by the Los Angeles City Police Department is available for review in the official files under City Plan Case No. 21475 in the Los Angeles City Planning Department.

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Table VI

1969 THROUGH 1975 SURVEY PERIOD
REPORTED CRIMES AND ARRESTS

	Hollywood Area			Citywide		
Part I Offenses	1969	1975	% Change	1969	1975	% Change
Homicide	19	37	+94.7	377	574	+52.3
Rape	214	199	-7.0	2115	1794	-15.2
Agrav. Assault	605	886	+46.5	14798	14994	+1.3
Robbery	905	1591	+75.8	11909	14667	+23.2
Burglary	5695	5551	-2.5	65546	69489	+6.0
Larceny	7852	8396	+6.9	89862	93478	+4.0
Auto Theft	2621	2608	-0.5	32149	30861	-4.0
TOTAL	17911	19268	+7.6	216756	225857	+4.2
St. Robberies	381	738	+93.7	5321	6684	+25.6
484 Purse Snatches	185	280	+51.4	1951	2668	+36.8

ARRESTS

	Hollywood Area			Citywide		
Part I Offenses	1969	1975	% Change	1969	1975	% Change
Homicide	21	26	+23.8	475	573	+20.6
Rape	67	47	-29.9	858	552	-35.7
Agrav. Assault	239	348	+45.6	6250	3163	-49.4
Robbery	368	285	-22.6	4855	5132	+5.7
Burglary	864	514	-40.5	7823	6032	-22.9
Larceny	546	1371	+151.1	6877	11706	+70.2
Auto Theft	319	226	-29.2	4820	3121	-5.3
TOTAL	2424	2817	+16.2	31958	30279	-5.3

	Hollywood Area			Citywide		
*Part II Offenses	1969	1975	% Change	1969	1975	% Change
TOTAL	10660	15503	+45.4	179233	185417	+3.4

*(Part II arrests include: other assaults, forgery and counterfeiting, embezzlement and fraud, stolen property, prostitution, narcotics, liquor laws, gambling, and other miscellaneous misdemeanors.)

Prostitution Arrests	1969	1975	% Change
Hollywood Area	433	2045	+372.3
Citywide	2864	3564	+24.5

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Table VI (cont'd)

Pandering Arrests	1969	1975	% Change
Hollywood Area	8	46	+475.0
Citywide	42	98	+133.3

NOTE: (The prostitution arrests made in Hollywood Area in 1975 represents 57.3 percent of all arrests for prostitution made in the city. The pandering arrests made in Hollywood Area in 1975 represents 46.9 percent of all pandering arrests made in Los Angeles during that year.)

DEPLOYMENT

Hollywood Area	1969	1975	% Change
Patrol	197	255	+29.4
Investigators	45	61	+35.6
TOTAL	242	316	+30.6
Citywide	5194	7506	+21.1

ADULT ENTERTAINMENT ESTABLISHMENTS
HOLLYWOOD AREA

1969 through 1975

1969

1 Hard-core motel
2 Bookstores
7 Theaters
1 Massage parlor/scam joint

11 Locations (Total)

1975

3 Hard-core motels
18 Bookstores
29 Theaters
38 Massage parlor/scam joints

88 Locations (Total)

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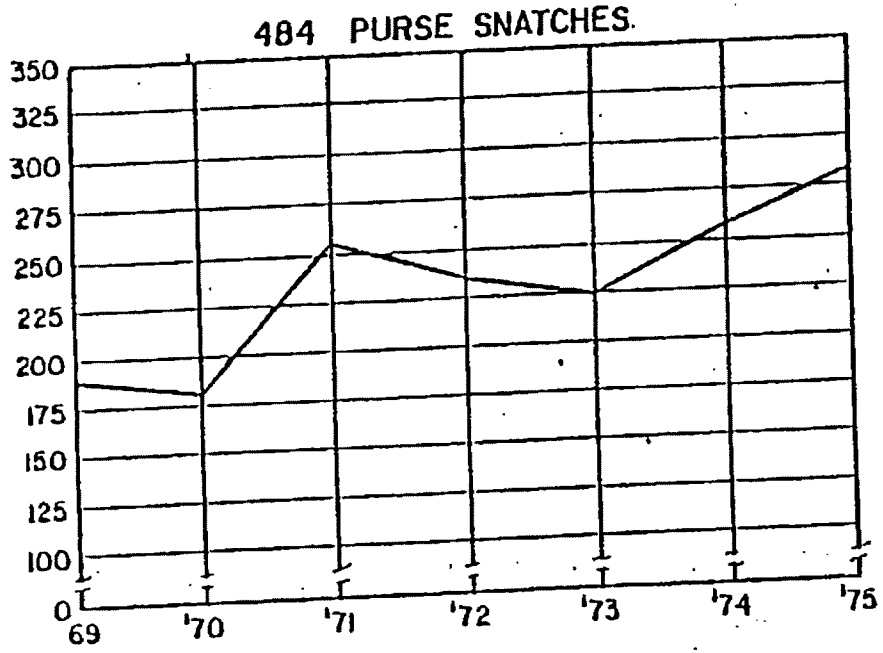
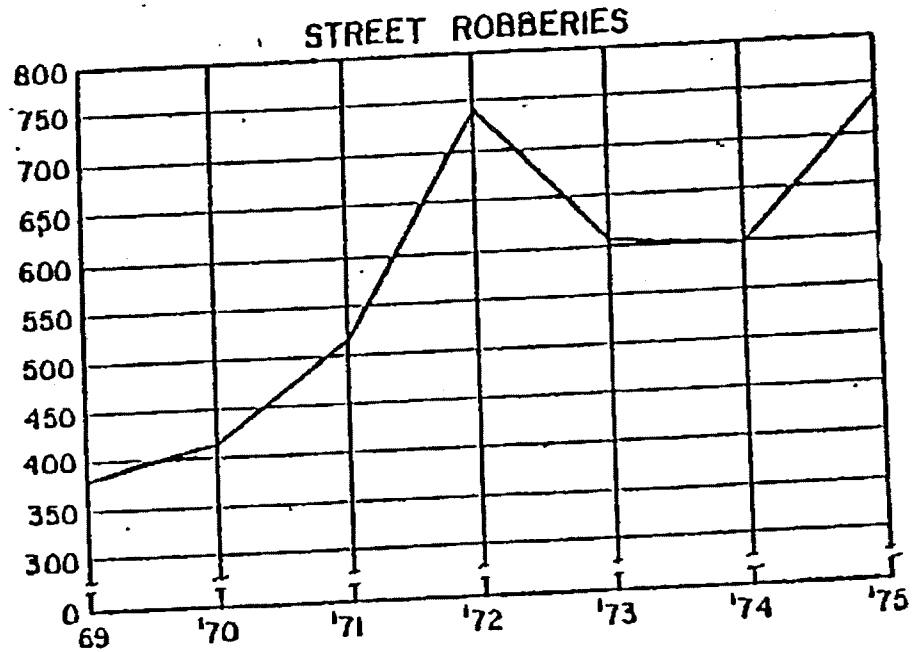
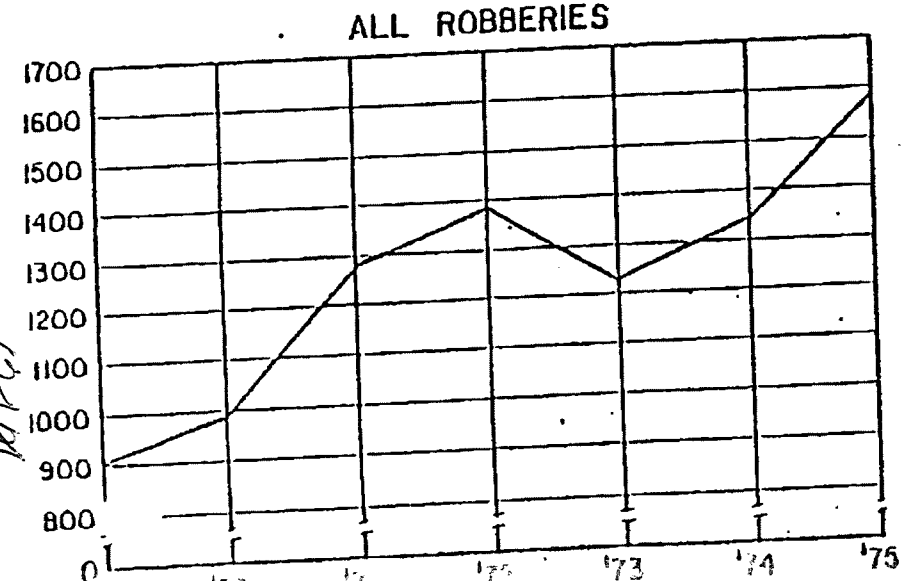
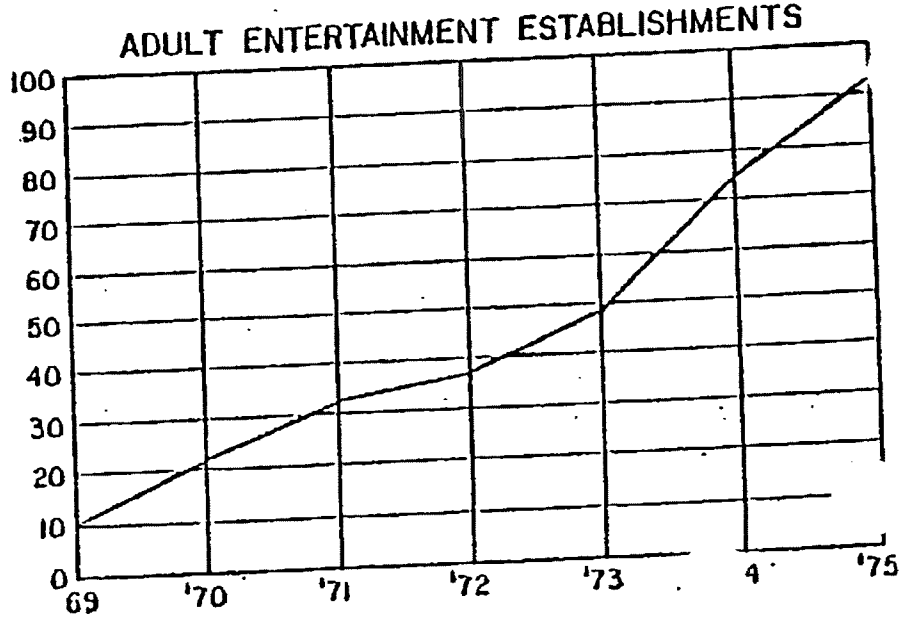
HOLLYWOOD AREA









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During the period included in this report, the Citywide deployment of police personnel rose by 21.2 percent. However, with the surge of crime in the Hollywood Area, deployment there increased by 30.6 percent, 9.4 percent higher than the rest of the City. Included in this figure is a 29.4 percent hike in uniformed officers and 35.6 percent rise in investigators to cope with the criminal elements.

This survey reflects a seven-year span during which time the Adult Entertainment Establishment in the Hollywood Area proliferated from a mere 11 establishments to an astonishing number of 88 such locations. The overall deleterious effect to the entire community is evident in the statistics provided. The overwhelming increase in prostitution, robberies, assaults, thefts, and the proportionate growth in police personnel deployed throughout Hollywood, are all representative of blighting results that the clustering of Adult Entertainment Establishments has on the entire community. These adverse social effects not only infect the environs immediately adjacent to the parlors but creates a malignant atmosphere in which crime spreads to epidemic proportions.

The remaining sections of the Police Department report are letters and signature petitions from concerned businessmen, clergy, merchants, citizens and police officers and are in the file and available for inspection upon request. The following paragraph summarizes this section of the Police Department report.

The police officer reports can be summarized as follows: all officers felt the sex-oriented businesses either contributed to or were directly responsible for the crime problems in the Hollywood area. The officers felt the sex shops were an open invitation to undesirables and thereby directly caused the deterioration of neighborhoods. Also, it was suggested that these businesses purposely cluster in order to establish a "strength in numbers" type effect, once they establish a foothold in a neighborhood they drive the legitimate businesses out.

The letters from the businessmen, clubs, churches and concerned citizens were all in support of police efforts to close adult entertainment facilities. The letters all expressed the feeling that the sex shops attracted homosexuals, perverts, prostitutes and other undesirables and directly contributed to the decline of the Hollywood area.

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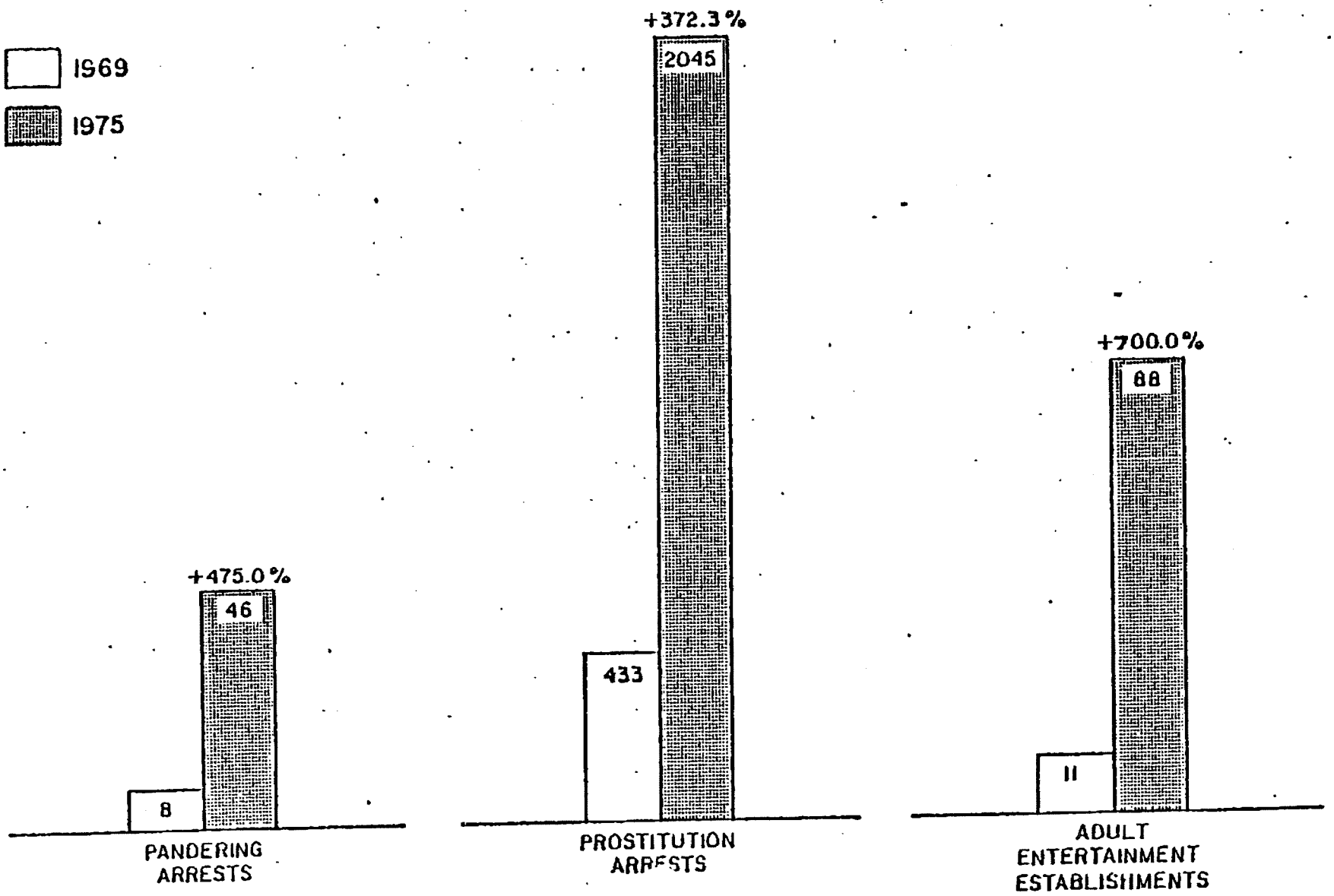
HOLLYWOOD AREA



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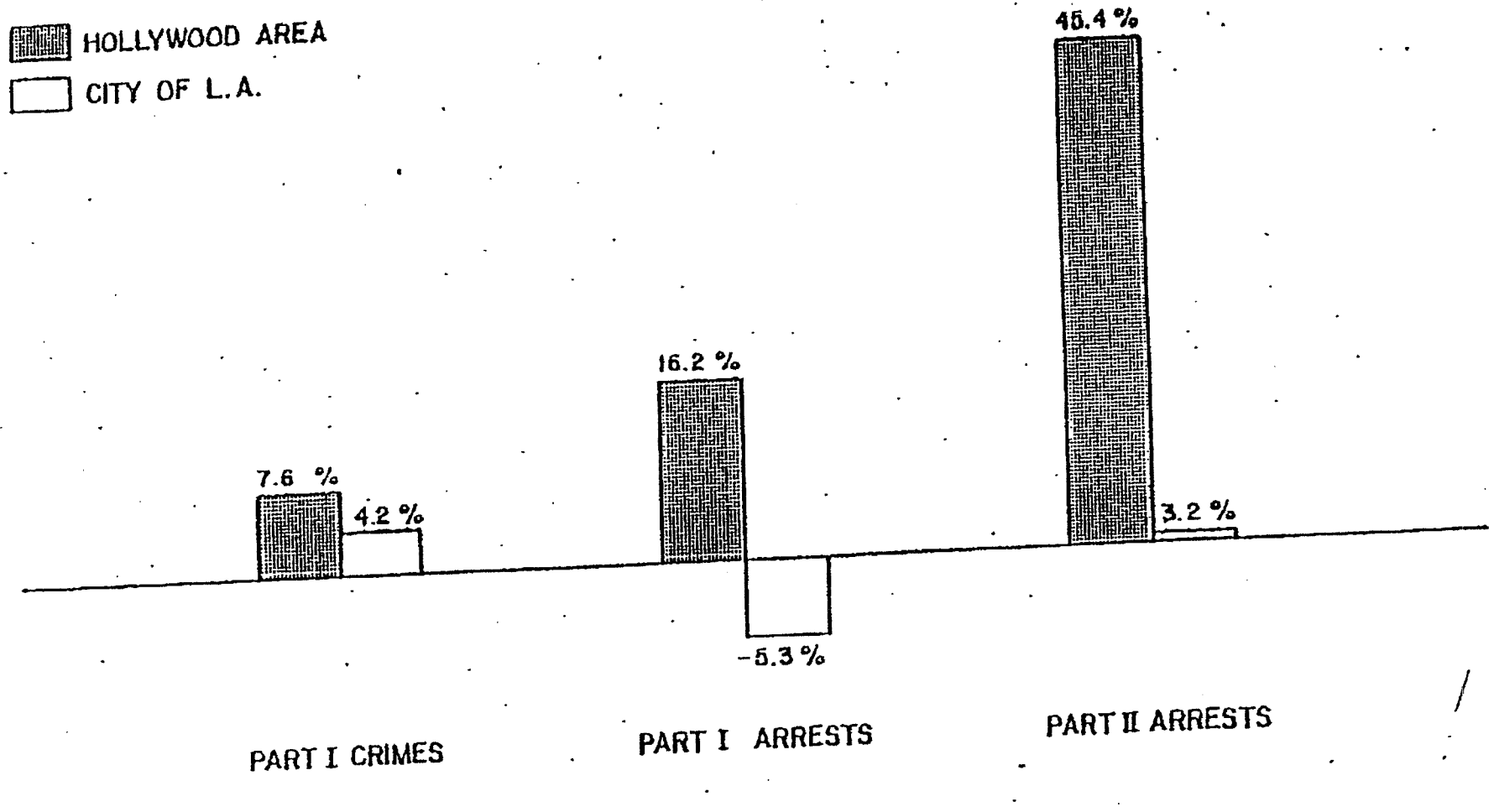
HOLLYWOOD AREA VS. CITY OF L.A.

RATE OF INCREASE 1969-1975



55-B

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Jeanne Crain, Typist
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APPENDICES.

APPENDIX A
(Sheet 1)

Changes in Assessed "Market" Value of Residential and Commercial Property 1970-76; Areas of Concentration of Adult Entertainment Businesses; Corresponding Control Areas, and City of Los Angeles

Areas of Concentration ("Nodes") and Control Areas	Assessed "Market" Values: Land 1970	Land 1976	Improvements 1970	Improvements 1976	Total 1970	Total 1976
Santa Monica & Western	12,955,100	12,926,800	12,945,620	13,697,620	25,900,900	26,624,420
Control Area - Santa Monica and Vermont	11,549,300	10,990,500	9,971,400	13,227,900	21,520,700	24,218,400
Hollywood & Western	17,618,700	18,237,710	20,361,040	23,015,660	37,979,740	41,289,370
Control Area - Hollywood & Highland	21,956,500	26,197,880	39,051,920	35,992,140	61,008,420	62,190,020
Selma & Cahuenga	28,720,280	34,785,080	31,852,740	27,856,660	60,573,020	62,641,740
Control Area - Hollywood & Gower	14,502,880	17,078,900	13,411,880	12,256,520	27,914,760	29,335,420
Tujunga & Ventura (Studio City)	7,115,460	11,890,900	8,493,260	13,852,800	15,608,720	25,743,700
Lankershim & Vineland (North Hollywood)	13,789,200	15,979,300	15,287,340	16,763,160	29,076,540	32,742,460
Control Area - Lankershim & Whipple	11,168,200	18,169,000	14,744,280	18,823,200	25,912,480	36,992,200
	Land		Improvements		Total	
City of L.A.	8,303,456,720	11,216,558,900	9,692,014,680	13,464,660,940	17,995,471,400	24,681,219,84

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CITY OF LOS ANGELES
CALIFORNIA

CITY PLANNING COMMISSION
SUZETTE NEIMAN
PRESIDENT
FRED E. CASE
VICE-PRESIDENT
DANIEL P. GARCIA
LESTER B. KING
LEONARD LEVY
RAYMOND I. NORMAN
SECRETARY

TOM BRADLEY
MAYOR

DEPARTMENT OF
CITY PLANNING
561 CITY HALL
LOS ANGELES, CALIF. 90012
CALVIN S. HAMILTON
DIRECTOR
FRANK P. LOMBARDI
EXECUTIVE OFFICER

APPENDIX B

March 14, 1977

REQUEST FOR YOUR ASSISTANCE IN OBTAINING INFORMATION REGARDING "ADULT ENTERTAINMENT ESTABLISHMENTS"

The Los Angeles City Council has recently requested the Department of City Planning, in cooperation with the Police Department and other City agencies, to conduct a study concerning "adult entertainment" businesses.

Because of your particular knowledge of the businesses in the vicinity of your adress, we are requesting that you answer the questions on the attached questionnaire. These questions relate to the effect of adult entertainment establishments on other businesses and neighborhoods in the surrounding area. The results of the questionnaire will be of great value to us in conducting this study.

Please return your completed questionnaire in the stamped envelope provided before April 1, 1977.

If you have any questions about the study or wish to discuss this matter with Planning Department staff members, please call 485-3508.

We greatly appreciate your cooperation in assisting us in this survey.

Original signed by Calvin S. Hamilton

CALVIN S. HAMILTON
Director of Planning

CSH:CSR:cd
0417B/0029A

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ADULT ENTERTAINMENT QUESTIONNAIRE

Los Angeles City Planning Department

May 9, 1977

Please answer the seven questions below by checking the appropriate spaces. Feel free to write comments in the space provided or on a separate sheet.

For the purposes of this study, an adult entertainment establishment includes businesses such as: adult bookstores; nude or topless dancing establishments; massage parlors; adult theatres showing X-rated movies; "peep shows"; so-called adult motels, and bars with X-rated entertainment.

1. What overall effect do you feel that adult entertainment establishments have on a neighborhood:

   Effect on the businesses condition (sales & profits) in the area:

   positive _____ negative _____ no effect _____

   Comments/Examples:

   Effect on homes (value & appearance) in the area immediately adjacent to adult entertainment businesses:

   positive _____ negative _____ no effect _____

   Effect on homes (values & appearance) in the area located 500 feet or more from adult entertainment businesses:

   positive _____ negative _____ no effect _____

   Comments/Examples:

(OVER)

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2. Do you feel the establishment of adult entertainment facilities in the vicinity of your business has had any of the following effects? (Please check all those effects which you feel have occurred.)

____ no effect	_____ decreased property values
____ lower rents	_____ increased property values
____ vacant businesses	_____ lower taxes
____ tenants moving out	_____ higher taxes
____ complaints from customers	_____ decreased business activity
____ less crime	_____ increased business
____ more crime	_____ more litter

____ improved neighborhood appearance
____ deteriorated neighborhood appearance
____ other (please specify) _____

Please list specific examples relating to any box checked, immediately above.

3. What are the hours of operation of your business? _____

4. Have you seriously considered moving your business elsewhere because of nearby concentrations of adult entertainment businesses?

_____ yes _____ no

Why?

5. Would you consider expanding in your current location?

_____ yes _____ no; if not, why?_____

_____

_____

_____

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6. What types of adult entertainment establishments are there in your area? (Please check all appropriate boxes.)

_____ adult bookstores

_____ massage parlors

_____ peep shows

_____ bars with X-rated entertainment

_____ nude or topless dancing

_____ adult theatres

_____ adult motels

How far from your business is the nearest adult entertainment establishment?_____

Thank you for your cooperation. Please return this questionnaire to:

City of Los Angeles
Department of City Planning
200 North Spring Street
Room 513, City Hall
Los Angeles, CA 90012

Name_____

(Business)_____

Address_____

_____

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APPENDIX C

March 14, 1977

REQUEST FOR YOUR ASSISTANCE IN OBTAINING INFORMATION REGARDING "ADULT ENTERTAINMENT" ESTABLISHMENTS

The Los Angeles City Council has recently requested the Department of City Planning, in cooperation with the Police Department and other City agencies, to conduct a study concerning "adult entertainment" businesses.

Because of your particular knowledge of the businesses in the vicinity of your address, we are requesting that you answer the questions on the attached questionnaire. These questions relate to the effect of adult entertainment establishments on other businesses and neighborhoods in the surrounding area. The results of the questionnaire will be of great value to us in conducting this study.

Please return your completed questionnaire in the stamped envelope provided before April 1, 1977.

If you have any questions about the study or wish to discuss this matter with Planning Department staff members, please call 485-3503.

We greatly appreciate your cooperation in assisting us in this survey.

CALVIN S. HAMILTON
Director of Planning

CSH:CSR:lmc

-C-

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Los Angeles City Planning Department

March 14, 1977

Please give your opinion regarding questions set forth below by checking the appropriate spaces and providing comments in the space provided or on a separate sheet.

For the purposes of this study, "adult entertainment establishments" include businesses such as: adult bookstores, nude or topless dancing establishments; massage parlors; adult theatres showing X-rated movies; "peep shows"; so-called adult motels and bars with X-rated entertainment.

EFFECT ON SURROUNDING BUSINESSES

1. What effect does the concentration of adult entertainment establishments have on the market value of business property (land, structures, fixtures, etc.) located in the vicinity of such establishments?

   increase in value_____ decrease in value_____ no effect_____

   Comments/examples: (Please cite specific examples, including available data.)

2. What effect does the concentration of adult entertainment establishments have on the rental value of business property located in the vicinity of such establishments?

   increase in value_____ decrease in value_____ no effect_____

   Comments/examples: (Please cite specific examples, including available data.)

3. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of business property located in the vicinity (length of time required to rent or sell property; rate of lessee/buyer turnover; types of businesses of prospective lessees/buyers; conditions of sale or lease, etc.)?

   increase in rentability/saleability _____

   decrease in rentability/saleability _____

   no effect _____

   Comments/examples: (Please cite specific examples, including available data.)

4. What effect does the concentration of adult entertainment establishments have on the annual income of businesses located in the vicinity of such establishments?

increased income_____ decreased income_____ no effect_____

Comments/examples: (Please cite specific examples, including available data.)

5. Have any business owners or proprietors considered relocating or not expanding their businesses because of the nearby concentration of adult entertainment establishments?

Yes_____ No_____ Not known_____

If yes, please indicate the specific reason, if known.

6. In recent years, has the commercial vitality (sales, profits, etc.) of any area in the City of Los Angeles been affected in any way by the nearby concentration of adult entertainment establishments?

Yes_____ No_____ Not known_____

If yes, which areas?

Comments/examples: (Please cite effects and provide available data.)

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EFFECT ON SURROUNDING RESIDENTIAL PROPERTIES

7. What effect does the concentration of adult entertainment establishments have on the market value of private residences located within the following distances from such establishments?

	Increase	Decrease	No Effect
Less than 500 feet	_____	_____	_____
500 - 1000 feet	_____	_____	_____
More than 1000 feet	_____	_____	_____

Comments/examples: (Please cite specific examples, including available (data.)

8. What effect does the concentration of adult entertainment establishments have on the rental value of residential income property located within the following distances from such establishments?

	Increase	Decrease	No Effect
Less than 500 feet	_____	_____	_____
500 - 1000 feet	_____	_____	_____
More than 1000 feet	_____	_____	_____

Comments/examples: (Please cite specific examples, including available data.)

9. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of residential property located within the following distances from such establishments?

	Increase	Decrease	No Effect
Less than 500 feet	_____	_____	_____
500 - 1000 feet	_____	_____	_____
More than 1000 feet	_____	_____	_____

Comments/examples: (Please cite specific examples, including available data.)

OVERALL EFFECTS

10. In regard to the questions set forth above, please describe the effects which you believe the concentration of adult entertainment businesses has on each of the following:

Property values of surrounding:

Commercial property _____

Residential property _____

Rental values of surrounding:

Commercial property _____

Residential property _____

Vacancies

Number _____

Length _____

Rate of tenant turnover _____

Annual business income _____

Complaints from customers and residents due to concentration _____

_____

Neighborhood appearance _____

Crime _____

Litter _____

Other (please specify _____

_____

Thank you for your cooperation. Please return this questionnaire to:

City of Los Angeles
Department of City Planning
200 North Spring Street
Room 516, City Hall
Los Angeles, CA 90012

Name _____

Organization _____

Address _____

_____

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Do you wish to be notified of the public hearing on this matter?

Yes _____ No

APPENDIX D-1

May 3, 1977

Concerned Members of the Public

ADULT ENTERTAINMENT STUDY

We wish to thank you for your interest in the above matter. Recently, residents of the Studio City area have received erroneous information regarding the activities of this Department. Specifically, they have been informed that it is our intent to create an "adult entertainment zone" on Ventura Boulevard. This information is not correct.

In January of this year, the Los Angeles City Council instructed the Planning Department to conduct a study to determine whether so-called "adult entertainment" establishments, where they exist in concentration, tend to have a deteriorating or blighting effect on adjacent properties and areas. Since that time, the Department staff has been evaluating data from the public and governmental agencies to determine whether evidence of such effects exists.

Within the next two months, the analysis of the information gathered will be presented to the Los Angeles City Council which will make a decision as to whether adoption of regulations is appropriate.

We regret that you were sent alarming erroneous information; if you have any further questions, please call my staff at 485-3508 or 485-3068.

(Original signed by)

CALVIN S. HAMILTON
Director of Planning

CSH:RJ:mw

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From the Desk of
MORT ALLEN

URGENT . . . . . .

Studio City (Ventura Blvd) has one of the largest concentration of "ADULT ENTERTAINMENT MOTELS" in Los Angeles.

The attached Press Release and Questionaire was not, to our knowledge, published in ANY locally circulated newspaper.

The hearings will be held in Hollywood & Northridge - WHY not in the Studio City area? (need we say more)

We URGENTLY request that you and your neighbors attend BOTH meetings and ALSO call or send telegrams to our elected leaders:

Joel Wachs, City Councilman
Tom Bradley, Mayor
Burt Pines, City Attorney
John Van de Camp, District Attorney
Ted Goldberg, President of Studio City Chamber of Commerce

WE ALL HAVE TOO MUCH INVESTED IN OUR PROPERTIES TO ALLOW ANY "RED LIGHT DISTRICTS" ANYWHERE IN THE CITY OF LOS ANGELES, AND ESPECIALLY IN THE SAN FERNANDO VALLEY.

Mort Allen
Dori Phillips
Karen Misraje
Karen Rosen
Linda Tarlow

Tarlton Realty Inc
12516 VENTURA BLVD. • STUDIO CITY, CALIF. 91604
POPLAR 9-4444

CC opposes X-rated Ventura Blvd. zone

A proposal to designate certain areas of Ventura Boulevard as an "adult entertainment zone" shocked members of the Studio City Chamber of Commerce Board of Directors when announced at their Wednesday meeting.

Community activist Mort Allen read a notice from the Los Angeles City Planning Department announcing public meetings to be held on the proposal to create special districts for X-rated entertainment.

Howard Raphael, field deputy for Second District Councilman Joel Wachs, said Wachs would oppose designating a portion of Ventura Boulevard as an adult entertainment zone.

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APPENDIX D-3

PRIVATELY DISTRIBUTED QUESTIONNAIRE
(Note: Not a portion of Planning Department Study)

- RESPONSES -

Total no. of responses = 197

Question	Response		
1. What effect does the concentration of adult entertainment establishments have on the market value of business property (land, structures, fixtures, etc.) located in the vicinity of such establishments?	increase in value	2	
	decrease in value	178	(90.4%)
	no effect	2	
2. What effect does the concentration of adult entertainment establishments have on the rental value of business property located in the vicinity of such establishments?	increase in value	2	
	decrease in value	169	(85.8%)
	no effect	3	
3. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of business property located in the vicinity (length of time required to rent or sell property; rate of lessees/buyer turnover; conditions of sale or lease, etc.)?	increase in rentability/saleability	2	
	decrease in rentability/saleability	161	(81.7%)
	no effect	3	
4. What effect does the concentration of adult entertainment establishments have on the annual income of businesses located in the vicinity of such establishments?	increased income	2	
	decreased income	149	(75.6%)
	no effect	5	
5. Have any business owners or proprietors considered relocating or not expanding their businesses because of the nearby concentration of adult entertainment establishments?	yes	71	(36.9%)
	no	4	(4.9%)
	not known	96	(48.7%)
6. In recent years, has the commercial vitality (sales, profits, etc.) of any area in the City of Los Angeles been affected in any way by the nearby concentration of adult entertainment establishments?	yes	100	(50.8%)
	no.	57	(28.9%)
	not known	___	(35.8%)

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7. What effect does the concentration of adult entertainment establishments have on the market value of private residences located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	-	148 (100%)	-	148
500 - 1000 feet	-	145 (100%)	-	145
More than 1000 feet	-	142 (95.9%)	-	148

8. What effect does the concentration of adult entertainment establishments have on the rental value of residential income property located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	-	143 (99.3%)	1	144
500 - 1000 feet	-	138 (98.6%)	2 (1.4%)	140
More than 1000 feet	-	133 (95%)	7 (50%)	140

9. What effect does the concentration of adult entertainment establishments have on the rentability/saleability of residential property located within the following distances from such establishments?

	Increase	Decrease	No effect	Total
Less than 500 feet	-	147 (100%)	-	147
500 - 1000 feet	-	141 (99.3%)	-	142
More than 1000 feet	-	141 (97.2%)	-	145

10. (Not tabulated)

In summary, the respondents felt that the subject businesses have a decidedly adverse impact on surrounding businesses and residential properties and the large majority believe that the adverse effect extends beyond the 1000-foot radius.

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Comments indicate concern for:

1. personal safety, e.g. assaults
2. moral effect on children
3. safety of property, e.g. vandalism, robbery, etc.
4. neighborhood appearance. Adult entertainment establishments were described variously as tawdry, tacky, garish, seedy, messy, neglected, untidy, blighted, unkempt.
5. litter, e.g. cans, bottles, newpapers, etc., strewn about public and private property, especially heavy after Saturday night.
6. spillover parking into residential areas. On-site parking is often inadequate. Customers seeking anonymity park at a distance away from any given establishment, on residential streets.
7. graffiti on public and private property.

APPENDIX E

SANTA MONICA BOULEVARD & WESTERN AVENUE

	NODE		CITYWIDE	
POPULATION	**1960**	**1970**	**1960**	**1970**
Total Population	18,484	19,033	2,479,015	2,811,801
Black	38	340	334,916	503,606
Percentage	0.2	1.8	13.5	17.9
Spanish	540	3,833	260,399	518,791
Percentage	3.7	20.1	10.5	18.5
Median Age	42.1	38.0	33.2	30.6
Persons 0-17	2,190	3,126	756,640	849,246
Percentage	11.8	16.4	30.5	30.2
Persons 65+	2,437	3,334	253,993	283,395
Percentage	13.1	17.5	10.2	10.1
No. of Husband & Wife Families	3,153	3,380	545,109	553,564
No. of Unrelated Individuals	3,833	6,190	329,977	421,701
Average Household Size	1.95	1.90	2.77	2.68
HOUSING				
Total Units	9,859	10,667	935,507	1,074,173
Singles	2,938	1,919	559,745	560,378
Percentage	30.0	18.0	59.0	52.0
Multiples	6,921	8,748	375,762	510,261
Percentage	70.0	82.0	40.0	47.4
Built Pre-1939	7,039	5,736	481,797	328,988
All Occupied Units	9,226	9,962	876,010	1,024,835
Owner	1,330	1,078	404,652	419,801
Percentage	14.0	11.0	50.0	39.0
Renter	7,896	8,986	471,358	607,573
Percentage	86.0	89.0	43.0	56.4
ECONOMICS				
Median Family Income	5,699	7,713	6,896	10,535
Median School Years Completed	12.1	12.3	12.1	12.4
Median Value Owner Occupied in $	16,450	25,825	17,300	26,700
Median Rent in $	77	105	78	114
Total Employed	9,370	9,113	126,276	1,150,796
Unemployed	900	912	6,914	86,802
Percentage	9.6	10.0	5.5	7.5

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LANKERSHIM BOULEVARD & WHIPPLE STREET
(Valley Control Area)

	NODE		CITYWIDE	
POPULATION	**1960**	**1970**	**1960**	**1970**
Total Population	5,497	5,897	2,479,015	2,811,801
Black	9	2	334,916	503,606
Percentage	0.0	.1	13.5	17.9
Spanish	100	439	260,399	518,791
Percentage	1.8	7.4	10.5	18.5
Median Age	42.1	41.6	33.2	30.6
Persons 0-17	1,106	1,091	756,640	849,246
Percentage	20.1	18.5	30.5	30.2
Persons 65+	729	1,076	253,993	283,395
Percentage	13.3	18.2	10.2	10.1
No. of Husband & Wife Families	1,371	1,301	545,109	553,564
No. of Unrelated Individuals	841	1,337	329,977	421,701
Average Household Size	2.36	2.11	2.77	2.68
HOUSING				
Total Units	2,520	2,865	935,507	1,074,173
Singles	1,289	1,082	559,745	560,378
Percentage	51.2	37.8	59.0	52.0
Multiples	1,231	1,783	375,762	510,261
Percentage	48.8	62.2	40.0	47.4
Built Pre-1939	898	813	481,797	328,988
All Occupied Units	2,328	2,790	876,010	1,024,835
Owner	1,076	989	404,652	419,801
Percentage	46.2	35.4	50.0	39.0
Renter	1,252	1,801	471,358	607,573
Percentage	53.8	64.6	43.0	56.4
ECONOMICS				
Median Family Income	8,086	13,154	6,896	10,535
Median School Years Completed	12.6	12.6	12.1	12.4
Median Value Owner Occupied in $	22,350	37,700	17,300	26,700
Median Rent in $	92	136	78	114
Total Employed	2,574	2,736	126,276	1,150,796
Unemployed	177	280	6,914	86,802
Percentage	6.9	10.2	5.5	7.5

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HOLLYWOOD & WESTERN

	NODE		CITYWIDE	
POPULATION	**1960**	**1970**	**1960**	**1970**
Total Population	6,860	8,438	2,479,015	2,811,801
Black	3	72	334,916	503,606
Percentage	-	.1	13.5	17.9
Spanish	183	909	260,399	518,791
Percentage	2.6	10.7	10.5	18.5
Median Age	43.9	41.3	33.2	30.6
Persons 0-17	576	803	756,640	849,246
Percentage	8.3	9.4	30.5	30.2
Persons 65+	1,158	1,644	253,993	283,395
Percentage	16.8	19.4	10.2	10.1
No. of Husband & Wife Families	1,306	1,408	545,109	553,564
No. of Unrelated Individuals	2,805	3,602	329,977	421,701
Average Household Size	1.76	1.62	2.77	2.58
HOUSING				
Total Units	6,773	8,044	935,507	1,074,173
Singles	764	702	559,745	560,378
Percentage	11.3	8.7	59.0	52.0
Multiples	5,818	7,559	375,762	510,261
Percentage	85.9	94.0	40.0	47.4
Built Pre-1939	3,731	3,037	481,797	328,988
All Occupied Units	5,996	7,506	876,010	1,024,835
Owner	394	420	404,652	419,801
Percentage	6.6	5.6	50.0	39.0
Renter	5,602	7,137	471,358	607,573
Percentage	93.4	94.4	43.0	56.4
ECONOMICS				
Median Family Income	6,429	8,537	6,896	10,535
Median School Years Completed	12.5	12.6	12.1	12.4
Median Value Owner Occupied in $	22,200	37,333	17,300	26,700
Median Rent in $	92	123	78	114
Total Employed	6,535	6,745	126,276	1,150,796
Unemployed	481	575	6,914	86,802
Percentage	7.4	8.5	5.5	7.5

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2-1292

SANTA MONICA BOULEVARD & VERMONT AVENUE

	NODE		CITYWIDE	
POPULATION	**1960**	**1970**	**1960**	**1970**
Total Population	16,855	15,736	2,479,015	2,811,801
Black	510	1,287	334,916	503,606
Percentage	3.0	8.2	13.5	17.9
Spanish	869	3,936	230,399	518,791
Percentage	5.2	25.0	10.5	18.5
Median Age	38.8	34.2	33.2	30.6
Persons 0-17	2,482	2,751	756,640	849,246
Percentage	14.7	17.5	30.5	30.2
Persons 65+	2,830	2,432	253,993	283,395
Percentage	16.8	15.5	10.2	10.1
No. of Husband & Wife Families	3,343	2,720	545,109	553,564
No. of Unrelated Individuals	4,881	4,818	329,977	421,701
Average Household Size	2.04	2.01	2.77	2.68
HOUSING				
Total Units	8,866	7,982	935,507	1,074,173
Singles	2,655	1,913	559,745	560,378
Percentage	30.0	24.0	59.0	52.0
Multiples	5,531	6,081	375,762	510,261
Percentage	62.4	76.2	40.0	47.4
Built Pre-1939	6,589	4,093	481,797	328,988
All Occupied Units	8,274	7,636	876,010	1,024,835
Owner	1,404	896	404,652	419,801
Percentage	17.0	11.7	50.0	39.0
Renter	6,870	6,748	471,358	607,573
Percentage	83.0	88.4	43.0	56.4
ECONOMICS				
Median Family Income	5,901	8,142	6,896	10,535
Median School Years Completed	12.2	12.5	12.1	12.4
Median Value Owner Occupied in $	15,975	24,100	17,300	26,700
Median Rent in $	76	103	78	114
Total Employed	9,073	6,528	126,276	1,150,796
Unemployed	595	465	6,914	86,802
Percentage	6.6	7.1	5.5	7.5

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SANTA MONICA BOULEVARD & VERMONT AVENUE

	NODE		CITYWIDE	
POPULATION	**1960**	**1970**	**1960**	**1970**
Total Population	16,855	15,736	2,479,015	2,811,801
Black	510	1,287	334,916	503,606
Percentage	3.0	8.2	13.5	17.9
Spanish	869	3,936	260,399	518,791
Percentage	5.2	25.0	10.5	18.5
Median Age	38.8	34.2	33.2	30.6
Persons 0-17	2,482	2,751	756,640	849,246
Percentage	14.7	17.5	30.5	30.2
Persons 65+	2,830	2,432	253,993	283,395
Percentage	16.8	15.5	10.2	10.1
No. of Husband & Wife Families	3,343	2,720	545,109	553,564
No. of Unrelated Individuals	4,881	4,818	329,977	421,701
Average Household Size	2.04	2.01	2.77	2.68
HOUSING				
Total Units	8,866	7,982	935,507	1,074,173
Singles	2,655	1,913	559,745	560,378
Percentage	30.0	24.0	59.0	52.0
Multiples	5,531	6,081	375,762	510,261
Percentage	62.4	76.2	40.0	47.4
Built Pre-1939	6,589	4,093	481,797	328,988
All Occupied Units	8,274	7,636	876,010	1,024,835
Owner	1,404	896	404,652	419,801
Percentage	17.0	11.7	50.0	39.0
Renter	6,870	6,748	471,358	607,573
Percentage	83.0	88.4	43.0	56.4
ECONOMICS				
Median Family Income	5,901	8,142	6,896	10,535
Median School Years Completed	12.2	12.5	12.1	12.4
Median Value Owner Occupied in $	15,975	24,100	17,300	26,700
Median Rent in $	76	103	78	114
Total Employed	9,073	6,528	126,276	1,150,796
Unemployed	595	465	6,914	86,802
Percentage	6.6	7.1	5.5	7.5

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SELMA AVENUE CAHUENGA BOULEVARD

	NODE		CITYWIDE	
POPULATION	**1960**	**1970**	**1960**	**1970**
Total Population	14,886	13,827	2,479,015	2,811,801
Black	43	342	334,916	503,606
Percentage	.3	2.5	13.5	17.9
Spanish	840	1,822	260,399	518,791
Percentage	5.6	13.2	10.5	18.5
Median Age	43.3	39.8	33.2	30.6
Persons 0-17	1,309	1,248	756,640	849,246
Percentage	8.8	9.0	30.5	30.2
Persons 65+	2,896	2,712	253,993	283,395
Percentage	19.5	19.6	10.2	10.1
No. of Husband & Wife Families	2,406	1,876	545,109	553,564
No. of Unrelated Individuals	6,631	5,951	329,977	421,701
Average Household Size	1.68	1.60	2.77	2.68
HOUSING				
Total Units	10,022	9,680	935,507	1,074,173
Singles	1,714	1,140	559,745	560,378
Percentage	17.1	11.8	59.0	52.0
Multiples	8,110	8,533	375,762	510,261
Percentage	80.9	88.2	40.0	47.4
Built Pre-1939	7,197	5,161	481,797	328,988
All Occupied Units	8,958	8,658	876,010	1,024,835
Owner	812	683	404,652	419,801
Percentage	9.1	7.9	50.0	39.0
Renter	8,164	7,965	471,358	607,573
Percentage	91.1	92.1	43.0	56.4
ECONOMICS				
Median Family Income	5,535	7,584	6,896	10,535
Median School Years Completed	12.2	12.5	12.1	12.4
Median Value Owner Occupied in $	20,125	30,925	17,300	26,700
Median Rent in $	80	111	78	114
Total Employed	8,112	6,990	126,276	1,150,796
Unemployed	998	943	6,914	86,802
Percentage	12.3	13.5	5.5	7.5

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TUJUNGA BOULEVARD & VENTURA BOULEVARD

	NODE		CITYWIDE	
POPULATION	1960	1970	1960	1970
Total Population	17,544	11,599	2,479,015	2,811,801
Black	50	44	334,916	503,506
Percentage	.3	.4	13.5	17.9
Spanish	398	758	260,399	518,791
Percentage	2.3	6.5	10.5	18.5
Median Age	39.6	38.7	33.2	30.6
Persons 0-17	3,638	2,137	756,640	849,246
Percentage	20.7	18.4	30.5	30.2
Persons 65+	1,368	1,232	253,993	283,395
Percentage	7.8	10.6	10.2	10.1
No. of Husband & Wife Families	4,526	2,664	545,109	553,564
No. of Unrelated Individuals	3,100	2,832	329,977	421,701
Average Household Size	2.36	2.17	2.77	2.68
HOUSING				
Total Units	8,110	5,529	935,507	1,074,173
Singles	4,520	2,716	559,745	560,378
Percentage	55.7	49.1	59.0	52.0
Multiples	3,590	2,813	375,762	510,261
Percentage	44.3	50.9	40.0	47.4
Built Pre-1939	2,058	1,009	481,797	328,988
All Occupied Units	7,548	5,367	876,010	1,024,835
Owner	3,904	2,463	404,652	419,801
Percentage	51.4	45.9	50.0	39.0
Renter	3,644	2,904	471,358	607,573
Percentage	48.3	54.1	43.0	56.4
ECONOMICS				
Median Family Income	9,956	15,672	6,896	10,535
Median School Years Completed	12.6	12.9	12.1	12.4
Median Value Owner Occupied in $	23,700	39,650	17,300	26,700
Median Rent in $	98	142	78	114
Total Employed	8,800	5,965	126,276	1,150,796
Unemployed	584	504	6,914	86,802
Percentage	6.7	8.4	5.5	7.5

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HOLLYWOOD BOULEVARD AND HIGHLAND AVENUE

	NODE		CITYWIDE	
POPULATION	1960	1970	1960	1970
Total Population	11,438	12,016	2,479,015	2,811,801
Black	38	326	334,916	503,606
Percentage	.3	2.7	13.5	17.9
Spanish	357	1,509	260,399	518,791
Percentage	3.1	12.6	10.5	18.5
Median Age	44.5	41.0	33.2	30.6
Persons 0-17	832	970	756,640	849,246
Percentage	7.3	8.1	30.5	30.2
Persons 65+	2,281	2,379	253,993	283,395
Percentage	19.9	19.8	10.2	10.1
No. of Husband & Wife Families	1,718	1,606	545,109	553,564
No. of Unrelated Individuals	5,768	6,408	329,977	421,701
Average Household Size	1.57	1.56	2.77	2.68
HOUSING				
Total Units	8,261	8,835	935,507	1,074,173
Singles	1,169	858	559,745	560,378
Percentage	14.2	9.7	59.0	52.0
Multiples	7,067	7,958	375,762	510,261
Percentage	85.5	90.1	40.0	47.4
Built Pre-1939	5,768	4,344	481,797	328,988
All Occupied Units	7,322	7,756	876,010	1,024,835
Owner	559	559	404,652	419,801
Percentage	7.6	7.2	50.0	39.0
Renter	6,781	7,197	471,358	607,573
Percentage	92.4	92.8	43.0	56.4
ECONOMICS				
Median Family Income	5,792	7,510	6,896	10,535
Median School Years Completed	12.3	12.6	12.1	12.4
Median Value Owner Occupied in $	23,000	33,300	17,300	26,700
Median Rent in $	85	117	78	114
Total Employed	6,469	6,177	126,276	1,150,796
Unemployed	861	878	6,914	86,802
Percentage	13.3	14.2	5.5	7.5

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HOLLYWOOD BOULEVARD AND GOWER STREET

	NODE		CITYWIDE	
POPULATION	**1960**	**1970**	**1960**	**1970**
Total Population	7,067	2,342	2,479,015	2,811,801
Black	9	53	334,916	503,606
Percentage	.1	2.3	13.5	17.9
Spanish	292	311	260,399	518,791
Percentage	4.1	13.3	10.5	18.5
Median Age	45.2	37.3	33.2	30.6
Persons 0-17	567	227	756,640	849,246
Percentage	8.0	9.7	30.5	30.2
Persons 65+	1,445	325	253,993	283,395
Percentage	20.4	13.9	10.2	10.1
No. of Husband & Wife Families	1,316	336	545,109	553,564
No. of Unrelated Individuals	2,707	1,155	329,977	421,701
Average Household Size	1.74	1.64	2.77	2.68
HOUSING				
Total Units	4,334	1,571	935,507	1,074,173
Singles	669	226	559,745	560,378
Percentage	15.4	14.4	59.0	52.0
Multiples	3,463	1,365	375,762	510,261
Percentage	84.6	85.6	40.0	47.4
Built Pre-1939	2,778	726	481,797	328,988
All Occupied Units	3,924	1,446	876,010	1,024,835
Owner	345	93	404,652	419,801
Percentage	8.8	6.4	50.0	39.0
Renter	3,579	1,353	471,358	607,573
Percentage	91.2	93.6	43.0	56.4
ECONOMICS				
Median Family Income	6,102	8,515	6,896	10,535
Median School Years Completed	12.4	12.4	12.1	12.4
Median Value Owner Occupied in $	21,750	27,600	17,300	26,700
Median Rent in $	84	112	78	114
Total Employed	3,885	1,430	126,276	1,150,796
Unemployed	380	148	6,914	86,802
Percentage	9.8	10.3	5.5	7.5

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LANKERSHIM BOULEVARD & VINLAND AVENUE

	NODE		CITYWIDE	
POPULATION	**1960**	**1970**	**1960**	**1970**
Total Population	7,600	9,344	2,479,015	2,811,801
Black	1	0	334,916	503,606
Percentage	0	0	13.5	17.9
Spanish	263	146	260,399	518,791
Percentage	3.5	1.6	10.5	18.5
Median Age	41.9	38.7	33.2	30.6
Persons 0-17	1,551	1,697	756,640	849,246
Percentage	20.4	18.2	30.5	30.2
Persons 65+	1,268	1,674	253,993	283,395
Percentage	16.7	17.9	10.2	10.1
No. of Husband & Wife Families	1,833	1,963	545,109	553,564
No. of Unrelated Individuals	1,325	2,521	329,977	421,701
Average Household Size	2.35	1.70	2.77	2.68
HOUSING				
Total Units	3,558	4,897	935,507	1,074,17
Singles	1,705	1,359	559,745	560,37
Percentage	47.9	27.8	59.0	52.0
Multiples	1,853	3,538	375,762	510,261
Percentage	52.1	72.2	40.0	47.4
Built Pre-1939	1,501	1,369	481,797	328,988
All Occupied Units	2,711	4,677	876,010	1,024,835
Owner	1,213	1,143	404,652	419,801
Percentage	44.7	24.4	50.0	39.0
Renter	2,098	3,534	471,358	607,573
Percentage	55.3	75.6	43.0	56.4
ECONOMICS				
Median Family Income	6,690	9,471	6,896	10,535
Median School Years Completed	11.9	12.4	12.1	12.4
Median Value Owner Occupied in $	17,800	25,450	17,300	26,700
Median Rent in $	86	118	78	114
Total Employed	3,483	4,452	126,276	1,150,796
Unemployed	267	291	6,914	86,802
Percentage	7.7	6.5	5.5	7.5

STAFF REPORT
AMENDMENT TO ZONING REGULATIONS
ADULT BUSINESSES IN C-2 ZONE WITH CONDITIONAL USE PERMIT
CASE NO. 353.015
JANUARY 9, 1978

Since 1969, beginning on Whittier Boulevard, easterly of the 605 Freeway, the community has experienced a rapid growth of adult businesses. Beginning in the unincorporated County area with an adult bookstore, the uses have expanded to include a theater, massage parlors, and model studios, and now stretch to the central business district of Whittier. Fifteen adult businesses now exist, thirteen of which are located in the City of Whittier.

On June 21, 1977, the City Council adopted Ordinance 2116, as an urgency measure, defining and regulating certain adult businesses through the conditional use permit process. The Council in the adoption of said ordinance declared that such uses have operational characteristics which may have a deleterious effect on immediately adjacent residential and commercial areas. The purpose of the urgency measure was to attempt to keep the situation status quo so that the issue could be studied and appropriate regulations, if necessary, be adopted in order to protect such commercial and residential areas within the City from the possible blighting or downgrading effect of adult business. Ordinance 2116 was amended on December 7, 1977 by Ordinance 2128 which added two uses to those regulated.

The urgency ordinance was modeled after an ordinance of Detroit, Michigan, which was upheld by the U. S. Supreme Court in June of 1976. Said ordinance dispersed such uses by use of separation distances from one another and from residential districts. Extensive discussion of the Detroit Ordinance and others appears in the American Society of Planning Officials Report No. 327, "Regulating Sex Businesses,"

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a copy of which is enclosed. (Copies furnished only to the City Council, Planning Commission, and the file. The file copy may be reviewed in the office of the Planning Department.)

EXISTING USES

Currently, there are adult businesses at the following locations:

Address	Type of Business
10529 Whittier Blvd.	Model studio
10555 Whittier Blvd.	Model studio
10619 Whittier Blvd.	Model studio
10703 Whittier Blvd.	Model studio
10705 Whittier Blvd.	Book store
10711 Whittier Blvd.	Model studio
10713 Whittier Blvd.	Massage parlor
10824 Whittier Blvd.	Massage parlor
11205 Whittier Blvd.	Massage parlor
11527 & 29 Whittier Blvd.	Model studio
11531 Whittier Blvd.	Book store
11729 Hadley	Massage parlor
7038 Greenleaf	Theater

The first of these, at 11729 Hadley Street, took out permits for partitions in January of 1969. The use of the building was stated as "physio-massage." Another massage parlor opened in 1976, at 11625 Hadley, but closed shortly thereafter. Several of the businesses have in these few years, changed hands and locations. At 10510 Dorland, a permit has been requested to convert an existing residence to a model studio, and is currently awaiting dedication of street right-of-way for issuance of permit.

STAFF STUDY

Since June 21, staff has been collecting and analyzing data

and reviewing testimonies and contacting other agencies in efforts to determine what effect adult businesses have on adjacent properties. The one major factor to keep in mind in reviewing the data, however, is that not all of it can be isolated as being directly related only to the presence of adult businesses because of the variety of the factors influencing the study areas over the last ten years.

The study compared two areas on Whittier Boulevard over a ten-year period. Said areas are shown on the attached map. Area One, between Redman Avenue and Norwalk Boulevard, contains the largest concentration of adult businesses, the other, Area Four, easterly of Painter Avenue, between Jacmar and Watson Avenues, had no commercial frontage on Whittier Boulevard, and was used as a control. Area Four was selected because of its similar street patterns, lot sizes, and number of homes, to those of the first, where the adult businesses were concentrated.

The ten years compared were 1968 through 1977 (including some 1967 date where 1968 was not available). The first adult business on Whittier Boulevard was licensed on November 29, 1971, but the first in the study area appeared in 1973, and by late 1974, more than half of the current businesses were in operation. Therefore, the end of 1973 was selected as the date to be used to compare before and after affects.

The following is a summary of the results of the study, and indicates the factors considered:

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		Study Area One			Study Area Fo	
		Number	Per cent		Number	Per cen
1.	Number of homes	160			175	
2.	Number of businesses					
	1967	17			0	
	1976	19				
3.	(a) Number of changes of occupant					
	Homes	154	96		170	97
	Business	37	205		0	
	(b) Changes since 1973					
	Homes	88	57		32	19
	Business	17	46		0	
	(Adult businesses)	(7)	(19)			
4.	Number not changed					
	Homes	67	41		79	
	Business	5	28		0	
5.	Number of homes sold					
	(a) At least once	46	28		79	45
	(b) Since 1973	26	57		58	61
	Average sale price					
	1968 $19,100	7		$18,750	5	
	1969 17,000	2		19,000	6	
	1970 21,000	2		20,500	3	
	1971 25,400	5		20,000	3	
	1972 20,500	4		20,650	7	
	1973 21,500	2		20,500	9	
	1974 28,300	4		22,125	7	
	1975 26,100	7		26,000	9	
	1976 31,100	9		30,800	14	
	1977* 36,500	8		37,227	18	
	*Projected from 6 month data					
6.	Median Home Value (1970) $18,214			$18,280		
7.	Per cent owner occupied					
	1970		64			82
	1977		84			
8.	Ages of housing	39 years			27 years	

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A further breakdown of the study area one, into the first and second blocks northerly of Whittier Boulevard reveals that the percentages in items 3,and 5 above, are slightly higher in the first blocks than in the second blocks by 5 to 15 per cent.

Item 3 (b), above, shows a major difference between study areas one and four of 36% (57 - 19) in number of changes in occupancy. Item 5 shows that the rate of sales of housing is about the same (57% - 61%), but item 7 shows that the owner occupancy rate has increased from 64% to 84% in study area one. This trend is supported by testimony at a recent public meeting, soliciting such information.

For business properties, the picture is more conclusive than for residential. Expanding items 3 and 4, above, in the business category, we find the following:

Number of changes in occupancy	since 1967	37
	since 1973	17
Number changing more than once	since 1967	12
	since 1973	4
Number not changing	since 1967	5
	since 1973	10
Number of changes to adult businesses		7

In addition to the above data, the annual vacancy rate dropped in 1976 to the level in 1966, having increased, to a peak of three and one-half times that level in 1972. It must be noted, however, that this apparent stability is due to the fact that adult businesses now occupy previously vacant buildings.

The Whittier Police Department has, during the last few years, been collecting evidence in efforts to eliminate alleged illegal activities from the adult businesses. As a result of these efforts,

seven of the existing businesses are presently the subject of "red light abatement" action. The initial investigation and evidence gathering documented that all of the nude model studios and three of the massage parlors were actively involved in prostitution. Other problems created by the presence of these businesses are in the form of assault and battery and aggravated assault incidents. There have also been several thefts reported by the customers (johns) who are victimized by the employees. These individuals usually do not file complaints on the incidents, however, fearing that their spouses will become aware of their activities. Therefore, these incidents always do not appear on the police logs.

For several years, the Police Department has received complaints of excessive noise, pornographic material left laying about and in some instances sexual offenders, such as exhibitionists, venting their sexual frustrations in the adjoining neighborhood. Another problem posed by the patrons of these adult businesses is the influx of drunk drivers and intoxicated persons. The majority of customers frequenting the business after 4:00 p.m., and until the early morning hours are males who have been drinking and are seeking sexual release. The Police Department has compiled from the daily logs for the two, four-year periods, 1970-1973 and 1974-1977, the number of incidents of 38 types of criminal activity and the data compared with the City as a whole.

This comparison revealed the following numbers of incidents in the given years:

1970	-	23	1974	-	57
1971	-	29	1975	-	73
1972	-	52	1976	-	90
1973	-	29	1977	-	49
1970-73	-	133	1974-77		269

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The comparison of the totals of each four-year time period shows an increase of 102% in incidents of crime in the period 1974-77 over the period 1970-73, whereas, the City as a whole for the same period, experienced only an 8.3% increase in incidents of crime.

Some specific crimes increased in greater proportions as indicated in the following figures for selected crimes:

CRIME	1970-1973	1974-1977	% increase
All Assaults	8	39	387
Theft (Petty)	13	29	123
Robbery	8	13	63
Burglary (Residential)	15	23	53
Malicious Mischief	3	24	700
Prostitution	3	12	300
Grand Theft Auto	5	14	180
Theft (Grand)	4	9	125
Arson	0	5	
Displaying a Weapon	0	5	
Prowling	0	5	

Some crimes, on the other hand, decreased in frequency, such as felony narcotics, which decreased from 16 to 9, but due primarily to changes in narcotics laws. Eight other crimes decreased from one or two incidents in four years to zero to one incident in four years. Nineteen of the remaining types of crimes increased, while ten types were reported for the first time during the time period of 1974-1977.

At various public meetings, over the last several years, citizens have testified of being afraid to walk the streets, that some businesses have left the area or have modified their hours of operation, and that they are fearful of children being confronted by individuals of offensive character or of being exposed to sexually explicit material.

At a recent meeting, several of those who spoke, but lived some distance from the adult businesses, spoke on behalf of those who lived closer, but feared reprisals if they testified.

At one time, there was a general complaint from parents in the neighborhood that their minor children had been in possession of the negative portion of Polaroid film packs and although this image was not as clear as the positive portion, it clearly showed the lewd poses of the models working in the studios. Young males would rummage through the trash receptacles of the various businesses and pick up these items. It was noted during Police Department investigation of the alleged prostitution activities at these nude model studios, that they had become aware of the complaints and refused to allow Polaroid cameras in the businesses. This did not, however, stop the problem of adult newspapers obtained at the book store being left strewn in the parking areas and alleys adjacent to the businesses.

Rates and numbers of changes of occupancy of residences and increases in complaints to the Police Department are the only measurab indicators of the moral and emotional impact of adult businesses on the surrounding neighborhood. This impact is, however, the most difficult to assess and is probably the most significant as it relates to the mental and physical well-being of the neighborhood and the City as a whole.

The health, welfare, and general prosperity of the community are some of those things which facts and figures cannot adequately describe, but the protection and furtherance of which is part of the stated purpose for the development of land use regulations.

An indication of the intensity of the moral and emotional impact is the unity of the residents and their willingness, through organizations, such as Citizens for Decency Through Law, to work for improvement of their neighborhood. This organization has been successful in eliciting support of other organizations to help in said efforts.

Aesthetics are a matter of personal preference, but plays an important role in effecting peoples' attitudes. Regulations, such as the sign ordinance, may not control content or colors of buildings or signs. Typically, the adult businesses are painted in garish, high contrast colors, utilizing flashing or moving lights to attract attention to the businesses. This technique is not, however, unique to such businesses, but is quite common in marginal, strip commercial areas. It is noted that one other major strip commercial use, fast food restaurants, are beginning to change their images from the bright roofs, big signs and giant logos, to the softer, more contemporary, brick, wood, and tile, finding that their success does not depend entirely on their visibility. They have found that those who wish to avail themselves of the services offered will seek them out. The same philosophy could also be applied to adult businesses, allowing them to blend into other commercial neighborhoods.

Dispersion or Concentration

Two basic types of ordinances have been enacted by cities across the United States, dispersing or concentrating. In contrast to the Detroit ordinance, Boston created an "adult entertainment" district, concentrating adult businesses into what became known as the "combat zone." The purpose was to concentrate adult businesses into a single small area to prevent them from spreading into other areas of the City.

The Boston experience failed, however, because, according to Boston police and redevelopment spokesmen, "they (the property owners) killed the goose that laid the golden egg," by not policing themselves.

In Detroit, as in Boston, the problem was primarily in large downtown commercial districts and "skid rows." In these areas, adult entertainment businesses mingled with pawnshops, cheap hotels,

bars, strip joints, etc., as well as the "non-porno" businesses. Property owners, attracted by the high rents, willingly paid by the adult businesses, eventually forced many legimate businesses to close, move, or go broke by increasing rents.

In the Hollywood area, as reported in several articles appearing in the Los Angeles Times, owners have stated that they don't particularly care for the type of business, but like the rent that will be paid by these businesses. This could be a major factor in low rent commercial areas. In the Hollywood area, the influx of adult businesses appears to have been followed by a higher vacancy rate. In West Whittier, however, the commercial area between Redman Avenue and Norwalk Boulevard, suffered from a higher vacancy rate before the commencement of adult businesses than after, but largely because adult businesses occupy those buildings which were most frequently found vacant. It could be expected that an owner of a vacant building would accept the high offers for rent with a good chance that the building would stay rented.

For the purpose of determining impact of concentration of adult businesses, four areas were compared, using Polk directories from 1967 to 1977 (1966 thru 76 information), to determine the rate of change of occupancy in adjacent residential neighborhoods before and after the introduction of adult businesses. Three of the surveyed areas contained adult businesses, the fourth, the control area, used for the entire study, included no commercial. Area one has six adult businesses, area two has one, and area three has three. The following map shows the areas studied. The results are as follows:

	Changes Per Year Before A.B.'s	Changes Per Year After A.B.'s
Area 1	9.4	22 (1974+)
Area 2	.1	.1 (1972+)
Area 3	5.3	11 (1974+)
Area 4 (Control)	20	11 (1974+)

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Map of
City of Whittier
showing
Areas studied to determine the affects of adult businesses on adjacent properties

Area 1, with a concentration of adult businesses by 1974, experienced a 134% increase in annual turnover rate, Area 2 experienced no measurable change, Area 3, with three businesses at one location, experienced a 107% increase. The control area, with no commercial and no adult businesses, experienced a 45% decrease in turnover rate for similar periods.

If dispersion is determined to be the most effective type of control (short of prohibition) to impose on such uses to protect adjacent properties, the question then becomes how much dispersion -- how much separation between related uses and from adjacent residential uses.

The Supreme Court in the Detroit case found no objection to the 1,000 ft. separation of "regulated businesses" and 500 feet from residential districts. As mentioned earlier, Detroit's ordinance was developed for a large downtown, with a skid row area. With the exception of Whittwood, the Quad, Uptown Whittier, and the industrial area, Whittier's commercial areas are strips of shallow commercial lots along Whittier Boulevard and intersections of major streets. Almost any separation between residential districts and adult businesses eliminates these businesses from the strip commercial areas, forcing them into Uptown or the shopping centers.

The issue of separation of adult businesses from schools, churches, parks, and similar public assembly areas, has also been raised and dealt with in ordinances of other municipalities. Currently, the closest adult businesses to any of these public uses is 470 ft. from a church, 300 ft. from a park, and 1,100 ft. from a school.

Any distance requirement must, however, be based on the relationship between distance and degree of impact. Brief discussion with the principal of Franklin School and a representative of Whittier

Presbyterian Church, revealed that neither had seen any evidence of direct impacts on their institution by the adult businesses. Both were very much aware of their presence, however, and the principal at Franklin School stated that several families who have moved from the area cited the presence of said businesses. One businessman who relocated to another area in the City, stated that the businesses were not a factor but that his clients now comment on the improvement.

The park referred to is McNees Park, at Whittier and Hadley, in the unincorporated County area. Whittier Police Department indicates that while the park is the scene of many arrests and source of many problems, no definite correlation can be made between the problems and its proximity to adult businesses.

Only one church is within the areas where the current urgency ordinance would allow adult businesses. Other churches are within 250 feet of the area uptown where such businesses could be located. Whittier High School is also within 250 ft. of allowable location in the M zoned area and St. Mary's parochial school is within 500 feet. Central Park (Bailey and Washington) is also within 250 feet of property eligible for the location of adult businesses.

Police records show that complaints of public drunkenness are more frequent in the areas around adult businesses where they are also in close proximity to bars and taverns which are not "bonafide eating places." There may, therefore, be reason to separate adult businesses from businesses with certain types of on-sale alcoholic beverage permits issued by the Alcoholic Beverage Control Board.

Churches, schools, and other public facilities are closed much of the time and do not present the opportunities which the parks do. The peak use hours of adult businesses are evenings, when schools, churches, and most public facilities are closed. Therefore, the

effect on these uses would naturally be less than on uses which were all day uses, such as parks, or which, like residences, have evening and weekend "peak use" or enjoyment times. For these reasons, it may be in the community interest to require separation between adult businesses and parks. Five hundred feet should be considered a minimum separation, as this distance can be easily walked in less than five minutes. A thousand feet would require an individual to purposely set out to walk whereas 500 feet or under can be "wandered into."

Based solely on the study of one adult business, located almost in the midst of a residential neighborhood (area 2), and its effect on that neighborhood, it would appear that a 500 ft. separation from residential areas is adequate so long as the adult businesses are separated from one another to avoid concentration.

Adequate separation between adult businesses would also lessen the visual or aesthetic impact of concentrations such as businesses caused by their usual garish colors and flashing signs.

In addition to adult businesses, the Detroit ordinance included, when originally adopted as a skid row ordinance in 1962, as "regulated uses," Group "D" cabaret, establishments for the sale of beer or intoxicating liquor for consumption on the premises, hotels or motels, pawnshops, pool or billiard halls, public lodging houses, secondhand stores, shoeshine parlors, and taxi dance halls. Adult bookstores and adult theaters were added to this ordinance in 1972.

The Group "D" cabaret mentioned above is a topless or nude cabaret. Cabarets in the City of Whittier are currently regulated through a permit processed through the City Council. Other establishments for on-premise consumption of alcoholic beverages are currently regulated through the conditional use permit process. Pool or billiard halls, secondhand stores, and pawn shops, are permitted

uses in the C-2 zones and by themselves present no evidence of any deleterious effect on adjacent properties. Shoeshine parlors and taxi dance halls are more or less unique to the skid row areas of the large cities and do not exist in Whittier nor are they expected to.

None of these uses are inherently attracted to one another, but all seem to be common to skid row areas. The skid row aspect of the Detroit ordinance has no bearing on Whittier's situation and staff cannot substantiate the need for any further regulation of those uses which are not classified as adult businesses.

In some areas, adult only motels and hotels have been established, featuring closed circuit TV showing pornographic movies as well as providing other "services," similar to the adult businesses discussed above. Staff feels that the likelihood of this type of business occurring in Whittier is not too great as these are more prevalent in areas of high transient traffic. Rather than attempt to define such a use in anticipation of its occurring, the proposed definition of adult businesses should provide adequate control over such a use.

Definitions

Defining an "adult business" is difficult, particularly when trying to separate them from other uses with similar names. The current urgency ordinance uses as its base, the definitions which appear in the Detroit ordinance with minor modifications.

The key to the Detroit definitions is the "specified anatomical areas" and "sexual activities." However, such terminology is not immediately applicable to such uses as modeling studios, massage parlors, body painting studios, escort service, rap centers, and similar uses which utilize live humans for providing services. These uses differ from theaters and bookstores in that the latter uses reproductions of humans and the "specified anatomical areas" can be easily applied.

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In defining individual adult businesses, the following have been used:

"Adult Book Store" shall mean an establishment having as a substantial or significant portion of its stock in trade, material which is distinguished or characterized by its emphasis on matter depicting, describing, or relating to specified sexual activity or specified anatomical areas, or an establishment with a segment or section thereof devoted to the sale or display of such material.

"Adult Business" shall mean and include an adult book store, adult theater, massage parlor, or modeling studio.

"Adult Theater" shall mean a theater which presents live entertainment or motion pictures or slide photographs, which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activity, or specified anatomical areas.

"Massage Parlor" shall mean an establishment or business which is required to be licensed pursuant to Section 6280 et seq of the Whittier Municipal Code.

"Material" shall mean, and include, but not be limited to, books, magazines, photographs, prints, drawings, or paintings, motion pictures, and pamphlets, or any combination thereof.

"Adult Modeling Studio" shall mean an establishment or business which provides the services of modeling for the purpose of reproducing the human body wholly or partially in the nude by means

of photography, painting, sketching, drawing, or otherwise.

"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.

In the Detroit case, the phrase "distinguished or characterized by an emphasis on matter depicting..." was attached as vague. But, since there was no question in the Detroit case as to whether the material was "distinguished or characterized by an emphasis on matter depicting," the court did not rule on the vagueness of such a definition. A similar vagueness is found in the definition of adult bookstore where the phrase reads, "an establishment with a segment or section devoted to the sale or display of such material." The City's urgency ordinance narrows the vagueness some by using the phrase, "substantial or significant portion of its stock in trade... depicting...." Such words as substantial, significant, distinguished by, segment and section usually require the courts to provide the narrowing.

A number of cities define adult businesses as:

"...any business which is conducted exclusively for the patronage of adults, from the premises of which minors are specifically excluded, either by law or by the operation of such business."

Such a definition will generally encompass any use which the City is attempting to regulate and gets around the touchy question of content of material, relying on existing State and local regulations. These regulations are briefly discussed below.

The Whittier Municipal Code, Section 6288, prohibits giving a massage to or admitting any person under 18 years of age into a massage parlor unless parent or guardian has consented thereto in writing.

Minors are currently excluded specifically from adult bookstores and adult theaters by Section 313.1 of the Penal Code of the State of California because of the "harmful" content of the material available.

Section 309 of the Penal Code prohibits admitting minors into places of prostitution, but the law does not prohibit admitting a minor to view the physical body and photograph it for his own use. In this case, the exclusion is imposed by the management of the business who is not required by law to do so but does so out of fear of the possibility of being found guilty of contributing to the delinquency of a minor pursuant to Section 272 of the Penal Code.

The difficulty at this point in time with a general definition is that litigation is still pending on one such ordinance whereas the court has sanctioned, though on a 5 - 4 vote, the definitions contained in the Detroit ordinance.

The two types of definitions can, however, be used together. The severability clause (Section 9105) of the zoning regulations would protect one definition if the other was ruled against by the court.

If the courts should rule in favor of the general definition, then the ordinance is that much stronger and accomplishes the overall goal of regulating existing and future adult business uses and eliminates the need for defining every possible business which might be conjured up.

Control

Assuming the dispersion approach is the most acceptable, two methods are available as alternatives to determining where adult businesses can be located. The first is to permit them by right in given zones, with the locational criteria. The second is to require approval through a permit process of some kind. The conditional use permit is the only tool available to the City for this type of control.

By allowing the use to be established by right, the City relinquishes control over the use other than through enforcement of criteria which might be established. Such regulation fails to take into account special circumstances relative to a specific location, on which adult businesses might have impact. The conditional use permit process allows staff and Planning Commission to review each request and requires the applicant to show that the use will not have an adverse impact on the area and that there is a demonstrated need for the use at that location.

The question remaining then is which zone is appropriate. Being a commercial use, an adult business would be limited to one of the C zones or the M zone. The C-0 zone is intended for offices and uses which service offices or employees of office type uses, such as beauty and barber shops. The C-0 zone, as well as the C-1 zone, act somewhat as transitional or buffer zones, often separating heavier C-2 zones from residential zones and allowing residential uses as

as well. Adult businesses in the C-0 and C-1 zones would not be able to meet any reasonable separation criteria. The C-2 zones, though often separated from residential districts by C-0 and C-1 zones are not ideal either because of their proximity to residential uses and the shallow depths of most C-2 zoning which makes meeting separation criteria difficult.

The courts have said that restrictions on a legal business cannot be such that the effect is elimination or prohibition of such uses. First permitting adult businesses in the C-2 zone would provide reasonable flexibility through the conditional use permit process for the approval of a limited number of adult businesses in several areas of the City.

Abatement of Nonconforming Uses

It is quite obvious that any requirement for separation from residential areas and between businesses will have the effect of making all of existing adult businesses, with the exception of the theater Uptown, nonconforming uses, subject to abatement.

The courts have held that reasonable time must be given in the amortization of nonconforming uses. Such time limits must commensurate with investment involved and based on the nature of the use.

The improvement made to structures in which existing adult businesses are located were basically partitioning and signs. The valuation listed on the permits ranged from (total of all permits on property) $1,000 to $12,450, averaging $3,105 per adult business. Three locations apparently had no modifications which required building permits. The permit fees amounted to a total of $572.95, averaging $47.75 per business. One case of high valuation and permits resulted from the repair to a structure after extensive

fire damage. These amounts are not, in staff's opinion, significant investments for the use, and on the high rate of return on adult business investments any costs should have been amortized several times.

The courts in 1974 upheld an 18-month amortization of a use declared a public nuisance, where users had no investment in any permanent improvements on the property and where users had adequate time to make plans to move and where there was substantial evidence that there was adequate properties favorably zoned in the county which could be used to locate the business.

A reasonable amortization should not be less than 18 months nor need be longer than two or three years. Where the conformity only requires a change in the stock in trade, such as books or a change in the material presented as in a theater, the amortization period can be shorter. The proposed ordinance would provide 90 days in this case.

Conclusion

The information obtained and reviewed during the conduct of this study has definitely shown that concentration of adult businesses in the City of Whittier have had an adverse impact on the adjacent neighborhoods. The increases in crime and residential occupancy turnover are two of the key indications of neighborhoods beginning to decline and deteriorate. The City's intent in regulating such businesses is to prevent them from causing deterioration in adjacent neighborhoods. Assuming that such regulation, now pending is timel· that is, not too late, some of the more physical evidences of deterioration are not blatantly evident. However, experiences of c municipalities and of individuals support the impact of prolonged concentration of such businesses.

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Inasmuch as the courts have prevented the outright prohibition of adult businesses, regulation is the only control left to the cities. It is evident from the study that individual, isolated businesses do not have nearly as great an impact as concentrations.

Therefore, the dispersion of adult business in certain areas of the City is the most appropriate form of regulation, using the conditional use permit process to review each application.

The Supreme Court has upheld 1,000 foot and 500 foot separations in the Detroit case. These separations are adequate for Whittier's situation. In certain circumstances, lesser separation would accomplish the same end, but structuring an ordinance with specific areas complicates its enforcement.

The effect of such separation would make portions of the industrial areas and shopping centers eligible locations for adult businesses, subject to conditional use permit approval.

All of the existing locations of adult businesses would become nonconforming under the provision of the proposed ordinance and required to conform within the prescribed abatement periods.

Recommendation

Staff recommends that the Planning Commission recommend that the City Council find that the regulation of adult businesses is required for the preservation of the integrity of existing commercial area and residential areas in close proximity thereto and is in the public interest and would promote the general welfare of the community and that the attached draft ordinance regulating such businesses be adopted.

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(Considered by Whittier City Planning Commission, January 9, 1978 and Whittier City Council January 24, 1978)

Whittier City Planning Commission
January 9, 1978
Whittier City Council
January 24,1978

Spokane, Washington
Proposed Amendment to County Zoning Code
****
Spokane City Plan Commission
November 29, 2000
****
Declaration of Patricia Connolly Walker
****
Declaration of Londi K Lindell

Summary Of Review & Conclusions Regarding the City of St. Cloud's Regulation of Adult Use Businesses by John W. Shardlow

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Littleton, Colorado Police Department Reports

Oklahoma City, Oklahoma Community Development Department
Survey of Real Estate Appraisers
March 3, 1986

Dallas, TX
Analysis of the Effects of SOBs
on
The Surrounding Neighborhoods
April 1997

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Notebook #1	22 Cities Studies (0 cases)
Notebook #2	Indianapolis, IN Study (2)
Notebook #3	Garden Grove (3) Houston, TX (4a) Houston, TX (4b) Phoenix (5a) Phoenix Affidavit (5b) Phoenix P.D. Reports (5c)
Notebook #4	Chattanooga, TN (6) Minneapolis, MN (7) L.A., California (8)
Notebook #5	C.A. Whitter (9) Spokane, WA. (10 Pg. 1-8) Spokane, WA. (10 Pg. 9-20) Spokane, WA. (10 Pg. 21-42) Spokane, WA. (10 Pg. 43-59) Spokane, WA. (10 Pg. 91-112) St. Cloud (11) Littleton, CO. (12) Oklahoma City, OK. (13) Dallas, TX. (14)
Notebook #6	Greensboro (15) Amarillo, TX (16) Abilene, KS DK.CO. Roncek (17a) Abilene, KS Dk.Co. McCleary (17b) N.Y. Time Square (18) MN State (19)

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Citation #1
124 S.Ct. 2219

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STUDY OF THE EFFECTS OF THE CONCENTRATION OF ADULT ENTERTAINMENT ESTABLISHMENTS IN THE CITY OF LOS ANGELES

DEPARTMENT OF CITY PLANNING

CITY OF LOS ANGELES

JUNE 1977

CITY PLAN CASE NO. 26475
Council File No. 74-4521-S.3

STUDY OF THE EFFECTS OF THE CONCENTRATION OF ADULT ENTERTAINMENT ESTABLISHMENTS IN THE CITY OF LOS ANGELES

Prepared for:

Planning Committee of
the Los Angeles City Council

Prepared by:

Los Angeles City Planning Department

June, 1977

Exhibit D

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MMARY AND RECOMMENDATIONS

A. Types of Ordinances to Control "Adult Entertainment" Uses

Two methods of regulating adult entertainment business via land use regulations have developed in the United States. They are: 1) the concentration of such uses in a single area of the city as in Boston; and 2) the dispersal of such uses, as in the City of Detroit. The Detroit ordinance has been challenged and upheld by the U.S. Supreme Court (Young vs. American Mini-Theaters, 96 S. Ct. 771, 1976).

B. Effect of "Adult Entertainment" Businesses on the Community

There has been some indication that the concentration of "adult entertainment" uses results in increased crime and greater police enforcement problems. In the City of Los Angeles, the Los Angeles Police Department has found a link between the concentration of such businesses and increased crime in the Hollywood community. (The major portion of a Police Department report on this subject is herein contained.) While several major cities have adopted ordinances similar to the Detroit ordinance, no other major city has, to our knowledge, adopted a Boston-type ordinance.

Testimony received at two public meetings on this subject has revealed that there is serious public concern over the proliferation of adult entertainment businesses-particularly in the Hollywood area. Citizens have testified of being afraid to walk the streets; that some businesses have left the area or have modified their hours of operation; and that they are fearful of children being confronted by unsavory individuals or of being exposed to sexually explicit material. A representative of an adult theater chain testified in support of the manner in which this business was run and in support of the type of clientele which attend the theaters. The Planning Department staff is of the opinion that the degree of deleterious effects of adult entertainment businesses depend largely on the particular type of business and on how any such business is operated.

A mail survey questionnaire conducted by the Planning Department has tended to emphasize general public concern over the proliferation of sex-oriented businesses and has indicated further, that appraisers, realtors and representatives of lending institutions are generally of the opinion that concentration of adult entertainment businesses exerts a negative economic impact on both business and residential properties. They feel that the degree of negative impact depends upon the degree of concentration and on the specific type of adult entertainment business.

The 1970-76 change in the assessed value of residential and commercial properties containing concentrations of adult entertainment businesses was compared with other areas without such concentrations, and with the City as a whole. On the basis of this comparison, it cannot be concluded that properties containing concentrations of adult entertainment businesses have directly influenced the assessed valuations of such properties.

Data and analysis based on the U.S. Census of 1970 and certain trend data from the censuses of 1960 and 1970 as applied to areas of the City containing concentrations of adult entertainment businesses are included in the body of the report and in the Appendix.

C. Scope of the Ordinances Enacted by Other Jurisdictions

The scope of "adult entertainment" ordinances encompases a variety of adult activities. For example, the Los Angeles Study has considered "adult entertainment" establishments to include adult bookstores and theaters, massage parlors, nude modeling studios, adult motels, arcades, and certain similar businesses. Many other ordinances studied, however, are less broad in their coverage. The Detroit ordinance, for instance does not regulate massage parlors or adult motels, nor does it provide for the closing of any such businesses by amortization, which would be necessitated by the retroactive application of such an ordinance. Table I on page 11 indicates the ordinances reveiwed and the major categories of uses they regulate.

Effect of Ordinances Enacted by Other Jurisdictions: The U.S. Supreme Court in Young vs. American Mini-Theaters pointed out, as one of the bases for upholding the Detroit ordinance, that the regulation did not limit the number of "adult entertainment" businesses. Our study has indicated that the practical effect of literal adoption of "Detroit" language without modification in the City of Los Angeles would be to limit the potential locations for such businesses rather severely. Due to the predominance of commercial zoning in "strips" along major and secondary streets, an ordinance preventing "adult entertainment" business from locating within 500 feet of residentially zoned property would, in effect, limit such businesses to those areas of the City where there is commercial zoning of greater than 500 feet in depth. Areas with such commercial frontage would include downtown Los Angeles, a small part of Hollywood, Westwood, and Century City. A few industrial areas would also afford a separation of this distance from residential properties. The limitation of 1,000 feet between establishments (as provided in the Detroit ordinance) would likely be inappropriate in the City of Los Angeles inasmuch as commercial zoning is located in a strip pattern along most of the City's approximate 1,400 miles of major and secondary highways. (It is estimated that approximately 400 miles of such "strip" commercial zoning exists in the City.)

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D. Recommendations

1. If the City Council should find it advisable in light of the findings of this report to recommend the preparation of an ordinance to control adult entertainment businesses, such an ordinance should be of a dispersal type rather than a concentration type. (To build a planning policy basis for such regulation, the Council may also wish the Planning Department to consider the development of appropriate policies for incorporation within the Citywide Plan.)

2. If a dispersal type ordinance is recommended by the City Council, the Planning Department is of the opinion that such an ordinance should be designed for specific application in the City of Los Angeles, rather than the direct adoption of the Detroit model. If such a dispersal type ordinance is recommended for enactment locally, it should consider:

   a. distance requirements between adult entertainment establishments. The Planning Department recommends that a separation between establishments greater than 1,000 feet is necessary and desirable.

   b. distance requirements separating adult entertainment establishments from churches, schools, parks, and the like. The Planning Department suggests that a separation of at least 500 feet is necessary. A similar distance separating adult entertainment uses from single-family residential development should also be considered.

   c. the possibility of enacting additional provisions to regulate signs and similar forms of advertising should also be considered.

3. If the City Council should find it advisable to recommend all of the types of "adult entertainment" businesses included in this study, it should consider whether all such uses should be in the same class and subject to the same regulations.

4. Should the City Council recommend the preparation of a zoning ordinance to regulate adult entertainment businesses, other sections of the Municipal Code relating to the subject, including police permit requirements, should also be amended in order to be consistent with the zoning regulations and to facilitate the administration and enforcement of such regulations.

5. The Planning De rtment recommends that i be instructed review existing zoning regulations applying to the C4 zone which currently prohibits "strip tease shows" and that the Zoning Administrator, through interpretation, consider expanding the list of prohibited uses in said zone to include additional adult entertainment uses as herein indentified.

6. To assist in the regulation of "adult entertainment" businesses, the City should continue to vigorously enforce all existing provisions of the Municipal Code relating to the subject, including Zoning regulations.

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I.

FINDINGS

1. A Boston-type ordinance (concentration) to control adult entertainment businesses would not be acceptable nor desirable in the City of Los Angeles.

2. In the event legislation is enacted in the City of Los Angeles there is adequate basis for a Detroit-type ordinance (dispersion) which requires a distance of 1000 feet between establishments and 500 feet from residential zones.

-- Existing locational patterns of adult entertainment businesses (in Hollywood, Studio City, North Hollywood) actually represent a concentration rather than a dispersion of establishments. (Such patterns are contrary to the Detroit concept and are due, in fact, to the City's strip commercial zoning pattern.)

3. If dispersion is desired in Los Angeles, an ordinance should be designed specifically for the City. (Direct application of the Detroit ordinance would not be desirable or appropriate in Los Angeles and would, in part, tend to result in a concentration of such businesses.)

4. Statistics provided by the Los Angeles Police Department (LAPD) indicate a proportionally larger increase in certain crimes in Hollywood from 1965-75, as compared with the City of Los Angeles as a whole. (Hollywood has the largest concentration of adult entertainment businesses in the City.)

5. Statistics provided by the LAPD indicate that there has been a large increase in adult entertainment enterprises since 1969, particularly in Hollywood. From December 1975 to December 1976, however, there has been a decrease in such establishments.

6. Testimony obtained at two public meetings on the Adult Entertainment study conducted on April 27 and 28, 1977 indicated that:

- Many persons, including the elderly, are afraid to walk the streets in Hollywood.
- Concern was expressed that children are being exposed to sexually explicit materials and unsavory persons.
- Some businesses no longer remain open in the evenings and others have left the area allegedly directly or indirectly due to the establishment of adult entertainment businesses.
- In Hollywood, some churches drive the elderly to services and others provide private guards in their parking lots.
- Nearly all persons opposed the concentration of adult entertainment activities.

Responses to questionnaires of the City Planning Department were indicated that:

- Appraisers, realtors, lenders, etc. believe that the concentration of adult entertainment establishments has had adverse economic effects on both businesses and residential property in respect to market value, rental value and rentability/saleability; that the adverse economic effects diminish with distance but that the effects extend even beyond a 1000-foot radius; and that the effects are related to the degree of concentration and to the specific type of adult entertainment business.

- Businessmen, residents, etc. believe that the concentration of adult entertainment establishments has adverse effects on both the quality of life, and on business and property values. Among the adverse business effects cited are: difficulty in retaining and attracting customers to non- "adult entertainment" businesses; difficulty in recruiting employees; and difficulty in renting office space and keeping desirable tenants. Among the adverse effects on the quality of life cited are increased crime; the effects on children; neighborhood appearance, litter and graffiti.

8. A review of the percentage changes in the assessed value of commercial and residential property between 1970 and 1976 for the study areas containing concentrations of adult entertainment businesses have indicated that:

- The three study areas in Hollywood containing such businesses have increased less than the Hollywood Community, and less than the City as a whole. Two of the three study areas in Hollywood have increased less than their corresponding "control areas"; however, one such study area increased by a greater amount than its corresponding control area.

- The study area in Studio City has increased by a greater percentage than its corresponding "control area", by a slightly lower percentage than the Sherman Oaks-Studio City Community; and by a considerably greater percentage than the entire city.

- The study area in North Hollywood has increased by a considerably lower percentage than its corresponding control area, the North Hollywood Community, and the City as a whole.

- On the basis of the foregoing it cannot be concluded that adult entertainment businesses have directly influenced changes in the assessed value of commercial and residential properties in the areas analyzed.

9. There are various existing laws and regulations (other than zoning) available to effect proper regulation of adult entertainment businesses.

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Kansas Catholic Conference

6301 ANTIOCH • MERRIAM, KANSAS 66202 • PHONE/FAX 913-722-6633 • WWW.KSCATHCONF.ORG

House Federal and State Affairs Committee
March 18, 2010

Testimony in Support of HB 2633 – The Community Defense Act
Michael Schuttloffel, Executive Director, Kansas Catholic Conference

Chairman Neufeld and members of the committee, I am testifying in support of HB 2633 on behalf of the Kansas Catholic Conference, the public policy arm of the Catholic Church in Kansas.

The Catholic Church does not seek to legislate its religious preferences upon the people of Kansas. Instead, it is our objective to bring attention to the moral principles at stake in debates over public policy such as the one occurring today. Many of the political issues debated by the Legislature have a moral dimension, and the legislation before you is no exception. One need not be a person of the Catholic faith, or any faith, to recognize the need for this legislation.

We believe it is important for the people's elected representatives to ensure that space remains in our society for decency to flourish. If there can be no possible regulation of the establishment of so-called "adult entertainment centers" next to our homes, schools, churches, and playgrounds, then what space will be left to the great majority of us that are deeply offended by their presence? It strains credulity to believe that our Founding Fathers intended the Constitution to be an instrument of protection for sexually oriented businesses that wish to operate whenever, wherever, and however they like.

We are confident that it has been established that regulation of sexually oriented business is constitutional. We believe that the deleterious effects of these businesses on society's moral fabric have been persuasively demonstrated as well.

Pornography is a cancer eating at our nation's soul. It destroys the marriages of those who become addicted to its consumption. It destroys the lives of those lured into the industry through drugs, disease, and the evisceration of self-esteem and self-respect. It destroys the innocence of children who are exposed to it at ever younger ages.

House Fed & State Affairs
Date: 3-18-2010

Attachment 3

It would be difficult to purposely design a medium that more perfectly targets the vulnerabilities of men and women than pornography. This industry preys on the worst instincts of us all. The fact that people routinely consent to their own exploitation does not render those choices harmless to themselves or society. Our laws should be written to reflect and to empower our better angels. Our vices need no aid.

Beyond the moral decay encouraged by pornography, sexually oriented business facilities like those contemplated by this legislation generate increased crime, decreased property values, prostitution, drug trafficking – the list goes on and on. The question is not whether their presence has negative effects on a community – this has been well documented. Rather, do these businesses hold any redeeming value for their communities at all? Few Kansans would answer in the affirmative.

Instead, these businesses can be counted on to hold hostage small towns without the financial means to defend themselves against their bullying tactics. Perhaps it should come as no surprise that an industry whose business model is exploitation would employ similar legal methods. Will the Legislature side with big porn against the state's small towns? Or will it side with the mothers and fathers who do not want a smut shop near their children's school or playground?

If we can and do prohibit prostitution, how can it be said that we cannot or should not place mild regulations on the location and operation of other forms of sexually oriented enterprise? Or does every regulation placed upon this industry traduce the Constitution? How long will it be before we are next told that even restrictions on the age of employees at adult entertainment facilities are a violation of the fundamental rights of customer and service provider alike?

HB 2633 places sensible, constitutional regulations on the operation of sexually oriented businesses. For those concerned that this legislation will fatally cripple the adult entertainment industry, have no fear. The industry – which nets more than the NHL, NBA, and Major League Baseball combined – will survive this legislation, rest assured.

Please support HB 2633. Thank you for your consideration.

Negative Secondary Effects of Sexually Oriented Businesses
HB 2633
By Scott D. Bergthold
presented to
House Federal & State Affairs Committee
Kansas Legislature
2010 Session

Speaker background:

Co-author, *Local Regulation of Adult Businesses, 2008 Ed. (Thomson West)*

Cases:

- **City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004)**
- **5634 East Hillsborough v. Hillsborough County, 294 Fed. Appx. 435(11th Cir. 2008)**
- **Sensations, Inc. v. City of Grand Rapids, 526 F.3d 291 (6th Cir. 2008)**
- **Daytona Grand, Inc. v. City of Daytona Beach, 490 F.3d 860 (11th Cir. 2007)**
- **Heideman v. South Salt Lake City, 165 Fed. Appx. 627 (10th Cir. 2006)**

House Fed & State Affairs
Date: 3-18-2010
Attachment 4

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding 1,000-ft. rule)

1. Legislatures can be proactive to prevent negative effects
2. Any evidence "reasonably believed to be relevant" is sufficient
3. Government is given leeway to address negative effects

Sources of Secondary Effects Information

1. Land Use Studies
2. Crime Reports
3. Judicial Opinions
4. Investigator Affidavits
5. Anecdotal Reports

Types of Secondary Effects

1. Adverse impacts on surrounding properties
2. Crime and its attendant public safety risks
3. Illicit sexual conduct and potential disease
4. Illicit drug use and trafficking
5. Litter, aesthetic impacts, noise, blight

Cases upholding similar regulations:

1. ***People ex rel. Deters v. Lion's Den***, No. 5-05-0413 (Ill. Ct. App. 2007) (1,000-ft. setback)
2. ***City of Erie v. Pap's A.M.***, 529 U.S. 277 (2000) (nudity prohibition)
3. ***Heideman v. South Salt Lake City***, 165 Fed. Appx. 627 (10th Cir. 2006)
4. ***Jake's Ltd., Inc. v. City of Coates***, 284 F.3d 884 (8th Cir. 2002) (6-ft. rule)
5. ***Richland Bookmart, Inc. v. Nichols***, 137 F.3d 435 (6th Cir. 1998) (statewide hours)

HB 2633 includes common-sense regulations that have been repeatedly upheld by the courts.

Every federal appellate case to consider dancer-patron buffers, no-touch rules, hours of operation, and open-booth regulations has upheld them as constitutional.

Secondary effects data relevant to regulating sexually oriented clubs and bookstores:

1. **Summaries of Key Reports**
2. **Phoenix, Arizona**
3. **Indianapolis, Indiana**
4. **Garden Grove, California**
5. **Whittier, California**

Secondary effects data relevant to regulating sexually oriented businesses:

6. Austin, Texas
7. Greensboro, North Carolina
8. Amarillo, Texas
9. Kennedale, Texas
10. Spokane, Washington Evidence re: Retail Adult Bookstores
11. 2008 Jackson County, Missouri Expert Report (describing flaws in industry reports)

Findings of expert witnesses:

1. Finding of secondary effects from sexually oriented businesses is scientifically robust, being confirmed in wide variety of data sources
2. The legislature has a substantial government interest in regulating adult businesses to prevent the identified negative secondary effects
3. Industry "counter-studies" based on ever-changing methodologies and faulty data (calls-for-service (CFS) to the police)
   - CFS are weakly correlated to actual crime
   - Most vice crimes never result in CFS

Industry experts' attacks insufficient:

1. ***City of Erie v. Pap's A.M.***, 529 U.S. 277 (2000) (Linz)
2. ***Daytona Grand, Inc. v. City of Daytona Beach***, 490 F.3d 860 (11th Cir. 2007) (Linz, Fisher)
3. ***Doctor John's, Inc. v. Wahlen***, 542 F.3d 787 (10th Cir. 2008)
4. ***Heideman v. South Salt Lake City***, 165 Fed. Appx. 627 (10th Cir. 2006)
5. ***SOB, Inc. v. County of Benton***, 317 F.3d 856 (8th Cir. 2003) (Linz)

Industry experts' attacks insufficient (cont'd):

6. ***Gammoh v. City of La Habra***, 395 F.3d 1114 (9th Cir. 2005) (Linz)
7. ***G.M. Enterprises, Inc. v. Town of St. Joseph***, 350 F.3d 631 (7th Cir. 2003) (Linz)
8. ***World Wide Video of Washington v. Spokane***, 368 F.3d 1186 (9th Cir. 2004) (McLaughlin)
9. ***Fantasy Ranch, Inc. v. City of Arlington***, 459 F.3d 546 (5th Cir. 2006) (Morris)
10. ***Fantasyland Video, Inc. v. County of San Diego***, 505 F.3d 996 (9th Cir. 2007) (Linz, Goldenring)

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HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
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INSURANCE
TAXATION

(Testimony provided by Representative Anthony R. Brown, 38th District - written testimony only)

Article from the Kansas City Star, March 14, 2010

Two men stabbed outside strip club

Two area men were stabbed outside a strip club early this morning near Lawrence.

They were treated at Overland Park Regional Medical Center, neither for life-threatening injuries, said Sgt. Steve Lewis of the Douglas County Sheriff's Department.

Lewis said the stabbing occurred around 12:30 a.m. outside the Outhouse, located just east of Lawrence. No suspect is in custody, but authorities are searching for a white male with short brown hair. He was a passenger in a dark SUV.

Anyone with any information is urged to call the Lawrence TIPS hotline at 785-843-8477 or 785-843-TIPS.

Randy Heaster, rheaster@kcstar.com

Posted on Sun, Mar. 14, 2010 11:26 AM

House Fed & State Affairs
Date: 3-18-2010
Attachment 5

TESTIMONY IN FAVOR OF HB 2633
The Community Defense Act
Diminishing the opportunity for subjugation of women is good public policy for Kansas
House Federal & State Affairs Committee
Concerned Women for America of Kansas
March 15, 2010

Chairman Neufeld and Members of the Kansas House Federal & State Affairs Committee:
Concerned Women for America of Kansas is testifying in favor of HB 2633, the Community Defense Act. As the largest public policy women's organization in the United States, we have a vested interest in furthering public policy that puts boundaries around businesses that subjugate women. A society that regulates tobacco products, drugs, and even proposes to regulate American's diets by limiting fats and salt should have no problem in regulating an industry that is the source of drugs, prostitution, disease and misery not to mention the destruction of families and marriages.

We are concerned about the young women who enter the industry of sexually-oriented businesses, often as waitresses, hostesses, etc. but then are lured into dancing by managers who entice them with promises of money and admiration by the patrons. According to testimony given to the Michigan House Committee of Ethics and Constitutional Law on January 12, 2000, by David Sherman, former manager of various strip clubs, drug and alcohol abuse are rampant among the employees of these establishments. By self-admission the women dancers (usually girls 18-21) take drugs to "numb themselves", "to fill a void"; this drug use usually escalates as they grow older and encounter more competition for patron's favors. He testified that part of the "management's" job is to groom young girls as potential dancers, to get them to feel at home and among friends before they ask them to dance "as a favor." Abuse by managers and patrons is common; women and girls are often coerced into performing "favors" for special customers by managers who don't want to lose their business. Women who strip are usually considered independent contractors, renting their dancing space or booths. Sometimes they end up paying up to 30 percent of their income just to work, not counting the tips they must pay to busboys, bouncers, bar-tenders, etc. They pay their own insurance, social security, taxes, etc. This former manager freely admits in his testimony that girls as young as 14 or 15 are working in these clubs; often they are the victims of human trafficking. As the clubs proliferate, the need for dancers and prostitutes escalates; the demand cannot be met by normal supply so traffickers bring in new supplies of girls. Sexually-oriented businesses contribute to crime, drug abuse, and facilitate sexual offenders who often own these businesses, not to mention the desensitization, degradation and destruction brought upon the young girls and women who work in them.

The restriction in hours of operation will help curb many of the illegal activities such as drug-dealing, solicitation and illegal dances brought about by the intoxication of both dancers and patrons. It will also help ensure that entertainers and employees will have safer places to work, and communities will be safer places to live and work. Many of the women feel they are forced by lack of education or lack of other job opportunities to work in these establishments. By limiting work hours, they could have the time to complete their education, find other job opportunities or be able to spend more time with their children and families. It will curb the enormous amount of cash flowing away from the families of patrons into club owner's pockets.

In closing, CWA of Kansas urges the Kansas Legislature to put in place public policies such as the Community Defense Act to protect women and young girls, to curb the detrimental effect these establishments have on families and to make Kansas a better place to live and work.

Judy Smith, State Director
Concerned Women for America of Kansas

Attachment 6

House Fed & State Affairs
Date: 3-18-2010

Attachment 6

Thank you for the opportunity to address you today.

My name is Serena Hein, I'm the Co-Chair of the Kansas State Progressive Caucus, Kansas Legislative director for the Greater Kansas City Women's Political Caucus, President and founder of the Women's Liberation Foundation which is a 501c3 charity in Kansas City focused on women's' rights. I'm on the executive committee for the Kansas State Democratic Party, and a two term precinct committeeperson as well as captain of my ward. I've also been working as an exotic dancer for the past 11 years. Today I am talking to you as a Christian.

The question of "Should the government be allowed to control an individual's life and what is the intended role of the government" is an ongoing debate within Christianity today. There are two opposing views on the Christian side of this answer the first is from the liberation minded Christians who see government as an oppressive institution and the Church as a new way to provide for the needs of the people that would make government obsolete.

And the other side that unfortunately is the more popular Christian philosophy in America these days is that of the morality Christians who define a Christian and Christianity as adhering to a set of moral behaviors and within that framework the government can be used as a tool to make the people behave in what they consider a Christian manner. For the sake of a church and a unified nation these two conflicting Christian approaches need to be reconciled.

The main problem with using the government as an enforcer/preventer of a particular behavior is that every time you create a law that violates the rights of the citizens you are not only creating a criminal in the eyes of the government but turning the government into a tyrant in the minds of the citizens. It's not as if a law is created against smoking weed or stripping or gambling or underage drinking and the people who were previously doing those activities are just going to stop, no they continue at greater danger to themselves and just have the opinion that the government isn't really there to help look after the people but just to control them.

The other problem with this kind of legislation is that it sets a bad example of a Christian in the eyes of the people and makes the whole vine look faithless. What this kind of legislation says is that you've lost your faith in the Word of God and your faith that living as an example of a moral Christian will help create a more moral society and that you have now turned your faith over to a governmental authority in hopes that they can force the people to do what you'd like them to do since you've lost faith in yourself and the scripture. It's not just that we have allowed politicians to come into the churches to manipulate votes out of the faithful but it looks to outsiders as if it's not God's authority we believe in but governmental authority.

When people talk of our liberties being taken away in this country I used to think that was crazy, until I was told that I'd have testify before the state congress on why I should be allowed to keep my job and now the saying that keeps coming to mind is "tyranny of the majority" and I'm not even a fan of Hamilton, I've always been a Jefferson girl. But the argument against a free and democratic society is and has always been that the people can not rule themselves justly. The majority opinion would have the ability to oppress the minority view. Now I don't consider myself as a minority here because of my profession because I know that most people are tolerant and while they may not do what I do they respect my right to earn a living in a way if I want to. I don't think this dissent is even in the minority, I think it is being manufactured by an out of state company selling ethical control to us like coke sells soda.

The point I'm making is that even if everyone in the state doesn't like what I'm doing, your job is to protect me from them, not be the instrument of their oppression. Not liking what I do does not give the people the right to deny my rights no matter how many people they can get to sign a petition.
And it's not really about protecting my rights but protecting the idea that democracy can work and that it isn't just another instrument of oppression.

On a different note I've been told the businesses really targeted in this bill are the adult bookstores. may I humbly request that you simply remove all exotic dancer regulations out of the bill.

Thank you for your time today

House Fed & State Affairs
Date: 3-18-2010

Attachment 7

Testimony of Marisa Jefferis

This testimony is in reference to the Community Defense Act currently in the Kansas House. I currently am a self-employed, adult entertainer in a Kansas adult entertainment establishment. I have been working in the adult entertainment business for six months. I am concerned with the effects that the bill would have on women, my co-workers, and me.

I can understand because of how adult entertainment is portrayed that you may have negative preconceived notions of the life and background of an entertainer; therefore, let me tell you my background. I currently am a college student with a 3.8 GPA, no criminal background, nor have I ever engaged in any form of prostitution. The majority of my co-worker are also college students, single mothers, or business woman trying to save capital for a future investment.

The job I have currently have gives me independence and the hope of a brighter future. I have the financial independence to continue going to college. I have high self- esteem because I know that I can afford to live on my own. My plan is to get my Master's degree in business at St. Mary's University, to save capital for a future business, and to use that capital to open an aerobic studio.

If the Community Defense Act passes then my future plans will be completely disrupted. The majority of income that I earn is between midnight and four in the morning. My income will significantly decrease or be completely eliminated. In addition, I believe that customers are more likely to go across the state line in order to attend another club; therefore, would completely put me out of a job.

If I am to not able to work, my life will be significantly affected. In order to continue my education, I would have to apply for financial aid, which I currently am not using. In addition, I may not be able to continue going college because I would have to work two full-time jobs in order accomplish what I am trying to do now, assuming I could even find a job. Moreover, my dreams of saving capital for my future investment would be demolished with the current bill being brought forth. Furthermore, it is possible that I may have to apply for government assistance if I am not able to make the same amount of money that I currently am able to make. I also would most likely have to file for bankruptcy because I would not be able to pay my debts if my income was reduced or eliminated.

This job allows women who might not otherwise be able to surpass financial obstacles the ability to do so. My mother was a single mother and she also was an adult entertainer, she used the money to go to college, and now is a licensed therapist. My mother told me a story of when I needed a six-thousand dollar surgery, and she was able to afford it with the money she made from the club. I remember I lived a normal childhood and all my needs were met. I remember my mom was able to spend the entire day with me, which most entertainers are able to spend a lot of time with their children because they only have to work three-five nights a week. I can not imagine what my childhood would have been like if my mother was unable to work as an entertainer. I believe if women are put out of work then their children may not get their needs met. WIC, SCHIP, and OARS are already stressed, if women are put out of work they may have no other alternative but to apply for state assistance, which they may or may not receive.

I currently have a safe and secure job that provides me an opportunity to further my dreams and education. I work in an environment that allows me to build friendships with other women. This job allows me to have the income to live an ordinary lifestyle with the ability to use the majority of my time to study and pursue my interests. I now have a job that gives me ability to pay for my own health care, housing, food, and transportation. I oppose House Bill 2633 and ask you not to vote for it.

House Fed & State Affairs
Date: 3-18-2010

Attachment 8

Testimony of Heather Hein

My daughter is, and has been an employee of a sexually oriented business as defined in Bill 2633 for the last eleven years, in other words she is an exotic dancer. She earned an associates degree from Kansas City Kansas Community College and has been able to fully repay all student loans she received from the Government by working as an exotic dancer. She bought a home in Wyandotte County, also working as an exotic dancer.

She enjoys her work, and does not have any plans to change her chosen vocation as an exotic dancer. If Bill 2633 is passed she , and thousands of other young women will not have a job, since the strict guidelines of the bill would put clubs featuring exotic dancers out of business. That means these women will not be able to provide for their families, and will no longer be tax paying citizens , but a further burden on an already drained economy. These women are not in gangs running around trying to solicit customers, or ruin small towns as the bill contends. A lot of tax paying citizens of Kansas want to be able to enjoy going to see exotic dancers, if this bill is passed instead of dancing in clubs where safety can be monitored for both the dancers, and their customers, by club employees, women will be dancing at private parties where if problems develop the police will have to be called, these parties could be at your next door neighbors house or anywhere. Right now unless someone is interested in going to a club to see exotic dancers they might not even know that a club exists in their area. In closing I ask you in a state where there are not enough jobs now for the people that are unemployed do we want to take away thousands of honest taxpaying jobs?

House Fed & State Affairs
Date: 3-18-2010

Attachment 9

Alaina Lamphear
5150 Rockenham Rd.
St. George, KS 66535
Alaina@ksu.edu

Dear Representative:

First of all, I would like to thank you for your time and the ability to share my questions with you. I am an opponent of H.B. 2633 based on the omission of information and the narrow nature to which this bill applies.

The first item I would like to address is in the Fiscal note and the application to KSA 75-3715a. The fiscal note did address the first half of this statute, although not in specific detail, but it did omit the second half which states, "...and with the sources and amount of revenue and other receipts of the state." While reading H.B. 2633, although it does not shut down adult establishments, it does strictly limit their operating hours, and the scope of their business which will have an effect on revenues both for the business itself and for the state in the returns of taxes, especially liquor taxes. The question I have, is that in this time of fiscal loss, does the cost we are currently spending or will be spending in the future on enforcement outweigh the revenue that the state would obtain via these establishments?

The second item I would like to address is the applicability of the laws, especially in respect to the semi-nudity clauses (New Sec 5 a,b,c). In a sexually oriented business, like a cabaret, this is an expectation but, for example, in a college town like Manhattan, I will often see examples such as these on a regular basis in Aggieville on a Friday or Saturday night. As a community member, by going to Aggieville, I do not have the expectation that I will see these acts, but if I were to frequent a cabaret I would have the expectation. The Community Defense Act is "to regulate sexually oriented businesses in order to promote the health, safety and general welfare of the citizens of Kansas." As a citizen of Kansas, I would much rather have this law apply specifically to places of business where I would not have an expectation of these acts, as opposed to a place that carries an expectation of sexually oriented acts being performed.

Finally, I would like to address the constitutionality of this bill at a state level. Based on the case United States v. O'Brien (391 U.S. 367) Judge Warren wrote: that when a regulation prohibits conduct that combines "speech" and "nonspeech" elements, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." The regulation must 1) be within the constitutional power of the government to enact, 2) further an important or substantial government interest, 3) that interest must be unrelated to the suppression of speech (or "content neutral", as later cases have phrased it), and 4) prohibit no more speech than is essential to further that interest." As a community member, I feel that the prohibition of semi-nudity, especially in art studios and cabarets, could be seen as an infringement on the First Amendment rights because substantial evidence is not shown as to the crime statistics, or health statistics. This could be established first on a local level and then possibly to a state level if substantial evidence could be shown that these establishments are a threat to the community. Allowing communities to establish their own laws and acts would also allow there to be no question regarding Miller v. California and their individual definition of community standards for obscenity.

As an alternative, I do feel that although this bill is too narrow, it could be adapted to set state level laws for the health and safety of both the employees and patrons. Including, maintaining health inspections or imposing set regulations for security and tax standards. I also believe that the bill is correct in maintaining the 1,000 foot barrier between schools as it is important to protect our youth.

Thank you for your time and allowing me to speak on behalf of my opposition to this law.

Sincerely,

Alaina Lamphear

Attachment

House Fed & State Affairs
Date: 3-18-2010

Attachment 10

Congress in 1965, 79 Stat. 586 (adding the words italicized below), so that, at the time O'Brien burned his certificate, an offense was committed by any person,

who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate. . . .

(Italics supplied.) In the District Court, O'Brien argued that the 1965 Amendment prohibiting the knowing destruction or mutilation of certificates was unconstitutional because it was enacted to abridge free speech, and because it served no legitimate legislative purpose.[fn3] The District Court rejected these arguments, holding that the statute, on its face, did not abridge **First Amendment** rights, that the court was not competent to inquire into the motives of Congress in enacting the 1965 Amendment, and that the **[p371]** Amendment was a reasonable exercise of the power of Congress to raise armies.

On appeal, the Court of Appeals for the First Circuit held the 1965 Amendment unconstitutional as a law abridging freedom of speech.[fn4] At the time the Amendment was enacted, a regulation of the Selective Service System required registrants to keep their registration certificates in their "personal possession at all times." **32 CFR § 1617.1** (1962).[fn5] Willful violations of regulations promulgated pursuant to the Universal Military Training and Service Act were made criminal by statute. 50 U.S.C.App. § 462(b)(6). The Court of Appeals, therefore, was of the opinion that conduct punishable under the 1965 Amendment was already punishable under the nonpossession regulation, and consequently that the Amendment served no valid purpose; further, that, in light of the prior regulation, the Amendment must have been "directed at public, as distinguished from private, destruction." On this basis, the court concluded that the 1965 Amendment ran afoul of the **First Amendment** by singling out persons engaged in protests for special treatment. The court ruled, however, that O'Brien's conviction should be affirmed under the statutory provision, 50 U.S.C.App. § 462(b)(6), which, in its view, made violation of the nonpossession regulation a crime, because it regarded such violation to be a lesser included offense of the crime defined by the 1965 Amendment.[fn6] **[p372]**

The Government petitioned for certiorari in No. 232, arguing that the Court of Appeals erred in holding the statute unconstitutional, and that its decision conflicted with decisions by the Courts of Appeals for the Second[fn7] and Eighth Circuits[fn8] upholding the 1965 Amendment against identical constitutional challenges. O'Brien cross-petitioned for certiorari in No. 233, arguing that the Court of Appeals erred in sustaining his conviction on the basis of a crime of which he was neither charged nor tried. We granted the Government's petition to resolve the conflict in the circuits, and we also granted O'Brien's cross-petition. We hold that the 1965 Amendment is constitutional both as enacted and as applied. We therefore vacate the judgment of the Court of Appeals and reinstate the judgment and sentence of the District Court without reaching the issue raised by O'Brien in No. 233.

I

WARREN, C.J., Opinion of the Court

SUPREME COURT OF THE UNITED STATES

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391 U.S. 367

United States v. O'Brien

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 232 Argued: January 24, 1968 --- Decided: May 27, 1968 [*]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. A sizable crowd, including several agents of the Federal Bureau of Investigation, witnessed the event.[n1] Immediately after the burning, members of the crowd began attacking O'Brien and his companions. An FBI agent ushered O'Brien to safety inside the courthouse. After he was advised of his right to counsel and to silence, O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law. He produced the charred remains of the certificate, which, with his consent, were photographed.

For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of Massachusetts.[n2] He did not contest the fact **[p370]** that he had burned the certificate. He stated in argument to the jury that he burned the certificate publicly to influence others to adopt his anti-war beliefs, as he put it,

so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position.

The indictment upon which he was tried charged that he

willfully and knowingly did mutilate, destroy, and change by burning . . . [his] Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App. United States Code, Section 462(b).

Section 462(b) is part of the Universal Military Training and Service Act of 1948. Section 462(b)(3), one of six numbered subdivisions of § 462(b), was amended by

My name is Anna Lawrence (DBA). I am a citizen of Lawrence, Kansas, where I am self-employed as an exotic dancer and currently work at the famous Outhouse strip club.

I grew up on the east coast in a wonderful family with loving parents and a handful of siblings whom I love very much. Being both academically gifted and a child from a very wealthy family, I had the privilege of attending some of the most prestigious schools in the world through which I received an excellent education. Throughout the course of my schooling, I was heavily involved in extra-curricular activities. At one time, I was editor-in-chief of a student newspaper, wrote letters with the Amnesty International club, and played soccer for my school. I was well supported by my peers and was active in student government. I also studied dance at a high level and successfully competed in dance competitions in my free time, winning many gold medals in both jazz and ballet.

After graduating from high school, I went on to attend an east coast women's college, where I remained active in student government and other extra-curricular activities including STAND, and earned my degree in international politics. In addition to my coursework, I did several nonprofit and policy-focused internships that made use of my exceptional writing skills and passion for social justice. My work was noticed, and at the age of 20, I was recruited to join the board of directors at a women's organization in a major city.

After graduation, I backpacked across Europe and North Africa for pleasure, and eventually took a job in fundraising at an Ivy League university on the east coast. When I unexpectedly lost this job in December 2008, I moved in with a college friend in Kansas and began to look for nonprofit fundraising jobs out here. After five months, I found a job at a small nonprofit focused on financially vulnerable and homeless families.

Though the job was non-paying, I was thrilled and grateful to have it. Not only was it a chance to effect change at a local level in a town that needed help, the position offered a chance to continue in my field of nonprofit management, which I thought was my dream. To make this endeavor possible, I decided to take a job dancing at North Lawrence's Paradise Saloon at night.

As I made my plans to start this job, I was fully aware of the stereotypes of strip clubs, of exotic dancers, and the clients who patronize sexually oriented businesses. To make sure I had the best information possible, I did my own research and discovered that strip clubs are actually not that scary, and the only people who tried to convince me that my every waking moment would be lived in terror were people with little or no experience even as a customer at a strip club. I did listen to their cautionary tales anyway, and decided I wanted my day job with the nonprofit so badly that I'd move ahead with my plan to start this job no matter what.

On May 5th, 2009, I donned the sexiest lingerie I owned and took off everything but my panties in front of strangers for the first time in my life. Drawing creatively on the dance training I'd had with some of the best teachers available today, I strut my stuff with a nervous smile and went home happy, if a bit overwhelmed, with hundreds of dollars in cash to show for it.

HB #2633 Hearing Testimony
March 15, 2010
Presented by Anna Lawrence (DBA)
Contact Information: [Handed Out on Business Cards]

For the following eight months, I lived two lives. By day, I was a director-level employee in a pencil skirt at a wonderful organization, where I threw myself into our mission to help the vulnerable people who needed us. By night, I switched outfits, made my dinner to go, and worked as a dancer at the Paradise Saloon.

Through experience, I discovered that the nightmare I imagined was simply not the reality of working at a strip club. Most of what I'd been told about strippers and the clubs they work at was patently false. Instead of drowning in a shark tank, I was surrounded mostly by friendly faces who supported me as I adjusted to this taboo new job. Given that it is a sales environment in which dancers are all competing for the same dollars, I would rank the work environment even higher. Girls patiently answered my questions about rules, laws, and how to dress. They hugged me when I felt nervous. The manager at the time, Steve, even sat with me for two hours before I started and made sure I understood the job, emphasizing that I never had to do anything I didn't want to do.

Rather quickly in this supportive environment, I made friends with the girls, the bouncers, and the bar staff. I came to look forward to getting on stage and showing off my dance skills and athletic body. I also looked forward to learning new pole tricks and meeting new people who live in the area and came into the club as customers. They were not the monsters that stereotypes would have you believe; rather, they are normal men and women who enjoy good conversation, a good lap dance, and a pretty girl. I am now closing in on my first year anniversary of being a stripper, and none of the novelty has worn off. I still dance in my seat as I drive to work, I still hang out with my girlfriends outside work, and, continuing a tradition I started very soon after I began stripping, I still make chocolate chip muffins for everyone I work with on the weekends.

Yes, there were tough moments (which I will readily tell to anyone who wants to know about them), but in almost a year of stripping, I'm glad to report I've personally experienced only two incidents (and witnessed one other) that can be classified as truly egregious behavior of a customer trying to compromise me. A small minority of customers, who assume, incorrectly, that dancers are also prostitutes, come in and make my job difficult. In that same small group of troublemakers are men who think that the social stigma of my job makes them a better person than I am also try to take advantage of me. Fortunately, their attempts are obvious, and I block them and report their behavior consistently.

With the good so overwhelmingly eclipsing the tougher moments, I fell so in love with this job and everyone I met that when it became impossible to continue with both my day and my night work, I resigned my nonprofit day job and became a full-time stripper. I've happily waltzed into this world and have no immediate plans to leave it. Rather than aspiring to become a director of development at a nonprofit, I now aspire to work as a stripper, save for law school, and become an attorney in the sex industry, and perhaps go on to become a college professor of women's studies or anthropology.

For now, I wake up every day excited to go to work, put on racy lingerie, and strut out onto the floor with my signature belt (of vicious discipline and fury!) draped over my shoulders, ready to make a smiling, giggling, excited customer's nigh dance skills and customer service skills I developed elsewhere.

With the March 11, 2010 headline on LJWorld.com reporting that the Kansas unemployment rate climbed upward frustrates me that House Bill #2633 will put me out of this job that I truly love. Not only are there few other optio this economy that I am interested in, but I have committed no crime to prompt a need for these additional rules.

House Fed & State Affairs
Date: 3-18-2010
Attachment 11

11-2

ake most of my money on Thursdays, Fridays, and Saturdays between 12:00 a.m. and 4:00 a.m., when the party atmosphere is strongest. Requiring strip clubs to close at midnight will cut out my most lucrative hours.

House Bill #2633 will also require my customers to stand six feet away from my stage when I'm showing off my dance skills. During my two-song set, then, they are unable to tip me and express their appreciation when I'm dancing in front of them. When the next girl gets up on stage, it will be too late. Their attention will be focused on another dancer, and I will never get that money that I deserve for my hard work.

I've long appreciated the phrase: 'If it ain't broke, don't fix it," and I believe it applies here.

Beyond that, I think that what bothers me most about this bill is that no one came and talked to me about it when they drafted it. They should feel embarrassed that I, along with a large group of other women, work at the most famous club in Kansas, and no one on their team thought to come and ask me what my job is like. Perhaps they suffer from 'damsel in distress' syndrome. Perhaps they think that primary sources are not worth the effort.

It is unreasonable to support a bill that clearly reflects a lack of understanding of my job as a local exotic dancer—and my life. House Bill 2633 is such a bill. It is authored by a party who has not only failed to come ask me about my experiences and my views about whether my job and my situation even *needs* improvement, but someone whose idea of what stripping is like in Lawrence, Kansas appears at best borrowed from someone else's life in another state, and at worst frozen in time in the mid-1980's or -1990's.

Here and now, in Lawrence, Kansas, in 2010, I am a happy, healthy, talented dancer who enjoys her sales job. Thank you for your time.

Testimony of Lauren Hergott

House district 30

My name is Lauren. I am 19 years old and am attending college at Johnson County Community College. I am going to school for early childhood education, wanting to be a fifth grade teacher. While attending college I am dancing at The Outhouse on the side to earn money.

I am a dancer that follows all of the rules of the club. This job is strictly a way of entertainment. You must be an adult to work in the dancing industry as well as be an adult to enjoy the entertainment. I feel very comfortable doing this line of work in a secure place where there are many men that are paid to protect me rather than on the street where my life would be at risk every second of every shift.

This is a great job for me while attending college because of the fact that I only have to work a few days a week, make very good money, and do not have to stress out about school because I don't have to work all the time just to survive. Before I started dancing I worked in the restaurant business when I first started college. I was stressed out all the time. My shifts were not terribly long but they were late at night, not getting off until around 11, and then I would have to go home and study. I worked four to six days a week, every week and still didn't make as much money as I do now. I was on a schedule so I couldn't just not go into work. Dancing makes things so much easier. I get to pick the days that I work so I can make it where it does not conflict with school. Also if I have a test coming up I can choose, without having to talk to anyone with a higher power such as a manager, to not go into work.

In my strongest opinion is that there is absolutely no reason to take my job away from me and the other girls that I work with and even the ones that I do not work with who are also just trying to make money. We are beautiful girls who are just trying to make money entertaining people and that's it.

Testimony of Kathleen Lozano

To Whom It May Concern

I am enraged at the very idea of this bill being allowed to pass. This job is something that I have chosen to do for myself- there was no man or "pimp" pressuring me into it. I am an educated woman with two small children ages three and two. I earned my degree in Biology in the year of 2008, but the economy took a nose dive as did my current job with state and the economy itself.

This job is quite possibly one of the best things I have come across in my life. When I started dancing I was married to a verbally abusive husband and was stuck in a very unhappy and new marriage. Dancing gave me the opportunity to earn funds so that I could actually afford to get a lawyer and begin the process of a divorce.

Dancing has also allowed me a most wonderful gift that no single mother I know, aside from other dancers, can achieve. I am able to support myself, my brother, and my two children on my own. I use no government assistance whatsoever and I do not even receive child support from my ex-husband. I can do this and stay home with my children, give them my full attention 5 days every week. I work Thursday thru Sunday nights. During the weekend my ex watches the children.

My dancing is also financially supportive because I am a taxpayer. I save 35% of everything I earn so that I can afford to send in my tax forms and pay what I owe. On that same note, hundreds of people visit the club every weekend. Those people spend money in our state, they buy gas from our gas stations, rent out our hotels, spend money in our restaurants, shop at our markets, and support single mothers.

If this bill were to pass it would most definitely mean the end of a very happy and self chosen way of survival for me and hundreds of other women. Every day I am thankful for the job that I have and the ability I have that I can support my family on my own. For the ignorance of the people that want to send this bill through I am saddened. I have done nothing wrong in my community. Yet here I am with fellow dancers being attacked by people who have little to no idea as to how safe and comfortable I feel with my job and how many dire consequences would go along with the passing of this bill.

Equal Entertainment Group

Kansas Licensed Beverage Association

CEO
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March 16, 2010 Testimony on HB 2633, House Federal and State Affairs

Mr. Chairman, and Members of the Committee,

I am Philip Bradley representing the Equal Entertainment Group (EEG) and Kansas Licensed Beverage Assn.(KLBA), the men and women, in the hospitality industry, who own, manage and work in Kansas bars, breweries, clubs, caterers, hotels and restaurants where beverage alcohol is served. These are the over 3000 places you frequent, enjoy and the tens of thousands of employees that are glad to serve you. Thank you for the opportunity to speak today.

We **oppose HB 2633** and ask you to not advance or support this act. This measure addresses many issues that appear simple on the surface but are very complex attempting to further expand government regulations. While one may or may not agree with current law and the courts interpretations of that law, those elements together have attempted to find a balance; the very important and critical balance. One between the individual rights, personal responsibilities and individual freedoms citizens are guaranteed and the duties of the government to protect its citizens. Our country is founded on the principles and beliefs that although certain practices and beliefs may not be shared by all and even be disapproved by some, they are worthy of protecting in the greater cause of our rights and freedoms.

These subjects are difficult to discuss objectively, and especially difficult to discuss in a forum such as this on a short schedule. They may be embarrassing to some. These issues are complex and need a thoughtful considered, deliberation before altering the status quo. This measure covers several areas including retail establishments and also entertainment venues that may and should be split into separate measures and considered individually.

HB 2633 proposes serious issues and need serious consideration. My testimony won't be covering the legal arguments that others have already addressed. My members are primarily concerned with the businesses defined in this measure as *(c) "Adult cabaret" means a nightclub, bar, juice bar, restaurant, bottle club or other commercial establishment, regardless of whether alcoholic beverages are served, which regularly features persons who appear semi-nude.*, and we generally limit ourselves to those places serving/selling beverage alcohol.

This appears to be a proposed solution looking for a non-existent problem. We have at the very least, object to the proposed hours of operation, requiring the changing of floor plans, interior rebuilds, installation of cameras/spying devices, hiring of additional personnel, and new additional operation procedures. We object that all of these new requirements be completed within 180 days. We also feel that the word "habitual", is open to subjective and varied interpretations.

We urge you to not advance this bill. However if the committee wishes to pursue this wide reaching and comprehensive act, we ask that the bill be split into 2 mesures, one for bookstores and another for on premise entertainment establishments, and suggest that a sub-committee be appointed. We offer to work with such a group.

Thank you for your time.
Philip B. Bradley

The difficulty in life is the choice. The Bending of the Bough Act I

Drink Responsibly. Drive Responsibly.

House Fed & State Affairs
Date: 3-18-2010
Attachment 14

Background Material
Opposing HB 2633
for the Committee on
Federal and State Affairs
from
The Equal Entertainment Group

House Fed & State Affairs
Date: 3-18-2010

Attachment 15

Background Material Opposing HB 2633
for the Committee on Federal and State Affairs
from The Equal Entertainment Group

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REASONS FOR OPPOSITION TO SECTIONS OF HOUSE BILL No. 2633

By Committee on Federal and State Affairs, Legislature of the State of Kansas

JUDITH LYNNE HANNA, Ph.D.

I am Judith Lynne Hanna. I earned a Ph.D. from Columbia University, and I am currently a Senior Research scholar in the Dept of Dance and a Senior Research Scientist at the University of Maryland.

I have been conducting research on dance as nonverbal communication, and thus communication protected by the First Amendment, since 1963. And since 1995 I have been conducting research on adult entertainment exotic dance. As in my other dance research, I examine the dance and its relationship to the community in which it is located. For example I conducted a study in Maryland and a study in North Carolina on of the impact of the clubs on their neighborhoods.

I have published scholarly peer-reviewed books and articles and have been an expert court witness for 140 cases in 27 states and the District of Columbia. My research is quoted in court decisions that have overturned such laws as the proposed House Bill No. 2633. The judges in these cases understand what valid research is and dismiss the myth that the clubs cause negative effects.

See my website, www.judithhanna.com on my background.

There are serious problems with these new sections in the community defense act; amending K.S.A. 2009 Supp. 22-3901 and repealing the existing section:

HB No. 2633 New Section 5.

(a) No person shall knowingly or intentionally, in a sexually oriented business, appear in a state of *nudity*.

(b) No employee shall knowingly or intentionally, in a sexually oriented business, appear in a semi-nude condition unless the employee, while semi-nude, shall be and remain on a fixed stage at least *six feet from all patrons* and at least 18 inches from the floor in a room of at least *600 square feet*

(c) No employee shall knowingly or intentionally, in a sexually oriented business, while semi-nude, *touch a patron* or the clothing of a patron.

HB No. 2633 New Section 8.

(a) No operator shall allow or permit a sexually oriented business to be or remain open between the hours of *12:00 midnight* and 6:00 A.M. on any day.

Contrary to the stated intent of the preamble to HB 26331, the proposed law seriously restricts the content of the exotic dance theater art and denies patrons access to a form of expression that has been popular since the mid 20th century.

In short the law would

1 ***violate the United States Constitution's First Amendment free speech rights*** in abolishing a genre of dance by suppressing essential and integral expressive and communicative components of exotic dance that are not merely incidental conduct associated with it, namely the use of space, touch, and nudity.

> *Exotic dance* is a form of dance and theater art that is, by definition, somewhat "risqué" adult play, a fanciful teasing in which more of the body is disclosed and more sexually suggestive movements are performed than are usually seen in public. An adult entertainment exotic dancer begins (part 1) with a stage dance for the entire audience. After it ends, she offers (part 2) a dance for a patron who pays a fee for a spatially-close personal dance in a romantic ambience to create the patron's own fantasy.
>
> Nudity in exotic dance conveys the message, "this is the adult entertainment of contemporary artistic theatrical exotic dance." Nudity not only conveys eroticism but divine manifestation, godliness, affirmation of life and sexuality intertwined with spirituality: Many Christians and members of other religions consider the body is the beneficent gift of the Creator and worthy of the attentive gaze. Indeed, bodies are considered temples of the Holy Spirit and people.

2 ***deprive dancers of artistic choice of communication*** using proximity, touch and nudity. Proximity to a patron and touch communicate many feelings and ideas -- from comfort, pleasantness, friendliness/fellowship, warmth/love, rapport, empathy, humor, playfulness, sentience, and immediacy to sensuality. Nudity is a form of costume, that is, a way to present oneself that conveys a message.

3 ***discriminate against a form of dance, dancer and legal entertainment*** by banning, nudity, dancer-patron proximity and touch only in exotic dance. In social and theatrical dance men and women hold each other, and nudity has long been part of mainstream ballet and contemporary dance. Exotic dance, but not other theater arts venues is required to have specific room sizes.

4 ***deprive patrons of choice*** of entertainment **and** ***freedom of expression*** of appreciation in being proximate to a dancer and tipping her

> Through direct tipping and purchasing private dances, the patron communicates appreciation of the dancer's physical appearance (attractive body shape and tone hair, makeup, etc.), dancer's costume (4 to 5 inch heels, attire, props), dancer's movement (graceful strut and posture; standard bumps, grinds, shimmy, etc., smooth transitions between movements and positions: prone, kneel, stand, elevated on pole; disrobes with attitude; variety; balanced use of stage; interprets music, proximity to patron), personal style (creative uniqueness) and connection with patron (personality, proximity, smile, eye contact, touch, charisma). The patron's tipping encourages a dancer to continue to perform in a way that pleases.

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5 ***insult and stigmatize women and men***, giving the false impression that women instigate crime, men cannot control themselves, and dancers have a contagious disease.

7 ***discriminate against women and a form of business*** in *violation of the Equal Protection Clause of the Fourteenth Amendment* by imposing upon adult entertainment more stringent hours of operation than those imposed on businesses selling alcoholic beverages with (or without) other types of entertainment.

9 ***chill the arts as a whole*** because different dance forms influence each other and other art forms

10 ***harm the dancer's livelihood as well as the livelihoods of others who work in the exotic dance business***, all contributing to the economy (clearly, patrons' unfulfilled expectations of receiving the messages of exotic dance result in fewer dances being sold and tips received),

11 ***eliminate the social, psychological and health benefits*** of (a) dancers gaining self-esteem for successfully controlling their own artistic expression, facing strangers and winning their appreciation for their dance skills and physical attractiveness, (b) working with flexible hours to attend school or care for a child and (c) the health (e.g., reduced stress) and social benefits of patrons being accepted, having a nonjudgmental listener.

In summary, there are **constitutional and moral reasons to delete New Section 5 (a), (b), (c), and New Section 8 (a)**. Moreover there has been no study of the impact of dancer-patron proximity or touch, direct tipping or hours of club operation although there have been studies that show that the clubs themselves benefit the neighborhoods in which they are located. Some people do not approve of the clubs, but they do not have to frequent them.

Attached to elaborate on my presentation:

1 "Right to Dance: Exotic Dancing in the U.S.," in Naomi Jackson and Toni Shapiro-Phim, eds., Dance, Human Rights and Social Justice: Dignity in Motion. Lanham, MD: Scarecrow Press, pp, 86-107, 2008

2 "Adult Entertainment Exotic Dance: A Guide for Planners and Policy Makers" (CPL [Council of Planning Librarians] Bibliography 375), Journal of Planning Literature 20(2):116-134, 2005

3 Legislative Talking Points, 2010

See www.judithhanna.com for further information.

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Right to Dance

Exotic Dancing in the United States

JUDITH LYNNE HANNA

I began my research on exotic dance adult entertainment in 1995 when I was asked to be an expert court witness in a First Amendment case.[1] I was contacted by an expert on the location and effects of exotic dance from the American Institute of Certified Planners and a lawyer representing dancers and owners of exotic dance clubs in Seattle, Washington, because they had discovered my anthropological research on dance as nonverbal communication through *Books in Print.*[2] They asked me to apply to exotic dance the semiotic, sociolinguistic paradigm I had used to study dance in Africa, on school playgrounds, and in American theaters. Since then, I have worked with fifty-five attorneys in regard to 117 legal cases in twenty-six states and the District of Columbia, and in the process I have observed and interviewed dancers (in more than 140 clubs), as well as members of their communities, including those in city and county council meetings and courtrooms.[3]

The Supreme Court of the United States recognizes artistic dance as protected expressive behavior, as a kind of "speech" that therefore falls under the First Amendment to the U.S. Constitution. (See Appendix 1.) As I will explain, it follows that the same protection should apply to exotic dance (also called striptease, stripping or erotic, topless, nude, table, couch, lap, go-go, juice bar, sports bar, and "gentleman's club" dance). Civil libertarians believe that exotic dancers, like other performers, should have the freedom to control their own artistic communication without state interference, police harassment, or the attacks of community members who try to impose their version of morality on everyone.

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Despite the "protected expressive behavior" and "speech" connection, hundreds of local and state governments nationwide use the coercive power of regulations to limit exotic dance, to force it out of existence, or to prevent new exotic dance clubs from opening.[4] Laws against adult clubs include banning nudity or partial nudity, "simulated nudity," "simulated sex," touching another person or self-touch, and "obscene" and "lewd" behavior—terms that are, of course, open to wide interpretation. Some laws have placed restrictions on direct tipping or require bright lighting, specific hours of operation, and licensing of dancers. Fighting such laws is costly, and not all clubs or dancers can afford to litigate them.

It is significant to note that some anti-exotic-dance laws are so broad they could easily be applied to other dance styles in different contexts. Nudity, touching another person or self-touch, "simulated nudity," and "simulated sex" occur in choreography shown in mainstream theaters. Had censorship succeeded, such past shockers and present classics as Maud Allan's *Dance of Salomé*, Michel Fokine's *Schéhérazade*, Isadora Duncan's modern dance, George Balanchine's *Prodigal Son* and *Bugaku*, Jerome Robbins's *The Cage*, Martha Graham's *Phaedra*, Anna Halprin's *Parades and Changes*, Glen Tetley and Hans van Manen's *Mutations*, or Rudi van Dantzig's *Monument for a Dead Boy* would have been lost.[5]

Ironically, these restrictive laws are not applied to social dancing in public, so that performers in licensed adult businesses could be arrested for dancing the way couples in many nightclubs do, or the way kids routinely dance at school dances today. Although some schools have banned so-called "freak dancing," it is still common to see young people perform variations of social dance that are called booty dancing, da butt, doggy dancing, front piggybacking, and hot salsa. These variants include moments when pelvises touch and rotate, upper torsos meet, and thighs entwine. Females often bend over until their hands are on the floor, then press and grind their buttocks against a male's thighs and crotch, much like adults engaged in lap dancing.

Especially when compared to tolerance for sexuality and nudity in stage dance, the targeted attacks on exotic dance can be seen as class related; that is, different standards are applied to dance not considered "high art"—dance not taught in schools and not privileged by the dance community or the general public. But the enforcement of anti-exotic-dance laws sets a problematic precedent for censorship in general, in that these laws might eventually be applied to other forms of dance and art, forcing them out of existence. The wider principle is the infringement upon the civil liberties of all people in the United States.

In the following article, I will discuss the myths and realities of exotic dance as I have discovered them through my research. Included will be reports

of performers' attitudes toward their work, legal treatment of exotic dance, and the tactics and reasoning used by adversaries of exotic dance. I will explain why their objections are ultimately limited and why all of this matters in the realm of dance and democracy.

EXOTIC DANCE IS DANCE

Exotic dance shares with virtually all dance genres the fact that it is a purposeful, intentionally rhythmical, culturally patterned, nonverbal, body movement communication in time and space, using effort and having its own criteria for excellence.[6] Like other kinds of dance, exotic dance conveys meaning by the use of space, touch, proximity to an observer, nudity, stillness, and specific body movements.[7] To use a ballet example, recall any number of versions of *Romeo and Juliet*, where the dancers' bodies are barely draped, and love is shown by touching hands, stroking a face, arching backward or falling into each other's arms. When Juliet's parents are urging her to marry Paris against her will, there's a moment when standing near him, her eyes coolly survey him from toe to head. Then her eyes turn away, and, rising on pointe, she briskly travels away from him.

In exotic dance, a performer might also emphasize lines of the body and use stroking and arching, eye contact, and proximity to a patron, but in this genre usually to indicate a more explicitly sexual way in which love is expressed, equally recognizable and also requiring choreographic creativity. Exotic dance also conveys a multitude of meanings, such as health, nature, beauty of the body, and feminine power. The meanings conveyed in contemporary exotic dance may be erotic, but erotic expression certainly does not exclude artistry. Indeed, some outstanding exotic dancers have attended performing arts high schools and performed in ballet companies and on Broadway. The excellent pole dancers have often trained in gymnastics.

All forms of dance have a range of amateur to professional, and an excellent performance can arouse emotions or suggest ideas for audience members. "Artistry," according to many dictionaries and choreographers, refers to the quality found in a performance that has creative imagination and knowledge and skill acquired by experience, study or observation, and communication. Dance writer Walter Sorell referred to artistry as "bringing dynamics and responsiveness to the craftsmanship."[8] These levels of mastery pertain to exotic dance. Artistic merit in exotic dance is recognized according to specific criteria applied in competitions, as well as when patrons remunerate dancers with individual tips and fees during performances. These criteria include talent,

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individual creativity, personality, appearance and costume, musicality, athletic strength and flexibility, and audience appeal.

In the course of studying many exotic dance performances, I could see that there was/is often more going on than sexual fantasy. One aspect that relates to the criteria for artistic expression is parody, when a dancer makes fun of the pretext of clothing, such as a police uniform or a cowboy outfit, and gender identity, female stereotypes, or femininity by exaggerating them. As adult theatrical entertainment, exotic dance involves play, fantasy, and acting; by definition it is supposed to be risqué, disclosing more of the body and kinds of movements than seen in public. We see minimal breast coverings and thongs that expose much of the body in public swimming areas, and sexually suggestive movements on MTV and social dance floors. These forms of dress and behavior are not policed in the same way exotic dancing often is, nor are many stage performers in so-called legitimate theatre harassed the way adult entertainment participants are.

Exotic dance, also like other dance forms, has its own history. Its roots can be seen in various styles of shimmying and hip-rotating Middle Eastern dance, especially in its incarnation as belly dance, which has also been called *danse du ventre, danse orientale,* hootchy-kootchy, or cooch. After Egyptian dancers were a sensation at the 1893 Chicago World's Columbian Exposition, aspects of this kind of dancing, previously a folk form in the Middle East, were appropriated widely.[9] It influenced not only many amateurs and pioneers of modern dance such as Maud Allen and Ruth St. Denis, but performers on the stages of American burlesque theaters. While many dancers tried to distance themselves from the sexual aspects of belly dance by emphasizing spiritual and artistic associations, exotic dancers developed their own forms in strip clubs, until their decline after World War II. Exotic dance began to flourish anew in the 1980s as upscale "gentlemen's clubs," managed by businesspeople and corporations, increasingly supplanted the old-style strip bars. This transformation was like going from greasy spoons to four-star gourmet restaurants. Indeed, some clubs serve excellent food.

Contemporary exotic dance has also been influenced by many important twentieth-century artistic developments, such as African American social dance forms, nudity in mainstream theater, and dance showcases. The development of exotic dance can be seen as part of a western art aesthetic mandate to explore what has been deemed off limits, such as gay themes, to find new objects to look at, such as multi-media productions, and new ways to look at familiar ones, such as Pilobolus dancers appearing as moving fungi. Pole dancing and lap dancing (extending the tradition of taxi dancing) are recent exotic dance innovations.

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Exotic dance usually has two sequential parts. First, a dancer performs onstage for the audience as a whole to entertain and then to showcase herself for the second part of the dance. Generally, nudity climaxes the last of a three-song performance in which the dancer appears on stage clothed for the first song, partially removes her clothes during the second, and strips to nudity at the end. The dance varies depending on the dancer, club, and locality. Performed in six- to eight-inch heels, the movements derive from belly dance, burlesque, popular dance, Broadway theater, music videos, jazz, hip-hop, cheerleading, and gymnastics. The common pole onstage serves as a prop and permits athletic stunts. Demi Moore's dance in *Striptease* is illustrative of some of this type of dancing. Dancers commonly gyrate hips and torso, thrust hips back and forth and rotate them ("bump & grind"), rotate hips into a squat (like a screw), undulate body or body parts, shimmy breasts, and bend torso to peek through one's legs.

The following is a description of a performer pole dancing to the music in a club in Albany, New York. First Song: Dancer walks onstage. Wipes mirror with cloth to best reflect her image. Twirls on her own axis while circling around the pole. Holds pole with right hand as support to twirl around pole, right thigh lifted. Places back to pole and extends right leg. Turns around, grabs pole and shimmies up, right leg extended outward, leans back, straightens up, leans back with legs outward horizontally, brings them up to chest. Flips body upside down on pole, extends legs in a split, slides to floor. Hooks right leg around pole as support to twirl around pole. Sits down, arches backward, unfastens hair tie to let hair flow with movement. Twirls around pole, shimmies up pole with both legs, hangs upside down by legs. Slides to knees, extends torso forward, legs bent outward. Stands with back to pole, arches head back. Swings up pole with one foot on stage rail, one hand on ceiling hook. Descends to floor, knees swivel toward and away from each other. Leans back against the mirror, extends hands upward, turns around, moves hands down body, faces mirror, twirls, creating self images twirling along mirror to right and then reversing direction. Sits down, flips head back. Walks to pole, twirls around it with right foot up. Lifts body onto pole with hands, flipping legs back and out. Hangs by one leg, the other extended outward, splits legs, descends to floor head first. Places hand modestly over pubic area. Shimmies up pole, turns upside down holding on with thighs, bounces buttocks sliding down. Twirls about pole, bends backward, one leg bent at knee. Shimmies up pole, moves body toward and away from pole, splits legs. Descends and twirls around pole; music accelerates as does movement. Slides back against pole, hands go up side of torso. Moves to edge of stage for patron to reward her performance by putting bill in her garter.

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Second Song: Wipes mirror. Walks to pole, twirls about it, leg hooked. Shimmies up pole, turns upside down holding with one leg hooked around pole, the other in bent shape extends outward. Stands with back to pole and removes her top. Shimmies up pole, spins in backbend, brushes her hair, upside down splits legs, extends them vertically and together, grasps pole. Descends to floor, flips hair back and forth, on hands and knees bounces buttocks, kneels, stands. Twirls about pole.

Third Song: Takes thong off. Backs up to mirror, creates S shape, slides to seated position, opens and closes legs. Walks to pole, hooks leg and twirls around pole, tosses head back, shakes hair. Descends pole into split, then rises with legs vertical to floor, buttocks first with torso bent forward, stands upright, tosses hair. Leans against pole, swings up with hands, body flung outward, and then legs grab pole. Vibrates legs in descent to floor. Circles pole. As foot pushes off from stage rail and one hand grasps a ceiling hook, swings up pole. Descends to floor with one, then another leg. Leans against pole, twirls, head arched backward. Shimmies up pole, splits legs outward, extends arms outward as thighs grip pole. Descends. Receives tips. Walks offstage.

In the second part of exotic dance, for a fee a performer dances for individual patrons next to where they are seated (or in lap dancing a performer dances on, straddling, or between a patron's legs). The dancer "says" through body and facial movement, proximity, and touch, the fantasy of "I am interested in you, I understand you, you're special and important to me." The patron's purchased "commodity" is a license to dream.

In many ways, the performance venues for exotic dance parallel those of mainstream dance forms. Gentlemen's clubs are theaters with an entrance fee that provides access to a place where professionals perform on a raised stage with special lighting, a commercial music system, and a master of ceremonies and/or disc jockey. Similar to mainstream dinner theaters, tables and chairs for audience members are arranged in areas where exotic dancers also perform. "Ushers" (floor managers or doormen) seat patrons, answer questions, and ensure proper audience behavior. As has traditionally been a feature of many major opera houses, clubs often have a special "VIP" room for audience members who pay for special ambience, alcoholic beverages, and attention. Backstage, there is a dressing area for performers.

Currently, there are approximately 4,000 clubs where exotic dance is performed, and the industry is estimated to be a multibillion-dollar concern, with clubs on the NASDAQ Stock Exchange (National Association of Securities Dealers Automated) and the American Stock Exchange. Annual individual club revenues may reach five million dollars, and clubs pay substantial local and state taxes. The industry boasts a host of organizations, schools, publications, and

national trade expositions. Among the patrons are businessmen and women who frequent exotic dance clubs to put their clients in the mood to close commercial deals. Onstage, performers include those who are also college students, lawyers, accountants, stockbrokers, artists, athletes, single moms, married women, ballet and modern dancers, and high-school dropouts. What they all share is that they are all professionals, all earning income, all doing a job.

EXOTIC DANCERS' PERCEPTIONS OF THEIR WORK

My interviews with hundreds of exotic dancers since 1995 reveal multiple reasons for choosing to perform. Earning money from this legitimate work is key. Some women become dancers through serendipity, meeting someone who does it or who knows a dancer. Being an exotic dancer offers women the opportunity to work fewer hours and earn more income than they would in doing many other jobs. Choosing their own schedules gives them time to attend college or bring up children.

While the exotic dance industry, like many other businesses, has its share of good bosses and bad bosses, and of illegal behavior, it has no monopoly. Most dancers in the clubs I have visited (and others who have written about their experiences) assert that they are independent subjects creating art, not submissive objects. They feel empowered by the financial independence they achieve and talk about the increased self-confidence and self-esteem gained from successfully facing strangers and winning their appreciation. Many identify themselves as feminists and think that dancers should be the ones to decide if, when, and under what circumstances they feel oppressed. A number of exotic dance supporters consider that the dancer's choice to place her body within a financial transaction does not reduce her to a commodity any more than a model, actor, or athlete would be by choosing their respective professions. Conversations with dancers and audience members alike have revealed an awareness that exotic dance merely taps into contemporary attitudes toward the body as something to be cultivated, used, and presented.

Dancers say the biggest problem they face is the stigma attributed to exotic dance. Doors held by employers who are biased against exotic dance may be closed to those who have had a career in this industry. The dancers may not only be stigmatized as instigators of crime when government regulations have been imposed on their industry, but their civil liberties are also threatened and their freedom of speech curtailed by their inability to speak about their work widely without fear of prejudice. Stigmatization of dancers can easily bleed into their private lives as well. It has proved to be a negative factor in cases of child custody or rape, for example, and in being denied access to housing. As

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a result of the stigma, many dancers feel compelled to perform incognito, not only using stage names, wearing heavy make-up and wigs, but also changing their contact lens color and way of speaking. For some women, exotic dance is an alternative path to success, but it is paved with the pain of public misperception. Yet from my research, I could see that performing in exotic dance clubs is far from a one-way trip to hell.

THE LAW: MORALS, OBSCENITY, AND ADVERSE EFFECTS

The U.S. Constitution, Supreme Court decisions, and subsequent case law provide constraints for regulating exotic dance.[10] Although the Supreme Court has recognized exotic dance as expression, or "speech," with First Amendment protection, in 1991, a fractured Supreme Court allowed exotic dance regulation on moral grounds (*Barnes v. Glen Theatre*). But that "morality" justification has since fallen by the wayside. An expression-restricting law based on public morality reflects a political consensus among a majority of elected representatives, not necessarily the moral preferences of a majority of citizens. In the more recent case of *City of Erie v. Pap's A.M.* (2000), the Supreme Court held that government could regulate adult-entertainment clubs if the aim is to prevent crime, property depreciation, and sexually transmitted disease—the legal doctrine of "adverse secondary effects." Content neutral (not impinging upon meaning) time, place, and manner regulations of exotic dance were permitted, the amount of regulatory control dependent upon whether or not alcohol was sold. In general, speech that aims to reconcile the individual's and society's interests must be justified by evidence that expression creates a clear, present danger, or that it is "obscene" under the difficult three-pronged "Miller test" (*Miller v. California,* 1973),[11] or that the restrictions otherwise further a compelling government interest. Furthermore, restrictions on speech generally must combat the danger by the least restrictive means.

Up until at least 2002, the federal, state, and local courts did not question local and state legislatures' specified intentions for regulations to deal with the "negative" effects of exotic dance. However, *Pap's, City of Los Angeles v. Alameda Books* (2002), and subsequent cases now allow the merit of a government's evidence for the need to control exotic dance to be challenged in court. "Shoddy" evidence or reasoning does not suffice, the Supreme Court said. Consequently, exotic dance clubs and associations have commissioned social scientists not only to critique "studies" that localities previously had been permitted to rely upon to justify their legislation, but also to conduct new research.

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Social scientists in the twenty-first century have critiqued the "studies" that governments have relied on as evidence to justify regulations that strangle exotic dance.[12] The "studies" typically include these faults: most do not follow professional standards of inquiry or meet the basic requirements for acceptance of scientific evidence. No control site is matched with an exotic dance cabaret site to ascertain if the latter is different regarding negative behavior, such as crime. No determination is made as to what exists before and what exists after a cabaret is opened in a particular location. No data are collected over several years to distinguish a relatively unstable or a one-time blip from what is usually the case. Studies conducted over a single time period and at a specific site are not applied to gentlemen's clubs located in adjacent counties and in other places. Studies focused on concentrations of a combination of different kinds of adult businesses, such as bookstores, peep shows, and massage parlors, are not necessarily applicable to cabarets. And there have been no studies examining the impact of a particular type of dance or kind of expression (whether nudity, semi-nudity, simulated nudity, stage design, or dancer-patron interaction) taking place inside an adult business.

Although adult entertainment cabarets in poor neighborhoods have more crime than businesses in other neighborhoods, this does not prove that the clubs cause crime (correlation is not causation). Change in police surveillance may also account for crime rates. Police calls by a cabaret may not indicate a troublesome business, but rather its commitment to maintain a safe and lawful establishment. Some police reports are proven false in court or do not reflect convictions. Charges for prostitution are at times merely based on the perception of "sexy" dancing or "come-on" fantasy talk. Opinions of appraisers constitute speculation, not empirical evidence of a valid relationship between exotic dance cabarets and their actual impact on property values. A "potential" negative impact is not a real impact. People presume nightclubs in general also cause noise, drunkenness, and litter. However, despite the intuitive appeal of these assumptions, there is a surprising absence of proof.

Most importantly, recent valid and reliable research has disproved the adverse secondary effects of exotic dance.[13] Of course, clubs may have crime, but not disproportionate to other businesses that are public places of assembly, and clubs often have positive effects. Clubs frequently benefit communities by attracting new business, providing employment, and paying taxes.

Typically, government regulates every exotic dance club the same way, regardless of their differences in operational character or their economic contribution to the community. Zoning is the first line of government control of adult entertainment. Areas are often set aside for clubs and distances from school and churches specified. Yet there is no evidence that it makes a difference if clubs are clustered or dispersed. Clubs may be eliminated

through eminent domain, which is the government purchase of land for the public interest.

In general, the courts have tended to be unaware of how dance conveys content symbolically and thus have permitted problematic "content-neutral" regulations. Some judges who recognize exotic dance as "speech" or "artistic expression" view it as less important than political speech in the hierarchy of First Amendment protection. Again, the problem is lack of knowledge about dance in general and exotic dance in particular, as well as the reigning supremacy of the verbal over the nonverbal.

ADVERSARIES OF EXOTIC DANCE

To begin my research in preparation for testifying in my first exotic dance court case, I had to break through demonstrators to get inside an exotic dance club. Adults and children who were picketing the club held banners that screamed, "Washington Together against Pornography!" I could see that a particular strain of Christian church was behind the opposition to adult entertainment, and I learned more about such hostility as I went along.

My research enabled me to prepare study reports, affidavits, and testimony to prevent the enactment of laws or to challenge laws that infringe upon the First Amendment of the U.S. Constitution (freedom of expression), the Fifth Amendment (due process related to arrests without warrants and regulatory and court proceedings) and/or Fourteenth Amendment (discrimination by singling out one kind of dance, nightclub, or business for regulation), or to defend dancers against charges of prostitution, lewdness, indecency, or obscenity. In every case, a pastor or church group was also involved, spearheading efforts to wipe out exotic dance. At first it seemed that these Protestant churches were acting independently in the tradition of local control; but eventually I realized they were part of a web of connection in a powerful Christian Right political alliance. I began to study these groups.[14]

In 1973, the politically active Christian Right was a small group of people with a grand design for the nation. Since then, a thirty-year effort using dynamic organizational momentum has led to religious conservatives gaining office at the local, state, and Supreme Court levels, to their taking control of Congress for the first time in forty years, and the elevation of George W. Bush, a born-again evangelical, to the White House. One of the major players I repeatedly saw in courtrooms across the country was attorney Scott Bergthold, who had been a member of several Christian Right political organizations, such as the Alliance Defense Fund, which are devoted to fighting adult entertainment. Now he carries on the fight through his own firm.[15]

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Through an organizational network fueled by money, lawyers, and technology, an emboldened division of the Christian Right fights adult entertainment as part of a political religious movement called Dominionism. Its goals are to supplant constitutional democracy with a bible-based Christian-governing theocratic elite.[16] Fights against exotic dance occur on merely one front in a broader culture war,[17] with other battles concentrating on abortion and prayer in the schools, for instance. Composed of evangelical traditionalists, centrists, and modernists, Christian Right divisions fight to have their voice and ideology prevail. My focus here is on the segment of political activists who have a thirst for eliminating the separation of church and state in order to create a scripture-guided nation, not the other divisions that concentrate on social welfare and global warming. However, if there are differences of opinion within the Christian Right regarding some "hot-button" issues, it is doubtful that they extend to exotic dance, which is broadly demonized.

Attempts to ban dance, of course, are not new.[18] The current rhetoric of the Christian Right echoes some past objections to dance based on the perceived threat it is seen to pose, in that the instrument of dance and sexuality are one and the same, namely, the human body. Eroticism has unleashed passions that have defied the dictates of many religious and political groups. As with theater, dance has been the object of suppression not only because of its perceived sexual nature, but because it has been associated with what is seen as "deceit and pretense," which is interpreted as "bearing false witness." In some religious interpretations, mimesis is linked to sin and blasphemy, in that it mocks nature and God. In other words, theatrical spectacle calls into question the very nature of truth by exaggerating it. Moreover, dance is considered to dissipate God's gift of time and money, because it is thought to serve no Christian purpose and to be poor preparation for death and eternity.

Moral crusades against dance are part of America's heritage, especially when dancers reveal evermore flesh and experiment with movement in ways that seem to flaunt traditional notions of modesty. Even ballet, perhaps the quintessential conception of high art dance today, was widely considered disreputable in the nineteenth century, because it publicly displayed the female body and provided a venue for rich gentlemen to pick up mistresses.[19] The current objections of the Christian Right repeat much of the anti-dance religious rhetoric of the past, in that Biblical injunctions concerning the use of the body and modesty recur,[20] and there is an emphasis on patriarchy, male-female polarity, and the belief that men have an inherently uncontrollable nature.[21]

Believing that people are tempted by sin and cannot be trusted with liberty, the Christian Right targets the publicly expressive body. Broadly speaking, white middle-class evangelical Christians who are socially, theologically, and economically conservative believe that a woman's place is in the home

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and only the husband should see the wife's nude body. They express outrage when a woman goes into the workplace and strips.

While many of these arguments may sound familiar, today's anti-exotic-dance brigade is different from those in the past because of the Christian Right's grasp of government policy and use of modern technology. A segment of the Christian Right is determined to reorganize American life more broadly.[22] Civil liberties constrain the movement's use of government to ban exotic dance outright; therefore, in the name of the "public good" and "protecting our children," which the Christian Right proclaims in public hearings and in legislative preambles, some members become legislators or enlist legislators to enact regulations that censor key elements of exotic dance, harm the business by eating away at its essence, and trample many people's civil liberties.

Wittingly or unwittingly, members of the Christian Right are joined by some feminists and the American Planning Association (APA) in the attempt to strip the First Amendment, corset the exotic dancer, and dismantle the industry. Concerned with protecting women, they consider exotic dancers to be objects of the "degrading" male gaze, said to hurt all women whether they know it or not. In this scheme, exotic dancers are infantilized by being characterized as hapless, exploited victims of patriarchy and unbridled male control, lust, and avarice. Yet my research indicates that most dancers are savvy entrepreneurs and, if they are subjects of the erotic gaze, they return that gaze in order to assess the monetary spending potential of patrons.[23] The female adversaries do not seem to recognize that male legislators who try to control exotic dance might be attempting to control women to reinforce patriarchy. In the economic realm, some businesses and property owners ally themselves with the moralists, fearing exotic dance in their neighborhoods would jeopardize safety and depreciate property values. Again, there is no scientific evidence to justify these fears.

Many people may join the anti-exotic-dance bandwagon in good faith, because they believe conservative propaganda and the stereotypes perpetuated by the media, or because they might remember past allegations that "strip joints" were run by organized crime and are unfamiliar with today's modern, well-run gentlemen's clubs. Easy to demonize because it is misunderstood, exotic dance adult entertainment is a lightning rod for culture conflicts in America and an easy scapegoat for fear of change in society. Exotic dance easily provokes public denunciation and governmental suppression for "the public good." Historically, those who perceive dance as a threat have responded in ways that have led to abuses of American and Fourth Geneva Convention human rights of autonomy, dignity, and justice. These abuses have challenged women's choice of work, freedom from exploitation and control, and choice of artistic expression. The NIMBY (not-in-my-backyard) issue also pits

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segments of the community against exotic dance stakeholders (dancers, patrons, club owners, and personnel).

TACTICS USED AGAINST EXOTIC DANCE

Strategies to promote the anti-exotic-dance agenda include the APA providing local governments with faulty, biased, outdated studies that claim exotic dance clubs cause harm.[24] One of their publications appears to call on the resources of academic experts, but, in fact, is inaccurate and misleading.[25] In addition, the APA files amicus curiae or friend-of-the-court briefs (namely, information provided on points of law or other aspects of a case to assist a court in its decision) against the adult industry.

More dire tactics against exotic dancers, including death threats and harassment of exotic dance stakeholders, are similar to those used against abortion service providers. The Christian Right also uses agitprop tactics by mobilizing the forces of highly organized church groups who respond to calls for massive letter-writing campaigns and become more visible though its media empire.[26] Not only do they attack exotic dance, but they assault the National Endowment for the Arts' existence and funding, disapproving of some grantees' work on moral grounds.

To help in these crusades, a number of religious conservative political action groups provide a model for anti-exotic-dance legislation[27] and other legal services to local governments. For example, the Community Defense Counsel (CDC) was set up by members of the Christian Right specifically to fight adult businesses and has offered national legal conferences, training seminars for prosecutors or city attorneys, drafting services for statutes or ordinances and testimonies, trial assistance, and appellate and amicus curiae briefs. It also provides a law library with "studies of secondary effects," a legal manual, model city ordinances, and workshops for church members held around the country to teach people how to keep adult businesses out of neighborhoods. The organization has been training a thousand attorneys to develop "secure cities" to improve the "the quality of life" in their communities. The CDC publishes articles in law journals and the popular media and puts out slick multicolored flyers that feature statements such as "We can help you draw the line for decency," "How can I get involved?" "You call this victimless?" "How to keep sex businesses out of your neighborhood," and "There's no place like home . . . for pornography?" (The Christian Right confounds exotic dance with pornography.)

The Christian Right also seeks to impose its views through lobbying, voter guides, and organizational structures, such as prayer-action groups that

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become political action committees. Christian Right stay-at-home women have become available platoons to further the conservative agenda.

In addition, the Christian Right pressures and also participates in government. A tactic against exotic dance clubs is for governments to require clubs to hire police for security, more expensive than private guards. Jurisdictions may turn to discriminatory licensing of exotic dancers (but not other dancers), clubs, and managers. Licensing, often expensive and cumbersome to the licensee, enables a locality to refuse, suspend, or revoke a license, often at a government official's discretion and without equitable appeal procedures. There may be special entertainment taxes ("sin" taxes) on adult clubs.

Criminal "obscenity," "public indecency," and "lewd conduct" laws tie the noose tighter. Governments may set hours of operation and require specific configurations of stage and seating. Some localities mandate bright lighting and patron-dancer distance requirements "to facilitate law enforcement against drugs and prostitution" and further impede dancers' creativity by specifying costumes, dictating what body parts can be exposed, and determining exotic dance styles, movements, the use of self-touch, and the manner in which patrons may tip dancers. Adversaries attempt to ban simulated nudity and simulated sex even though they do not define them.

Another tactic is to change the rules as soon as exotic clubs comply with a regulation ordinance and still thrive or the court overturns a restrictive law. If during a court hearing a government realizes a challenge to its ordinance will most likely succeed, it amends the restriction to render the court case moot and to avoid paying the challenger's attorney's fees. Fearful of losing in court and paying costs and damages, some local governments are becoming cautious about passing anti-exotic-dance ordinances. They may require adversarial church groups to first create a legal defense fund of one hundred thousand dollars to cover the expected cost of club challenges to the ordinances.

Law enforcement may root out, prosecute, and render stiff penalties for violations of adult business regulations.[28] Asking inspectors from fire, health, building, alcohol, or public works agencies and the Internal Revenue Service or state tax authority to find any kind of code violation is another form of harassment. Club Exstasy in Prince Georges County, Maryland, experienced four raids in thirty days in 2006, and customers received citations for jaywalking and not parking between a private parking lot's lines. Intimidating threats of undercover operations and vice-squad raids exert control. In some localities, law enforcement has prevented entry into a club and deterred patrons under the pretext of protecting demonstrators against the club, at the same time permitting the demonstrators to trespass. A Kansas law mandates a grand jury investigation if enough names (3,300 signatures) can be gathered through a petition process. Thus the Christian Right in several cities forced

grand jury investigations of sexually oriented businesses. However, grand juries refused to issue indictments in most cases.

Tactics against exotic dance also include a kind of psychological assault on specific exotic dancers and patrons and on the reputation of the exotic dance industry in general. At public hearings, on websites, and in publications, Christian Right talk show hosts, writers, and organizers often characterize the exotic dance world as dangerous, suggesting along the way that the rights women have gained through the feminist movement and 1960s sexual revolution are causing their lives to fall apart. Former strippers who are "born-again" Christians commonly tell dark tales, which, even if true, serve mostly to exaggerate outsider fears, the way much stereotyping does.

Along with picketing exotic dance clubs, members of the Christian Right note patrons' license plate numbers and phone their families and employers. One Christian group sent a letter to parents living within three blocks of a club, alerting them to the recently opened business and making negative allegations against the owners and their wives; this led to club owners' children being harassed in school. Club customers have received postcards mailed by a church group. The text read, "Observed you in the neighborhood. Didn't know if you were aware there is a church in the area." Patrons were sent photos of their cars parked outside the club and had their faces and license plate numbers photographed by picketers posted on a website called "seewhosthere." A group called People Advocating Decency videotaped patrons entering a club. "We just wanted to make people think twice before they go in," a spokesperson said. "They might think, 'I don't want the world to know about this.'"

Going even further, the Carolina Family Alliance used patrons' car tags to track their identity and contact them by phone or mail to encourage them to seek professional help. They also notified their family and friends about the potential "danger" the clubs pose to loved ones. Protesters have used bullhorns on a club's property. The Family Coalition protested outside a club for over a year with a billboard that read, "Pornography Breeds Rapists," although exotic dance is not pornography; nor is there evidence it causes rape.[29] Anti-club protesters also engage in assaults on property and physical threats. Some slash tires in club parking lots. A club called Delilah's Gone Platinum was vandalized twice. Vandals made sledgehammer-sized holes throughout the building; substantially smashed block-glass windows, mirrors, ceramic statues and the stereo system; flooded several hallways and rooms with an inch of water; and tore up the dance stage floor.[30] In another case in upstate New York, a couple that owned a club under attack sent their daughter to live with relatives for safety after threats to her life.

Stigmatization of dancers is yet another means of assaulting an industry. Groups trying to "save" dancers are stigmatizing them, assassinating

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their characters as independent decision-making women, and re-sowing false myths. When governments require a six-foot buffer zone between the dancer and her audience—or even a clear unbreakable glass or Plexiglas wall prohibiting physical contact between the entertainer and her audience—this dehumanizes the dancer and sends patrons the message that she is like an infectious patient in a hospital isolation ward, or a prisoner or caged animal in a zoo. The rights of patrons are also affected when draconian laws prevail; when direct tipping is banned, they cannot say thank-you to the dancer and express their opinions about the merit of the performance. The impact of the ordinance is like a salesperson not being able to hand a customer a receipt or a maître d' not being able to receive a tip.

DEFENDERS

People who challenge the religious, feminist, economic interest, social, and governmental assaults on exotic dance include equally passionate liberal feminists and civil rights activists. Many citizens object to singling out exotic dance clubs for special regulations because these regulations not only infringe on civil liberties, but they cost taxpayer money to develop, enact, enforce, and defend. Government jurisdictions have spent millions of dollars in litigation and damages, and the exotic dance regulations divert needed resources from real problems and cut the local government tax income. After all, the clubs pay taxes, employ people, support legitimate businesses through purchasing a range of goods and services, and attract new businesses to their neighborhoods, including upscale women's dress stores. As well, there are some businessmen who do not like the idea of government micromanaging any business.

Exotic dancers and clubs have fought opponents with the help of members of the First Amendment Lawyers Association, Association of Club Executives National Trade Association, American Civil Liberties Union, other civil liberties organizations, as well as Dance USA among arts groups.[31] In countering attacks on their businesses, exotic dance clubs take offensive and defensive action in the courts of public opinion and law. Lobbying, presentations to local councils and state committees, as well as support for open-minded political candidates, are preemptive efforts to halt the passage of restrictive ordinances. Some club owners and dancers run for political office. Clubs have organized successful referenda against club regulations in California, Washington, and Arizona. Litigation over exotic dance is ongoing in local, state, and federal courts with wins and losses.[32] However, the highly organized, religiously motivated adversaries of exotic dance are persistent and dangerous, requiring equal persistence in efforts to uphold the U.S. Constitution.

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IMPLICATIONS

The Christian Right, viewing exotic dance as a cancer to be eliminated as part of creating a scripture-based society, acts against it with much muscle. Adversaries of exotic dance try to keep it out of their neighborhoods on the basis of a widespread mythology that recently has been shown to be false. In the conflict, antagonists infringe on the First Amendment and other civil liberties of the exotic dance stakeholders. When local governments single out exotic dancers to be licensed, without requiring licenses for other kinds of dancers, the governments discriminate against exotic dancers and violate their Fourteenth Amendment rights. Planners and legislatures mandate distance requirements, including raised platforms, between dancers and patrons on the presumption that it will prevent illegal behavior. Yet by using the logic that planners and legislatures apply to exotic dance for monitoring misbehavior, there should be similar requirements to separate children and priests and pastors in church or teachers at school, because the adults might sexually molest the children. In fact there is substantial evidence of clerical sexual abuse of children and adults, with convictions and churches paying billions of dollars in settlements, whereas no such evidence has been produced regarding the dangers of exotic dance.

Inherent in the debate over exotic dancing is a class and social status issue, in that so-called "high art" dance is not similarly controlled and censored. To cite just one example, on January 31, 1978, April 28, 1982, and January 25, 1992, the community of theater-goers in Roanoke, Virginia, accepted nudity in the touring Broadway show *Oh! Calcutta,* with male and female nude bodies touching. But in 1997 a Roanoke jury did not accept nude female soloists in the exotic dance club Girls, Girls, Girls, and charged them with obscenity. As well, there is a contradiction in terms of regulation when it comes to social dancing; while exotic dancers are censored or harassed, there is relative acceptance of adults or teenagers who are similarly attired and engaged in sexually explicit dancing.

Various kinds of government-imposed burdensome regulations diminish the multifaceted messages of exotic dance and constrain the free market. This effectively denies both dancers and audience members access to free artistic expression. The restrictions imposed on exotic dance have the potential to impact other dance and performing arts, and, indeed, all Americans. Had dance been successfully censored in the past, many dance forms and masterworks recognized today would have been lost.[33] Throughout history, battles have been waged over the shock of unconventional sexuality, miscegenation, bodily disclosure, touching, and homosexuality in ballet, modern, postmodern, and performance art dance. A censorship assault on any form of dance, even the

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stigmatized exotic dance, harms all art. For example, the Christian Right's intimidation causes some choreographers to self-censor and shrinks public and private dance funding for "controversial" work.

Moreover, the art of dance develops with inspiration from, and porous boundaries between, various kinds of dance, especially if they are sexual and shocking. Jerome Robbins directed and choreographed the Broadway show *Gypsy* in 1959 based on the life of stripper Gypsy Rose Lee; modern dancer Mark Morris choreographed *Striptease*; renowned choreographer and founder of the New York City Ballet George Balanchine featured a striptease dancer in *Slaughter on Tenth Avenue*. Broadway star Bob Fosse produced renditions of exotic dance in Broadway musicals (the comic "Hernando's Hideaway" in *The Pajama Game* and "Whatever Lola Wants" in *Damn Yankees*) and the film *All That Jazz* (a suggestive ballet). Jawole Willa Jo Zollar, a modern dancer based in New York City and head of the Urban Bush Women company, has spoken of the influence of the strippers she saw in her childhood on her dances.

Assaults against dance eerily recall tactics by fascist and totalitarian governments whose legislation gradually eats away at human rights. The banning of dance in Afghanistan by the Taliban was only one of the most recent examples of how human rights are curtailed. It only takes one look at anti-dance rhetoric of the past to see the dangers. A famous man once wrote that "our whole public life today is like a hothouse for sexual ideas and stimulations. Theater, art, literature, cinema, press, posters, and window displays must be cleaned of all manifestations of our rotting world and placed in the service of a moral, political, and cultural idea." The man was Adolf Hitler.[34]

In sum, the opprobrium targeted at exotic dance threatens all dance, and more importantly, places everyone's civil liberties at risk. Nadine Strossen, New York University law professor and president of the American Civil Liberties Union, said, "Once we cede to the government the power to violate one right for one person, or group, then no right is safe for any person or group."[35]

APPENDIX 1: PROTECTION UNDER THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NOTES

1. I wish to acknowledge the helpful comments of Pamela Squires, Naomi Jackson, Toni Shapiro-Phim, and Jennifer Fisher on this article. All arguments and interpretations are, ultimately, mine. This essay is biased in favor of the U.S. Constitution—free speech, due process of the law, and nondiscrimination—and evidence over misperception and myth.

2. Judith Lynne Hanna, *To Dance Is Human: A Theory of Nonverbal Communication* (Chicago: University of Chicago Press, 1987); *Dance, Sex, and Gender: Signs of Identity, Dominance, Defiance and Desire* (Chicago: University of Chicago Press, 1988); *Disruptive School Behavior: Class, Race and Culture* (New York: Holmes & Meier, 1988); *The Performer-Audience Connection: Emotion to Metaphor in Dance and Society* (Austin: University of Texas Press, 1983); and a 1988 preliminary version of *Dancing for Health: Conquering and Preventing Stress* (Lanham, Md., AltaMira Press, 2006). Since 1995, I have continued my work on dance as nonverbal communication: *Partnering Dance and Education: Intelligent Moves for Changing Times* (Champaign, Ill.: Human Kinetics, 1999); "The Language of Dance," *JOPERD* 72, no. 4 (2001): 40–45, 53; numerous peer-reviewed articles and nearly one hundred fifty articles for dance magazines (see www.judithhanna.com).

3. A listing of most of the forty-four cases in which a court swore me in as expert court witness appears in Hanna, "Adult Entertainment Exotic Dance: A Guide for

Planners and Policy Makers" (CPL [Council of Planning Librarians] Bibliography 375), *Journal of Planning Literature* 20, no. 2 (2005): 116–34. I also gave presentations at public hearings and regulatory boards and wrote reports for cases that precluded a lawsuit or were settled.

4. Since 1995, I have come across more than four hundred jurisdictions fighting exotic dance, and often more than once. Angelina Spencer, National Executive Director of the Association of Club Executives, reported that two hundred state legislative bills were leveled at the industry in 2007.

5. Poseyville and New Harmony, Indiana, for instance, have passed ordinances that ban nudity in "performances," including any play, motion picture, dance, or other exhibition or presentation, whether it is pictured, animated, or live, performed before an audience of one or more. This means libraries, museums, and movie theaters could all be breaking the law.

6. Hanna, "Undressing the First Amendment and Corsetting the Striptease Dancer," *The Drama Review* 42, no. 2 (Summer 1998): 38–69; Hanna, "Toying with the Striptease Dancer and the First Amendment," in *Play and Culture Studies, Vol. 2*, ed. Stuart Reifel (Greenwich, Conn.: Ablex, 1999), 37–55. Over the past six decades, numerous dancers have written about their lives as strippers, there are how-to books, journalists have given us reports, scholarly articles abound, and recently revised dissertations, some by former exotic dancers, have appeared: Katherine Frank, *G-Strings and Sympathy: Strip Club Regulars and Male Desire* (Raleigh, N.C.: Duke University Press, 2002); Katherine Liepe-Levinson, *Strip Show: Performances of Gender and Desire* (New York: Routledge, 2002); Christine Bruckert, *Taking It Off, Putting It On: Women in the Strip Trade* (Toronto: Women's Press, 2002); R. Danielle Egan, *Dancing for Dollars and Paying for Love* (New York: Palgrave Macmillan, 2006); Bernadette Barton, *Stripped: Inside the Lives of Exotic Dancers* (New York: New York University Press, 2006); and Catherine M. Roach, *Stripping, Sex, and Popular Culture* (New York: Berg, 2007).

7. Hanna, "The Language of Dance," *JOPERD* 72, no. 4 (2001): 40–45, 53; Hanna, "Body Language and Learning: Insights for K–12 Education," in *Dance: Current Selected Research, Vol. 5*, ed. Lynnette Y. Overby and Billie Lepczyk (New York: AMS Press, 2005), 203–20.

8. Valerie Preston-Dunlop, compiler, *Dance Words* (Chur, Switzerland: Harwood Academic Publishers, 1995), 139.

9. See Anthony Shay and Barbara Sellers-Young, eds., *Belly Dance: Orientalism, Transnationalism, and Harem Fantasy*, Biblioteca Iranica: Performing Arts Series, 6 (Costa Mesa, Calif.: Mazda Publishers, 2005).

10. For a listing of such cases, see Hanna, "Adult Entertainment Exotic Dance: A Guide for Planners and Policy Makers" (CPL [Council of Planning Librarians] Bibliography 375), *Journal of Planning Literature* 20, no. 2 (2005): 116–34.

11. All three prongs of the definition must be satisfied for a work to be constitutionally obscene: 1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; 2) whether the work depicts, or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and 3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

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12. Bryant Paul, Daniel Linz, and Bradley J. Shafer, "Government Regulation of Adult Businesses through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects," *Communication Law and Policy* 6, no. 2 (2001): 355–91.

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America (Albany: State University of New York Press, 2003); Brian Malley, *How the Bible Works: An Anthropological Study of Evangelical Biblicism* (Lanham, Md.: AltaMira Press, 2004); Catherine Margaret Miles, *Carnal Knowing: Female Nakedness and Religious Meaning in the Christian West* (Boston: Beacon, 1989); James Rudin, *The Baptizing of America: The Religious Right's Plans for the Rest of Us* (New York: Thunder Mouth's Press, 2006); and Elaine B. Sharp, *Morality Politics in American Cities* (Lawrence: University Press of Kansas, 2005).

17. See Marty Klein, *America's War on Sex: The Attack on Law, Lust and Liberty* (Westport, Conn.: Praeger, 2006) for numerous examples.

18. See Ann Wagner, *Adversaries of Dance: From the Puritans to the Present* (Urbana: University of Illinois Press, 1997). Also see Elizabeth Aldrich's article in this volume.

19. John Elsom, *Erotic Theatre* (New York: Taplinger, 1974); Ivor Forbes Guest, *The Romantic Ballet in Paris* (Middletown, Conn.: Wesleyan University Press, 1966); Parmenia Migel, *The Ballerinas: From the Court of Louis XIV to Pavlova* (New York: Macmillan, 1972); Lynn Matluck Brooks, ed., *Women's Work: Making Dance in Europe before 1800* (Madison: University of Wisconsin Press, 2007).

20. Jeff Pollard, *Christian Modesty and the Public Undressing of America* (San Antonio, Tex.: Vision Forum, 2004); see Jim C. Cunningham, *Nudity & Christianity* (Bloomington, Ind.: AuthorHouse, 2006), on the historical and geographical contexts of modesty and various biblical interpretations of nudity.

21. Tim LaHaye, *How to Be Happy Though Married* (Wheaton, Ill: Tyndale House, 1963).

22. Several of the many organizations that have leaders who speak out against exotic dance are: American Decency Association, American Family Association, Americans United to Preserve Marriage & American Values (formerly Family Research Council), Child Welfare Foundation, Christian Broadcasting Network, Citizens for Community Values, Concerned Women for America, Concerned Women for America's Culture and Family Institute, Coral Ridge Ministries, Eagle Forum, Family Research Council, Florida Family Association, Focus on the Family, Free Congress Foundation, National Association of Evangelicals, National Center for Law and Families, National Empowerment Television, Southern Baptist Convention, Traditional Values Coalition, and Wall Builders.

23. Hanna, "Empowerment: The Art of Seduction in Adult Entertainment Exotic Dance," in *Music, Dance and the Art of Seduction*, ed. Frank Kouwenhoven and James Kippen (Leiden, the Netherlands: Chime, 2008).

24. I identified these tactics during thirteen years of field research across the country, conducting interviews with dancers, club management, patrons, community members, government representatives; reading letters from strangers who wanted to share their stories with me; observing behavior; watching television; and reading newspapers and reports on several listservs, websites, and chatrooms dealing with sexuality in society, adult entertainment, Christianity, and civil liberties.

25. Hanna, "Review of Eric Damian Kelly and Connie Cooper, *Everything You Always Wanted to Know About Regulating Sex Businesses*," *Journal of Planning Literature* 17, no. 3 (2003): 393–94.

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26. Linda Kintz, *Between Jesus and the Market: The Emotions That Matter in Right-Wing America* (Durham, N.C.: Duke University Press, 1997).

27. Len Munsil, *The Preparation and Trial of an Obscenity Case: A Guide for the Prosecuting Attorney* and *How to Legally Stop Nude Dancing in your Community* (Scottsdale, Ariz.: National Family Legal Foundation, 1988; 1994).

28. U.S. Attorney General John Ashcroft used the Patriot Act to enter the fray in "Operation G-String." Attorney General Alberto Gonzalez made war on pornography (exotic dance is erroneously placed in this category) a top priority of his office. One FBI agent anonymously said, "I guess this means we've won the war on terror. We must not need any more resources for espionage." See Barton Gellman, "Recruits Sought for Porn Squad," *Washington Post*, September 20, 2005, A21.

29. R. A. Baron, "Sexual Arousal and Physical Aggression: The Inhibiting Influence of 'Cheesecake' and Nudes," *Bulletin of the Psychonomic Society* 3 (1974): 337–39. The criminal justice system has no evidence of a correlation between watching exotic dance and raping women.

30. "Strip Club Vandals Return," *Indianapolis Star*, October 10, 2001.

31. In addition to Dance USA, Alley Theatre, Association of Performing Arts Presenters, Kathleen Chalfant, Tony Kushner, The Looking Glass Theatre Company, Terrence McNally, Oregon Shakespeare Company, Yvonne Rainer, Rachel Rosenthal, Theater Artaud, Theatre Communications Group, and the Walker Art Center also contributed to an amicus brief to the U.S. Supreme Court in *City of Erie v. Pap's A.M.*

32. This paper has focused on female dancers who perform for men and also for women, who are increasingly attending exotic dance clubs. Some clubs may have an occasional night featuring male dancers and there are a few clubs that cater to women patrons and put on all-male shows. Exotic dance regulations apply to both female and male dancers, and litigation in a 2006 case in Prince Georges County, Maryland, included clubs featuring female dancers and a club featuring male dancers.

33. Hanna, "Ballet to Exotic Dance—Under the Censorship Watch," in *Dancing in the Millennium: An International Conference; Proceedings*, Juliette Crone-Willis and Janice LaPointe-Crump, compilers (Washington, D.C.: 2000), 230–34; "Dance under the Censorship Watch," *Journal of Arts Management Law and Society* 29, no. 1 (2002): 1–13.

34. Adolf Hitler, *Mein Kampf* [My Struggle] (New York: Houghton Mifflin, 1943), 254–55.

35. World Pornography Conference, Center for Sex Research at California State University, Northridge, 1998.

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Exotic Dance Adult Entertainment: A Guide for Planners and Policy Makers

Judith Lynne Hanna

Because exotic dance adult entertainment is a nationwide lightning rod for conflict, a comprehensive knowledge base is necessary. This bibliographic summary of literature addresses some misperceptions and notes new United States Supreme Court cases that can lead planners, policy makers, and government attorneys into legal difficulties over restrictions they try to impose on this industry. Costs to enact, enforce, and defend the restrictions may divert scarce resources. The multidisciplinary literature encompasses books, articles, court testimony, and court rulings on exotic dance written by researchers in anthropology, architecture, biology, criminology, economics, journalism, law, photography, planning, police work, psychology, real estate, and sociology, as well as accounts presented by former exotic dancers. Topics include First Amendment–related characteristics of exotic dance, its expressive components, performers, patrons, adversaries, and supporters; the validity of studies used to justify zoning, alcohol beverage control, and other restrictive ordinances; and legal justifications and limitations on regulating exotic dance.

Keywords: *adult entertainment; court decisions; effects; misconceptions; regulations*

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I. INTRODUCTION

Exotic dance adult entertainment is controversial and not widely understood. Because it is a lightning rod for conflict in many parts of the United States, a comprehensive knowledge base is necessary. There are prevailing *fallacies* that exotic dance causes the adverse secondary effects of crime, property depreciation, and disease (e.g., Paul, Linz, and Shafer 2001; Freeman and Linz 2002; Land et al. 2004). There may also be intemperate rhetoric (Munsil 1988, 1994), sensationalist media portrayals (e.g., the film *Showgirls*), and uninformed legislation and judicial findings. Countering these are scholarly studies of exotic dance, its nonverbal communication, and its impact on society that have appeared within the past decade (see bibliography below on exotic dance). Misperceptions lead planners, policy makers, and government attorneys into difficulties over the restrictions they try to impose on the exotic dance adult entertainment industry to protect "the public health, safety, morals, comfort, and neighborhood property values" or the "general welfare of the populace." This review argues that such restrictions serve no compelling government interest in a democracy. Laws usually already exist against crime; thus, singling out exotic dance club businesses among other businesses for special regulations may appear to be discriminatory.

Deliberations about exotic dance have been hampered by the absence of the results of relevant research (drawn from the arts, humanities, and social and behavioral sciences) on the relationship of the First Amendment to nonverbal communication, dance, and exotic dance. Several visits to a club, or titillating portrayals in cinema, television, or talk shows, provide insufficient bases for understanding exotic dance (Hanna 2004).

At issue are the reasons for regulating exotic dance clubs; the constitutionality of these regulations in light of recent U.S. Supreme Court decisions; whether exotic dance is "conduct" *or* "communication" and "expression" (Tiersma [1993] explains the distinction that affects its First Amendment—free speech—protection); what is obscene (determining community standards when multiple standards most likely exist, tolerance versus acceptance, and a juror's personal standards, Scott [1991]; indecency protection, Robbins and Mason [2003]); economic ramifications; who advocates regulations; and costs to enact, enforce, and defend the regulations. Disputes also arise about, for example, government use of unscientific negative effects studies; government use of studies of other jurisdictions that are irrelevant to time, place, and specific kind of adult business within its own jurisdiction; overbroad and vague regulations; what constitutes dance, theater, and artistic merit; and licensing and appeal procedures.

The "not in my backyard" (NIMBY) syndrome envelops adult entertainment. Some neighborhood residents claim exotic dance clubs cause problems and thus are an unwelcome development in their neighborhoods. Local governments cannot outright ban the clubs, which have some measure of First Amendment protection. So residents employ alternative mechanisms to curtail the clubs. They engage in an array of confrontational strategies. For example, some people picket clubs, call patrons' families and employers, slash tires in club parking lots, and make threatening calls to club owners. People work through their local governments to enact ordinances that try to eliminate the clubs or prevent them from opening (Munsil 1988, 1994; Kelly and Cooper 2000; Hanna 1999). Governments can also authorize vice squad raids, sting operations, stringent licensing requirements, and high criminal penalties for regulatory violations. When exotic dance club owners litigate and courts void laws, many localities may enact new legislation, which could lead to further lawsuits and more regulations.

However, there are examples of community support for exotic dancing. In response to Los Angeles regulations of exotic dance adult entertainment in 2003, 107,000 citizens signed petitions for a referendum against the regulations, resulting in Los Angeles

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rescinding the regulations (Pierson 2003). Citizens in Glendale, Colorado, voted lawmakers supporting regulations out of office. A former exotic dancer became mayor in Georgetown, Colorado. Grossman (2003) reported professional trend spotter Irma Zandl's recent forecast based on the responses of three thousand young people who are ethnically and geographically diverse and gender balanced: "Strippers are really setting the trends right now. I think strippers have become hugely important" (p. 52). The respondents said, "Striptease is cool."

Many citizens may not only object to regulations of exotic dance clubs because they infringe on civil liberties but may also object to the cost of regulations."Dance police" can divert scarce resources from fighting crime that has victims. Forcing exotic dance adult entertainment clubs to comply with or litigate regulations can decrease the clubs' contribution to the economy (they pay taxes, employ people, purchase a range of goods and services, and sometimes attract new businesses to the neighborhood). Furthermore, resources paid by taxpayers are required to develop, enact, and enforce laws. If laws are challenged and government loses, the government pays court costs, attorney fees of the challenger (which have ranged from $35,000 to more than a million dollars), and often damages. For example, in *Gammoh v. City of Anaheim* (Superior Court, Orange County, California, Case 736182, 2004), a settlement for Anaheim's unconstitutional zoning ordinance cost the city two million dollars. (There was a prior related decision, 73 Cal.App.4th 186, 86 Cal.Rptr.2d 194 [1999], as well as an unreported decision from 2003.) In addition, a jury awarded a club owner $1.4 million for profits lost because the city of San Bernardino closed his club for four years, claiming the property was not an area zoned for adult cabarets. The city was liable under the Federal Civil Rights Act and had to pay attorney fees as well (*People v. Manta Management*, San Bernardino Superior Court, No. SCV 18157, 2004).

Conflict over exotic dance plays out in the courts. Overriding state law, the U.S. Supreme Court's decisions related to exotic dance adult entertainment (see section II.C for an explanation, list, and annotation of specific cases) have primarily been rooted in the governmental interest to protect the populace, alcoholic beverage regulations, zoning ordinances, and morality.

However, recent cases have changed the landscape for regulating adult businesses. Negative effect studies that localities have used in the past to justify ordinances recently have been challenged as to the quality and relevance to the specific jurisdiction. Critiques and new research have shown the past studies to be invalid as explained below (section II.B). The result is that it is now much harder for governments to overcome the many hurdles to withstand First Amendment challenges to their ordinances.

This multidisciplinary bibliography is based on a comprehensive reading of theoretical, descriptive, and empirical work by researchers in anthropology, architecture, biology, criminology, economics, journalism, law, photography, planning, police work, psychology, real estate, social work, and sociology related to exotic dance, as well as accounts by former dancers. The items were identified through library databases, bibliographies of published work, networking among researchers and attorneys, and several list-servs.

The bibliography follows this format: a summary annotation of the consensus of the citations in each section. Because the titles of references are self-explanatory within a topical grouping, an annotation for each specific reference would be redundant. However, major legal cases that have regulatory impact beyond a jurisdiction are annotated separately in section II.C.

Placing exotic dance adult entertainment in historical context contributes to its understanding. Using the human body as the instrument for both dance and sex has long made dance, generally, suspect or immoral in some people's eyes. Since early American history, there has been debate against all manner of dance and allegations of its dangers, such that one may wonder if anyone dared to dance (Wagner 1997). Ballet, recognized today as a fine art, was until the mid-1950s stigmatized and associated with the *demi-monde* (Hanna 1988, 2002). Foster (1996) shows the common thread of sexuality in ballet and exotic dance. Hostility to and titillation by dance continue today, especially with exotic dance adult entertainment (also called erotic, striptease, titty bar, topless, nude, table, couch, lap, go-go, and "gentleman's club" dance).

The 1980s saw a proliferation of upscale exotic dance establishments. The United States now has about three thousand adult entertainment clubs, as well as an annual national trade exposition and several exotic dance organizations and publications for club owners and for dancers. These organizations deal with issues such as litigation, club management, employee relations, sexual harassment, fire safety, theft, equipment, lighting and sound systems, and beverage and other services. The industry is estimated to be a $15 billion business. Average annual individual club revenues are estimated to be more than $500,000. Top-end clubs may net $100,000 monthly. See *Exotic Dancer's Club Bulletin* (ED Publications) and *White Paper 2005: A Report on the Adult Entertainment Industry* [in California] (Free Speech Coalition). Clubs pay substantial local and state taxes, and some contribute to local charities and work with their local Chambers of Commerce for the commu-

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nity welfare. The stocks of some exotic dance clubs are traded on the NASDAQ Stock Exchange (Schlosser 1997). PT Showclubs chain, with sixteen clubs in eight states, was traded on the American Stock Exchange in 2004.

Exotic dance fits within the broader context of art forms that have moved (or are moving) from the margin into the mainstream (e.g., hip-hop). Dance forms on the margins often contribute to the Western aesthetic for innovation, and exotic dance is no exception. Exotic dance expression has influenced communication in other forms of dance. Renowned founder of the New York City Ballet George Balanchine featured a sexy burlesque striptease queen in "Slaughter on Tenth Avenue" (1936). He was inspired by his penchant after ballet performances when on tour in Paris to visit the Crazy Horse Saloon for the midnight striptease show (Bentley 2002). Jerome Robbins directed and choreographed the Broadway show "Gypsy" in 1959 based on the life of stripper Gypsy Rose Lee; revivals of "Gypsy" continue to be staged (one appeared in 2003 on Broadway). Modern dancer Mark Morris choreographed "Striptease." Broadway star Bob Fosse produced renditions of exotic dance in Broadway musicals. Jawole Willa Jo Zollar, head of the Urban Bush Women Company, has spoken of the influence on her dances of the strippers she saw in her childhood. The Pepatian troupe presented "Como Desnudarse" ("How to Undress") and "El Striptís" at the 92d Street Y in New York City. Some of Madonna's backup singers have used moves borrowed from strippers, while Madonna touches her crotch and grinds. Sensual stripper workouts surfaced at gyms, and students enroll in classes at universities and community centers to learn to love their bodies, to get in touch with their femininity and denied sexuality, and to feel comfortable with various stages of undress. Nudity has become pervasive on mainstream stages (beginning in 1842), in film, and on television.

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II. BIBLIOGRAPHY

A. Exotic Dance

1. DANCE, COMMUNICATION, ART, THEATER, AND ADULT ENTERTAINMENT

Under the umbrella of the First Amendment (see section II.C), exotic dance is a form of dance, art, and adult entertainment performed by a loosely organized dance company in a cabaret theater with mirrors to show dancers from different perspectives. Contemporary exotic dance usually has two sequential parts. In the first part, a dancer performs onstage for the audience as a whole to entertain and to showcase herself as an advertisement for the second part of the exotic dance. Generally, nudity climaxes a three-song performance in which the dancer appears on stage clothed for the first song, partially removes her clothes during the second, and strips to nudity at the end. In the second part of exotic dance, a performer dances in the audience area for individual patrons for a fee. This individual patron-

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focused dance takes place next to where the patron is seated, or in lap dancing (common in some clubs), also on a patron's thighs. The dancer artistically communicates to a patron, through body movement, proximity, touch, and dim light, the fantasy of "I am interested in you and you alone, I understand you, you're special and important to me." Most strippers are women, but some transvestites perform among them. Men also strip for women and for other men.

Stripping also occurs in peep shows, in which dancers perform in an enclosed space (e.g., the Lusty Lady in San Francisco and Seattle). But peep shows differ from exotic dance clubs in that exotic dance clubs are open theaters serving beverages and sometimes gourmet meals.

Dance is a form of nonverbal communication, a kind of "speech," more like poetry than prose that expresses emotions and ideas. Just as verbal language has vocabulary, semantics, syntax, and symbolism, so too does dance. Exotic dance, with its nudity and sexy movements, communicates the message that it is adult entertainment. There is a distinction between adult entertainment, usually subject to regulation, and other forms of stripping, for example, the revival of old-style strippers skilled in the art of seduction, who leave more to the imagination (see "The New Burlesque," *Los Angeles Times Calendar Weekend*, March 14, 2002, cover and pages 6-8). About 20 burlesque troupes from around the country recently gathered at two New Orleans nightclubs for Tease-O-Rama, a three-day celebration of the allure of old-fashioned striptease. Across the continent in Helendale, California, is the Exotic World Burlesque Museum Hall of Fame that hosts the Annual Striptease Reunion & Miss Exotic World to honor the past and present revival. Legends, such as Tempest Storm, join newcomers at these annual events.

In one nouvelle rendition of striptease, Americans can get a sensual toning, tightening, and titillating stripper workout at gyms from Los Angeles and San Francisco to New York and Miami. In *The New York Times Magazine*, Mary Tannen in "Pole Cats" (April 28, 2002, p. 82) reported that stripper-style pole dancing had become an exercise craze. Crunch Fitness in New York has been offering cardio striptease classes since October 2001, with mirrors and stripper moves, including sliding clothes back and forth between legs and pole work (performing erotic and acrobatic movements on a vertical pole in the middle of the stage). Those ashamed of their bodies or self-conscious people may prefer another nouvelle tradition, for example, a "therapeutic" class in "The Art of Exotic Dancing for Everyday Women" at the Learning Center in Malvern, Pennsylvania. The class has a companion 86-minute instructional video, a best-seller on Amazon.com.

So, as stripping flourishes in museums, gyms, colleges, and community centers, and seemingly no longer transgressive, the exotic dance called *adult entertainment* needs distinguishing characteristics. Otherwise, what makes it an adult business and subject to regulation? Note that nudity in exotic dance, as in other dance and art forms, communicates an array of messages depending on the performer and the patron's perception: eroticism, yes, but also nature, health, simplicity, beauty of the body as an art form, honesty, the body as God's gift and worthy of the gaze, innocence, independence, empowerment, demystification of the natural body, status of a popular culturally defined well-maintained body, parody of pretension, and being human (Wheeler and O'Neil [1999] provide illustrations of these multiple meanings of nudity in the performing arts).

Exotic dance movements are not sex but are choreographed to create sexual fantasy through patrons' "ocular penetration" (Hanna 1998b, 2002a, 2002b; Liepe-Levinson 1993, 1998, 2002 in II.A.2a; and references below). The movements, performed in high heels, derive from belly dance, burlesque, popular, Broadway theater, music video, jazz, and hip-hop, dance, cheerleading, and gymnastics. The common pole onstage serves as a prop and permits athletic stunts.

Rooted in an American tradition of parody, namely, American burlesque striptease entertainment and the pelvic and shimmy movements of Middle Eastern belly dance (first seen publicly at the 1893 Chicago World's Columbian Exposition), exotic dance is, by definition, supposed to be "naughty" adult play, a fanciful teasing that transgresses social decorum and dress codes in an ambience ranging from sedate to carnival-like (Allen 1991; Jarrett 1997). To be risqué, exotic dance discloses more of the body and uses different movements than are usually seen in public. Striptease (its first generation was from 1918 to 1945) most likely began when dancer Hinda Wassau's accidental strip to full nudity during a shimmy in 1928 evoked such a positive audience response that she incorporated her accident into future performances. Striptease became so popular that in 1937, the Minsky brothers, theater owners, convinced the U.S. House Immigration Committee to rule that the burlesque "striptease is an American art" and thereby prevent foreigners from practicing it in the United States.

When television captured public attention, support of lavish striptease productions diminished. Their full orchestras transformed into small bands, bands became jukeboxes, and elaborately choreographed routines and striptease to pasties and G-string turned into more daring full nudity (Urish 2004). Since the 1980s, traditional burlesque has spawned exotic dance in upscale, well-managed "gentlemen's clubs" run by successful

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businesspeople, in addition to a classical burlesque revival and the nouvelle renditions of sensual stripper workouts in gyms and classes for mainstream women.

Exotic dance can be viewed on three continua: art, play, and sexuality (Hanna 1998b). The continuum of art is from exotic dance, considered by some as "low brow art" (another example is popular social dance onstage), to "high brow art" (such as ballet). Exotic dance meets the criteria of art: skill acquired by experience, study, or observation; creative imagination; and communication. Each dance form has its own criteria for artistic merit. Exotic dance aesthetics center on physical appearance (body shape and tone, hair, makeup), costume (distinctiveness), movement (sexy, flexible, spirited, seductive, graceful strut and posture, balance on spiked heels, standard bumps-grinds-shimmy [pelvic thrusts and rotations and upper shoulder-torso vibration], smooth transitions between movements and positions whether prone, kneeling, standing, or elevated on the common floor-to-ceiling pole used for gymnastic movements, variety, balanced use of stage and interpretation of music), and personal style (creative uniqueness, connection with audience through personality, smile, eye contact, and charisma). Exotic dance competitions at local, state, and national levels, and patron tips and fees (for a dancer performing for an individual patron) recognize excellence.

Several court cases have recognized exotic dance as a theater art. For example, in *Iowa v. Marshall* (Iowa District Court for Scott County, Case No. SRCR202583, May 8, 1998), "the Court does conclude that dance, even nude dance, may be an art.... That the dance performed at the Southern Comfort Free Theater for the Performing Arts is not dance as performed at Hancher Auditorium, the Galvin Fine Arts Center, or the Adler Theater is a difference of degree or quality, not a difference of kind." In 2004, a company's self-identification as a Performing Arts Theater in Mills County, Iowa, kept it from falling within the jurisdiction of an ordinance for sexually oriented businesses.

The play continuum ranges from child and family play to adult fantasy play and entertainment (including exotic dance). The sexuality continuum goes from fantasy (including exotic dance) to sex. The meanings of exotic dance come from the meanings of social behavior, movements, and sensory elements in contemporary mainstream everyday life. These meanings have a history.

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—Note, in the following litigation (affidavits, reports, depositions, testimony, and court proceedings), Hanna reported her research on the First Amendment implications of ordinances designed to regulate exotic dance: the nonverbal communicative dimensions of dance that convey meaning (use of time, space, and effort, parts of the body moved and how, costume, lighting, distance between dancer and patron, and touch); how exotic dance is a form of dance, theater art, and adult entertainment; and criteria for artistic merit in exotic dance. In 1995, an American Institute of Certified Planners expert on the effects of exotic dance and a lawyer representing dancers and owners of exotic dance clubs discovered Hanna's anthropological research on dance as nonverbal communication through *Books in Print.* They asked her to be an expert court witness in a First Amendment case and apply to exotic dance the semiotic, sociolinguistic paradigm she had used to study dance in Africa, on school playgrounds, and in American theaters. Since then, she has visited more than 104 clubs and worked on more than eighty legal cases. Hanna has conducted research not only in exotic dance clubs but also in courtrooms, judge's chambers, city and county council meetings, club neighborhoods, newspapers, radio, and television. As part of this process, she analyzed court cases and legislation and interviewed dancers, club owners, personnel, patrons, dance club neighbors, and other community members. The court cases are listed chronologically.

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State of Minnesota, County of Goodhue, City of Cannon Falls v. Jessica Nicole Ann, T6-00-5844, 2000.
t. State of Minnesota 1st Judicial District, Court Criminal Division, Goodhue County.
State of Minnesota, County of Goodhue, City of Cannon Falls v. Carla Shalon Lyons, T6-00-0004631, 2000.
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2. *DANCERS, PATRONS, AND MANAGERS*

Socially redeeming values exist for many participants engaged in legal exotic dance performances. About one-third of the performers are putting themselves through college and graduate school with earned income and flexible schedules. Single women, single mothers, and married women dance, all doing an artistic role-playing job (Hanna 1998b). Former dancers have written doctoral dissertations in social work, anthropology, women's studies, and theater arts on "gentlemen's clubs," disproving misconceptions about exotic dance and contributing to the destigmatization of dancers (e.g., Frank 2002; Liepe-Levinson 2002). Some exotic dancers and patrons say exotic dancing is safe sex—fantasy—in an era of AIDS and other sexually transmitted diseases. Dancers provide a kind of therapy for some patrons who need someone to listen to their problems nonjudgmentally. Watching and fantasizing about exotic dancers, or getting suggestions from dancers on how to please a woman, sometimes can save a marriage by rekindling a romantic flame. Of course, attractive women in any setting can threaten a weak marriage. Peter S. Statts, Division of Pain Medicine at Johns Hopkins University, reported to the American Pain Society meeting, October 1999, that envisioning pleasurable sexual fantasies increased pain tolerance,

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improved mood, reduced worry and tension, and enhanced participants' feelings of self-worth.

Today's well-managed exotic dance clubs provide sexual fantasy, entertainment, and aesthetic appreciation. Laws, club rules, and circulating floor managers work to maintain law-abiding establishments and to promote positive experiences for dancers and patrons. Many club owners and managers try to work with their neighbors to solve problems that arise, for example, trash, noise, parking, or signage.

In the past, some exotic dancers had performed in carnival tents (Meiselas 1975) and small "dives" where illegal acts were alleged to have occurred, and dancers had negative experiences (such sleazy establishments still remain in some places). Some dancers were verbally abused, targets of tossed objects, and physically groped by patrons and managers. "Has-been" dancers performed in what was called "varicose alley."

Contemporary exotic dance clubs are said by some people to exploit, oppress, and degrade performers. But most exotic dancers freely choose to dance and control their own artistic communication, as noted in both the academic studies and dancer autobiographies below. These entertainers consider themselves independent subjects, not submissive objects. The exotic dancer placing her body within a financial transaction reduces herself to a commodity no more than a model's, actor's, or athlete's choice to be professional and earn a livelihood using his or her body.

Throughout the history of exotic dance, some dancers have been hurt by comments on their physical appearance. For example, a patron asked a flat-chested dancer, "Why the hell are you dancing?" Dancers who have bad nights receiving little remuneration from tips or private dances often have hurt egos and anxiety about paying their bills. Many dancers, however, say social stigma causes them the most grief. Some cannot tell people in their family, school, or community about their dancing. Dancers' contributions to good causes may be rejected. For example, in Washington, D.C., Deloris Dickson has owned an exotic dance club for more than 40 years. She and a number of the club's 100 dancers and their families have struggled with the trauma of breast cancer. Yet, when the women tried to give $5,000 from an entire day's work to the National Breast Cancer Coalition, the coalition wanted nothing to do with it (Marc Fisher, "Charity's Gaffe Smacks of Burlesque Act," *Washington Post*, June 3, 2004, p. B1). Physical and psychological violence against exotic dancers has come primarily from some vice squad misbehavior (Hanna 1998a) and radical moralists. The press perpetuates social stigma by identifying a woman involved in a crime by her stripper profession, even if she left it long ago. Even research data about pornography (which does not include exotic dance, although some Americans call it soft porn) and rape from four countries—the U.S., Denmark, Sweden, and West Germany—suggest that pornography does not represent a blueprint for rape. Rather, it is an aphrodisiac, food for sexual fantasy (Kutchinksy 1991). Aggression against dancers occurs for the same reasons as violence against women in general (e.g., in the armed services, law offices, churches, corporations, automobile plants, and elsewhere).

Of course, as in any industry, there can be misbehaving, rude performers, patrons, and managers (e.g., Angier 1976; Mattson 1995; Burana 2001; Dee 2002; Eaves 2002). Dancers usually ask patrons to desist from inappropriate behavior, and if the patrons are uncooperative, the dancers alert managers, who ask the patrons to leave. Dancers may be penalized or fired for misbehavior.

Dancers often complain to owners or leave clubs where there is poor management. Issues arise over independent contractor versus employee status (Fischer 1996); the amount dancers pay to perform (as artists rent space for an art show); overbooking of dancers; and clubs fining dancers for violating club policies, and at times even requiring sexual favors for preferred performance schedules or other perks. At least one dancer successfully sued for sexual harassment (the owner wrongly assumed that because dancers performed nude, men could enter the dancer's dressing room at will—however, dancers act onstage but are women entitled to their privacy offstage).

Ownership of exotic dance clubs varies: single proprietors, partnerships that may include doctors and lawyers, and corporations with a chain of clubs. Some owners/managers have worked up the ladder from being doormen, ushers (bouncers), bartenders, or dancers. More owners of upscale establishments are businesspeople, for whom the club is but one of their several enterprises. As in any business, the quality of management varies.

Patrons, mostly men but increasingly women and couples, vary by age, income, profession, ethnicity, religion, and motivation for attending exotic dance clubs. They have social, aesthetic, and therapeutic reasons. Some patrons are lonely, unhappy, shy, or lacking relationship skills who need understanding listeners and/or attention from attractive women, perhaps as a spouse once was. Some men gain a sense of safety with exotic dancers who are perceived as "vulnerable" in their nudity and not competitors or judges. A one-on-one experience with a beautiful showgirl is a magnet for some patrons. Clubs provide a refuge, a place to hang out, relax, and be entertained. Some patrons just like to view and/or fantasize about a variety of women and

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still remain faithful to their own partner. A man can feel manly and dominant when he pays for a dance, without having to try to relate to a woman and risk failure. Bachelor parties celebrate and "educate" the groom by arranging for him to be onstage with the dancers who poke fun at marital consummation. Macho men find male identity, bonding, and dominance through fantasy. Many men (and increasingly women) who frequent the clubs seek aesthetic pleasure in the beauty and gracefulness of the nude female body. Some businessmen and women bring clients to what they perceive as the pleasant ambience of upscale establishments to seal business deals. While some women may feel uncomfortable in these environs, others enjoy them.

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3. DANCE ADVERSARIES AND SUPPORTERS

Exotic dance is a moral and emotional powder keg. Localities across the United States, with the urging of some of their constituents (such as the Religious Right and some feminist groups), attack exotic dance on the bases of alleged crime, property depreciation, disease, obscenity, being a public nuisance, and demeaning women—without reliable, trustworthy evidence that exotic dance causes these problems. For some antagonists, the fight against the clubs is a crusade.

On the grounds of alleged negative effects, adversaries pressure governments to pass ordinances designed to force exotic dance clubs out of business and prevent others from opening. Examples include laws hostile to exotic dance that prescribe zoning requirements and land use regulation; rezoning areas previously zoned for adult entertainment clubs and giving the power to a review board to deny a business because of lack of "wholesomeness"; and requiring extensive procedures for licensing of dancers, clubs, and managers. Regulations can include hours of operation, amount of body disclosure, types of exotic dance movements permitted, whether and how dancers may touch themselves and patrons, visibility of dancing onstage and offstage at a patron's table side; club illumination and other physical configuration characteristics of a facility, distance and buffer zone between dancer and patron, and manner of tipping. The amount of regulatory control over exotic dance clubs depends on whether or not alcohol is sold on the premises. Efforts are made to declare exotic dancing a public nuisance. Utah passed a gross receipts "sin tax" on adult cabarets, on the false assumption of a cause-and-effect relationship between adult business and persons who commit sex crimes; the tax is earmarked for treatment of sex offenders (McCullough 2004).

Laws are often written so vaguely or with overbreadth that people do not know what is permitted so as to act accordingly. Government officials have options of using different measurements for distance between clubs and, for example, schools (door to door or boundary line to boundary line), police have wide discretion, and arrests are made by officers without taking notes or agreeing on the rationale for the arrests.

Violation of ordinances regulating adult entertainment may result in the arrests of the dancer, club owner and manager, and patron; criminal charges; closing of clubs; and defensive legal action. The result is costly to taxpayers and exotic dance stakeholders (dancers, club owners and staff, club food, beverage, sound, lighting, and furnishings suppliers).

In part a backlash against the 1960s sexual revolution, adversaries of sexuality have not been able to eliminate nudity and sensuality on mainstream stages, television, or the cinema. Thus, many turn to the weaker target veiled in mythology, namely, local exotic dance clubs. Some religious and conservative groups (such as the American Decency Association, American Family Association, Community Defense Counsel, Family Research Council, Focus on the Family, Leadership Institute, National Family Legal Foundation, and National Law Center for Children and Families) provide model legislation to try to eliminate exotic dance clubs, help draft legislation, and help defend legislation in court (Munsil 1988, 1994). Their attorneys, Bruce Taylor and Scott Bergthold, are seen in numerous courts.

A social class basis appears to exist. Several courts and numerous observers have noted that nudity is usually acceptable in opera and "high art" theaters, for the "wine-drinking quiche eaters," but not in exotic dance clubs for what used to be "beer-drinking pretzel eaters." Yet today, some gentlemen's clubs serve high-end alcoholic beverages and four-star meals. Club advertisements and signs (e.g., a silhouette of a nude dancer) are sometimes at issue when parents drive their children past the clubs and do not want to discuss sexuality with the youngsters. Well-managed clubs try to accommodate their neighbors.

Supporters of exotic dance (see references II.A) defend women's freedom to control their own exotic dance work without state interference, police harassment, or male dominance. Attacks against exotic dancing, supporters remind us, recall the rationalization of totalitarian countries that eat away at human rights (Ellis, O'Dair, and Tallmer 1988, 8). Exotic dancers have also defended their occupation on the grounds of values, art, entertainment, celebration of the female body and sexuality, self-empowerment, economic opportunity, and legitimate work. They rebut the charge of female dancers being subject to abuse any more than women in society at large.

Contrary to the opinions of adversaries of adult entertainment, architect Arthur Cotton Moore believes exotic dance clubs are an asset to cities. In his book, *Powers of Preservation: New Life for Urban Historic Places* (Moore 1998), he says that exotic dance clubs in the city contribute to the quality of life. They make the city an exciting place to go: "There are functions of a city which rarely make it inside the covers of city planning treatises. These functions have two characteristics: They gain their appeal being sharply different from (discontinuous) and more permissive than the general ethos and morality of the surrounding area and they are elemental, genetic, and as old as the first human settlement" (p. 204). Moore continues, "Human contact is the most powerful and represents the last basic advantage of the city in an anti-urban, electronically equipped

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fearful world. Clearly, the most common manifestation of human contact is represented by perfectly respectable theaters, nightclubs, bars, dance halls, and restaurants where the mating and dating rituals of relationships can take place. People want to go on dates 'where it's happening' and that still is somewhere in the city. This suggests that in this population the underlying driving force for going to the city is a sexual force" (p. 204). Moore notes that tourists and conventioneers visit cities that have such excitement. The "empty nesters," mostly older and affluent people, are also drawn by the excitement of the city, which makes them feel young again (p. 209). "My idea is to use permissive activity as one more arrow in the badly depleted quiver of the dedicated preservationist and urbanist" (p. 207). Moreover, he observes, "The preservation of old buildings and sexually permissive activities have a scenographic affinity which can be exploited so that together they become another reliable economic rehabilitation resource for the city of the future" (p. 209).

The defense of exotic dance includes the participation of such organizations as the First Amendment Lawyers' Association (FALA), American Civil Liberties Union (ACLU), People for the American Way, National Coalition Against Censorship, Coalition for Free Expression, Free Speech Coalition, Thomas Jefferson Center for the Protection of Free Expression, Association of Performing Arts Presenters, and Dance/USA.

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B. Studies of the Impact of Exotic Dance

Singled out among businesses, exotic dance has been charged with causing adverse secondary effects. A review of the *Washington Post*, the *New York Times*, U.S. Department of Justice Office of Justice Programs' reports, and several list-servs dealing with adult entertainment, prostitution, and other crime since 1995 reveal no evidence of such problems disproportionate to exotic dance businesses. The literature related to exotic dance adult entertainment shows that even with complete nudity, alcohol, and contact between dancer and patron, exotic dance is no more likely to be linked with prostitution, drugs, sexually transmitted diseases, property depreciation, or harm to children and juveniles (who are not admitted to adult entertainment venues in any case) than dancing in restaurants, community centers, municipal theaters, and hotels. Every business or organization has its "bad apples" and illegal transgressions, and exotic dance clubs are not immune. What transpires outside the business property is unknown. The Catholic church is not blamed for the *convictions* for pedophilia and rape by some clergy; rather, efforts are made to stop and punish the transgressions.

In a three-part study in Charlotte, North Carolina, Land et al. (2004), McCarthy and Renski (2001), and Hanna (2001) found exotic dance clubs caused no negative effects. None of the 100 residents and business operators located within 1,000 feet of each of three exotic dance clubs reported any negative effects from the clubs. Several businesses in the clubs' neighborhoods said the clubs brought in business. Some businesses used the club as a landmark to find their establishment.

Most studies cited by localities nationwide as evidence that exotic dance clubs cause adverse primary or secondary effects do not meet the basic requirements for the acceptance of scientifically valid evidence prescribed in *Daubert v. Merrell Dow*, 509 U.S. 579 (1993) or the research methodology in Darwin G. Stuart's *Urban Indicators: Their Role in Planning*, published by the American Society of Planning Officials [now the American Planning Association], Planning Advisory Service, Report No. 281, Chicago, June 1972. The few studies that meet Daubert or social science criteria for evidentiary value demonstrate either no deleterious impact associated with adult businesses or, in fact, positive effects (economic development in their neighborhoods).

Paul et al. (2001) analyzed for scientific validity more than 110 studies that local governments most frequently cite. Freeman and Linz (2002) critiqued studies of property value. The methodological problems with the studies (noted in the meta-analysis account below) include the lack of evidentiary literature on negative effects of exotic dance clubs.

Linz's work in articles and court cases identifies four requirements for a valid study of secondary effects caused by adult businesses: Do the studies answer or violate the following principles: (1) "Compared to

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what?" Did the study employ a properly selected control or comparison point? (2) "Is this just a one-time fluke?" Did the study employ a time frame long enough to detect a stable pattern of secondary effects? (3) If crime is measured, "is the crime measured according to a reliable source?" and "did the government go looking for more crime to justify its legislation?" (4) "Did the investigators talk only to people who would give them answers they wanted to hear?"

The problems (noted by many methodologists) that have diminished findings that exotic dance clubs cause a deleterious impact include the following: Studies usually lack control sites matched with exotic dance club sites as well as measures before and after the presence of a club in a particular location. Data are not collected over several years to distinguish a relatively unstable or a onetime blip in increases or decreases in crime. Studies of sexually oriented businesses conducted in the 1970s are not applicable to "gentlemen's clubs" that first developed in the 1980s. Studies have not demonstrated that a single adult business, standing alone, has any negative secondary effects. Indeed, studies have focused on concentrations of adult businesses.

There is no study that has specifically examined the impact of a particular dance or type of dance or kind of expression taking place inside an adult business. None of the studies explored, for example, whether nudity, seminudity, simulated nudity, stage design, or dancer-patron interaction had an impact on a neighborhood's quality of life.

Adult entertainment clubs in poor neighborhoods have higher crime than establishments in other neighborhoods, but correlation is not causation, as noted in any methods textbook. Change in police surveillance may account for crime rates. Police calls by a club, especially in a high-crime neighborhood, may not indicate a troublesome club but, rather, club policy to maintain a safe and lawful establishment. (In fact, police often encourage such calls so potential problems are not permitted to develop.) Although some studies group a variety of adult businesses together and find they cause problems, there is no evidence that exotic dance clubs are responsible for any of them. Sometimes police reports are proven false in court. Some crime reports used in studies do not reflect convictions. Charges for prostitution sometimes mean sexy dancing for money or "come on" fantasy talk about solicitation and sex.

Opinion surveys of appraisers constitute speculation, not empirical evidence of a valid relationship between exotic dance clubs and their actual impact on property values. A "potential" negative impact is not a real impact.

Whereas in the past, local governments did not have to conduct their own studies to justify their ordinances, the *City of Erie v. Pap's A.M.* (2000) Supreme Court decision (and, especially, the opinion of Judge Souter) held that the validity of the underlying proof of the need for regulations can be challenged. Evidence local governments provide to justify regulations to combat the allegedly harmful side effects of exotic dance (the judicially created secondary-effects doctrine) has to be relevant to the locality in question.

1. META-ANALYSIS OF STUDIES

McLaughlin, R. Bruce. 1994. *Adult uses: Zoning and land use issues, a technical update [MDII Entertainment, Inc. v. City of Dallas,* 393CV2093T, U.S. District Court].

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2. GENERAL STUDIES

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3. CRIME

Exotic dance is alleged to be a prelude to or an advertisement for prostitution. However, there is no evidence of convictions disproportionate to the adult entertain-

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ment industry. Exotic dance and prostitution are distinct activities in the United States. In well-run clubs in most jurisdictions, omnipresent security (doormen, floor men, and video monitors) oversees the facility to be in compliance with the law. In addition, performers monitor each other, and managers terminate a dancer who has contact with a patron outside the club. Men who misbehave are asked to leave the club.

In some localities, such as San Francisco, local government leaders have tolerated prostitution that is not on the street. (Kay [1999] interviewed ten dancers in three clubs.) However, prostitution cases that attract media attention are police charges, often not leading to convictions, and allegations about athletes. For example, in Atlanta's multimillion-dollar Gold Club 2001 case, employees testified that celebrities and professional basketball, baseball, and football players often received sexual favors from strippers. (A television show was made about the sex scandal.)

There is also a myth that exotic dance attracts illegal drugs. However, again, this problem is not disproportionately present in the adult entertainment industry. For example, illegal drugs are present in numerous schools and universities. Exotic dance security staff members usually monitor club activity; some managers periodically check dancers' lockers and even employ drug-sniffing dogs to be absolutely certain drugs are not on the premises.

The studies below demonstrate that crime is not any more problematic in the exotic dance industry than in most other businesses. In fact, two police studies conducted at different times found that exotic dance clubs that served alcohol and had live nude dancing had no negative impact on crime, although there were problems with clubs that only served alcohol and had no nude dancing (Fuller and Miller 1997; Phifer and Fulton County Police Department 2001). A comparison of crime-related and public order–related calls for police service between three exotic dance adult entertainment clubs (a total of 27 calls) and three licensed alcohol beverage establishments (a total of 138 calls) in Prince George's County, Maryland, in 2002, found no association between the presence of exotic dance clubs and crime-related secondary effects. Although there was a triple homicide in the parking lot of one exotic dance club, the detective handling the case said this incident could have happened anywhere.

The Land et al. (2004) empirical study sought to determine whether a relationship exists between adult exotic dance clubs and increased numbers of crimes reported in the areas surrounding the adult businesses in Charlotte, North Carolina. For each of 20 businesses, a control site (matched on the basis of demographic characteristics related to crime risk) was compared for crime events during a period of three years (1998-2000) using data on crime incidents reported to the police. The study found that the presence of an adult nightclub does not increase the number of crime incidents reported in localized areas surrounding the club (defined by circular areas of 500- and 1,000-foot radii) compared with the number of crime incidents reported in comparable localized areas that do not contain such an adult business. Indeed, the analyses imply the opposite, namely, that the nearby areas surrounding the adult business sites have smaller numbers of reported crime incidents than do corresponding areas surrounding the three control sites studied. These findings are interpreted in terms of the business mandates of profitability and continuity of existence of the businesses.

There have been some unusual exotic-dance–specific charges. A patron has alleged harm from a dancer's breast hitting his face. At his bachelor party in a Fort Wayne, Indiana, club, Justin Scheidt claims that while he was onstage for the ritual of being teased, two dancers held him down at the base of the strip pole, while a third dancer cannon-balled down the pole from about six feet up and landed on his genitals. Although he said to stop, the two other dancers did the same, causing him excruciating pain and inability to consummate his marriage on his honeymoon due to "serious and permanent injuries."

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4. ECONOMIC IMPACT

Exotic dance clubs are alleged to cause property depreciation. But the studies below (critiques of studies localities have used and ones that provide new site-specific research) show no evidence that exotic dance clubs have a negative impact on real estate values near them. Indeed, exotic dance clubs often attract business. For example, car repair facilities take advantage of patrons who stop at the clubs for lunch; in Ft. Lauderdale, Loehmann's, an upscale women's discount dress store, opened up across the street from the Gold Club. Law-abiding adult entertainment clubs may be woven into the mainstream of everyday life. If so, it certainly raises questions about the need for special zoning for them.

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5. HEALTH

Some ordinances have preambles to justify regulations that are "necessary" to prevent exotic dancers from causing disease. But there is no verifiable evidence of a relationship between exotic dance and disease. They may cause no more health problems than restaurants, shopping malls, or churches.

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6. ZONING

Zoning is used to designate areas where adult entertainment may operate. There are centralized and dispersal models, where communities either try to concentrate adult entertainment activities in one central area, or attempt to scatter them throughout the community. Controversy arises over proposed changes in required distances of exotic dance clubs from schools, churches, and residential areas, and definitions of these, as well as economic development that changes an area designated for exotic dance clubs, as indicated in the work cited below. Federal law says exotic dance clubs cannot be banned and sites for them are required, excluding sites such as in the ocean or other area that lacks infrastructure for a business.

REFERENCES

McLaughlin, R. Bruce. 2003. *City of Rockford, Illinois, alternative avenues of communication for adult uses planning review* [U.S. District Court, Northern District of Illinois, Eastern Division, *R.V.S., LLC. v. City of Rockford*, 03-C-50048].

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C. Regulations and Legal Cases with National Importance

This section presents legal cases that have guided the national debate. Not trained in law, I have drawn upon the interpretations that appear in legal pleadings, analyses, and decisions on cases with which I have been involved. The U.S. Constitution, Supreme Court's decisions related to exotic dance adult entertainment, and circuit courts following the Supreme Court override state law. Sometimes it takes time for the impact of these decisions to take shape. Listed below are first the most recent Supreme Court decisions within each category that prevail over earlier cases.

Under the umbrella of the First Amendment, dance is the communication of expressive content. A regulation directed at content or viewpoint will not withstand judicial scrutiny. Courts have upheld reasonable time, place, and manner regulations that are content neutral, for example, *Kev, Inc. v. Kitsap County* (1986). The Fourteenth Amendment antidiscrimination and due process clauses also protect exotic dance adult entertainment.

The U.S. Supreme Court's decisions concerning exotic dance adult entertainment have been primarily rooted in, for example, governmental interest to protect the populace, *United States v. O'Brien* (1968); alcoholic beverage regulations, *California v. La Rue* (1972); the Supreme Court's first recognition of First Amendment rights for exotic dance as communication, albeit at a superficial level, obscenity, *Miller v. California* (1973); zoning ordinances to cope with adverse secondary effects, *Young v. American Mini Theatres* (1976); and morality, *Barnes v. Glen Theatre* (1991).

There are three recent court cases related to regulating exotic dance adult entertainment that change what governments can do and make it more difficult to overcome the many hurdles to withstand challenges to their ordinances:

City of Los Angeles v. Alameda Books (2002): See C.1, Evidence for Justifying Governmental Interest, below, for further discussion.

Now governments must provide a factual basis for their regulations that plaintiffs can challenge by demonstrating that the government's evidence does not support the regulations or furnishing evidence that disputes the government's factual findings. This case weakens *City of Renton v. Playtime Theatres* (1986), which held the government could use studies of other jurisdictions if the local government reasonably believed the studies to be applicable to its own circumstances.

City of Erie v. Pap's A.M. (2000)

The secondary effects rationale for regulations replaced the moral rationale of *Barnes v. Glen Theatre* (1991).

44 Liquormart v. Rhode Island (1996)

When Prohibition ended, the Twenty-First Amendment gave state and local governments the authority to regulate establishments that serve alcohol. However, this authority does not override the First Amendment.

Although nude dancing has been recognized as expressive and at the outer margins of First Amendment protection, the courts have not, until recently, addressed other nonverbal communicative dimensions of dance: use of time, space, and effort, parts of the body moved and how; costume; distance between dancer and patron; and touch—all of which can convey meaning.

1. EVIDENCE FOR JUSTIFYING GOVERNMENTAL INTEREST

R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402 (7th Cir. 2004).

See Zoning below.

City of Los Angeles v. Alameda Books Inc., 535 U.S. 425 (2002).

Although a five-four decision upheld the city ban on multiple adult businesses in one building, the majority did not agree on a single rationale. Only four found that Los Angeles could rely on a 1977 study of adult businesses in general to justify the ordinance at issue. The others supported the position, noted above, that governments must fairly support the rationale for an ordinance, show a factual basis for their regulations, and consider "how speech will fare" (not attack speech). Plaintiffs challenging an ordinance must have the opportunity to cast doubt on its rationale by demonstrating that the government's evidence does not support its rationale or by furnishing evidence that disputes the government's factual findings. Justice Souter, in formulating a legal test based on empirical verification, argues that the weaker the empirical evidence concerning secondary effects, the more likely the governmental action is not content neutral.

Flanigan's Enterprises Inc. v. Fulton County, 242 F.3d976 (11th Cir. 2001).

Nude dancing in establishments licensed to sell liquor may not be banned without a factual basis to support the claim that they are connected with negative secondary effects. A city cannot reasonably rely upon data from other localities that contradicts good local data.

City of Erie v. Pap's A.M., 529 U.S. 277 (2000).

Governments may ban secondary effects–justified (not morality-based) nude dance with time, place, and manner regulations as a way to combat negative secondary effects. Although a locality may rely on secondary effects studies done by other cities or judicial opinions that discussed them, their evidence now can be challenged as to its quality and relevance to the locality's own jurisdiction.

Daubert v. Merrell Dow, 509 U.S. 579 (1993).

This case against a pharmaceutical company held that the trial judge is responsible to ensure that experts' testimony both rests on a reliable foundation and is relevant to the contested issue. (See Federal Judicial Center. 1994. *Reference manual on scientific evidence*. Rochester, NY: Lawyers Cooperative Publishing, for case law on the use of surveys.)

United States v. O'Brien, 391 U.S. 367, 377 (1968).

A government regulation is justified if (1) it is within the constitutional power of the government, (2) it furthers an important or substantial governmental interest, (3) the governmental interest does not suppress free expression, and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to further that interest. Statutes should be narrowly tailored and not be irrational, arbitrary, or capricious.

2. *ZONING*

R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402 (7th Cir. 2004).

A locality may not use its zoning power to regulate any type of dancing without offering sufficient evidence to support its rationale that the dancing causes adverse secondary effects. The governmental interest for imposing content-based time, place, and manner restrictions may only be upheld if a connection can be made between the negative effects and the regulated speech. Otherwise the regulations violate the First Amendment. Open and explicit hostility toward and disapproval of the speech itself is not a permissible purpose for a regulation.

Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Florida, 11th Cir. (2003).

Regulations that dictated the physical layout of a club, permitted the sheriff to search the premises without a warrant, and banned nudity were overturned. The court emphasized the differences between zoning ordinances (evaluated under standards for time, place, and manner) and public nudity ordinances (evaluated under the four-part test set forth in *O'Brien*) and used in *Barnes* and *Pap's A.M.* A key issue in the analysis of a secondary effects–justified "content-based zoning ordinance" is "how speech will fare" under the ordinance, a new requirement in a time, place, and manner analysis. To meet its burden of justification imposed by *City of Renton v. Playtime Theatre, Inc.* (1986), a city must have studies or other evidence submitted preenactment and allow its evidence to be challenged.

Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993).

The court said that the economics of site location is a valid consideration.

Woodall v. City of El Paso, 959 F.2d 1305 (5th Cir. 1992)

It is illegal for cities to attempt to ban, regulate, or impose excessive location requirements because they object to their sexually explicit messages.

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City of Renton v. Playtime Theatres, 475 U.S. 41, 106 S.Ct. 925 (1986).

An ordinance must serve a substantial governmental interest. Government must rely on evidence to justify content-neutral restrictions of time, place, and manner on expressive conduct. A local government may rely on studies from other jurisdictions documenting "adverse secondary effects" of adult uses, if the local government reasonably believes the studies to be applicable to its own circumstances. Renton had no adult entertainment and consequently had no alternative but to look to outside studies. Requiring a set distance of a club from the location of any residential area, school, park, or church also requires that there be alternative locations.

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

A zoning law cannot be overbroad in proscribing all live entertainment, including nude dancing.

Young v. American Mini Theatres Inc., 427 U.S. 50, 96 S.Ct. 2440 (1976).

Zoning to disperse entertainment and require separation from any residential area is permissible if governments can show proof of adverse secondary effects. This is the beginning of the secondary-effects doctrine. Governments must allow for reasonable alternative locations.

3. ALCOHOL

44 Liquormart v. Rhode Island, 517 U.S. 484 (1996).

Liquor regulation permitted by the Twenty-First Amendment does not override the First Amendment.

New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981).

The state can regulate establishments serving alcohol.

Doran v. Salem Inn, Inc. 422 U.S. 922 (1975).

The justices view nude dancing as expression warranting constitutional protection in establishments without alcohol.

California v. La Rue, 409 U.S. 109 (1972).

When prohibition ended with the Twenty-First Amendment, state and local governments were given authority to regulate establishments that serve alcohol. The Alcohol Board of Control could ban nude dancing at premises licensed by it. Prohibition is nothing more than a time, place, or manner regulation of speech.

4. OBSCENITY

The People [City of Anaheim] v. Janini, Super. Ct. No. Ap-11129 (1999).

The People [City of Anaheim] v. Ly, Super Ct. No. AP-11130 (1999).

Lap dancing is legal, not prostitution. Anaheim's ordinance banning lap dancing was preempted by the state penal code, which already outlaws prostitution and lewd conduct. The court referred to the 1920s' taxi dancing, the sale of a body-rubbing dance for a dime, that continues to this day but at a higher price.

Pope v. Illinois, 481 U.S. 497 (1987).

A determination of obscenity must assess the social value of the material from the standpoint of a "reasonable person" using national standards rather than local community judgments.

Brockett v. Spokane Arcades Inc., 472 U.S. 491 (1985).

The Court did not intend to characterize as obscene material that provided only normal, healthy sexual desires. Justice White said "lust" implied a normal, healthy interest in sex.

Miller v. California, 413 U.S. 15 (1973).

Obscenity is one of the few categories of expression the First Amendment does not safeguard, but the Court laid out guidelines for determining whether a dance qualifies as legally obscene. All three prongs of the definition must be satisfied for a work to be constitutionally obscene: (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts, or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Supreme Court decisions following *Miller* have held that the states may provide their own geographic definition of the community or not define it at all.

Roth v. United States, 354 U.S. 476 (1957).

"Obscene utterance" as determined by community standards was not protected by the First Amendment.

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5. TIME, PLACE, MANNER, AND INCIDENTAL BURDEN

See *Peek-A-Boo* under Zoning above (C.2).

Colacurcio v. City of Kent, 163 F.3d 545 (9th Cir. 1998).

The Court upheld a 10-foot buffer zone between patron and performer, failing to recognize that stage dances (performed for everyone) and private table dances (dances performed for a specific patron) convey different messages. The Court left open the issue of the buffer zone causing financial harm to businesses.

Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 2753, 104 L.Ed.2d 661 (1989).

Content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.

City of Renton v. Playtime Theatres, 475 U.S. 41, 106 S.Ct. 925 (1986).

Government must rely on evidence to justify its decision that there is an important governmental interest in reasonable time, place, and manner restrictions on expressive conduct. A local government may rely on studies from other jurisdictions documenting "adverse secondary effects" of adult uses, if the local government reasonably believes the studies to be applicable to its own circumstances.

Kev, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986).

Government may impose reasonable restrictions on the time, place, and manner of protected activity under the First Amendment.

6. LICENSING

Dream Palace v. County of Maricopa (AZ), CV-97-02357 SMM (9th Cir. September 27, 2004).

A county could not publicly release sensitive information (dancers' stage names, addresses, and phone numbers) submitted by employees on their permit applications because this could expose them to harassment from "aggressive suitors" or people opposed to the industry.

City of Littleton, Colorado v. A.J. Gifts, D-4, LLC, 2004 WL 1237360 (2004).

For an "adult business" licensing scheme to satisfy First Amendment requirements, the licensing scheme must provide assurance of speedy access to the courts for review of adverse licensing decisions and also provide assurance of a speedy court decision. However, judicial review of adverse licensing decisions in accordance with states' ordinary review procedures was sufficient to satisfy First Amendment requirements.

FW/PBS, Inc. V. City of Dallas 493 U.S. 215 (1990).

Licensing provisions may not constitute a prior restraint on freedom of expression. Government should make a licensing decision in a specific brief time period and provide the possibility of challenge of its determination through prompt judicial review and judicial decision; free speech rights would be denied through inaction.

7. MORALITY

See *City of Erie v. Pap's A.M.* in II.C.1, Evidence for Justifying Governmental Interest, overriding Barnes.

Barnes v. Glen Theatre, 111 S.Ct. 2456 (1991).

Nude dancing is a form of expression entitled to a measure of First Amendment protection, but states may ban it in the interest of "protecting order and morality" without proof of localized effects. Justice Byron R. White said that by prohibiting nude dancing, a state inevitably prohibited the communication of an idea because "the nudity itself is an expressive component of the dance. . . . It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the state seeks to regulate such expressive activity." Justice David Souter said it was the "secondary effects," prostitution, sexual assault, and associated crimes, of clubs like the Kitty Kat Lounge that justified Indiana's rule. The Fifth, Sixth, Seventh, Eight, and Eleventh Circuit Courts treated Justice Souter's opinion as holding in *Barnes*. Subsequently, *Erie v. Pap's A.M.*, 529 U.S. 277 (2000) further placed the rationale for regulation on secondary effects.

8. OVERBREADTH

Spoons v. Kenneth Morcke, 1:04CV0314 (2004). U.S. District Court for the Northern District of Ohio Eastern Division.

The ban on nudity, simulated sex, self-touch, and "improper conduct of any kind . . . that would offend the public's sense of decency" is unconstitutional under the First and Fourteen Amendments and overbroad.

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Lacking evidence of adverse secondary effects, the regulation serves no governmental interest.

Giovani Carandola v. George Bason, 303 F.3d 507 (4th Cir.2002).

The regulations on exotic dance adult entertainment had overbroad application.

Ways v. City of Lincoln, 274 F.3d (8th Cir. 2001).

The prohibition of "sexual contact" was overbroad because it covered any business or commercial establishment.

Déjà vu of Nashville, Inc. v. Metro Government. 274 F.3d (6th Cir.2001).

The ordinance was not upheld on grounds of overbreadth.

Triplett Grille v. City of Akron, 40F.3d 129, 136 (6th Cir. 1994).

A ban on public nudity cannot sweep within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other crimes.

9. DANCE MOVEMENTS AND GESTURES

Dream Palace v. County of Maricopa (AZ), CV-97-02357 SMM (9th Cir. September 27, 2004).

A regulation that bans "sex acts, normal or perverted, actual or simulated" amounts to a ban on nude dancing, a constitutionally protected activity. "If Elvis' gyrating hips can fairly be understood to constitute a simulated sex act, one can fully appreciate the potential scope of the restrictions placed on erotic dancers in Maricopa County," Judge Diarmuid F. O'Scannlain wrote for a three-judge panel.

Schultz v. City of Cumberland, 228 F.3d 831 (7th Cir. 2000).

Government cannot outlaw particular movements and gestures of exotic dance because they would deprive the dancers of a repertoire of expressive elements with which to communicate an erotic, sensual message. Protected expression cannot be unconstitutionally burdened.

ACKNOWLEDGMENTS

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Legislative Talking Points (3-18-10)

Regulating Adult Entertainment Exotic Dance Clubs

(including clubs with alcohol, nudity & incidental touch between dancer & patron)

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Background:

Adult entertainment exotic dance, rooted in belly dance seen in America in 1893 and in burlesque thereafter, is a form of dance and theater art that is somewhat "risqué" adult play, a fanciful teasing. More of the body is disclosed than is seen in public. Like a joke's punch line, exotic dance has stripping to nudity. First there is a stage dance for the entire audience, and second, there is usually a dance for a patron who pays a fee for a personal dance to create his own fantasy. This activity, which has changed over time, evokes considerable misunderstanding.

Main Talking Points:

1. Governmental interest and public welfare.

Special regulations for adult entertainment exotic dance clubs serve **no governmental purpose** for these reasons:

No evidence (scientifically reliable and valid) exists that exotic dance clubs cause problems ("adverse secondary effects") disproportionate to other businesses or institutions of public assembly (crime in schools and sexual abuse of priests against children and adults females do not mean schools and churches cause crime and require special government regulations).

E.g., in Prince George's County, Maryland, a comparison of crime-related and public order-related calls for police service between three strip clubs (a total of 27 calls) and three licensed alcohol beverage establishments (a total of 138 calls) found no association between the presence of strip clubs and crime-related secondary effects.

E.g., in Fulton County, Georgia, police reported clubs with alcohol and nudity had fewer problems than clubs without nudity (*Flanigan's Enterprises Inc. v. Fulton County,* 242 F.3d976, 11th Cir. 2001). A subsequent police study revealed the same finding.

E.g., in Charlotte, North Carolina, interviews with residents and business operators within a 1,000 foot radius of three clubs revealed those with first-hand knowledge of what takes place at and around the clubs did not experience problems emanating from them.

No evidence exists that the exotic dance industry and nudity exploit/degrade women.

> Approximately 800 interviews with dancers in 140 strip clubs nationwide and an extensive literature suggest stripping is generally not demeaning. Most dancers feel empowered through financial independence, flexible schedules allowing them to attend school and to care for their children, and self-esteem gained from successfully controlling their own artistic expression, facing strangers and winning their appreciation. Working out of economic necessity, as do most people, dancers placing their bodies within a financial transaction reduces them to a commodity no more than professional models, actors or athletes who earn a livelihood using their bodies. But dancers feel that society's stigmatization of the "stripper" hurts them.

2. **Requirement for legislative predicate (reasons for legislation).**

The U.S. Supreme Court ruled that a government **must show evidence related to the current situation of its own jurisdiction, and the quality of that evidence can be challenged.**

(*City of Erie v. Pap's A.M.,* 529 U.S. 277, 2000; *City of Los Angeles v. Alameda Books Inc.,* 535 U.S. 425, 2002; *Peek-A-Boo Lounge v. Manatee County*, 11th Cir., FL, 2003)

3. **Constitutionality.**

The **First Amendment protects expression** (nudity, spatial distance, touch and nudity are expression).

The **First Amendment overrides** the **Twenty-first Amendment** (*Liquormart v. Rhode Island,* 517 U.S. 484, 1996).

Regulations singling out exotic dance for regulation **violate the Fourteenth Amendment** by **discriminating against a specific kind of dance.**

Civil liberties, defining our democracy, override tyranny of the majority, personal, moral, or NIMBY ("not in my backyard") preferences.

4. **Cost to enact, defend and enforce special regulations.**

Redundancy: laws against crime (e.g., assault, drugs and prostitution) already exist.

If **unconstitutional,** laws are challenged and government looses, it pays **court costs, attorney fees of the challenger and damages** (up to millions of dollars).

> *Déjà Vu of Kentucky, Inc. et al. v. Lexington Fayette Urban County Government* ($62,426.27 to plaintiff)
>
> *Kentucky Restaurant Concepts, Inc., et al. v. City of Louisville* ($144,573.64 to plaintiff)

A settlement in 2004 called for City of Anaheim to pay a club owner $2 million for having violated his constitutional rights and caused business loss because the city prevented him from opening Taboo Gentlemen's Club from 1994 to 1999. The city also had to pay court and plaintiff attorney's fees.

In 2005, Judge William Rea of the U.S. District Court in Los Angeles ordered the SimiValley City to pay about $100,000 in damages and attorney fees to an entrepreneur for violating his right to open a nude dancing club. Simi Valley's 1993 ordinance regulating nude entertainment clubs was unconstitutional.

The Supreme Court has (*Palazzolo v. Rhode Island*) expanded the Fifth Amendment concept that private property may not be "taken" without just compensation to include partial "regulatory" takings. If a regulation deprives the owners of the businesses of their expected return on investment, government must pay compensation.

"**Dance police"** divert scarce resources from fighting crime that has victims.

5. Cost to economy.

Regulations usually **hurt the economy** by diminishing or driving out of business exotic dance clubs. The clubs contribute local and state property taxes, provide employment, purchase goods and services (napkins to furniture and utilities) as well as attract legitimate business to their neighborhoods.

6. Opposition to regulation of exotic dance clubs.

Clubs in Los Angeles mobilized to obtain 450,000 citizens' signatures to put regulations on the ballot; Los Angeles rescinded the regulations.

Citizens in Glendale, Colorado, voted out of office lawmakers supporting regulations.

A former exotic dancer became mayor in Georgetown, Colorado.

Time magazine reported a forecaster's 3,000-person nationwide survey that found "striptease is cool."

Many citizens of Benton County, MN, expressed outrage at cases against an exotic dance clubs. See, "The First Amendment, Artistic Merit and Nudity in Minnesota: Dance, Criminal Public Indecency and Evidence. *Minnesota Law and Politics Web Magazine* www.lawandpolitics.com (click on MN & then web magazine)

Referenda in Seattle, Los Angeles and Scottsdale opposed government regulations harmful to clubs.

7. Community-Business Relations

Communities upset by exotic dance clubs, e.g., due to building appearance, can work with clubs to address issues of concern.

Running Head: SECONDARY EFFECTS

Testing Assumptions Made by the Supreme Court Concerning the Negative Secondary Effects of Adult Businesses: A Quasi-Experimental Approach

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2002 International Communication Association:
Top Four Refereed Papers in Communication, Law and Policy.

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Testing Assumptions Made by the Supreme Court Concerning the Negative Secondary Effects of Adult Businesses: A Quasi-Experimental Approach

Abstract

In order to test the foundational assumptions made by the Supreme Court that communities may regulate adult businesses because they are associated with negative secondary effects, an empirical study of criminal activity surrounding exotic dance nightclubs[1] in a Midwestern community contemplating legislation regulating exotic dance clubs (Fort Wayne, Indiana) was undertaken. Unlike previous studies, conducted in other municipalities, specific attention was given to developing an empirical approach that fulfilled the requirements set out by the Supreme Court for the proper conduct of a social scientific inquiry. A 1000 feet circumference surrounding each of eight exotic dance nightclubs in Fort Wayne was established. Comparison areas were selected in the city of Fort Wayne and matched to the club areas on the basis of demographic features and commercial property composition. The number of calls to the police from 1997-2000 in the areas surrounding the exotic dance nightclubs was compared to the number of calls found in the matched comparison areas. Our analysis showed little difference, overall, between the total number of calls to the police reported in the areas containing the exotic dance nightclubs and the total number of offenses reported in the comparison areas.

[1] The Ft. Wayne clubs studied in this paper do not operate in a form of what is traditionally considered to be an "adult" entertainment business. The entertainers at these nightclubs perform wearing "pasties" and "g-strings" consistent with Indiana statute and the United States Supreme Court's decision in Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). For this reason, while we refer to previous reports and studies as attempting to analyze the relationship of "adverse secondary effects" and "adult" businesses, we generally refer to the studied facilities here either as "nightclubs" or "exotic dance" establishments.

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Testing Assumptions Made by the Supreme Court Concerning the Negative Secondary Effects of Adult Businesses: A Quasi-Experimental Approach

THE SUPREME COURT AND THE ASSUMPTION OF NEGATIVE SECONDARY EFFECTS OF ADULT BUSINESSES

Since 1976, the United States Supreme Court has decided a series of cases focusing on whether the free speech clause of the First Amendment allows cities and states to enact legislation controlling the location of "adult" businesses.[2] "Zoning" regulations (e.g., laws or ordinances that prevent a sex-related business from operating within a certain number of feet from residences, schools and houses of worship or a given distance from one another) have been predicated on the notion that cities and other municipalities have a substantial interest in combating so-called "negative secondary effects" on the neighborhoods surrounding exotic dance businesses. These secondary effects are generally said to include alleged increases in crime, decreases in property values, and other indicators of neighborhood deterioration in the area surrounding the exotic dance business. Typically, communities have either conducted their own investigations of potential secondary effects or have relied on studies conducted by other cities or localities.

In more recent years, the Court has considered the constitutionality of anti-nudity ordinances passed by municipalities or states that have relied on negative secondary effects to justify the legislation.[3] In a fractured decision, the Court in *Barnes v. Glens Theatre Inc.* held that the State of Indiana could regulate public nudity.[4] Justice Souter in a concurring opinion ruled that the government

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[2] *See e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *City of Renton v Playtime Theatres Inc.*, 475 U.S. 41 (1986).
[3] *See e.g., Barnes v. Glens Theatre Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).
[4] *Barnes v. Glens Theatre Inc.*, 501 U.S. 560 (1991) [hereinafter *Barnes*].

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could undertake such regulation on the basis of the presumed negative secondary effects on the surrounding community.[5]

Most recently, in *City of Erie v. Pap's A.M.* the Court again held that municipalities have the right to pass anti-nudity ordinances.[6] And, again, the Court was fractured. However, three Justices agreed with Justice O'Connor's opinion that in conformity with Justice Souter's concurrence in *Barnes*, combating negative secondary effects associated with adult businesses was a legitimate basis for the imposition of anti-nudity regulations. Most notable for the current study, was Justice Souter's partial concurrence and partial dissent in the *Pap's* decision. He significantly revised the position he took regarding secondary effects in *Barnes*. In *Pap's*, Justice Souter admitted that the evidence of a relationship between adult businesses and negative secondary effects is at best inconclusive.[7] He called into question the reliability of past studies that purported to demonstrate these effects and suggested that municipalities wishing to ban nudity must show evidence of a relationship between adult businesses and negative effects.[8]

In addition, writing on behalf of four of the other Justices in *Pap's,* Justice O'Connor noted that the nightclub at issue there "has had ample opportunity to contest the council's findings about secondary effects -- before the council itself, throughout the state proceedings, and before this [the Supreme] Court. Yet, to this day, [the club] has never challenged the city council's findings or cast any specific doubt on the validity of those findings." The four-member plurality of the Court therefore rejected the club's challenge to the assertion that the facility engendered adverse secondary effects, because the business itself had not submitted any evidence to refute such an asserted connection.

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[5] As will be discussed in depth below, restrictions on erotic dance have typically included requiring dancers to wear at least pasties and a G-string when performing.
[6] *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) [hereinafter *Pap's*].
[7] *Id.* at 6-7 (Souter, D. concurring in part dissenting in part).
[8] *Id.* at 5 n.3.

The purpose of the present study is to develop the type of evidence demanded by Justice Souter and noted to be relevant by Justice O'Connor and the other Justices, in order to determine if a relationship exists between the exotic dance clubs in Fort Wayne, Indiana and negative secondary effects. Further, this evidence is obtained in accordance with established methodological procedures so as to insure the highest levels of scientific reliability.

This study was undertaken in response to an ordinance being considered by the Fort Wayne City Council that would expand the city's law on how close adult businesses (including adult cabarets) can be to schools or churches. The distance would increase from 500 feet to 750 feet. The city also considered early closing times for adult businesses and a ban on so called "lap dancing" at exotic dance clubs. The city justified the expansion of regulations on the existence of negative effects associated with these businesses that were reported to have occurred in other municipalities.

THE SCIENTIFIC STUDY OF NEGATIVE SECONDARY EFFECTS

Unfortunately, when most municipalities have conducted studies of crime and adult businesses in the past there has not been a set of methodological criteria or minimum scientific standards to which the cities were required to adhere. Without such standards we have argued most cities that have passed legislation are relying on flawed databases.[9]

The basic requirements for the acceptance of scientific evidence for legal decision-making were prescribed by the Supreme Court in the 1993 case of *Daubert v. Merrell Dow.*[10] In *Daubert,* Justice Blackmun, writing for the Court, held that there are certain limits on the admissibility of scientific evidence offered by "expert witnesses" in federal courts.

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[9] *See*, Bryant Paul, Daniel G. Linz, and Bradley J. Shafer. *Government regulation of adult businesses through zoning and anti-nudity ordinances: Debunking the legal myth of negative secondary effects*. Comm. L. & Pol'y 355-392 (2001).
[10] *Daubert v. Merrell Dow*, 509 U.S. 579 (1993) [hereinafter *Daubert*].

In an attempt to prevent the proliferation in courtrooms of what Peter Huber has called "junk science," the Supreme Court in *Daubert* opined that scientific knowledge must be grounded "in the methods and procedures of science," and must be based on more than "subjective belief or unsupported speculation." Thus, the Court said, "the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability.[11] The Court observed that "[i]n a case involving scientific evidence, evidentiary reliability will be based upon scientific validity."

Offering "some general observations" as to how this connection can be made, the Court provided a list of factors that federal judges could consider in ruling on a proffer of expert scientific testimony: 1.) The "key question" is whether the theory or technique under scrutiny is testable, borrowing Karl Popper's notion of falsifiability. 2.) Although publication was not an absolute essential, the Court noted that peer review and publication increased "the likelihood that substantive flaws in methodology will be detected." 3.) Error rate. 4.) Adherence to professional standards in using the technique in question. 5.) Finally, though not the sole or even the primary test, general acceptance could "have a bearing on the inquiry."[12]

While it may not be necessary to hold a single study of adverse secondary effects to each of these considerations when weighing the validity of evidence substantiating the existence of such effects, at least two factors, error rate and adherence to professional standards are indispensable. Before discussing those two elements, we will briefly address the other factors as well.

Criteria for Insuring a Scientifically Valid Study of Secondary Effects

We presume that it is at least a testable position that secondary effects may exist, and may be connected to certain businesses, or else a study would not be undertaken in the first place. More to the

[11] *Id.* at 590 n. 9.

point, however, in *Pap's,* both the opinion by Justice Souter and that authored by Justice O'Connor on behalf of four Justices (therefore constituting a combined majority of the Court) presume that such a connection or nexus is testable. In fact, Justice Souter states specifically that "[t]he proposition that the presence of nude dancing establishments increases the incidence of prostitution and violence is amenable to empirical treatment . . . ."[13] In addition, the procedures and methodologies that we use here are no different than our previous review and critical analysis of the existing "secondary effects" literature; which itself has been both peer-reviewed and published. *See*, n.9, *supra.* Finally, the analysis that we undertake here -- comparing specified locations with regard to calls for service -- is neither novel, unique, nor groundbreaking. It is a form of research that receives general acceptance in the scientific community. It is only the nature of the businesses that makes this study different.

The third and fourth factors, the calculation of an error rate and adherence to professional standards in using techniques or procedures are the most critical factors that need to be applied to any secondary effects study in order to ensure "evidentiary reliability." Without this reliability, there is no basis to determine whether there is a substantial or important governmental interest involved or whether a specific piece of legislation is "necessary" in order to further that interest, or whether it is "reasonable" for a municipality to rely upon such a study as a basis for enacting legislation.[14]

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[12] *Id.* at 593-594.

[13] *Pap's*, 120 S.Ct. 1382, 1404 n.3 (Souter, J. concurring in part and dissenting in part).

[14] These are the factors that the United States Supreme Court has established in order to analyze the constitutionality of legislation under what is known as "intermediate" scrutiny. In *United States v. O'Brien,* 391 U.S. 367 (1968), the Supreme Court established a four-part test for such scrutiny, which requires a court to analyze, for example, "whether the regulation furthers an important or substantial governmental interest," and "whether the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." Id. at 377. In addition, when determining whether a regulation furthers an important or substantial governmental interest in the context of a "secondary effects" analysis, a municipality may rely upon previous studies "so long as whatever evidence the [government] relies upon is reasonably believed to be relevant to the problem that [it] addresses." *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 51-52 (1986) (clarification added).

In a scientific study, the error rate refers to the probability of accepting a result as true, when in fact it is false.[15] It is an indication of the reliability of a finding. An error rate is determined by first calculating an estimation of a population characteristic (a statistic) that summarizes the data that has been collected, and then asking how likely it is that that statistical value would be obtained by chance alone. The error rate is the degree of chance a scientist will allow. In the social sciences it is conventional to set the error rate at five percent or less (i.e., we will tolerate an error rate that 5 times out of 100, the results may be obtained by chance and that we may be wrong).[16]

Unless certain assumptions are met, statistical tests cannot be applied to the data and an error rate cannot be calculated. Most important of these assumptions in regard to, for example, survey research, is that the units of analysis (e.g., survey respondents) are randomly selected from the population, or in regard to an experiment, that the units of analysis (e.g., subjects) are randomly assigned to experimental (or study) and control (or comparison) groups.[17] The results of properly conducted experiments and surveys are always couched in terms of an error rate.

However, in many cases, especially in field research, it is not possible to randomly assign units of analysis to an experimental group and a control group.[18] This is universally true of "secondary effects" studies.[19] It is not feasible to randomly assign exotic dance nightclubs to some locations in the

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[15] *See,* Robert R. Pagano, *Understanding Statistics in the Behavioral Sciences.* 215-216, 384 (5th ed. 1998). *See also* Geoffrey Keppel, *Design and Analysis: A Researcher's Handbook.* 164-165 (3rd ed. 1991); David C. Howell, *Statistical Methods for Psychology.* 349-350 (4th ed. 1997). *See generally,* Jacob Cohen & Patricia Cohen, *Applied Multiple Regression/Correlation Analysis for the Behavioral Sciences.* 166-176 (2nd ed. 1983) (discussing causes of type I and type II error and ways to correct for each).

[16] Jacob Cohen & Patricia Cohen, *Applied Multiple Regression/Correlation Analysis for the Behavioral Sciences.* at 21 (2nd ed. 1983).

[17] Earl Babbie, *The Practice of Social Research.* 202-210 (8th ed. 1998). *See also*, Royce A. Singleton, Jr., Bruce C. Straits, & Margaret Miller Straits, *Approaches to Social Research.* 136-151 (2nd ed. 1993).

[18] Donald T Campbell & Julian C. Stanley, *Experimental and Quasi-experimental Designs for Research.* 34 (1963).

[19] Obviously, it is not possible to randomly assign certain businesses to some neighborhoods and hold other neighborhoods as controls.

city and randomly assign other areas as control areas and then take account of whether crime increases or decreases around the clubs relative to the control areas.

When this is the case, adherence to a set of professional standards that have been devised by scientists in a particular area of inquiry to insure methodological integrity and thus the validity of a study is all the more necessary. These standards vary somewhat depending on the area of inquiry or social science discipline, but they are generally known as professional standards for conducting "quasi-experiments."[20]

Secondary Crime Effects

The majority of the secondary effects studies reviewed generally assume the following form. Researchers assemble crime statistics and calculate average property values and other general measures of neighborhood quality or deterioration (e.g. residential turnover rate, local tax revenue, etc.) in the geographical area surrounding exotic dance entertainment businesses. In a few studies these measures are compared to other areas that do not contain an adult business. Another popular data gathering methodology is to perform a survey in which residents or business owners are asked for their opinions of the likely impact of adult entertainment businesses on their neighborhoods. The former type of study may be relevant to determining whether certain forms of establishments cause "adverse secondary effects" if conducted in accordance with sound scientific principles, while the latter arguably does not provide any empirical insight to this issue.[21]

In the present study, the impact of exotic dance clubs on the occurrence of crime is specifically considered. The discussion of acceptable scientific procedures is limited to those necessary to insure the proper implementation of such a crime study.

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[20] *See*, Campbell & Stanley, *supra* note 68 at 34-71.

Three criteria are crucial in insuring that a scientifically valid study of secondary crime effects has been conducted. First, in order to insure accurate and fair comparisons, a control area must be selected that is truly "equivalent" to the area containing the exotic dance entertainment business(es).[22] Since most analyses of secondary effects attempt to uncover increases in crime, professional standards dictate that the control (non-exotic dance) site must be comparable (matched) with the study (exotic dance) site on variables related to crime. Of particular importance are that the study and control areas are matched for ethnicity and socioeconomic status of individuals in both areas. A concerted effort should also be made to include only comparison areas with similar real estate market characteristics such as proportion of commercial and industrial space in either area. The study and control areas should also approximately equal in total population. Finally, because of the effect of businesses that serve alcoholic beverages on crime and neighborhood deterioration, the study and control area should be matched on the presence of alcohol serving establishments.[23] The reasons for these concerns are discussed later in this paper.

In summary, studies which employ a test group or area and a matched control group or area, are commonly referred to as "quasi-experimental" designs and the most important consideration in such a design is whether the comparison group or control group are well matched.

Second, a sufficient period of elapsed time, following the establishment of an exotic dance entertainment business, is necessary when compiling crime data in order to ensure that the study is not merely detecting an erratic pattern of social activity. Generally, the longer the time period for

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[21] *See*, n.9, *supra*.
[22] *See*, Campbell and Stanley, *supra* note 68. *See also,* Babbie, *supra* note 67 at 213-214.
[23] See e.g., City of St. Paul, Minnesota, Neighborhood deterioration and the location of adult entertainment establishments in St. Paul. (1978).

observation of the events under consideration, the more stable (and more valid) the estimates of the event's effects tend to be.[24]

Third, the crime rate must be measured according to the same valid source for all areas considered.[25] Studies of secondary effects typically focus on two general types of crime in relation to exotic dance entertainment businesses. These two types of crime are "general criminal activity" (including, but not limited to, robbery, theft, assault, disorderly conduct, and breaking and entering) and "crimes of a sexual nature" (including, but not limited to, rape, prostitution, child molestation, and indecent public exposure). It is especially important that the measurement of these crimes is based on the same information source for both sites and throughout the entire study period. For example, if the study area measures crime by the number and type of calls made to the police department, the comparison area must also rely on such a measure when the two areas are compared.

In addition, the crime information source must be factually valid and reliable such as a daily log kept by police, or a compilation of the number of calls for service made in a municipality recorded by street address or similar geographical locators.

Any change in police surveillance techniques regarding exotic dance entertainment businesses in a particular community must also be noted. Obviously, increased surveillance of an area simply because an exotic dance club is located there will have an impact on the amount of crime detected by the police. If increased police surveillance and the presence of an exotic dance club in a particular area are confounded in this way, it is impossible to tell whether crime has increased due to the presence of the club or simply because of the increased police activity.

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[24] Royce A. Singleton, Bruce C. Straights, & Margaret M. Straights, *Approaches to Social Research*. at 213-241 (1993).
[25] *See,* Campbell & Stanley, *supra* note 68 at 5, 9.

Finally, an error rate must be calculated. The error rate is the degree of chance a scientist will allow. In the social sciences it is conventional to set the error rate at five percent or less (i.e., we will tolerate an error rate of 5 times out of 100 the results may be obtained by chance).

The Study of Negative Secondary Crime Effects in Fort Wayne, Indiana

The following criteria were applied to insure that a scientifically valid quasi-experimental study of secondary effects would be conducted in the city of Fort Wayne. First, in order to insure accurate and fair comparisons, comparison areas were selected that were equivalent to the areas surrounding the exotic dance entertainment businesses. Second, a sufficient period of time (over three years) was employed when compiling the crime data used in this investigation in order to ensure that the study was not merely detecting a temporary and erratic pattern of criminal activity. Third, the crime rate was measured according to the same valid source for all areas of the city considered and the crime information source was a factually valid compilation of the calls for service supplied by the City of Fort Wayne. Statistical analysis is undertaken where appropriate and an error rate is calculated to determine if any differences found between club and comparison areas are due to chance or true differences.

METHODS

A Quasi-Experimental Approach

It was not possible to randomly assign units of analysis to an experimental group and a control group to perform a "true" experiment to test the hypothesis that exotic dance nightclubs in Fort Wayne engender negative effects. However, as noted above, there is a set of professional standards that have been devised by social scientists to insure "methodological rigor" (procedural validity) in this situation. These standards are generally known as professional standards for conducting "quasi-experiments."

In order to insure accurate and fair comparisons, a control area must be selected that is truly "equivalent" to the area containing the adult entertainment business(es). Since in this study an attempt was made to uncover whether crime had increased in the areas surrounding the exotic dance nightclubs, professional standards dictate that the control (non-exotic dance) site must be comparable (matched) with the study (exotic dance) site on demographic and other variables that are generally regarded as being related to crime rates.

Matching club and comparison areas on demographic variables related to crime

In order to insure confidence in our results, it is particular importance that the study and comparison areas be matched for population ethnicity and age, two factors that are known to be related to crime rates. The socioeconomic status of individuals in both areas must also be considered and the study and comparison areas must be matched on these variables as well. For example, Cohen, Gorr, and Olligschlaeger[26] have found that crime hotspots tended to be in areas with higher levels of poverty.

The number of female-headed households and total divorced residents in each area should also be taken into account. This is because Cohen, Gorr, and Olligschlaeger found that crime hotspots tended to be associated with low family cohesion.[27]

The study and control areas should also be approximately equal in total population both in order to control for the effects of population density on crime and to correct for rate of crime.

A concerted effort should also be made to include only comparison areas with similar real estate market characteristics, such as proportion of commercial and industrial space in either area. Higher levels of crime tend to plague places with certain types of facilities and not others. In some

[26] Jacqueline Cohen, Wilpen Gorr, and Andreas Olligschklaeger. *Modelling street-level illicit drug markets*. Working paper 93-64, The H. John Heinz III School of Pub. Pol. and Mngmt., Carnegie Mellon University, Pittsburgh (1993).
[27] *See*, Id.

cases, for example, crimes seem to be elevated by a target rich environment—for example, thefts of 24-hour convenience stores, auto thefts from large parking lots, or robberies from shoppers in heavily frequented commercial areas.[28] (Engstad 1975; Duffala 1976).

Finally, because of the effect of businesses that serve alcoholic beverages on crime and neighborhood deterioration, the study and control area should be matched on the presence of alcohol serving establishments such as bars and taverns. Certain activities such as alcohol consumption seem to contribute to levels of violence[29]

All of these various attempts to "match" the subject and control areas are critical in order to insure that the results we obtain can be ascribed to the presence or absence of (in this case) an exotic dance nightclub, and not to some other irrelevant factor.

Establishing Matched Comparison Locations

In order to insure that the research reported here utilized appropriately "matched" exotic dance club (study) and non-club (comparison) areas, a crime mapping approach was utilized. A 1000 feet area was identified as surrounding each of eight exotic dance nightclubs in Fort Wayne, Indiana.

Comparison areas, each 1000 feet in radius were selected by using a set of neighborhood demographic features that matched with the exotic dance business areas on the basis of demographic features known to be related to crime, and by further matching areas on the basis of commercial property composition.

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[28] P. A. Engstad. *Environmental opportunities and the ecology of crime.* Crime in Canadian Society. (1975); D. C. Duffala. Convenience stores, armed robber, and physical environmental features. *American Behavioral Scientist*, 20: 227-246. (1976).

[29] Dennis W. Roncek and M. A. Pravatiner. Additional evidence that taverns enhance nearby crime. *Sociology and Social Research*, 70; 185-188; Richard Block and Carolyn Block. Space, place, and crime: Hot-spot areas and hot places of liquor-related crime. In *Crime and Place*, edited by J.E. Eck and D. Weisburd. Vol. 4 of *Crime prevention studies*. Monsey, New York: Criminal Justice Press.

The following demographic variables were chosen for matching control and exotic dance club sites because of their established empirical relationship with criminal activity: Number of female headed households, total population (1997), total number of white residents, total number of black residents, residents aged 18-29, total divorced residents and median household income. Each of these variables was identified at the U.S. Census block level.

The geographic information system computer program, Maptitude, was used to locate the census block within which each club was located. The values on each of the demographic variables were identified for the census block within which the exotic dance nightclub was located. A comparable block, matched for values on the crime variables, was then selected via Maptitude. When study or comparison areas fell across more than one census block, a mean for all of the blocks involved was calculated to determine the value of each demographic variable. All control areas were selected before the crime data was obtained and thus before any analysis of the crime data was undertaken.

Table 1 displays a comparison of the values for the demographic characteristics measured at the census block level for the club locations and the control locations to which they were matched. The average level of each variable (summed across locations) for the club areas and the control areas are presented in **Table 2.** Looking at the table reveals, for example, that the exotic dance nightclub area census blocks had an average of 88 female-headed households, while the comparison or control area blocks had approximately 73 similar households. Or, to take another example from the Table, the 1997 median household income level for the comparison area was approximately $34,270, while the club area income level was approximately $33,505.

A statistical analysis was undertaken to insure that the eight club and eight comparison locations did not differ significantly from each other in terms of the demographic variables chosen for matching. A t-test for equality of means for independent samples was undertaken for the comparison

and club areas for each demographic variable. None of these tests reached statistical significance ($p < .05$) (see **Table 3**) meaning that, on average, the comparison and exotic dance club areas did not statistically differ from one another, and were therefore well matched. This helps ensure that any differences that we might later uncover in the number of calls for service are the result of the presence or absence of these exotic dance clubs, and not the result of some other factor.

Figure 1 presents a map of the central Fort Wayne area and shows the location of the exotic dance clubs in the Fort Wayne area; including the 1000 feet radius around each club location. Also displayed in **Figure 1** are the areas located by Maptitude that are matched to the club areas by the demographic variables related to crime.

Measuring Crime

Calls for service for crimes that were presumed to be related to exotic dance establishments in several of the more methodologically sound studies conducted by other municipalities were included in our examination. These included: 1) Sex crimes (rape, molestation, indecent exposure, sexual battery), 2) aggression related non-sexual offenses (shootings, fights, non-sexual battery, disturbances), and 3) thefts, burglaries and robberies. Over 39,000 calls for service to the police for a three-year-ten-month period from January 1997 to October, 2000, were obtained from the City of Fort Wayne crime records division and examined. Only those incidents for which calls for service were made and later not based on unfounded charges were included in the study. A listing of all crimes included in the study and their location are available by computer disk from the authors.

RESULTS

Table 4 displays the calls for service undertaken by the Fort Wayne police within a 1000 feet radius of the eight exotic dance nightclubs and the matched comparison areas. For two of the overall

arrest categories, a) sex crimes, and c) thefts, burglaries and robberies, the number of calls for service were remarkably similar. The additional arrest category, aggression related non-sexual offenses, displayed a markedly different pattern.

Inspection of the table reveals that for crimes presumed to be especially likely to be related to exotic dance entertainment establishments, such as rape, molestation, indecent exposure and sexual battery, the number of crimes was nearly identical in the areas surrounding the exotic dance nightclubs and the comparison areas (a total of 42 in the club areas and 43 in the matched comparison areas).

In order to form a visual representation of the pattern of calls for service for sex-related crimes in Fort Wayne, generally, and the location of sex crime calls for service within the 1000 feet radius of the exotic dance clubs calls for service and in the matched comparison areas, the geographical location of the sex related calls for service were plotted on a map of the city. These locations are presented in **Figure 2.** A closer inspection of the street addresses for calls for service in the vicinity of an example club and its comparison area can be found in **Figure 3.**

For the aggression related non-sexual offenses, categories including shootings, fights, nonsexual battery and disturbances, the results indicated greater frequencies of arrest in the comparison areas compared to the club areas (a total of 111 in the club areas and 245 in the matched comparison areas). However, calls for service for thefts, burglaries and robberies were more comparable to one another in the club and comparison areas (a total 467 for the club areas and 424 in the matched comparison areas).

Overall, summing across all of the crime categories there were a total of 620 calls for service in the exotic dance club areas and 712 calls for service in the comparison areas.

Table 5 displays the citywide total for calls for service within each crime category for the three-year period. It is useful to calculate the number of calls for service that are attributed to the exotic

dance club areas as a percentage or proportion of the total number of calls for service for the city of Fort Wayne as a whole. Expressed this way, it may be noted that the areas surrounding the exotic dance clubs accounted for only 42 of a total of 1732 sex crimes in Fort Wayne, or approximately 2 percent of the total. The areas around the exotic dance clubs were locations for approximately four-percent of the total aggression related nonsexual offenses, while the comparison areas were the locations for twice as many calls for service over eight percent of the total calls for service in this crime category. Finally, the areas around the exotic dance clubs accounted for approximately three-percent of the total number of thefts burglaries and robberies in the city. This percentage was a similar proportion of the total as that accounted for by the comparison areas.

SUMMARY AND IMPLICATIONS

An empirical study of criminal activity surrounding exotic dance nightclubs in Fort Wayne, Indiana, was undertaken. The present investigation, unlike most others of adverse secondary effects, adhered to the basic requirements set out by the Supreme Court for the proper conduct of a social scientific inquiry. A quasi-experimental approach was undertaken in which areas surrounding the exotic dance clubs and comparison (control) areas were examined. In order to insure accurate, fair and useful comparisons, control areas were selected that were equivalent to the areas surrounding the exotic dance entertainment businesses. A sufficient period of elapsed time was employed when considering arrest data to ensure that the study did not merely detect a temporary or erratic pattern of crime activity. To this end, information on calls for service for a three-year period was obtained from the City of Fort Wayne.

A 1000 feet circumference surrounding each of eight exotic dance nightclubs in Fort Wayne was examined for the number of police calls for service occurring over a three-year period.

Comparison areas were selected in the Fort Wayne area and matched to the club areas on the basis of demographic features known to be related to crime.

The number of calls for service in the areas surrounding the exotic dance nightclubs was then compared to the number of calls for service found in the matched comparison areas. The crimes in our examination included: 1) Sex crimes (rape, molestation, indecent exposure, sexual battery); 2) aggression related non-sexual offenses (shootings, fights, non-sexual battery, disturbances); and 3) thefts, burglaries and robberies.

An analysis showed that for crimes presumed to be especially likely to be related to adult entertainment establishments, such as rape, molestation, indent exposure and sexual battery, the number of calls for service for such crimes was nearly identical in the areas surrounding the exotic dance nightclubs and the comparison areas. For the aggression related non-sexual offenses, the results indicated greater frequencies of arrest in the comparison areas compared to the club areas. In fact, the percentage of calls for service as a function of the total calls for service made in the city for these crimes was twice as high in the comparison areas as in the club areas. However, the thefts, burglaries and robberies arrest frequencies were more comparable to one another.

It must be concluded that there is no empirical evidence for the presence of adverse secondary effects, in the form of crime, surrounding exotic dance businesses in Fort Wayne. The assumption that such effects exist and that a community may regulate these establishments on the basis of adverse secondary effects is therefore not substantiated in the present study.

In addition, it is further concluded that unlike the general types of alcohol facilities (bars and taverns) which do not present "adult" or exotic forms of entertainment, but which are generally associated with elevated levels of criminal activity, the exotic dance nightclubs in Fort Wayne do not demonstrate any empirical connection to the "adverse secondary effect" of elevated crime rates.

Social Theories of Crime Location

There is neither sound sociological theorizing nor empirical research to substantiate the idea that crime would occur disproportionately in the areas immediately surrounding "adult" businesses.

Recently, there has been a resurgence of interest in crime "places"-- the geographical location of crime -- among criminologists. This interest spans theory from the perspective of understanding the etiology of crime, and practice from the perspective of developing effective criminal justice interventions to reduce crime. For example, in Routine Activities Theory, first introduced in Cohen and Felson (1979), later refined in Felson (1986, 1994), and extended to crime pattern theory in Brantingham and Brantingham (1993), location or "place" is central to an understanding of crime patterns. A particular geographical location may serve as a locus where motivated offenders come together with desirable targets in the absence of crime suppressors (who include guardians, intimate handlers (Felson 1986), and place managers (Eck, 1994). In this theorizing, the convergence of crime opportunities in certain places is facilitated by both physical and social features. These features provide a context or setting that is more or less conducive to crime (Clarke 1992).

The data obtained in the present study, consistent with these ideas about features of certain places and increased crime, indicate that there is little difference between the exotic dance nightclub areas and comparison areas especially in regard to sex-related crimes and property crimes. These clubs do not appear to be locations where, as criminologists term it, potential sex offenders gather to prey on desirable targets in the absence of crime suppressors, such as place managers.

The extensive management of the parking lots adjoining the exotic dance nightclubs, in many cases including guards in the parking lots, valet parking and other control mechanisms, reduces the possibility of disputes in the surrounding area. In addition, unlike other liquor serving establishments (bars and taverns), disputes in the areas surrounding these exotic dance clubs between men regarding

unwanted attention by other males to dates or partners are minimal due to the fact that the majority of patrons attend the clubs without female partners. Further, security measures inside the clubs reduce the potential for skirmishes among customers.

The possibility of interpersonal aggression may be greatly reduced in the vicinity of exotic dance clubs, compared to most other locations where adults congregate, such as bars or taverns that do not feature exotic dancing. The finding of a greater frequency of calls for service for nonsexual offenses in the comparison areas, compared to the club areas, suggests that the control mechanisms found in the exotic dance locations that may prevent criminal activity may not be present in the comparison locations. Liquor serving establishments in the comparison areas may not maintain high levels of parking lot and other customer security measures. This lack of crime suppressing features for bars and taverns may account for the higher levels of arrest in the comparison areas.

Implications of the Pap's A.M. Decision for the Consideration od Secondary Effects Studies

It has been demonstrated through this study that there is a sufficient basis for a serious challenge to the assumption that there is an empirical relationship between exotic dance businesses and at least one kind of negative secondary effect, specifically increases in crime. Further, this conclusion is based on research procedures that adhere to long-standing and well-accepted methodological procedures for insuring sound scientific conclusions.

In *Pap's*, Justice O'Connor provides room for challenges, based on the collection of empirical evidence, to the assertions made by municipalities regarding a relationship between adverse secondary effects and nude dancing. She noted that the adult business in question in *Pap's* (Kandyland) could have challenged the city of Erie's assertion that nudity led to ill effects, but did not do so.[23] This leaves room for the introduction of secondary effects evidence, such as that collected in the present quasi-

[23] *Pap's*, *supra* note 5 at 17 (plurality opinion).

experimental investigation, by businesses both in city council hearings and in any subsequent court litigation.

In order to remain consistent with the Supreme Court's holding in *Pap's*, lower courts will be required to consider the methodological legitimacy of evidence of a relationship between negative secondary effects and the subject businesses collected both by governments and by those business owners who attempt to challenge government ordinances restricting their establishments.

In evaluating the admissibility of this evidence, the courts are best served by turning to standards laid out in *Daubert* for the admissibility of scientific evidence. The study presented here meets such standards for admissibility. The application of such standards, bolstered by Justice Souter's opinion in *Pap's*, may force courts to reject studies that have been previously relied upon as evidence of negative secondary effects, and require new, more methodologically sound, studies to demonstrate the necessity for regulations directed at the exotic dance industry. The courts should be mindful of the criteria laid out above for collecting empirical evidence in a methodologically sound manner. Specifically, only evidence obtained using relatively closely matched comparison and study areas, or a comparable procedure, may be acceptable.

15-72

Table 1: Comparison of the club locations and the matched control locations on the variables related to crime.

	CONDITON	FEMALE HEAD OF HOUSE HOLD	TOTAL POPULATION 1997	WHITE	BLACK	AGE 18-29	TOTAL DIVORCED IN POPULATION 1997	INCOME 1997
randy's	1.00	177.00	5503.00	5309.00	128.00	1005.00	579.00	37488.00
randy's control	.00	112.00	4055.00	3667.00	275.00	902.00	379.00	46716.00
agney's Showclub	1.00	61.00	2233.00	2103.00	78.00	350.00	164.00	38547.00
agney's Showclub ntrol area	.00	70.00	1374.00	1516.00	104.00	211.00	137.00	34912.00
li's	1.00	20.00	1582.00	1426.00	90.00	456.00	172.00	39025.00
li's control area	.00	30.00	1455.00	1332.00	74.00	364.00	168.00	36973.00
air A Dice	1.00	82.00	895.00	453.00	411.00	145.00	83.00	27798.00
air A Dice control area	.00	71.00	897.00	364.00	492.00	141.00	77.00	26293.00
oor John's	1.00	18.50	284.00	195.00	74.00	57.00	43.00	21900.00
oor John's control area	.00	15.00	310.00	195.00	109.00	40.00	51.00	20190.00
howgirl 1	1.00	177.00	5503.00	5309.00	128.00	1005.00	579.00	37488.00
howgirl 1 control area	.00	112.00	4055.00	3667.00	275.00	902.00	379.00	46716.00
howgirl 3	1.00	109.00	1649.00	1501.00	85.00	265.00	191.00	33147.00
howgirl 3 control area	.00	119.00	1599.00	1449.00	93.00	125.00	212.00	31408.00
tewie's	1.00	60.00	681.00	604.00	57.00	178.00	96.00	32647.00
tewie's control area	.00	56.00	624.00	577.00	32.00	146.00	92.00	30959.00

15-73

Table 2. Average values (means) for demographic variables averaged across exotic dance nightclub and comparison areas.

	Condition	N	Mean	Std. Deviation	Std. Error Mean
Female Head of Household 1990	Comparison area	8	73.1250	39.0474	13.8053
	Club area	8	88.0625	62.4342	22.0738
Estimated 1997 population	Comparison area	8	1796.1250	1460.3971	516.3283
	Club area	8	2291.2500	2074.3695	733.4004
Number of households 1997	Comparison area	8	772.1250	583.7914	206.4014
	Club area	8	946.0000	824.2210	291.4061
WHITE	Comparison area	8	1595.8750	1372.9412	485.4080
	Club area	8	2112.5000	2069.7428	731.7646
BLACK	Comparison area	8	181.7500	154.4092	54.5919
	Club area	8	131.3750	115.7262	40.9154
People aged 18 - 29	Comparison area	8	353.8750	350.6783	123.9835
	Club area	8	432.6250	374.0424	132.2439
Divorced males and females in 1997	Comparison area	8	186.8750	129.1925	45.6764
	Club area	8	238.3750	216.0740	76.3937
1997 median household income	Comparison area	8	34270.8750	9247.0605	3269.3296
	Club area	8	33505.0000	6044.2528	2136.9661

15-74

Table 3. Statistical tests (t-tests) for demographic variables used to match club and comparison areas.

	t value	df	Sig. (2-tailed)	Mean Difference
Female Head of Household 1990	-.574	14	.575	-14.9375
Estimated 1997 population	-.552	14	.590	-495.1250
Number of households 1997	-.487	14	.634	-173.8750
WHITE	-.588	14	.566	-516.6250
BLACK	.738	14	.472	50.3750
People aged 18 – 29	-.434	14	.671	-78.7500
Divorced males and females in 1997	-.579	14	.572	-51.5000
1997 median household income	.196	14	.847	765.8750

15-75

Table 4. Calls for service in the city Fort Wayne generally and in exotic dance nightclub and matched comparison areas by crime type.

Sex Crimes	Club	Comparison	City-wide Total
Rapes	6	10	432
Molesting	6	6	677
Indecent exposure	29	22	590
Sexual battery	1	5	33
Total	42	43	1732
Additional Aggression Related Non-sexual Offenses			
Shootings	2	6	284
Fights	14	75	341
Non-sexual battery	18	61	887
Disturbance	77	103	1398
Total	111	245	2910
Thefts, Burglaries & Robberies			
Theft from buildings	277	226	3476
Theft -bikes	10	16	1232
Burglaries	116	129	7238
Robberies w/ firearm	39	33	882
Robberies w/o firearm	25	20	1215
Total	467	424	14043
Overall Reported Offenses	620	712	18685

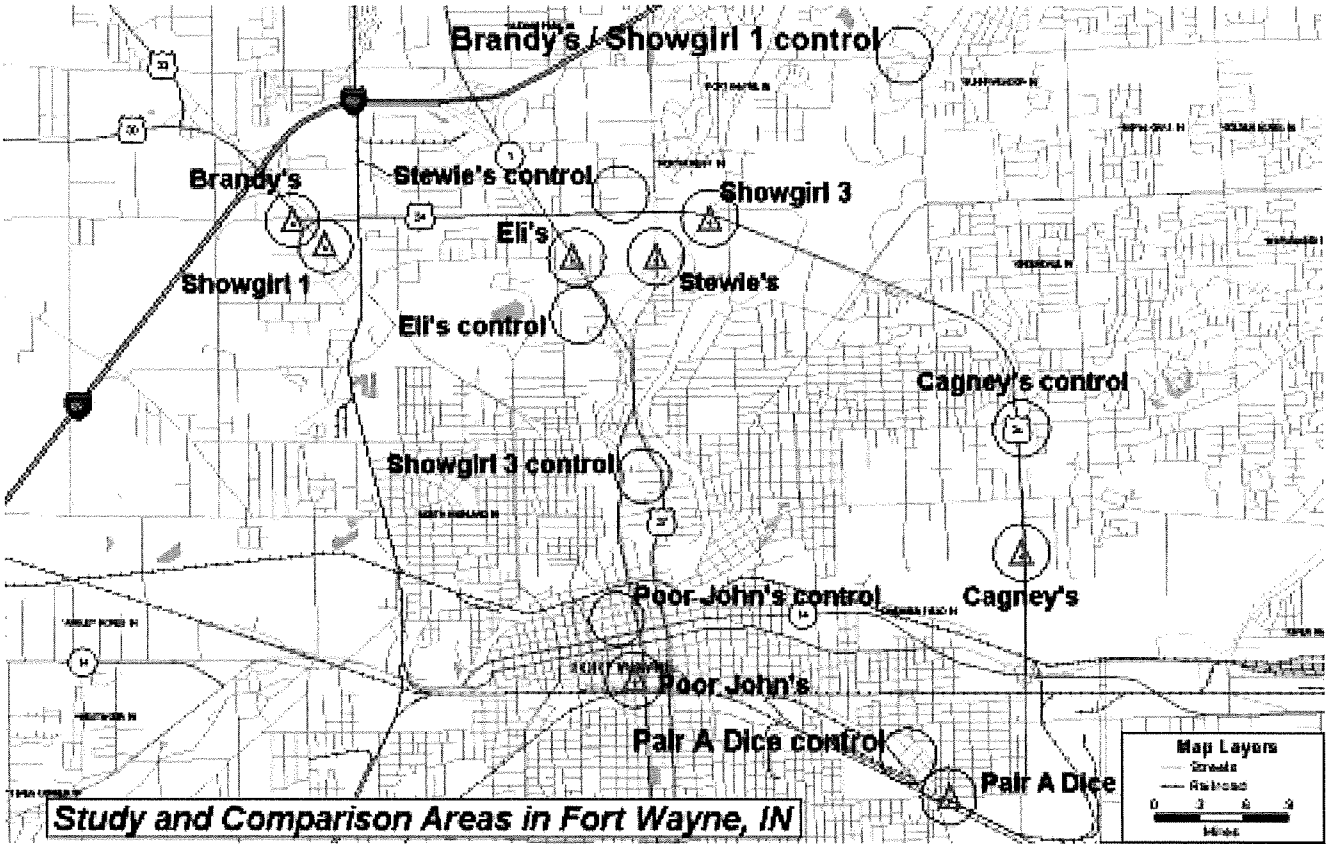
15-76

Table 5. Percentage of calls for service in club and comparison areas as a function of total calls for service for sex crimes; additional aggression related non-sexual offenses; and thefts, burglaries and robberies.

	Club	Comparison	Total
Sex Crimes			
Total	42	43	1732
Percentage of sex crimes total	2.4%	2.4%	
Additional Aggression Related Non-sexual Offenses			
Total	111	245	2910
Percentage of aggression related non-sexual total	3.8%	8.4%	
Thefts, Burglaries & Robberies			
Total	467	424	14043
Percentage of thefts, burglaries & robberies	3.3%	3.0%	
Overall Reported Offenses	620	712	18685
Percentage of overall reported offenses	3.3%	3.8%	

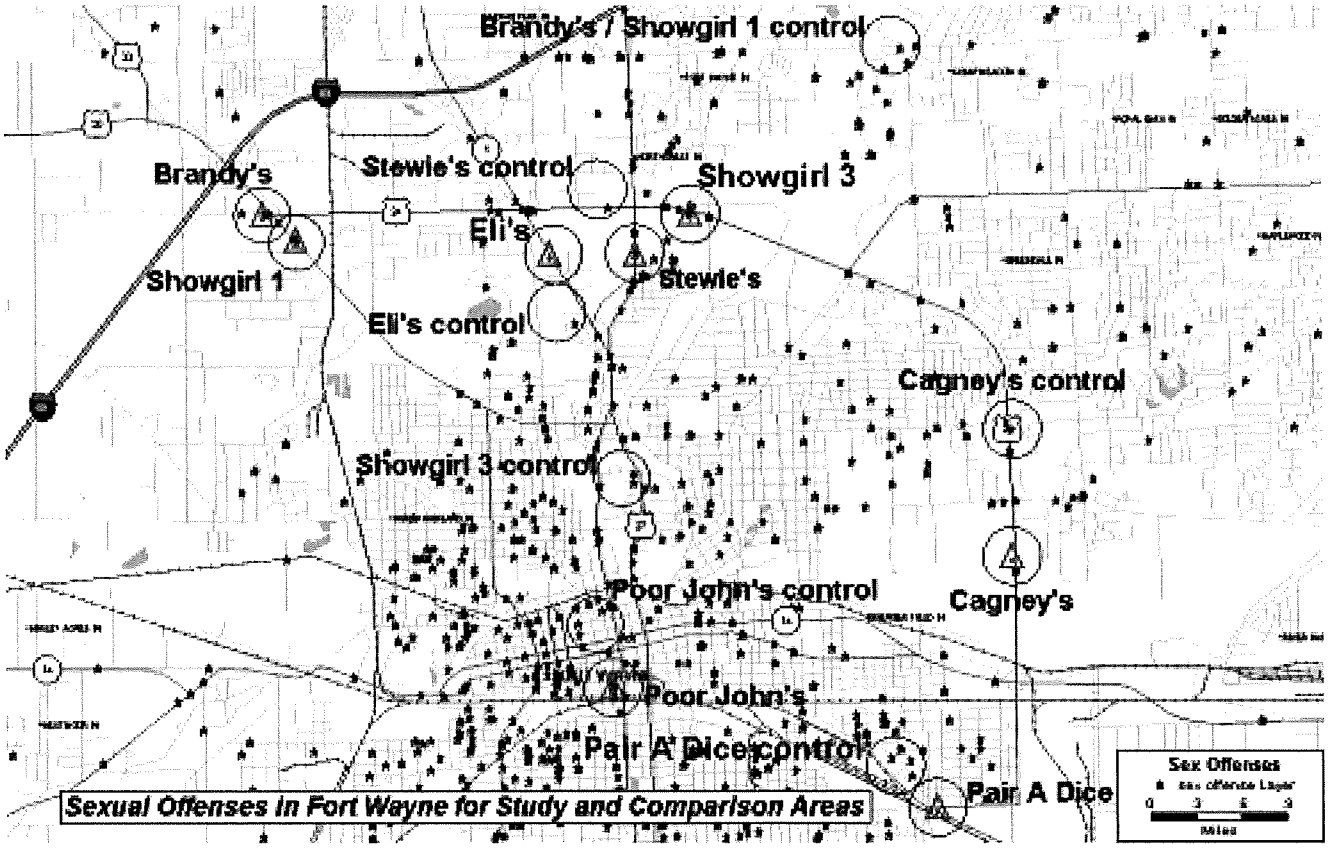
15-77
~~153~~

Figure 1. Location of the exotic dance clubs in the Fort Wayne area (including the 1000 feet radius around each club) and areas matched to the club areas by the demographic variables related to crime.



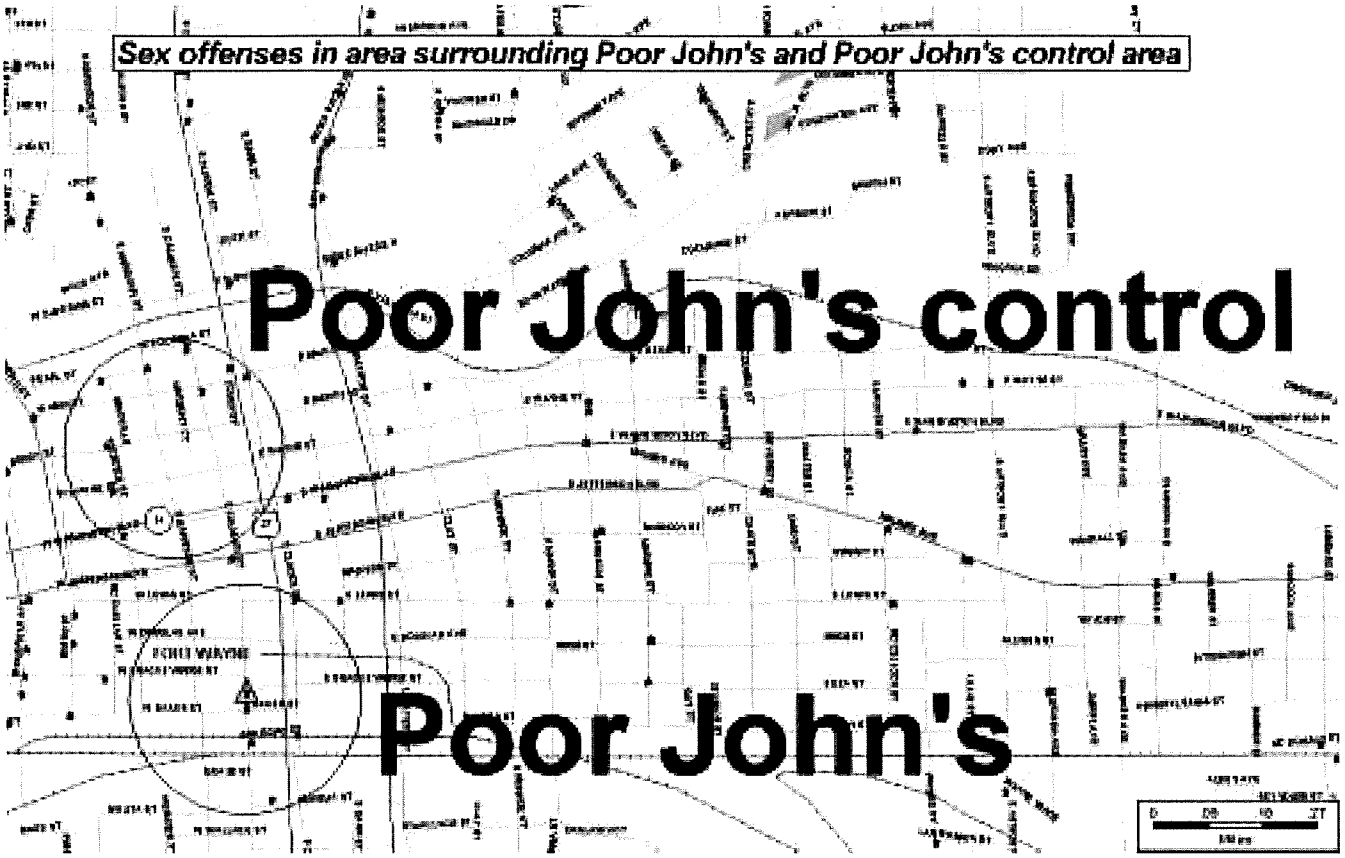
15-78

Figure 2. Geographical location of the of calls for service for sex-related crimes in Fort Wayne, generally, and the location of sex crime calls for service within the 1000 feet radius of the exotic dance clubs calls for service and in the matched comparison areas.



15-79

Figure 3. Geographical location of the calls for service for sex-related crimes in Fort Wayne for a selected exotic dance club and its matched comparison area.



15-80

An Examination of the Assumption that Adult Businesses Are Associated with Crime in Surrounding Areas: A Secondary Effects Study in Charlotte, North Carolina

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Jay R. Williams
Bryant Paul
Michael E. Ezell

Recent Supreme Court decisions have signaled the need for sound empirical studies of the secondary effects of adult businesses on the surrounding areas for use in conjunction with local zoning restrictions. This study seeks to determine whether a relationship exists between adult erotic dance clubs and negative secondary effects in the form of increased numbers of crimes reported in the areas surrounding the adult businesses, in Charlotte, North Carolina. For each of 20 businesses, a control site (matched on the basis of demographic characteristics related to crime risk) is compared for crime events over the period of three years (1998–2000) using data on crime incidents reported to the police. We find that the presence of an adult nightclub does not increase the number of crime incidents reported in localized areas surrounding the club (defined by circular areas of 500- and 1,000-foot radii) as compared to the number of crime incidents reported in comparable localized areas that do not contain such an adult business. Indeed, the analyses imply the opposite, namely, that the nearby areas surrounding the adult business sites have smaller numbers of reported crime incidents than do corresponding areas surrounding the three control sites studied. These findings are interpreted in terms of the business mandates of profitability and continuity of existence of the businesses.

Introduction

In a 1977 ABC News Special entitled *Sex for Sale: The Urban Battleground*, Howard K. Smith concluded a segment with the following:

We thank John Couchell, Assistant Director, Strategic Planning & Analysis, Charlotte-Mecklenburg Police Department for providing the data analyzed in this study and for helpful advice. Any inadequacies of analysis or errors of interpretation are, however, solely the responsibility of the authors of this article. Address all correspondence to Daniel Linz, Professor, Department of Communication and the Law and Society Program, University of California, Santa Barbara, CA 93106; e-mail: linz@comm.ucsb.edu.

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> Commercial sex is often called a victimless crime. We have shown that a glomeration of sex businesses, in fact, have many victims. Residents move out of the areas from fear, customers desert legitimate shops which have to sell out at a loss. City dwellers are victimized by having to pay more taxes to make up for the areas that are in arrears because of sex businesses. In the spreading decay, muggers, dope pushers move in. It's harder to spot their crimes in a general sea of rot. Police and courts tend to give up. Civilization living by rules moves out and we're all victims. Better solutions may emerge, but for now the Detroit plan is the best in sight. Leave aside individual arrests for obscenity, which the law seems to have an impossible time defining. Pass a zoning law allowing no sex-related establishment or service to exist within three blocks, say, of any other. Let none become the nucleus for a cancerous spread.

In the summer of 1976, the city of Detroit, Michigan introduced zoning laws designed to break up the concentrated areas containing sex-related "adult" businesses.[1] The assumption driving the dispersion of concentrated adult businesses was the presumed negative "secondary effects" of these businesses on the surrounding neighborhood. Enthusiasm for the Detroit zoning approach quickly spread to other cities.

This diffusion of the Detroit zoning approach throughout the nation over the last 25 years has produced a continuing history of constitutional litigation. Since 1976, the Supreme Court has decided a series of cases focusing on whether the free speech clause of the First Amendment allows cities and states to enact legislation controlling the location of adult businesses on the basis of presumed negative secondary effects.[2]

The Court's Presumption of Adverse Secondary Effects

The rationale for the secondary effects doctrine was most completely laid out in *Renton v. Playtime Theatres, Inc.*, in 1986. In *Renton*, the Supreme Court considered the validity of a Renton municipal ordinance that prohibited any adult theater from locating within 1,000 feet of any residential zone, family dwelling, church, park, or school. The Court's analysis of the ordinance proceeded in three steps. First, the Court found that the Renton ordinance did not ban adult theaters altogether, but merely required that they be a certain distance from so-called "sensitive locations." The ordinance, the Court said, was properly considered

[1] "Adult" or "adult-oriented" or "sex-related" businesses may include pornography stores, massage parlors, and topless or nude dance nightclubs. In the present study, the adult businesses studied are topless nightclubs, also known as "gentlemen's clubs."

[2] See, e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *City of Renton v. Playtime Theatres Inc.*, 475 U.S. 41 (1986).

15-82

to be a time, place, and manner regulation. The Court next considered whether the ordinance was content neutral or content based. If the regulation were content based, it would be considered presumptively invalid and subject to the "strict scrutiny" standard. The Court held, however, that the ordinance was not aimed at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely at crime rates, property values, and the quality of the city's neighborhoods. Given this finding, the Court stated that the ordinance would be upheld as long as the city of Renton showed that its ordinance was designed to serve a substantial government interest such as a reducing crime rates or maintaining property values.

Further, in *Renton* the Court stated, for the first time, that a city interested in restricting the operation of adult businesses was not required to show adverse impact from operation of adult theaters in its own community if no data on adverse impacts existed, but could instead rely on findings of impacts from other cities as a rationale for supporting passage of an ordinance. The Court ruled that Renton could rely on the experiences of and studies produced by the nearby city of Seattle as evidence of a relationship between adult uses and negative secondary effects. Thus, the Court ruled that the First Amendment does not require a city to conduct new studies or produce new evidence before enacting an ordinance, as long as the evidence relied upon is reasonably believed to be relevant to the problem the city faces.

Since *Renton*, a number of cities, counties, and states have undertaken investigations designed to establish the presence of such secondary effects and their connection to adult facilities. These studies have, in turn, been shared with other municipalities and generally serve as the basis for claims that adult entertainment establishments are causally related to harmful secondary side effects, such as increased crime and decreases in property values. Many local governments have relied on this body of information as evidence of the secondary effects of adult businesses. Further, in most cases, cities and other governmental agencies have used the findings of a core set of studies from other locales as a rationale for instituting regulation of such businesses in their own communities.

In more recent years, the Court has considered the constitutionality of anti-nudity ordinances passed by municipalities or states that have relied on negative secondary effects to justify the legislation.[3] In a fractured decision issued in 1991, the Court in *Barnes v. Glens Theatre Inc.* held that the state of Indiana could

[3] See e.g., *Barnes v. Glens Theatre Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

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regulate public nudity.[4] Justice Souter in a concurring opinion ruled that the government could undertake such regulation on the basis of the *presumed* negative secondary effects on the surrounding community.[5]

In the 2000 decision *City of Erie v. Pap's A.M.*, the Court again held that municipalities have the right to pass anti-nudity ordinances on the assumption that nudity is associated with adverse secondary effects such as crime.[6] Again, the Court was fractured; however, three justices agreed with Justice O'Connor's opinion that in conformity with Justice Souter's concurrence in *Barnes*, combating negative secondary effects associated with adult businesses was a legitimate basis for the imposition of anti-nudity regulations.

Most notable for our purposes, however, was Justice Souter's partial concurrence and partial dissent in the *Pap's* decision. He significantly revised the position he took regarding the assumption of secondary effects in *Barnes*. In *Pap's*, Justice Souter said he was now of the opinion that the evidence of a relationship between adult businesses and negative secondary effects is at best inconclusive.[7] He called into question the reliability of past studies that purported to demonstrate these effects and suggested that municipalities wishing to ban nudity must show evidence of a relationship between adult businesses and negative effects.[8]

Most recently (2002) Justice O'Connor, joined by the Chief Justice, Justice Scalia, and Justice Thomas (with Justice Kennedy's concurrence) concluded that the city of Los Angeles may reasonably rely on its 1977 study to demonstrate that its present ban on multiple-use establishments serves the city's interest in reducing crime. In *City of Los Angeles v. Alameda Books, Inc., et al.*, the Court maintained that it was "reasonable for Los Angeles to suppose that a concentration of adult establishments is correlated with high crime rates because a concentration of operations in one locale draws, for example, a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity." Justice Kennedy, whose opinion may be the controlling one in the case, reiterated the assumption that adult businesses cause negative secondary effects. In his opinion in *Alameda* he asserts, "municipal governments know that high concentrations of adult businesses can damage the value and integrity of a neighborhood. The damage is measurable; it is

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[4] *Barnes v. Glens Theatre Inc.*, 501 U.S. 560 (1991) (hereinafter *Barnes*).

[5] As will be discussed in depth below, restrictions on erotic dance have typically included requiring dancers to wear at least pasties and a G-string when performing.

[6] *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (hereinafter *Pap's*).

[7] *Id.* at 6-7 (Souter, D. concurring in part dissenting in part).

[8] *Id.* at 5 n.3.

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all too real." The Court held that a municipality may rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest.

However, the plurality added an important methodological caveat concerning the evidence necessary to validate the assumption that adult businesses cause secondary effects. The Court warned:

> "This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support its rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the *Renton* standard. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance."

Empirically Testing the Assumption of Secondary Effects from Adult Businesses

Justice Souter, joined by Justice Ginsburg, Justice Breyer, and Justice Stevens, took the admonishment by the plurality in *Alameda* that municipalities cannot rely on methodologically frail demonstrations of secondary effects a step further. Justice Souter faulted the city of Los Angeles because the city did not demonstrate that its theory that regulation requiring adult establishments disburse and be operated as free standing businesses will reduce crime. Justice Souter asked the city to demonstrate, not merely by appeal to common sense *but also with empirical data*, that adult businesses are associated with crime and that its ordinance will successfully lower crime.

In fact, Justice Souter claims that the only way to avoid a zoning ordinance such as that passed in Los Angeles from being unconstitutional due to the lack of content neutrality, a requirement set out in *Renton*, is to conduct empirical evaluations of whether such effects, assumed in the past, actually exist. He notes in *Alameda*:

> "(the) risk of viewpoint discrimination is subject to a relatively simple safeguard, however. If combating secondary effects of property devaluation and crime is truly the reason for regulation, it is possible to show by empirical evidence that the effects exist, that they are caused by the expressive activity subject to zoning, and that the zoning can be expected either to ameliorate them or to enhance the capacity of the government to combat them . . . "

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The Present Study

The first purpose of the present study is to conduct the type of empirical study demanded by Justice Souter and noted to be relevant by Justice O'Connor and the other justices in *Pap's*. Also, it is designed to avoid the collection of "shoddy data" or the use of (shoddy) "reasoning" as demanded in *Alameda Books*, in order to determine if a relationship exists between adult businesses and negative secondary effects, or whether, as Justice Souter has contended, such a relationship must not be assumed. Further, this evidence is obtained in accordance with established methodological procedures so as to insure a high level of scientific reliability.

Past studies claim to have found crime but lack the essential methodological features necessary to validly make such a claim. Paul, Linz, and Shafer (2001) found numerous problems among the most frequently cited studies by communities across the United States. For example, the Indianapolis, Indiana study (1986) failed to properly match study and control areas on variables, the Phoenix, Arizona study (1979) relied on crime data collected for only a one-year period, and in the Los Angeles study (1977) authors admitted that the police stepped up surveillance of adult businesses during the study period. Each of these methodological problems severely limits the utility of these studies.[9]

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[9] As we noted above, the Court in *Alameda* warned that a municipality cannot get away with shoddy data or reasoning. The municipality's evidence must fairly support its rationale for its ordinance. What methodological features of an inquiry may prevent the collection of reliable data and sound reasoning concerning secondary effects? Unfortunately, when municipalities have conducted studies of crime and adult businesses in the past, there has not been a set of methodological criteria or minimum scientific standards to which the cities were required to adhere. Paul, Linz, and Shafer (2001) have argued that, without such standards, most cities that have passed legislation are relying on methodologically flawed data and research.

The basic requirements for the acceptance of scientific evidence for legal decision making were prescribed by the Supreme Court in the 1993 case of *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). In *Daubert*, Justice Blackmun, writing for the Court, held that there are certain limits on the admissibility of scientific evidence offered by "expert witnesses" in federal courts. In an attempt to prevent the proliferation in courtrooms of what Peter Huber has called "junk science" and what the Supreme Court is now calling "shoddy data or reasoning," the Supreme Court in *Daubert* opined that scientific knowledge must be grounded "in the methods and procedures of science," and must be based on more than "subjective belief or unsupported speculation." Thus, the Court said, "the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." The Court observed that "[i]n a case involving scientific evidence, evidentiary reliability will be based upon scientific validity."

Offering "some general observations" as to how this connection can be made, the Court provided a list of factors that federal judges could consider in ruling on a proffer of expert scientific testimony: (1) the "key question" is whether the theory or technique under scrutiny is testable, borrowing Karl Popper's notion of falsifiability (Popper 1959); (2) although publication was not an absolute essential, the Court noted that peer review and publication increased "the likelihood that substantive flaws in methodology will be detected"; (3) an error rate or estimate of the probability that empirical relationships are due to chance should be calculated; (4) adherence to professional standards in using the

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More recently, Linz and Paul (2002) have undertaken an examination of adult cabarets in the city of Fort Wayne, Indiana, that serve alcoholic beverages and that provide exotic entertainment wherein dancers are required to wear pasties and G-strings. Unlike previous studies conducted in other municipalities, specific

technique in question; and (5) finally, though not the sole or even the primary test, general acceptance could "have a bearing on the inquiry."

In the present study, we specifically consider the impact of adult dance clubs on the occurrence of crimes reported to the police. We will limit our discussion of acceptable scientific procedures to those necessary to insure the proper implementation of such a crime study. Three criteria are crucial in insuring that a scientifically valid study of secondary crime effects has been conducted, as follows. First, in order to insure accurate and fair comparisons, a control area must be selected that is truly "equivalent" to the area containing the adult dance entertainment business(es) (cf. Campbell & Stanley 1963: 34; Babbie 1999:240). Because most analyses of secondary effects attempt to uncover increases in crime, professional standards dictate that the control (non-adult dance) site must be comparable (matched) with the study (adult dance) site on variables related to crime. Of particular importance are that the study and control areas are matched for ethnicity and socioeconomic status of individuals in both areas. A concerted effort should also be made to include only comparison areas with similar real estate market characteristics such as proportion of commercial and industrial space in either area. The study and control areas should also be approximately equal in total population. Finally, because of the effect of businesses that serve alcoholic beverages on neighborhood deterioration and crime (Roncek & Maier 1991), the study and control areas should be matched on the presence of alcohol-serving establishments. The reasons for these concerns are discussed later in this article. In summary, "quasi-experimental" studies employ a test group or area and a matched control group or area. The most important consideration in such a design is whether the comparison group or control group are well matched.

Second, a sufficient period of elapsed time following the establishment of an adult dance entertainment business is necessary when compiling crime data in order to ensure that the study is not merely detecting an erratic pattern of social activity. Generally, the longer the time period for observation of the events under consideration, the more stable (and more valid) the estimates of the event's effects tend to be (cf. Singleton, Straits, & Straits 1993:213–41).

Third, the crime rate must be measured according to the same valid source for all areas considered (Campbell & Stanley 1963: 59). Studies of secondary effects typically focus on two general types of crime in relation to adult dance entertainment businesses. These two types of crime are "general criminal activity" (including, but not limited to, robbery, theft, assault, disorderly conduct, and breaking and entering) and "crimes of a sexual nature" (including, but not limited to, rape, prostitution, child molestation, and indecent public exposure). It is especially important that the measurement of these crimes is based on the same information source for both sites and throughout the entire study period. For example, if the study area measures crime by the number and type of calls made to the police department, the comparison area must also rely on such a measure when the two areas are compared.

In addition, the crime information source must be factually valid and reliable, such as a daily log kept by police, or a compilation of the number of calls for service made in a municipality recorded by street address or similar geographical locators. Any change in police surveillance techniques regarding adult dance entertainment businesses in a particular community must also be noted. Obviously, increased surveillance of an area simply because an adult dance club is located there will have an impact on the amount of crime detected by the police. If increased police surveillance and the presence of an adult dance club in a particular area are confounded in this way, it is impossible to tell whether crime has increased due to the presence of the club or simply because of the increased police activity. Finally, an error rate must be calculated. The error rate is the degree of chance a scientist will allow. In the social sciences, it is conventional to set the error rate at 5% or less (i.e., we will tolerate an error rate that says that up to 5 times out of 100 the results may be obtained by chance).

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attention was given to developing an empirical approach that fulfilled the requirements set out by the Supreme Court for the proper conduct of a social scientific inquiry. A 1000-foot circumference surrounding each of eight exotic dance nightclubs in Fort Wayne was established. Comparison areas were selected in Fort Wayne and matched to the club areas on the basis of demographic features associated with crime and commercial property composition. The number of calls to the police from 1997 to 2000 in the areas surrounding the exotic dance nightclubs was compared to the number of calls found in the matched comparison areas. The analysis showed little difference, overall, between the total number of calls to the police reported in the areas containing the exotic dance nightclubs and the total number of offenses reported in the comparison areas.

The present study is also informed by two related bodies of thought about crime and place, social disorganization theory, and routine activity/crime opportunity theory. The second purpose of this study is to examine the impact of adult businesses in a local community in light of these perspectives. These approaches point to variables that predict the frequency and location of criminal activity in a community. This set of ideas is also especially relevant here, first, because they are the implicit theories employed by municipalities addressing the problem of adverse secondary effects, second, because they suggest a number of other variables, predictive of crime events, that must be considered as control variables in any study of the impact of adult businesses on crime, and finally, because these variables have been successful as predictors of crime events.

Routine Activities/Crime Opportunity Theory

While perhaps not the ideal forum for the examination of criminological theory, investigating the secondary effects of adult bars as a stimulus for crime addresses a current and pressing legal policy issue. City planners and other representatives of local governmental bodies have explicitly claimed that adult businesses are associated with crime and disorder and have theorized that the presence of an adult business in a localized area increases the concurrence of offenders motivated to commit crimes together with suitable targets for the crimes.

In Phoenix, for example, the city adopted a zoning ordinance whose restriction of adult business to within 500 or 1000 feet of sensitive land uses such as churches, schools, and daycare centers is predicated on the idea that the presence of adult businesses attracts persons who will engage in crime. The Phoenix ordinance was based on the theory that there are direct impacts that uniquely

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relate to this class of land use. In fact, the city planners in Phoenix asked: "are the crime impacts . . . directly related to the adult businesses being there, or to some other societal variables in the neighborhood?" Realizing that these other societal variables need to be controlled for, the Phoenix planners undertook an empirical study in which they considered adult land uses and negative secondary effects in light of other variables related to crime such as number of residents, median family income, percentage of non-white population, percentage of dwelling units built since 1950, and percentage of acreage used residentially and non-residentially (Planning Department of Phoenix 1979:4).

More formal expressions of how certain societal factors that may be related to the commission of crime have come from criminologists propounding routine activities/crime opportunity theory (Cohen & Felson 1979; Cohen, Kluegel, & Land 1981). This approach begins by noting that, in order for a predatory crime (e.g., robbery) to occur, there must be a concurrence in space and time of (1) a motivated offender, (2) a suitable target, and (3) an absence of a guardian that is capable of preventing the crime. This theory then focuses on how changes in the time and space of how people order their lives can change the opportunity structure for crime and thus affect crime rates and rates of criminal victimization—even in the absence of an increase in the structural or psychological factors that produce increases in the number of motivated offenders.

Routine activities/crime opportunity theory has been quite successful in empirical tests (see, e.g., Miethe & Meier 1994). This theory also has been used to guide research by criminologists on so-called hot spots or locations in urban areas that attract large numbers of crime incidents (see, e.g., Roncek & Maier 1991; Smith, Frazee, & Davison 2000). Researchers have found that perpetrators of street crime such as robbery commit their crimes proximate to where they live, on face blocks with which they are familiar or which they traverse in their routine activities.

This approach suggests a number of variables that must be considered in any investigation of the relationship of crime events to adult businesses in a community. It is necessary to control for population size, because, all else being equal, blocks with many people may have more potential crime victims than do face blocks with few people. Somewhat surprisingly, however, the population control variable is often found to be negatively associated with the number of crimes such as street robberies, suggesting that robbers tend to target victims where fewer people reside, and perhaps where fewer witnesses are likely.

In addition, it is necessary to control for neighborhood business and housing characteristics such as multiple apartments, or even

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multiple buildings at a given address under the assumption that, all else being equal, the more places, the more likely a robbery victimization will occur on a face block. Higher levels of crime tend to plague places with certain types of facilities and not others. In some cases, for example, crimes seem to be elevated by a target-rich environment—for example, thefts of 24-hour convenience stores, auto thefts from large parking lots, or robberies from shoppers in heavily frequented commercial areas (Engstad 1975; Duffala 1976). The presence of bars, restaurants, and gas stations identifies blocks that might be particularly attractive for potential offenders because of easy accessibility and the presence of people carrying cash, often under the influence of alcohol (Roncek & Maier 1991; Sherman et al. 1989; Stark 1987). The number of other commercial places, such as business offices, industrial buildings, and warehouse facilities on a block is also important in predicting crime events.

Specific land uses are not only important in themselves but also operate in interaction with variables indicative of social disorganization in determining the risk of crime. Variables that have been investigated and been found to be most important as predictors of crime activity include measures of racial composition (number of African Americans and racial heterogeneity), family structure (as measured by number of single-parent households), economic composition (as measured by family income), and the presence of motivated offenders including males between the ages of 18 and 25 (Miethe & McDowall 1993). These social disorganization variables have been examined on the basis of the assumption that a local area's population age structure (especially the presence of young adults) and its race/ethnic composition can affect both the size of the pool of motivated crime offenders and the presence of suitable targets for predatory crimes (see, e.g., Miethe & Meier 1994).

Similarly, the socioeconomic status of individuals in a local area can affect both the prevalence of motivated offenders and crime targets. For example, Cohen, Gorr, and Olligschlaeger (1993) found that crime hot spots tended to be in areas with higher levels of poverty or low income, and were likewise associated with low family cohesion—an indication of the prevalence of both motivated offenders and crime targets.

Research Question

Once variables known to be related to crime events suggested by social disorganization and routine activities theories have been taken into account we may ask: does the presence of an adult business in a localized area increase the concurrence in space and time of offenders motivated to commit crimes together with suitable targets for the crimes in the absence of guardians capable of preventing or deterring the crimes?

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The site for the present study was Charlotte, North Carolina. For each adult topless dance club in that community, a control site (matched on the basis of demographic characteristics related to crime risk) is compared for crime events over the period of three years (1998–2000) using data on crime incidents reported to the police. This research is designed to address the questions of whether and to what extent the adult dance clubs contribute to community disorder—that is, increased crime in neighborhoods—compared to their control neighborhoods that do not have adult dance clubs.

Data and Methods

Establishing Matched Comparison Locations

Twenty topless adult nightclubs in Charlotte, North Carolina are the focal points of the present study. It was not possible to randomly assign units of analysis to an experimental group and a control group to perform a "true" experiment to test the hypothesis that adult nightclubs in Charlotte engender negative effects. Instead, a "quasi-experiment" was conducted in which matched "control" areas were found and compared to "test" areas containing the adult business. In order to insure accurate and fair comparisons, a control area must be selected that is as "equivalent" as possible to the area containing the adult entertainment business(es).

The main hypothesis to be tested in the present study is that the presence of an adult nightclub increases the number of crime incidents reported in localized areas surrounding the club as compared to the number of crime incidents reported in comparable localized areas that do not contain an adult nightclub. In order to test this hypothesis, suitable control (non-adult nightclub) sites must be chosen that are comparable (matched) to the test (adult nightclub) sites on key demographic and other variables that are generally regarded as being related to the incidence of crime.

In order to insure that the research reported here utilized appropriately "matched" adult nightclub (test) and non-club (control) areas, a crime-mapping approach was utilized. Two radii—500 feet and 1,000 feet—were used to identify circular perimeters surrounding each of 20 adult nightclubs in Charlotte. These distances were chosen because they represent the city's presumptions about negative secondary effects. The Charlotte city code, as is the case for hundreds of municipalities across the United States, mandates that adult establishments be no closer than 1000 feet from churches, schools, daycare centers, and other sensitive land uses. Other cities such as New York specify distances of 500 feet.

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Comparison areas or control sites (census block groups) of physical size roughly comparable to the areas containing the adult nightclubs, each with 500 and 1000 feet in radius, were selected that matched the adult nightclub areas on the basis of several of the variables known to be related to the risk of crime victimization (on the basis of social disorganization and routine activities theory as reviewed above) and by further informally attempting to equate areas on the basis of commercial property composition. Additional variables were also taken into consideration in order to rule out alternative explanations but were not formally considered for matching purposes.

The following variables were used for the selection of control sites: total population size (1997), percentage of households that are female headed, percentage of the population that is African-American, percentage of the population aged 18–29, percentage of the adult population that is divorced, and median household income. Each of these variables was identified at the U.S. Census block group level. Properly "matching" the subject and control areas is critical in order to insure that the results we obtain can be ascribed to the presence or absence of (in this case) an adult nightclub, and not to some other irrelevant factor.

In addition, although not formally matched on these variables beforehand, measurements were taken of traffic patterns and number of businesses and commercial properties in the areas immediately surrounding the adult and control sites.[10] Traffic patterns may be important to consider because they are an indication of the number of people moving through an area both suitable as targets and as perpetrators of crime. Business composition is important because of the effect of the number of businesses on crime opportunity and neighborhood deterioration. These variables, while technically measured, are not included in the formal model testing. They will be examined to determine simply whether they covary with crime patterns. If it is found that they correspond to the pattern of crime in a particular area, we may have some indication that these features of the environment may be reasonable explanations for the findings we obtain.

The geographic information system computer program Maptitude (1999) was used to locate the census block group within which each club was located. For each census block group, a Maptitude data set provides counts for most of the demographic variables measured by the 1990 U.S. Census. In addition, 1997 supplements are provided for most variables. The values of each of the variables of interest were identified for the census block within

[10] The figures showing the names and locations of business composition are available from the authors.

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which the adult nightclub was located. When the 1000-foot area surrounding a club location touched more than one census block, the average value for each of the relevant demographic variables was calculated across the blocks that overlapped with the club perimeters. A comparable area, matched for values on the crime-related variables, was then selected via Maptitude. All control areas were selected before the crime data were obtained and thus before any analysis of the crime data was undertaken. Finally, it should be noted that two variables often associated with social disorganization and routine activity theory, social class and residential mobility, are not available in census block data, and thus they cannot be included in the analysis. To the extent that social disorganization variables included in the model correlate with these unavailable variables, the consequences for our conclusions may be minor.

Table 1 displays a comparison of the values for each of the demographic characteristics measured at the census block level both for the adult nightclub locations and the control sites to which they were matched. Table 1 contains a column for the population size variable, four columns for the four percentage variables, and a final column for the median household income variable. Rows for the 20 adult nightclub sites are ordered alphabetically from top to bottom in Table 1, with rows for the three control sites ordered alphabetically at the bottom of the table. For each of the demographic and income variables in the table, it can be seen that there is a substantial amount of variability among the club and control sites.

To determine which control site to match with which adult nightclub location, the frequency distributions of each of the six demographic variables given in Table 1 were divided into five equally distributed levels (quintiles). For each demographic variable, each of the quintiles was assigned a numerical value that could range from 1 to 5, where 1 indicates that level of the demographic variable that is least likely to be associated with the occurrence of crime events and 5 being equal to the value that is most likely to be related to crime risk. For all but one of the demographic variables in Table 1, this resulted in the assignment of high code numbers for variables that had high values and low code numbers for variables that had low values. The only exception was median household income, for which research suggests that higher levels of household income will be associated with lower crime risk.

Table 2A contains the resulting codes for each of the demographic variables for each of the adult nightclubs and control sites. The right-most column of the table gives the combined means of the quintile codes—ranked from highest (4.0) to lowest (1.67)—where a higher mean quintile code indicates a location with a higher crime risk and a lower mean code indicates a location

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Table 1. Absolute Values for Demographic Variables Related to Crime in Areas Around Club and Control Sites

Club	Population	Percentage of Households that Are Female Headed (%)	Percentage African American (%)	Percentage Age 18–29 (%)	Percentage Total Divorced (%)	Household Income ($)
Baby Dolls	3881	0	21	72	2	38,624
Club Champagne	2480	19	59	23	11	32,222
Crazy Horse	1026	6	31	28	10	33,772
Diamond Club	1203	7	7	14	7	47,373
Fancy Cat	1483	18	53	22	11	32,486
Gentlemen's Club	45	67	58	13	16	32,188
Just Because	705	34	97	20	7	24,910
Leather 'n Lace N	3438	6	16	29	6	49,065
Leather 'n Lace S	525	17	13	20	10	35,854
Men's Club	5675	10	47	29	10	39,645
Office Lounge	4217	2	37	27	9	39,373
Paper Doll Lounge	761	30	18	16	11	35,298
Platinum Club	1204	7	07	14	7	47,373
Player's Club	1649	44	97	17	7	20,749
Polo Club	649	10	16	17	8	26,616
Tattletales	1008	13	15	19	12	28,746
Temptations	4028	10	38	26	9	41,254
Twin Peeks	4511	3	20	63	2	38,042
Uptown Cabaret	293	0	61	36	9	38,750
VIP Showgirls	1216	15	12	24	11	36,268
Exxon Control	1640	3	9	15	8	74,433
KFC Control	1084	14	95	18	8	32,172
McDonald's Control	3024	4	23	39	10	40,145

Table 2A. Quintile Scores for Demographic Variables in Areas Around Club and Control Sites[a]

Club	Population Size Code	% Fem. Head of Household Code	% African American Code	% Age 18–29 Code	% Divorced Code	Income Level Code	Combined Mean of Codes—Ranked
Club Champagne	4	4	5	3	4	4	4.00
Fancy Cat	3	4	4	3	5	4	3.83
Just Because	2	5	5	3	2	5	3.67
Player's Club	4	5	5	2	1	5	3.67
Men's Club	5	3	4	5	3	1	3.50
Gentlemen's Club	1	5	4	1	5	4	3.33
Temptations	5	3	4	4	3	1	3.33
McDonald's Control	**4**	**2**	**4**	**5**	**3**	**2**	**3.33**
Crazy Horse	2	2	3	4	4	4	3.17
Tattletales	2	3	2	2	5	5	3.17
VIP Showgirls	3	4	1	3	5	3	3.17
Office Lounge	5	1	3	4	3	2	3.00
Twin Peeks	5	1	3	5	1	3	3.00
KFC Control	**2**	**3**	**5**	**2**	**2**	**4**	**3.00**
Uptown Cabaret	2	5	2	1	4	3	2.83
Paper Doll Lounge	1	1	5	5	3	2	2.83
Baby Dolls	4	1	3	5	1	2	2.67
Polo Club	1	4	1	2	4	3	2.50
Leather 'n Lace S	1	3	2	2	2	5	2.50
Leather 'n Lace N	4	2	2	4	1	1	2.33
Diamond Club	3	2	1	1	2	1	1.67
Platinum Club	3	2	1	1	2	1	1.67
Exxon Control	**4**	**1**	**1**	**1**	**2**	**1**	**1.67**

[a]Values for each variable could fall within one of five equally distributed levels, and were assigned a value for this table that could range from 1 to 5, where 1 was equal to the level of that variable that was least likely to be associated with crime and 5 was equal to the value that was most likely to be related to crime. For all but one variable considered in this table, this resulted in high code numbers for variables that had high values and low code numbers for variables that had low values. The only exception was for income, where a higher value resulted in a lower code score and a lower value resulted in a higher code score, because higher levels of income were expected to be associated with lower levels of criminal activity.

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with a lower crime risk. The adult nightclubs are reordered in Table 2A into three groups corresponding to the three control sites with which the various clubs are associated. The first group in the table identifies seven clubs located in relatively high-crime risk locations—Club Champagne, Fancy Cat, Just Because, Player's Club, Men's Club, Gentlemen's Club, and Temptations. The control site for these clubs is a McDonald's fast food establishment with a mean quintile social disorganization variable score of 3.33. A second group in Table 2A identifies five clubs of medium relative crime risk—Crazy Horse, Tattletales, VIP Showgirls, Office Lounge, and Twin Peeks. The control site for these clubs is a Kentucky Fried Chicken (KFC) fast food restaurant with a mean quintile social disorganization score of 3.0. A third group in Table 2A identifies eight clubs of low relative crime risk—Uptown Cabaret, Paper Doll Lounge, Baby Dolls, Polo Club, Leather 'n Lace South, Leather 'n Lace North, Diamond Club, and Platinum Club. The control site for these clubs is an Exxon gasoline service station with a mean quintile score of 1.67. Note that the average quintile score for each of the control sites is equal to the lowest mean quintile score of the clubs in the group to which it is matched. Because the mean quintile scores are indicative of the criminogenic potential in the areas surrounding the sites, this implies that most of the adult nightclubs to which the control sites are matched should be expected—solely on the basis of the demographics of the surrounding areas—to have higher numbers of crime events recorded.

Table 2B displays the vehicular traffic counts for club and control areas in recent years. As can be seen from the table, the relationship between the volume of vehicular traffic and relative crime risk is not straightforward. The high-crime risk control location has a much higher volume of vehicular traffic than the average of the adult nightclub study sites. This pattern does not hold for the medium- and low-crime risk locations, however. The medium-crime risk location has the lowest volume of traffic. The low-crime risk location has an intermediate level of traffic.

Land use, commercial establishments, and business patterns were also taken into consideration by a simple count of commercial establishments for each control location and the computation of average counts for the club locations. Table 2C displays these counts and averages. No particular pattern was observed here either. The high-crime risk control area has a large number of commercial sites compared to the test area. However, on average, the medium-crime risk area test sites have many more commercial businesses in the area than the medium-crime risk control area. Finally, the low-crime risk area has substantially more commercial establishments than the test sites.

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Table 2B. Traffic Patterns at the Nearest Intersection to the Study or Control Sites Counted by the Charlotte-Mecklenburg Department of Transportation (all counts are taken at mid-block volume and are average weekday traffic patterns)

	Volume of Motor Vehicle Traffic	Year Count Taken
Relatively High Crime Risk Locations		
Club Champagne	No data for nearest intersection	
Fancy Cat	26,400	2000
Gentlemen's Club	35,000	2000
Just Because Sports	16,000	2002
Player's Club	12,000	2000
Men's Club	31,400	2002
Temptations	43,900	2000
Average	22,217	
Control Site		
McDonald's	82,100	2000
Medium Relative Crime Risk Locations		
Twin Peeks	34,200	2000
Crazy Horse	No data for nearest intersection	
Tattletales	32,100	2000
VIP Showgirls	32,000	2001
Office Lounge	40,600	2000
Platinum Club 2000	No data for nearest intersection	
Average	34,725	
Control Site		
Kentucky Fried Chicken	20,700	2000
Relatively Low Crime Risk Locations		
Polo Club	32,100	2000
Baby Dolls	24,000	2000
Paper Doll Lounge	37,800	2000
Diamond Club	35,000	2000
Leather 'n Lace S	No data for nearest intersection	
Leather 'n Lace N	No data for nearest intersection	
Uptown Cabaret	26,500	2002
Average	31,080	
Control Site Exxon	45,900	2001

Data on Crimes Reported

With support from the U.S. Department of Justice Office of Community Oriented Policing Services, the Charlotte-Mecklenburg Police Department maintains a computerized "reported incidents" information system for the city of Charlotte and Mecklenburg County, North Carolina. This system is capable of providing geo-coded information on all crime incidents reported at or near locations in the Charlotte area. Using this computerized database, brief descriptions of all crime incidents reported at or near each of the adult nightclubs and control sites identified above for the three years 1998–2000 were identified and provided to the authors by the Charlotte-Mecklenburg Police Department. The two perimeters identified above were employed, thus yielding records of incidents that occurred within a 500-foot radius and incidents that occurred within a 1,000-foot radius.

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Table 2C. Counts of Number of Businesses at Control and Test Sites Within a 1,000-Foot Radius

	Number of Businesses/ Commercial Properties
Relatively High-Crime Risk Locations	
Club Champagne	21
Fancy Cat	36
Gentlemen's Club	49
Just Because Sports	18
Player's Club	11
Men's Club	61
Temptations	21
Average	31
Control Site	
McDonald's	57
Medium Relative Crime Risk Locations	
Twin Peeks	50
Crazy Horse	48
Tattletales	33
VIP Showgirls	37
Office Lounge	80
Platinum Club 2000	81
Average	55
Control Site	19
Kentucky Fried Chicken	
Relatively Low Crime Risk Locations	
Polo Club	84
Baby Dolls	0
Paper Doll Lounge	23
Diamond Club	67
Leather 'n Lace S	84
Leather 'n Lace N	34
Uptown Cabaret	31
Average	46
Control Site	89
Exxon	

There are no formal measurements of the accuracy with which the officers in the Mecklenburg Police Department or the dispatchers of the Computer Aided Dispatch (CAD) system locate a crime event. The dispatcher is at the mercy of the caller who relates an address. The police department does not keep an account of the discrepancy between the original address reported to the dispatcher and the address noted in any subsequent police report.

For crimes such as rape, robbery, and assault, the address of the actual offense may not be the address of the dispatch. Victims of these crimes sometimes go to other locations and call for service. The discrepancy between call address and actual address of the crime event may therefore be sizable, approximately 10%–20%, according to the Charlotte assistant crime analyst. But, these inaccuracies only occur for these crimes. The address of the crime location and the call location are highly consistent between the

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CAD and the location of the crime for property crimes and serious assaults resulting in incapacitation and murder.

The database used for the present study contains only those crime incidents derived from the CAD database for which the police completed a report. This constitutes approximately 25%–30% of the entire CAD database. The accuracy of addresses listed in the report data file is not checked against the CAD, nor is it checked against a map of the city (although a procedure for verifying addresses has recently been implemented by the department). Accuracy is estimated by the crime analyst to be in the 94%–95% range.

For purposes of the present study, the authors grouped the reported crime incidents into six categories, ordered from the most to the least inclusive, as follows: total crimes (i.e., the total of all crime categories listed below), total Uniform Crime Reports (UCR) Index Crimes (i.e., the total of the UCR Violent and Property Crimes identified below), total Uniform Crime Reports Violent Crime Index Crimes (murder, rape, aggravated assault, and robbery), total Uniform Crime Reports Property Crime Index Crimes (burglary, larceny/theft, motor vehicle theft, and arson), sex crimes (the crime reports data had counts listed only as "sex offenses" to which were added rape/attempted rape counts, to define this variable), and all other crimes (minor incidents such as disorderly conduct, hit and run, non-aggravated assault, embezzlement, and forgery).

Counts of the number of incidents reported in each of these six categories for each of the three years of the study for each of the 23 adult nightclub and control sites for each perimeter constitute the dependent variables to be studied.

Statistical Model

In addition to overall estimates of mean numbers of crime incidents surrounding the adult nightclub and control sites, we conducted a panel regression analysis of the data.[11] For this,

[11] The dependent variable is a positively skewed count variable. Therefore, we experimented with the estimation of either a Poisson or negative binomial regression model that more accurately accounts for such a dependent variable, using specifications identical to the OLS regression models presented in the article. However, due to the limited number of clubs/controls and the relatively large number of parameters in comparison (especially the club-specific fixed-effects that were included to account for unobserved heterogeneity at the club/neighborhood level), we routinely encountered convergence problems and were not able to reliably and robustly estimate these models. This was entirely expected by us given that the Poisson and binomial models are nonlinear models that are estimated via maximum likelihood methods. The maximum likelihood estimation (MLE) method requires, for convergence, a relatively well-defined likelihood surface. If we had access to either more years of crime data or more clubs/controls, these models would have been more feasible and more appropriate, as a larger number of observations would bring asymptotics into play more definitely and stabilize the likelihood surface. Therefore, we chose to work with the OLS estimates, which were statistically stable and substantively interpretable.

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we use fixed-effects or least-squares dummy-variable regression models (see, e.g., Hannan & Young 1977; Hsiao 1986) to analyze the Charlotte crime events data arranged in a pooled time-series cross-section with site (club or control)-years as units of analysis. Effects are fixed for years and sites. Site-fixed-effect models eliminate bias created by the failure to include controls for unmeasured characteristics of the sites that have additive effects. Thus, fixed-effects models control for unmeasured characteristics of the sites that may affect the incidence of crime events at or near the adult nightclub and control sites. The regression model is:

$$Y_{it} = \beta_0 + \varepsilon_{it}, \tag{1}$$

where

$$\varepsilon_{it} = u_i + v_t + w_{it}$$

In this model, the regression parameter β_0 denotes an overall constant term for the model, which corresponds to the overall average number of crime incidents of a given type across all sites and years. This overall average number of crime incidents is adjusted up or down for each site i and year t by the overall error term ε_{it}. The overall error term ε_{it} is composed of a cross-sectional (site) component u_i plus a year component v_t plus a purely random component w_{it}. The additive error term effects of the sites are estimated relative to a base nightclub that consistently has low numbers of crime incidents (Fancy Cat), so that most site-specific effects for most crime categories will be positive. Overall year effects on the numbers of reported crime incidents also are estimated for 1999 and 2000, with the year 1998 taken as the base year.

For all models, we used a heteroskedasticity-consistent covariance matrix to estimate the standard errors of the regression coefficients. This method of calculating the standard errors, often referred to in the statistical literature as the HC3 estimator, is a robust estimator similar to the one derived by White (1980), but adding a finite sample correction term to relax the asymptotic requirements of White's original formulation (Davidson & McKinnon 1993; Long & Ervin 2000; McKinnon & White 1985). The finite sample correction term produces a more conservative estimate of the variance of the parameter estimates by adding an adjustment term that accounts for the small sample size (Long & Ervin 2000). The HC3 estimator is an approximation of the jackknife variance estimator (Long & Ervin 2000; McKinnon & White 1985).

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Results

Table 3 reports overall results on mean numbers of crime incidents reported to the Charlotte Police Department for local areas (both 500- and 1,000-foot radii) surrounding both the 20 adult nightclubs and the three control sites.[12] The table includes the means for each of the three years 1998, 1999, and 2000, as well as for all three years combined. Means are given for each of the six categories of crime described earlier. For the adult nightclubs, two estimates of the means are given. This is due to the fact that one of the clubs, Baby Dolls, had no reported crimes within 1,000 feet during any of the three years. Therefore, in order to provide an estimate of the mean crimes reported that is not distorted by including a club in the denominators that did not contribute to the incidents in the numerators, two sets of mean estimates are reported—one that includes Baby Dolls and one that does not.

Several results in Table 3 merit comment. First, consider the overall means for our most comprehensive measure of crime incidents—the Total Crimes rows of Table 3. For this crime category, the mean number of incidents for all three years combined in the adult nightclub locations is between 59% and 62% of those reported for the control sites for the 500-foot perimeters and between 45% and 47% of those reported for the control sites for the 1,000-foot perimeters. Roughly similar bounds characterize the means for the combined years for all of the other crime categories in the table. Thus, with respect to all six categories of crime incidents under investigation, it is evident that the overall mean numbers of crime incidents for all three years combined are somewhat less in the areas surrounding the adult nightclubs than in the areas surrounding the control sites.

Next, consider the year-specific means of crime incidents reported in Table 3. For both the 500- and 1,000-foot perimeters and four of the crime categories in the table, namely Total Crimes, Total UCR Crimes, UCR Property Crimes, and Other Crimes, there is an evident difference between the adult nightclub and

[12] Recall that the three control sites were chosen solely on the basis of demographic characteristics of their surrounding neighborhoods that research motivated by crime opportunity/routine activities theory has found to be associated with crime risk. On this basis, we identified the McDonald's control site as a "high-crime risk" control site, the KFC site as a "medium-crime risk" site, and the Exxon station as a "low-crime risk" site. These characterizations of the relative crime risk potential of the sites are, in fact, corroborated by the data on crimes reported to the Charlotte Police Department, as reported in Table 3. For instance, for Total UCR Crimes, the average numbers of crime incidents reported across the three years within the 500-foot (1,000-foot) perimeters are 86.33 (294.67) at the McDonald's site, 69 (156.33) at the KFC site, and 24 (56) at the Exxon site. The orderings of the three sites by numbers of crime incidents reported for all of the other crime categories studied in this article are similar.

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Table 3. Mean Number of Crimes Reported to the Police by Crime Type and Radius

		500-Foot Radius			1,000-Foot Radius		
		Clubs			Clubs		
Crime Type	Year	w/o B.D.[a]	w/ B.D.[b]	Controls	w/o B.D.	w/ B.D.	Controls
Total Crimes	1998	62.6	59.5	124.0	130.2	123.7	297.3
	1999	67.7	64.3	101.0	134.5	127.8	282.3
	2000	60.9	57.9	84.0	121.5	115.4	237.3
	All	63.7	60.6	103.0	128.7	122.3	272.3
Total UCR Crimes	1998	38.2	36.3	65.7	78.5	74.6	177.0
	1999	44.4	42.2	63.3	84.7	80.5	181.7
	2000	38.8	36.9	50.3	73.9	70.2	148.3
	All	40.5	38.4	59.8	79.0	75.1	169.0
UCR Violent Crimes	1998	7.0	6.7	17.7	12.0	11.4	34.7
	1999	7.0	6.6	19.0	13.4	12.8	36.7
	2000	6.2	5.9	10.7	11.2	10.7	26.0
	All	6.7	6.4	15.8	12.2	11.6	32.4
UCR Property Crimes	1998	31.2	29.7	48.0	66.5	63.2	142.3
	1999	37.4	35.6	44.3	71.3	67.7	145.0
	2000	32.6	31.0	39.7	62.7	59.6	122.3
	All	33.8	32.1	44.0	66.8	63.5	136.6
Sex Crimes	1998	0.53	0.50	0.33	1.05	1.00	1.00
	1999	0.32	0.30	0.33	0.79	0.75	0.33
	2000	0.26	0.25	0.67	0.63	0.60	3.67
	All	0.37	0.35	0.44	0.82	0.78	1.67
Other Crimes	1998	24.2	23.0	58.3	51.2	48.7	119.7
	1999	23.2	22.0	37.3	49.3	46.9	100.3
	2000	22.0	20.9	33.3	47.1	44.8	87.3
	All	23.1	22.0	43.0	49.2	46.8	102.4

[a]This mean excludes the club Baby Dolls, which had no reported crimes within 1,000 feet during the years 1998, 1999, and 2000.

[b]This mean includes the club Baby Dolls (i.e., the denominator is increased by 3).

control sites. That is, the trend in the means across the three years for the control sites for all of these crime categories is down, whereas there is little, if any, trend across the years for the adult nightclub sites. It is as if the levels of crime incidents in the control site areas are declining toward the already lower levels near the club sites. Even so, however, for all four categories, the mean numbers of crime incidents reported in the last year available, the year 2000, in the nightclub areas remain below those in the control areas. This is especially true when the perimeter around these locations is expanded to 1,000 feet, which, of course, permits the inclusion in the crime counts of incidents further removed from the club and control site premises. For two other crime categories in Table 3, UCR Violent Crimes and Sex Crimes, the trends across the three years are more muted for both the club and the control sites. This is due, in part, to the fact that the numbers of these

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crimes are lower, so that even a slight increase in incidents can be influential in the computation of the means.

For a more precise statistical analysis of the crime events data, the regression model described above in Equation 1 was estimated. Table 4 reports parameter estimates and summary statistics for the full version of this regression model wherein the dependent variable is the Total UCR Crimes reported in the 500- and 1,000-foot perimeters of the adult nightclub and control sites.[13] This model takes the number of crime events reported for 1998 as the omitted year and the number of events reported for the Fancy Cat Club as the omitted adult nightclub site.[14] The coefficients of determination (R-squared) reported in Table 4 show that the fixed-effects regression models succeed in explaining over 90% of the variance in numbers of Total UCR Crimes reported in the two perimeters.

It can be seen from Table 4 that the partial regression coefficients estimated for the year 1999 are 4.78 and 5.74 for events reported within a 500-foot and 1,000-foot radius of the clubs and control sites, respectively. This means that, on average, about five more crime events were reported within 500 feet of all locations in 1999 than in 1998 and about six more within the 1,000-foot radius. By comparison, in the year 2000, the regression coefficients indicate a decrease of one to two crime events from that in 1998 within 500 feet and seven to eight within 1,000 feet of all locations. However, none of these year-specific regression coefficients has an associated p-value less than the .05 level of statistical significance, that is, statistically significant from zero. Therefore, it can be inferred that these year-to-year variations from the 1998 base year are sufficiently small that they are statistically meaningless.

Examining next the estimated partial regression coefficients for the adult nightclub and control sites in Group 1, recall that these are in relatively high-crime risk locations. A key comparison is the size of the coefficient estimated for the control site for this group, a McDonald's fast food restaurant, with the coefficients for the club sites in this group. It can be seen that the estimated coefficients for

[13] Full regression models were estimated for both the 500- and 1,000-foot perimeters and all six of the categories of crime incidents identified earlier in the text. We exhibit the regression model for Total UCR Crimes in Table 4, as this category consists of the most serious crimes reported to the police.

[14] Fancy Cat was chosen as the omitted site, because it has relatively low numbers of crime events within the defined areas. This means that the regression coefficients estimated for the other club and control sites will be positive coefficients, thus indicating the increase in crime events expected for their defined areas relative to those for Fancy Cat. Similarly, the year 1998 was chosen as the omitted year category so that the average number of crime events across all sites reported for 1999 and 2000 can be interpreted as the average increase or decrease expected in those years relative to 1998.

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Table 4. Parameter Estimates from Fixed-Effects Dummy Variable Regression Model of Total UCR Crimes

	500-Foot Radius			1,000-Foot Radius		
		Robust			Robust	
Variable	b-Coeff.	HC3 S.E.	*p*-Value	b-Coeff.	HC3 S.E.	*p*-Value
Year 1999	4.78	4.61	0.305	5.74	6.07	0.350
Year 2000	−1.52	4.72	0.749	−7.52	6.41	0.247
Group 1						
Club Champagne	22.33	9.63	0.025	38.00	12.54	0.004
Just Because	26.67	13.14	0.048	69.33	21.93	0.003
Player's Club	45.00	8.59	0.000	85.33	11.00	0.000
Men's Club	63.00	21.18	0.005	64.67	23.01	0.007
Gentlemen's Club	101.33	8.47	0.000	94.33	10.42	0.000
Temptations	6.33	7.09	0.376	26.33	12.21	0.037
McDonald's	82.33	5.01	0.000	276.00	8.72	0.000
Group 2						
Crazy Horse	91.00	9.41	0.000	113.67	16.12	0.000
Tattletales	47.67	7.84	0.000	59.33	8.06	0.000
VIP Showgirls	6.00	5.37	0.270	34.33	5.50	0.000
Office Lounge	34.67	9.88	0.001	97.33	12.05	0.000
Twin Peeks	19.33	7.15	0.010	20.33	8.66	0.024
Kentucky Fried Chicken	65.00	16.53	0.000	137.67	23.96	0.000
Group 3						
Uptown Cabaret	93.00	19.65	0.000	109.00	13.62	0.000
Paper Doll Lounge	16.33	5.91	0.008	21.33	7.28	0.005
Baby Dolls	−4.00	5.19	0.445	−18.67	6.96	0.010
Polo Club	28.67	6.31	0.000	65.33	17.76	0.001
Leather 'n Lace South	31.00	6.09	0.000	79.00	11.86	0.000
Leather 'n Lace North	21.33	5.68	0.001	10.67	6.58	0.112
Diamond Club	8.67	5.86	0.146	90.33	14.36	0.000
Platinum Club	30.33	8.30	0.001	68.00	6.68	0.000
Exxon	20.00	5.60	0.001	37.33	11.70	0.003
Constant	2.91	5.20	0.578	19.26	5.93	0.002
R-Squared	0.91			0.95		

NOTE: The reference site is the Fancy Cat Club.

McDonald's are 82.33 and 276 for the 500- and 1,000-foot radii, respectively. These coefficients can be interpreted as indicating that, net of the overall constant and year-specific terms for the regression equations, the McDonald's site is expected to have about 82 and 276 more crime events reported on average per year than the Fancy Cat Club, respectively, for the two perimeters. For the 500-foot perimeter, the coefficient for McDonald's is substantially larger than those for all of the adult nightclubs in Group 1 except for the Gentlemen's Club. In the case of the 1,000-foot perimeter, the McDonald's coefficient is much larger than the coefficients of all of the club sites, including the Gentlemen's Club.[15]

[15] The fact that the regression coefficient estimated for the Gentlemen's Club for the 1,000-foot perimeter (94.33) is smaller than that for this club for the 500-foot perimeter (101.33) is not an error. To calculate the unconditional expected value for the club and control site locations, one must add the regression coefficient for the site to the overall constant term for the regression equation. Making this calculation, it can be seen that the average expected number of events across the three years for the 1,000-foot perimeter for the Gentlemen's Club is about 114 as compared to 104 for the 500-foot perimeter.

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Consider next the adult nightclub and control sites in Group 2. Recall that these are medium-crime risk locations. In this group, the control site is the Kentucky Fried Chicken restaurant, which has an estimated regression coefficient of 65 for the 500-foot perimeter and 137.67 for the 1,000-foot perimeter. For the 500-foot perimeter around the sites, the KFC regression coefficient is substantially larger than those of all of the club locations in this group except those for the Crazy Horse Club. The same is true for the coefficients for the 1,000-foot perimeter model.

The adult nightclub and control sites in Group 3, the low-crime risk locations, were then examined. In this group, the Exxon service station is the control site. It has an estimated regression coefficient of 20 crime events for the 500-foot perimeter and 37.33 for the 1,000-foot perimeter. For the 500-foot perimeter around the sites, this coefficient is larger than those estimated for three adult nightclubs (Paper Doll Lounge, Baby Dolls, and Diamond Club), about the same as one club (Leather 'n Lace North), somewhat smaller than those for three club sites (Polo Club, Leather 'n Lace South, and Platinum Club), and much smaller than that for one club (Uptown Cabaret). For the 1,000-foot perimeter, the estimated regression coefficient for Exxon is larger than those for three clubs (Paper Doll Lounge, Baby Dolls, and Leather 'n Lace North) and smaller than those for five clubs (Uptown Cabaret, Polo Club, Leather 'n Lace South, Diamond Club, and Platinum Club).

We next turn to an assessment of the statistical significance of the differences between the net effects (i.e., the estimated partial regression coefficients) of the three groups of adult nightclub sites as compared to the corresponding control sites. For this, we estimated a set of constrained regression models, as reported in Tables 5A and 5B. Table 5A reports the results for the 500-foot perimeters around the sites; Table 5B reports the corresponding results for the 1,000-foot perimeters.

Each of these constrained models commenced with a corresponding full model, like that displayed in Table 4 for Total UCR Crime incidents reported within the 500-foot perimeter. We then constrained all of the adult clubs in one of the groups, namely Group 1, to have a common partial regression coefficient. For Total UCR Crimes, this group coefficient, 29.14, is reported in the first column of coefficients in Table 5A. The constrained model also estimated a partial regression coefficient for the Group 1 control site, the McDonald's fast food restaurant. This coefficient, 73.14, is reported in the second column of coefficients of Table 5A. An F-ratio then was computed for the null hypothesis that the common regression coefficient for the Group 1 sites is equal to the coefficient for the corresponding control site. This statistic, 27.60, is given in the third column of coefficients of Table 5A. The fourth

Table 5A. Summary Results of F-Tests Comparing the Equivalence of the Club Group Dummy Variables and the Matched Control Site: 500-Foot Radius

Model	Group	Group Coefficient	Control Coefficient	F-Value	*p*-Value	Model R-Squared
Total Crimes						
	1	47.05	128.33	13.40	0.0006	0.65
	2	65.33	106.00	1.70	0.1982	0.73
	3	43.67	44.33	0.00	0.9582	0.67
Total UCR Crimes						
	1	29.14	73.67	27.60	0.0000	0.59
	2	39.73	65.00	1.96	0.1682	0.73
	3	28.17	20.00	1.36	0.2487	0.66
UCR Violent Crimes						
	1	8.14	15.00	11.15	0.0016	0.61
	2	4.47	27.67	6.15	0.0167	0.78
	3	4.38	2.67	0.34	0.5623	0.51
UCR Property Crimes						
	1	21.00	58.67	21.63	0.0000	0.53
	2	35.27	37.33	0.02	0.8790	0.69
	3	23.79	17.33	1.95	0.1682	0.73
Sex Crimes						
	1	0.29	0.67	0.82	0.3689	0.30
	2	0.20	0.00	1.91	0.1738	0.40
	3	0.50	0.67	0.03	0.8572	0.17
Other Crimes						
	1	17.71	54.33	4.16	0.0468	0.65
	2	25.47	41.00	1.31	0.2579	0.67
	3	15.33	24.00	1.52	0.2227	0.62

NOTE: For Group 1, the reference site is the Diamond Club. For Groups 2 and 3, the reference site is the Fancy Cat Club.

column of coefficients reports the statistical significance of the F-ratio. For Group 1 Total UCR Crimes, it can be seen in Table 5A that the estimated difference of the partial regression coefficients for Total UCR Crimes for the Group 1 adult clubs and the control site for this group is highly statistically significant, that is, has a *p*-value or estimated probability of occurrence that is equal to zero to four decimal places. In other words, the numerical difference of the estimated partial regression coefficients for the Group 1 sites and the control site for Group 1 is not likely to be due to chance variations. Furthermore, the estimated coefficients show that the adult club sites in Group 1 are highly likely to have a net number of Total UCR Crimes that is much smaller than the control site.

Examining all of the estimated coefficients, F-ratios, and *p*-values in Table 5A, it can be seen that a pattern is readily apparent: for four of the crime categories—Total Crimes, Total UCR Crimes, UCR Violent Crimes, and UCR Property Crimes—the numerical differences of the estimated partial regression coefficients for the Group 1 sites (the adult nightclubs located in relatively high-crime risk areas) and the coefficients for the control site (the McDonald's fast food restaurant) are highly statistically significant. That is, these numerical differences are not likely due to chance fluctuations in the

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Table 5B. Summary Results of F-Tests Comparing the Equivalence of the Club Group Dummy Variables and the Matched Control Site: 500-Foot Radius

Model	Group	Group Coefficient	Control Coefficient	F-ratio	*p*-value	Model R-squared
Total Crimes						
	1	−55.67	257.67	151.77	0.0000	0.87
	2	104.67	239.00	8.17	0.0063	0.87
	3	78.33	74.33	0.03	0.8561	0.79
Total UCR Crimes						
	1	−36.33	185.67	408.27	0.0000	0.87
	2	65.00	137.67	7.97	0.0069	0.87
	3	53.13	37.33	1.24	0.2698	0.79
UCR Violent Crimes						
	1	1.62	23.00	30.57	0.0000	0.67
	2	7.20	51.67	16.13	0.0002	0.89
	3	6.54	3.33	0.89	0.3508	0.76
UCR Property Crimes						
	1	−37.95	162.67	344.71	0.0000	0.87
	2	57.80	86.00	3.10	0.0849	0.86
	3	46.58	34.00	1.13	0.2936	0.79
Sex Crimes						
	1	0.67	0.67	0.00	1.0000	0.18
	2	0.67	2.33	0.52	0.4734	0.49
	3	0.67	1.67	0.46	0.4992	0.43
Other Crimes						
	1	−19.71	71.67	31.32	0.0000	0.81
	2	39.27	100.33	7.75	0.0077	0.82
	3	24.92	36.00	1.11	0.2973	0.74

NOTE: For Group 1, the reference site is the Diamond Club. For Groups 2 and 3, the reference site is the Fancy Cat club.

data. In other words, the expected numbers of crime events for these four categories of crime reported within 500-foot perimeters of the Group 1 adult nightclub locations are much lower than those reported within this perimeter for the control site. And these differences are not likely to be due to random or chance fluctuations.

For these four categories of crime incidents, the numerical differences of the coefficients for the Group 2 (clubs located in medium-crime risk areas) and Group 3 (clubs located in low-crime risk areas) adult nightclub sites and their respective control sites are not nearly as large and tend not to reach statistical significance. An exception is the Group 2 constrained model for UCR Violent Crimes, which has an F-ratio of 6.15. This F-ratio has a *p*-value or probability of occurrence under the null hypothesis of no difference in the regression coefficients for the club and control sites of .0167, which is statistically significant at the .05 level. Generally, however, the main conclusion from Table 5A for these four crime categories is that, within the 500-foot perimeters, there are significantly lower numbers of crime incidents reported around the Group 1 adult nightclubs than around the corresponding control site. For the Group 2 and Group 3 club sites, the

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differences in the partial regression coefficients tend not to be as large and not attain statistical significance.

For the other two crime categories in Table 5A—Sex Crimes and Other Crimes—there is less of a pattern to the group differences. Recall that the number of sex crimes reported per year at any of the adult nightclub or control sites is very small. It is therefore not surprising that none of the numerical differences of regression coefficients for the groups of club sites and their corresponding control sites attain statistical significance. For the Other Crimes category, the numerical differences of the estimated regression coefficients for both the Group 1 clubs and their control site attain statistical significance. Even for these crimes, however, the numerical values of the regression coefficients for the Group 2 club locations (25.47) and their control site (41) indicate a larger expected number of crime incidents—about 16 per year—within the 500-foot perimeters around the club locations than around the control site. But the variability within the Group 2 club locations is sufficiently large that this numerical difference is not statistically significant.

What is the effect on the club group versus control site comparisons of enlarging the perimeters for crimes reported to 1,000 feet around the sites? Recall that this allows for the inclusion of more crime incidents from the neighborhoods around the club and control locations. Table 5B provides the answers. For four of the six crime categories—Total Crimes, Total UCR Crimes, UCR Violent Crimes, and Other Crimes—the estimates in Table 5B show that the adult club sites have estimated partial regression coefficients that are much smaller than those of the corresponding control sites for the Group 1 and Group 2 clubs. And these numerical differences all are statistically significant at the .05 level. Indeed, most of the F-ratios have p-values much smaller than .05. The estimated partial regression coefficients for the UCR Property Crimes category show a similar pattern of differences of club and control sites for the Group 1 clubs. However, while the coefficient difference is in a similar direction for the Group 2 clubs and control site for this crime category for the Group 2 clubs, the corresponding F-ratio has a p-value of .08, which does not exceed the .05 level of statistical significance. For the fifth crime category, Sex Crimes, the numerical differences between expected numbers of incidents reported for the club and control sites again are small and statistically insignificant. In brief, the main effect of enlarging the perimeters around the adult nightclub and control site locations from 500 to 1,000 feet for most categories of reported crime incidents is that the gaps in the expected numbers of crime incidents become very large and highly statistically significant for both the high- and the medium-crime risk locations.

Conclusion

On the basis of the findings reviewed above, it must be concluded that there is little evidence in the data to support the main hypothesis stated earlier. Recall that we asked: once variables known to be related to crime events suggested by social disorganization and routine activities theories have been taken into account, does the presence of an adult business in a localized area increase the concurrence in space and time of offenders motivated to commit crimes together with suitable targets for the crimes in the absence of guardians capable of preventing or deterring the crimes? We found that, at least in Charlotte, North Carolina, it is not the case that the presence of an adult nightclub increases the number of crime incidents reported in localized areas surrounding the club as compared to the number of crime incidents reported in comparable localized areas that do not contain an adult nightclub.

Indeed, the empirical data and analyses reported above imply the opposite, namely, that the nearby areas surrounding the adult nightclub sites have smaller numbers of reported crime incidents than do corresponding areas surrounding the three control sites studied. Furthermore, it must be emphasized again that the control sites were chosen solely by matching set demographic characteristics (which were chosen on the basis of crime opportunity/routine activities theory and research) of the census block or blocks containing the adult nightclubs and control sites. Thus, these findings could not have been biased by the choice of the control sites. Further, although not incorporated into the formal model, examination of the vehicular traffic patterns and number of commercial establishments surrounding the adult businesses yielded no consistent pattern of findings. There were not, for example, consistently more business targets for crime or greater numbers of human traffic passing through the control areas that would account for the greater numbers of crimes in these locations compared to the adult locations.

Our regression analyses help to identify more precisely exactly where the adult nightclubs with relatively low numbers of reported crime incidents are located. Specifically, for local areas around the adult nightclub and control sites defined by 500-foot radii, the regression analyses show that it is in the high-crime risk locations in which the numbers of reported crimes are significantly lower than in the corresponding control site. In the medium- and low-crime risk club and control site locations, the regression models estimate smaller effect coefficients for crime risk of the club locations than for the corresponding control sites. However, the numerical differences of the coefficients for these two more moderate-crime

risk groups versus their control sites generally do not reach standard levels of statistical significance. The regression analyses for the clubs and control sites defined by the 1,000-foot radii (which allow for the inclusion of more crime incidents from the neighborhoods around the sites) show similar results for the high-crime risk locations. In addition, the 1,000-foot perimeter regression analyses similarly show that the medium-crime risk locations generally have significantly lower numbers of crime incidents that those reported for the corresponding control site.

Our analyses of the overall mean numbers of crime incidents (for the adult nightclubs compared to the control sites) for the years 1998–2000 suggest that Charlotte, like many cities across the country and the United States as a whole (U.S. Department of Justice, Federal Bureau of Investigation 2000), was experiencing declining numbers of crime incidents during this period. These analyses show that the overall lower numbers of crime incidents reported in the local areas around the adult nightclubs than around the control sites declined across the three years. That is, the differences decreased, thus indicating that, as the overall level of crime in Charlotte declined from 1998 to 2000, the numbers of crime incidents reported in local areas around the control sites declined toward the lower levels already present in the local areas surrounding the adult club sites. In other words, the areas around the adult club sites already had relatively low levels of reported crime in 1998. Then, as the overall levels of crime in Charlotte declined in 1999 and 2000, the numbers of crime incidents reported around the club sites remained at these low levels. But, during 1999 and 2000, the numbers of crime incidents reported around the control sites declined along with crime levels in the city as a whole and toward the already low levels of the locations around the club sites.

Implications for Crime Opportunity and Social Disorganization Perspectives

What accounts for these findings? In contradiction to the hypothesis stated earlier in this article, why do the local areas surrounding the adult nightclubs in Charlotte have lower numbers of reported crime incidents than corresponding areas around the control sites? Why do we not find empirical evidence of the social disorganization/crime opportunity spillover of these adult establishments of the type cited at the outset of this article?

First, the adult nightclub business in the late-1990s in many respects may be quite unlike that of the 1960s and 1970s when these establishments were relatively new forums of entertainment in American society. As noted in the introduction to this article, adult nightclubs have been subjected to over two decades of

municipal zoning restrictions across the country, and they usually must comply with many other regulations as well. These clubs do not appear to be locations where potential offenders gather to prey on desirable targets in the absence of crime suppressors, such as employees whose role is to ensure the safety of customers and the maintenance of order within the clubs.

The establishments themselves have evolved more closely into legitimate businesses—establishments with management attention to profitability and continuity of existence. To meet these objectives, it is essential that the management and/or owners of the clubs provide their customers with some assurance of safety. Accordingly, adult nightclubs, including those in Charlotte, often appear to have better lighting in their parking lots and better security surveillance than is standard for non-nightclub business establishments. These may be factors producing fewer crime opportunities and lower numbers of reported crime incidents in the surrounding areas of the clubs.

The extensive management of the parking lots adjoining the exotic dance nightclubs, in many cases including guards in the parking lots, valet parking, and other control mechanisms, may be especially effective in reducing the possibility of violent disputes in the surrounding area. In addition, unlike other liquor-serving establishments (bars and taverns that do not offer adult entertainment) that may be present in the control areas, violent disputes in the areas surrounding exotic dance clubs between men over unwanted attention by other males to dates or partners are minimal due to the fact that the majority of patrons attend the clubs without female partners. Thus, the possibility of interpersonal aggression may be greatly reduced in the vicinity of adult dance clubs, compared to most other locations where adults congregate, such as bars or taverns that do not feature adult entertainment.

Findings from a qualitative, anthropological case study of several of the exotic dance clubs included in this study undertaken by Hanna (2001) are consistent with these speculations. Three adult clubs were chosen to reflect three different kinds of economically developed neighborhoods. Neighborhood residents had few complaints about the adult businesses and most neighboring business owners were quick to note that the reason they felt the adult clubs had few negative effects was because of very efficient management of the property and facilities.

A related, but alternative, explanation might also be considered. Perhaps victims of crime in areas surrounding adult clubs are not motivated to report crime incidents to the police. If this were the case, there may not be stable crime reporting across study and control sites. It could be that, compared to the control sites, more of the crime that occurs in the adult dance club zone goes

unreported. It seems plausible that many of the victims of crime in these areas might not want to draw attention to themselves. This may be a plausible alternative explanation for crimes such as personal assault and robbery; it would not be a reasonable explanation for burglary, serious property crimes in adjacent buildings, murder, or serious personal assault.

Finally, it is important to point out that imperfections in matching control and adult club areas may always be advanced to account for the findings here or for any other quasi-experimental study. While we attempted to match the sites on variables known to be related to crime as suggested by criminological theory and further examined business and traffic patterns and found no consistent pattern that could plausibly account for the results, it is never possible, logically, to rule out all alternative explanations based on some unobserved variable to match all possible variables. Indeed, we always fail to match on some unspecified variable. The challenge is to identify that variable before hand which may more reasonably account for the findings.

One specific difference between control and club sites may be worth noting, however, and could be the basis for further study. We chose specific business locations in the center of the control areas for our crime event counts, and this yielded two popular fast food restaurants and a gas station as control sites. There might be more appropriate control sites for comparison given the context of the secondary effects legal arguments.

Conceptually, it may be more appropriate to compare adult club sites with non-adult club sites so that one can determine whether the type of club activity affects the level of crime. This comparison may be implicit (if not explicit) in the minds of citizens and justices when considering whether an adult club should be allowed to locate in a particular area. Methodologically, using basic service type businesses such as fast food restaurants as control sites may confound the comparisons being made in the research, even if they are located in areas equivalent to those in which adult dance clubs are located.

There is an empirical study conducted in another locale, which may allay the concern that the control areas chosen in the present study would yield abnormally high crime rates relative to adult club locations. The Board of Commissioners of Fulton County, Georgia (Atlanta area) attempted to address the assumption that the consumption of alcoholic beverages in adult entertainment establishments may contribute to increased crime in the vicinity of such adult entertainment establishments. This study, conducted by the Fulton County Police Department, compared calls for service to the police that resulted in an arrest or a report in the vicinity of six liquor-serving establishments that featured adult entertainment

and six liquor-serving establishments that did not include adult entertainment (Fulton County Police 1997). The findings indicated substantially more calls for service to the police to liquor establishments that *did not* provide adult entertainment compared to liquor establishments featuring adult entertainment. These findings lend credibility to the outcome of the present study and suggest that the results are not a function of improperly matched control and test sites. Unfortunately, the Fulton County study did not match test and control areas on demographic variables known to be related to crime and is therefore methodologically limited.

The most informative approach would be to examine crime incidents surrounding adult businesses while simultaneously controlling for all other known or suspected causes of crime. This would include taking into account variables such as land use, social disorganization and crime opportunity, traffic patterns, and the presence or absence of alcohol-serving establishments. Future research should be devoted to the study of secondary effects of adult businesses with these methodological refinements.

Legal and Policy Implications

It has been demonstrated through this study that there may be a sufficient basis for a serious challenge to the assumption made by municipalities and the courts that there is an empirical relationship between exotic dance businesses and at least one kind of negative secondary effect, specifically increases in crime. Further, this conclusion is based on research procedures that adhere more thoroughly to long-standing and well-accepted methodological procedures for insuring sound scientific conclusions than previous studies undertaken by municipalities across the country.

In *Pap's*, Justice O'Connor provides room for legal challenges, based on the collection of empirical evidence, to the assertions made by municipalities regarding a relationship between adverse secondary effects and nude dancing. In order to remain consistent with the Supreme Court's holding in *Pap's*, lower courts will be required to consider the methodological legitimacy of evidence of a relationship between negative secondary effects and the subject businesses collected both by governments and by those business owners who attempt to challenge government ordinances restricting their establishments.

Further, in *Alameda*, Justice O'Connor and others further refined her notions of how municipalities' assumptions about adult businesses and secondary effects may be challenged by admonishing cities that they cannot engage in shoddy data collection or reasoning in coming to the conclusion that adult businesses cause these effects. In evaluating the quality of the data collected and the

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reasoning of municipalities, a standard such as that laid out in *Daubert* for the admissibility of scientific evidence may best serve the interests of justice.

The study presented here, we would argue, meets such standards for admissibility. The application of such standards, bolstered by the Court's opinion in *Alameda*, may force courts to reject studies that have been previously relied upon as evidence of negative secondary effects, and require new, more methodologically sound studies to demonstrate the necessity for regulations directed at the exotic dance industry.

Challenging Common Sense Assumptions About Adverse Secondary Effects

This investigation suggests it may be best not to assume adverse secondary effects in the form of greater crime emanate from adult businesses in a community. Further tests of this assumption on a community-by-community basis are not tremendously difficult. Justice Souter noted in his opinion in *Alameda*:

> . . . stress should be placed on the point that requiring empirical justification of claims about property value or crime is not demanding anything Herculean. Increased crime, like prostitution and muggings, and declining property values in areas surrounding adult businesses, are all readily observable, often to the untrained eye and certainly to the police officer and urban planner. These harms can be shown by police reports, crime statistics, and studies of market value . . .

And precisely because this sort of evidence is readily available, Justice Souter noted:

> Reviewing courts need to be wary when the government appeals, not to evidence, but to uncritical common sense in an effort to justify such a zoning restriction. It is not that common sense is always illegitimate in First Amendment demonstration. The need for independent proof varies with the point that needs to be established, and zoning can be supported by common experience when there is no reason to question it. But we must be careful about substituting common assumptions for evidence, when the evidence is as readily available as public statistics and municipal property valuations, lest we find out when the evidence is gathered that assumptions are highly debatable.

In fact, in the *Alameda* case, Justice Souter has formulated a legal test based on empirical verification. He argues that the weaker the empirical evidence concerning secondary effects, the more likely the governmental action is not content neutral. He states:

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> . . . The lesson is that the lesser scrutiny applied to . . . zoning restrictions is no excuse for government failure to provide a factual demonstration for claims it makes about secondary effects; on the contrary, this is what demands the demonstration. And finally the weaker the demonstration of facts distinct from disapproval of the adult viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the legislation. The danger is that without empirical verification the city has a right to experiment with a First Amendment restriction in response to a problem of increased crime that the city has never shown to be associated with adult businesses.

However welcome, this is an admittedly strong position in favor of empirical evidence to substantiate a legal assumption about human behavior. At the very least, however, a study like the one reported here could have the effect of shifting the burden of proof to municipalities to demonstrate that their theory of adverse secondary effects is correct.

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A Study of Secondary Crime Effects in the Township of Union New Jersey

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A Study of Secondary Crime Effects in the Township of Union New Jersey

Executive Summary

In the present study, we ask the following question concerning secondary crime effects in the Township of Union New Jersey: Do crime statistics show that police activity and resources are disproportionately attributed to the address where an adult entertainment business is located compared to other retail, eating and entertainment venues in Union? For the analyses we rely on calls for service (CFS) to the Township of Union Police Department. This included records of dispatches or calls for service that were either police-initiated or calls from the public from 2002 to 2006. An analysis by specific address was undertaken to determine if the adult business "Hott 22" located at 1721 US Highway 22 has required special attention from the police compared to other addresses in the Township of Union,

The results showed that there is no evidence that 'Hott 22" is disproportionately more often the source of police attention that other addresses. Crime does not tend to accompany, concentrate around, or be aggravated by this adult business. Likewise, the results of this study show no evidence of an increase in narcotics

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distribution and use, prostitution, violence against persons and property around this adult business. We therefore conclude that Hott 22 is not associated with so-called "adverse secondary effects." These results are consistent with and completely predicable from modern criminological theory and with past empirical research.

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THE SUPREME COURT AND THE ASSUMPTION OF NEGATIVE SECONDARY EFFECTS OF ADULT BUSINESSES

Since 1976, the United States Supreme Court has decided a series of cases focusing on whether the Free Speech clause of the First Amendment allows cities and states to enact legislation controlling the location of "adult" businesses (*See e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *City of Renton v Playtime Theatres Inc.*, 475 U.S. 41 (1986). "Zoning" regulations (e.g., laws or ordinances that, for example, prevent a sex-related business from operating within a certain number of feet from residences, schools and houses of worship, or a given distance from one-another) have been predicated on the notion that municipalities have a substantial interest in combating so-called "negative secondary effects" on the areas surrounding adult businesses. These secondary effects are generally said to include alleged increases in crime, decreases in property values, and other indicators of neighborhood deterioration in the areas surrounding "adult" businesses. Typically, communities have either conducted their own investigations of potential secondary effects or have

relied on studies, reports or other materials utilized by other cities or localities.

The rationale for the secondary effects doctrine was most completely laid out in *Renton v. Playtime Theatres, Inc.*, in 1986. In *Renton* the Supreme Court considered the validity of a Renton, Washington, municipal ordinance that prohibited any adult theater from locating within 1,000 feet of any residential zone, family dwelling, church, park or school. The Court's analysis of the ordinance proceeded in three steps. First, the Court found that the Renton ordinance did not ban adult theaters altogether, but merely required that they be a certain distance from so-called sensitive locations. The ordinance, the Court said, was properly considered to be a time, place and manner regulation. The Court next considered whether the ordinance was content neutral or content based. If the regulation were content based, it would be considered presumptively invalid and subject to the "strict scrutiny" standard. The Court held, however, that the ordinance was not aimed at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely at crime rates, property values, and the quality of the city's neighborhoods. Given this finding, the Court stated that the ordinance would be upheld so long as the City of Renton showed that its ordinance was designed to serve a substantial government

interest, such as a reducing crime rates or maintaining property values.

Most recently (in 2002), a plurality of the Supreme Court (Justice O'Connor joined by the Chief Justice, Justice Scalia and Justice Thomas), with Justice Kennedy's concurrence, added an important methodological caveat concerning the evidence necessary to validate the assumption that adult businesses cause secondary effects. The Court warned in *City of Los Angeles v. Alameda Books., et al.* that:

> "This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support its rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the Renton standard. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance."

THE TOWNSHIP OF UNION ORDINANCE

AND IT'S LACK OF JUSTIFICATION

On April 11, 2006 the Township of Union passed Ordinance No. 4942, an ordinance deleting Article V, entitled

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'Sexually oriented businesses" chapter 164 in its entirety and replacing it with a new chapter. This new chapter established a license requirement for adult oriented businesses, limiting hours of operation to 10:00 am until 11:00 pm and restrictions on dancer patron proximity (e.g., dancers must perform on an elevated platform and dances may not occur closer than 6 feet to any patron or customer).

The Township makes no reference to studies conducted by other communities concerning the so-called adverse effects of adult businesses. Had the Township relied on these outside studies however, the ordinance would not have been justified on the basis of these research endeavors as most of the studies conducted by other municipalities do not adhere to professional standards of scientific inquiry necessary in order to insure methodological integrity and thus study reliability and validity. Further, the authors of several of the studies themselves often admit that they do not find evidence of adverse secondary effects associated with adult businesses. Finally, many of the so-called studies are not empirical investigations of secondary effects at all but rehashes of other cities' efforts at collecting evidence or reports from city officials concerning zoning laws or other legal alternatives available to municipalities.

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The conclusions stated above are based on the peer-reviewed published paper entitled: Governmental Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances; Debunking the Legal Myth of Negative Secondary Effects, *Paul, et al.*, Communication Law & Policy, Vol. 6, No. 2, Spring, 2001, pp. 355-391. This paper is attached as **Exhibit A.**

In this paper we examined over 100 reports and "studies" of secondary effects undertaken by municipalities in the United States. We engaged in a detailed examination of the methodological flaws in the "Top Ten" studies cited by municipalities. We conclude that the studies relied upon by other communities throughout the country do not adhere to professional standards of scientific inquiry, and nearly all failed to meet the basic assumptions necessary for methodological validity. Those studies that are scientifically credible demonstrate either no negative secondary effects associated with adult businesses, or a reversal of the presumed negative effects.

The Township of Union conducted no formal secondary effects study of its own. The Township did not examine crime incidents in the areas surrounding the adult cabaret and compare them to other suitably matched locations. In our opinion the only reliable information that could have provided the Township of Union with a reasonable basis for concluding that sexually oriented

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business/establishments are related to adverse secondary effects would have been obtained by systematically collecting police call-for-service information or similar data involving crime incidents and adhering to the minimal methodological standards outlined above for a study of such data as described in *Paul*.

This would have included obtaining from the police department the computerized records of calls for service. This information is easily generated as most cities have a computerized aided dispatch (CAD) system. This system logs each call made to the police and each report generated by the police. It is not, therefore, an onerous task for the Township to have obtained these calls for service and analyzed them according to proper methodological standards to determine whether secondary effects existed. Without such evidence, the Township has failed to demonstrate the existence of adverse secondary effects. We have undertaken such a study.

THE PRESENT STUDY

The purpose of the present study is to conduct the type of empirical analysis in the Township of Union that avoids both the collection of "shoddy data" and the use of (shoddy) "reasoning" as demanded in *Alameda Books*. We ask whether a relationship, in fact, exists between the presence of an adult cabaret and negative secondary effects in Township of Union. Further, this evidence is

obtained in accordance with established methodological procedures so as to insure a high level of scientific reliability.

Specifically, in the present study, we ask the following question concerning secondary crime effects in the Township of Union, New Jersey: Do crime statistics show that calls for service to the police occur with disproportionate frequency to the address where an adult entertainment business "Hott 22" is located compared to other retail, eating and entertainment venues in the Township?

DATA AND METHODS

Overview

The methodological approach taken here involves a focused analysis by specific address to determine if the adult business "Hott 22" has required special attention from the police compared to other addresses in the Township. "Hott 22" is an adult cabaret that features exotic dancing but that does not serve alcohol. Patrons are permitted to bring their own bottles of wine or beer.

Choosing the Comparison Locations

Locations defined by businesses that served alcohol, food, offered retail shopping or entertainment were chosen as comparison addresses. In addition, certain public institutions such

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as the local high school were chosen for examination. The establishments chosen for the study represent a nearly exhaustive list of neighborhood bars, fast food businesses and shopping locations in the Township of Union.

Adult Business and Comparison Locations

Figure 1a-c displays a map of the adult cabaret "Hott 22" and the comparison locations in the Township of Union. As can be seen from the figures most of the comparison businesses are located along the same major route and comprise retail shopping establishments, fast food restaurants, bars as well as a public institution, the local high school. These businesses are a mix of establishments some located in shopping centers, some free standing.

Measuring Crime and Disorder Incidents

For the analyses below we rely on data collected by the Township of Union Police Department. This included records of dispatches or calls for service (CFS) at "Hott 22" and the comparison locations. We requested data for the period 2001 to 2006. Each record contained the date, location of the call and the classification of the call. For many establishments, including "Hott 22," the police record keeping was unable to distinguish between calls for service and police dispatches to individual businesses that shared the same address (e.g., businesses located in

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shopping malls). "Hott 22," for example, shares its address with a very popular bowling alley that serves alcohol and a check-cashing establishment. Individualized address data was requested for each of the businesses in the study, however, we were informed that the record keeping system was inoperative and these could not be provided. Upon repeated requests only one individualized calls for service report was issued, this individualized report was for the "Hott 22" establishment.

Table 1 displays the total number of all reported incidents before and after filtering all obviously non-criminally related reports for adult and comparison areas. The number of calls for service ranged from approximately 3000 calls and dispatches during the study period for the high school to approximately 400-700 calls for the businesses "Chuck E. Cheese's" and "Tiffany Gardens" "Hott 22" was at the low end of the establishments in terms of police attention with 795 calls and dispatches. The largest percentage of the calls to the police or dispatches for all locations were classified as traffic stops, followed by patrol checks and routine patrol checks. **Figure 2** displays histogram of the breakdown of calls for service to the police for all of the study addresses.

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In the next step of the analyses we eliminated the categories: Directed Patrol, Parking Violations, Parking Complaints, 911 Excused, Parking Complaints, Traffic Stop, Disabled Vehicle, Accident, Medical Aid, Fire Inspection, Fire Inspection, Duplicate Call, Unfounded Call, Lockout Vehicle, Premise Check, False Alarm, Tow/Private, Sewer. The analyses was then completed with incident categories such as Suspicious Acts, Robbery, Dispute, Disorderly Persons, Vehicle Theft, Assault and other more crime-related activities.

Examination of crime related incidents only reveal that "Hott 22" has 409 instances of these events. Comparing this number to other locations we may infer that the area surrounding the adult cabaret "Hott 22" is approximately as likely to receive police attention for crime related matters as the areas surrounding "Hooters" (411) or Chuck E. Cheese's (360). The "Hott 22" area is substantially *less* likely to be associated with crime than the area surrounding "Pizza Hut" (698) or "Applebee's (882). The area surrounding Wal-Mart-McDonald's was three times as likely to receive police attention for criminal matters and constituted a significantly greater source of police activity than "Hott 22."

Finally, as noted above we were able to obtain the records for the "Hott 22" individual address Only 16 incidents (or

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approximately two incidents per year) specifically occurred at "Hott-22" between 2001 and 2006. These are listed below.

1. Dec 23, 01 Dispute
2. March 01, 02 Burglary of M.V
3. March 22, 02 Cooperate Municipality Agency
4. March 26, 02 Suspicious Act,
5. March 27, 02 Criminal Report after the fact
6. Sept. 28, 02 Dispute
7. Oct. 5, 02 Dispute
8. Dec. 9, 02 Suspicious Act in progress
9. Jan. 13, 03 Disorderly person
10. June 20, 03 Armed Robbery
11. Sept. 3, 03 Detective Burglary Investigation, active Burglary
12. Apr. 3, 04 Arrest all others
13. July 17, 04 Harassment report
14. Nov. 6, 04 Local code violation
15. Sept. 17, 05 Dispute
16. Oct. 1, 05 Arrest Warrant

SUMMARY AND CONCLUSIONS

There is no evidence that the adult business "Hott 22' is more often the source of police attention than other addresses in Union. When compared to other locations there is no evidence that crime tends to accompany, concentrate around, and be aggravated by the adult business. In summary, the adult gentleman's club "Hott 22' are neither more or less likely to require special police attention proportionately compared to other businesses. These results are consistent with modern criminological theory and with evidence from published peer reviewed empirical studies of the adult businesses that show no adverse effects associated with adult businesses in communities across the United States.

THE ROUTINE ACTIVITIES MODEL

That the gentlemen's club "Hott 22" is not a particularly salient source of criminal activity in the Township of Union and in fact requires far less police attention than other businesses such as fast food restaurants, retail shopping locations and alcohol serving bars is completely consistent with Cohen and Felson's (1979) routine activities theory of crime. This theory and its progeny are expertly summarized by criminologist Dr. Terry A. Danner of *Saint Leo University* (see: Violent Times: A Case Study of the Ybor City Historic District in *Criminal Justice Policy Review*, Volume 14, Number 1, March 2003 3-29, 2003). Danner notes that this theory explores the link between social change, routine activities, and criminal opportunities. Based on the assumption of interdependence between legal and illegal routine activities, the essence of this theory can be reduced to the following formula: $(O + V) - G = C$, where O represents the "motivated offender"; V indicates the victim (which can be either the victim's person or property and is thus often referred to as "target."); G denotes "guardianship," which, in this version of the theory, is any person who can deter the criminal act; and C is the probability that a direct contact predatory crime will occur.

The theory emphasizes the idea that whenever the economic, demographic, and social forces that shape a community bring potential offenders and suitable targets together in the absence of effective guardianship, the probability that a criminal event will occur increases. In terms of analyzing possible criminogenic locations, the three essential questions are: How does this location influence the motivation, decision-making, and presence of potential offenders? How does it affect the supply and suitability of potential targets? What physical and social characteristics of the location inhibit or facilitate guardianship?

As will be shown below, exploration of each of these questions shows that there is nothing unique about gentleman's clubs in general, and "Hott 22" located in the Township of Union, in particular, that increases the probability of crime at this location relative to other locations in the community. Modern criminological theory, in contrast to the assumptions made by municipalities and courts in the past, does not support the idea that adult cabarets will any more likely to be associated with criminal activity, and in some cases less likely to be sources of criminal activity in the community compared to other locations.

First, we discuss the theory's explication of offender characteristics, then we describe the theory's notion of victim characteristics, finally we describe what has been termed place,

offender, and target convergence taking special note of the implications of routine activities theory for gentlemen's clubs.

Offender Characteristics

Research studies have identified four relevant characteristics of potential offenders that, through interaction with the situational factors of place, are likely to influence the potential offender's decision-making process. They are 1) lifestyle proximity, 2) offender knowledge, 3) offender anonymity, and 4) offender impairment. The question for each of these factors is: is an adult business such as a gentlemen's club more or less likely to associated with processes that capitalize on the offender's decision making processes?

Lifestyle proximity. Lifestyles that regularly bring potential offenders into proximity with suitable targets have been found to facilitate crime (Brantingham & Brantingham, 1981; Cohen&Felson, 1979; Eck&Weisburd, 1995; Felson, 1995). If there exists congruence between the lifestyles of populations that tend to be at high risk for crime commission, the lifestyles of people who might be suitable targets for these potential offenders, and the activities that commonly occur at a particular place, then this would tend to increase offender-victim proximity and thus facilitate crime occurrences.

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Offenders are theoretically attracted to areas and locations that bring them into proximity with suitable targets. Congruent with this element of the theory we found in the present study that the most likely areas for police activity in the Township of Union would be shopping malls, large retail store parking lots, and fast food restaurants. These locations are far are most likely to be both target rich and congruent with lifestyle of people that are likely to committing crime than other locations. The "Hott 22" gentlemen's club does not present an environment as target rich as several fast food restaurants or shopping malls in the Township of union. "Hott 22" gentlemen's club may be too expensive a location and therefore incongruent with the lifestyles of the most likely offenders. This business charges an expensive entry fee and alcohol service and entertainment fees are likely incongruent with the lifestyles of high risk for crime commission populations.

Offender knowledge. The presence of potential offenders with an extensive knowledge of the areas wherein suitable targets can be found is a facilitator of crime (Brantingham & Brantingham, 1993; Clarke, 1992; Eck & Weisburd, 1995; Reppeto, 1976). Beyond the more obvious advantages of knowing the routes of access and escape, potential offenders who are familiar with the physical layout and social rhythms of a specific environment are also more aware of the local crime opportunity

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structure. Familiarity with the criminal opportunities and physical layout of an environment should thus facilitate the criminal activity of potential offenders in the area wherein they possess this level of awareness.

This element of the theory was confirmed in that shopping areas adjacent to neighbor hoods and bars and restaurants located within or adjacent to residential neighborhoods were most likely to be areas of areas of criminal perpetration. Strange areas unknown to criminals would not be favored. Offenders would not know the routes of access and escape, potential offenders who are familiar with the physical layout and social rhythms of a specific environment are also more aware of the local crime opportunity structure. Because adult businesses including gentleman's clubs are often subject to zoning regulations that do not permit them to locate near residential areas the probability of criminal predation may be reduced compared to shopping malls, fast food restaurants, and bars.

Offender Anonymity. The presence of potential offenders whose identity is unknown to possible capable guardians in the area is a facilitator of crime (Felson, 1995; Roncek & Bell, 1981; Roncek & Maier, 1991; Sampson, 1987). This anonymity can result from the sheer volume and turnover of people in an area or its lack of community solidarity, but it may also result from the

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potential offender's purposeful actions to remain unknown. Whatever the source, it is a characteristic of potential offenders that facilitates their criminal activity because it can reduce the effectiveness of whatever capable guardianship (a concept discussed in greater detail below) might exist.

Since anonymity can result from the sheer volume and turnover of people in an area the theory suggests that shopping malls, fast food restaurants and bars that are extremely popular would be the most likely targets for offenders. The study reported here confirms this prediction.

There may be additional implications for adult gentlemen's clubs such as "Hot 22". If there are offenders in the area unknown to potential guardians the probability of crime may increase. Because of the extensive guardianship at the gentlemen's clubs in general and the "Hott 22' location in particular this proved not to a problem.

Offender Impairment

The presence of potential offenders whose decision-making capabilities have been impaired by the ingestion of psychoactive substances is a facilitator of crime (Block & Block, 1995; Clarke, 1992; Roncek & Maier, 1991; Roncek&Pravatiner, 1989

Obviously, areas in which psychopharmacological disinhibitors are freely distributed and ingested are likely to have a

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higher concentration of disinhibited people, and this in turn increases the potential for offending (for a review of the literature examining the connection between alcohol intoxication and aggression, see Fagan, 1990). This suggests that premises that sell alcohol such as liquor stores and bars and some restaurants most likely to be crime targets by offenders. The "Hott 22" gentlemen's club does not sell alcohol. The club is a BYOB establishment and this policy excludes bringing hard liquor onto the premises. Consequently, the possibility that business is the source of predators who are impaired is greatly reduced.

Characteristics of Targets

Routine activities theory also implies that people and their property vary in suitability as targets for predatory crime and that these differences influence which are chosen by offenders, or whether or not a crime even occurs at all (Brantingham & Brantingham, 1993; Felson & Cohen, 1980; Miethe & Meier, 1990). At the aggregate level, given a stable exposure to potential offenders and consistency in capable guardianship, the more a place attracts suitable targets and/or increases their suitability, the greater the frequency of crime that will result. Research has identified three constructs that can be considered characteristics of potential targets that, in interaction with the situational factors of place, are likely to influence the probability of a person or his or

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her property becoming a victim of crime.

Target Value

The presence of people or their property that have high value as crime targets is a facilitator of crime (Felson & Cohen, 1980; Roncek & Maier, 1991). The most obvious form of target value is economic. This suggests that fast food customers will be the most likely targets as will bar patrons and indeed the findings of this study bear out the idea that the police are frequently summoned to these locations. These customers are most likely to be carrying cash for their transactions. Further, a range of soft targets such as elderly men and women, mothers with small children in tow carrying cash would be considered theoretically the most valuable targets and these are not frequent patrons of the "Hott 22" establishment.

Perhaps less likely to be attractive targets are Wal-Mart and other retail outlet customers who will probably use credit cards rather than cash, however these locations. However, since credit card transactions are available in gentlemen's clubs and "Hott 22" has an ATM to dispense cash within the premises thus relieving the customer of the need to carry cash there should theoretically be no greater target attractiveness at this location. The findings of this study show that retail outlets are far more likely to attract police attention and utilize police resources than an adult business such as

"Hott 22."

However, a target's usefulness as an outlet for retaliation, sexual aggression, or as a means for improving the offender's self-concept is also possible. Target's outlet for retaliation implies high school. Indeed, the present study revealed that the local high school is by far the most criminogenic source of police activity in the Township of Union. One would be more likely to expect sexual assault surrounding gentlemen's club if the theory is correct. However, no evidence of this criminal activity was found in the present study.

Target Visibility

The presence of people or their property that are highly visible as suitable targets is a facilitator of crime (Felson & Cohen, 1980; Roncek & Maier, 1991). Some places attract or produce large concentrations of people with high profile levels of vulnerability. People who are inattentive to their surrounding, appear to lack "street smarts," are physically incapacitated due to medical conditions or intoxication, or any combination of these characteristics, are at a higher risk of victimization when exposed to potential offenders than are those without such characteristics.

The presence of people who are inattentive to their surrounding is far more likely at bars rather than "Hott 22." Because "Hott 22" does not serve alcohol and because "Hott 22"

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and similar venues are controversial in the community, customers are far more likely to be especially vigilant. The low rate of victimization found in the present study is congruent with these ideas.

Target Guardianship

The presence of people and their property without capable guardianship is a facilitator of crime (Cohen & Felson, 1979; Eck & Weisburd, 1995; Felson, 1995; Riccio, 1976; Roncek & Maier, 1991; Roncek & Pravatiner, 1989; Shannon, 1986; Sherman, Gartin, &Buerger, 1989). Guardianship is defined as the presence of persons who can protect would-be victims through the deterrence power of their potential to intervene in one way or another. Guardians may physically stop the offense from occurring. They may have the potential to report the crime to authorities, identify the offender, or even apprehend or injure the perpetrator. In this sense, guardianship can be a feature of place, but it can also be a characteristic that people bring with them.

Although places that consistently have large numbers of people present are likely to increase contact between potential offenders and suitable targets, they can also provide high levels of guardianship. The presence of an audience should generally increase the probability that a potential offender will choose not to commit a crime. "Hott 22" is an establishment with an

exceptionally high level of guardianship. The establishment employs several male floor hosts and "bouncers" (3-4 employees Sunday through Wednesday and 5 bouncers security personnel Thursday through Saturday). These security personnel also patrol the parking area and the business establishment has a multitude of security cameras that oversee every entry and egress location in the club. These guardianship practices undoubtedly contribute to the relatively low level of police activity found at the "Hott 22" location.

Place of Offender/Target Convergence

As Danner points out it is the essential nature of a place that influences the interaction of potential offenders, suitable targets, and guardianship. The context of where the place is located, what kind of people it attracts, and the routine activities that occur there are essential to its criminogenic potential. Some elements of this backcloth can work to inhibit crime while other features facilitate it.

Danner notes that research into the environments of crime has identified five characteristics of place that, through interactions with the characteristics of the people who frequent the location, influence the probability of a person becoming a victim of crime.

Place Management

Places in which there is little active management of

behavior facilitate crime (Block&Block, 1995; Clarke, 1992; Eck&Weisburd, 1995; Felson, 1995; Mazerolle, Kadleck, & Roehl, 1998; Sherman, 1995). Places where "anything goes" can allow relatively minor incivility to escalate into crime. Conversely, it has been found that places in which managers and employees are assigned guardianship roles that include the consistent enforcement of clear rules of behavior have lower occurrences of crime. As noted above "Hott 22" is an establishment with an exceptionally high level of guardianship. The establishment employs security personnel inside the premises and security personnel also patrol the parking area. These active guardianship practices contribute to the relatively low level of police activity found at the "Hott 22" location.

Ecological Labeling

Places that have been labeled as a "devalued area" wherein deviance is tolerated facilitate crime (Block & Block, 1995; Brantingham & Brantingham, 1991; Sherman et al., 1989). Once a place starts to develop a reputation as an environment in which deviance is tolerated, a deviation amplifying feedback loop can begin. That is, the more deviance occurs, the more normal it appears to be, and the more it is accepted as normal behavior, the more people choose to act in deviant ways. For places, being labeled as an environment of unlimited personal freedom attracts

people who wish to behave without restraint. It is possible that areas with reputations of this type may also repel potential victims who want to avoid dangerous places.

Research has shown that this kind of environmental labeling does tend to attract relatively higher numbers of potential offenders and that this "attractor effect" can increase the probability of crime. The exceptionally high level of guardianship at the "Hott 22" establishment apparently dampens any possibility that such an "anything goes" environment could be created.

Place Proximity

The location of places close to concentrated populations of potential offenders facilitates crime (Brantingham & Brantingham, 1991, 1993; Dunn, 1980; Felson, 1986; Roncek & Maier, 1991; Roncek & Pravatiner, 1989; Sherman, 1995; Sherman et al., 1989). Affluent areas are often victimized by offenders who live in less affluent places that are close by. These more affluent areas attract predatory offenders because they provide a concentration of suitable targets in a conveniently located environment.

Youth Attractors

Areas that attract a high number of young people are facilitators of crime (Block & Block, 1995; Brantingham & Brantingham, 1981, 1993; Roncek & Faggiani, 1985; Roncek & Lobosco, 1983; Roncek & Pravatiner, 1989). Because age is

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strongly related to both offending and being victimized, places that attract large numbers of young people concentrate, and thus increase, the contact between offenders and suitable targets. This is not a problem for gentlemen's clubs. Instead, as the data from the present study indicates it may be more of a problem for fast food restaurants and the local high school.

Bars

Areas that contain public establishments that serve alcohol as an important part of their retail activity facilitate crime (Block & Block, 1995; Minnesota Crime Commission, 1980; Roncek & Bell, 1981; Roncek & Maier, 1991; Roncek&Pravatiner, 1989; Shannon, 1986; Sherman, 1995). Not all bars are criminogenic, but certain types of bars and clusters of bars within night entertainment areas can facilitate crime by concentrating a number of the conditions described above. These circumstances can be counteracted through the practice of patron management, providing guardianship, and other types of crime prevention activities. It has also been shown that higher levels of alcohol outlet density are geographically associated with higher rates of violence (Scribner, Cohen, Kaplan, & Allen, 1999; Scribner, MacKinnon, & Dwyer, 1995). This appears not to be a problem for "Hott 22," itself but it suggests that the bar in the adjacent bowling alley could attract people who will be the source of crime.

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FURTHER EMPIRICAL SUPPORT FOR ROUTINE ACTIVITIES THEORY AND LACK OF EFFECTS FOR ADULT BUSINESSES

Peer reviewed empirical studies that do not suffer from the basic methodological flaws we enumerate in *Paul* have confirmed the routine activities theory of crime.

Dr. Bryant Paul, (currently an assistant professor in the Department of Telecommunications at Indiana University) and I undertook an examination of adult cabarets in the City of Ft. Wayne, Indiana, which serve alcoholic beverages and provide exotic entertainment. The report of this study received a top award from the United States Department of Justice and thus has been vetted for its methodological soundness. This work was awarded "Top Student Paper" at the student paper competition at the conference: Translating Spatial Research Into Practice: The Fifth Annual International Crime Mapping Research Conference, Sponsored by the Crime Mapping Research Center, National Institute of Justice, U.S. Department of Justice. A copy of the award letter is attached as **Exhibit B.** A subsequent version of this report authored by Mr. Paul and myself was presented at the 2002 International Communication Association where is was recognized

as one of the "Top Four Refereed Papers in Communication, Law and Policy." "Using Crime Mapping to Measure the Negative Secondary Effects of Adult Businesses in Fort Wayne, Indiana: A Quasi-Experimental Methodology." This paper is attached to this report as **Exhibit C.**

In this study a 1000 feet circumference surrounding each of eight exotic dance nightclubs in Fort Wayne was established. Comparison areas were selected in the city of Fort Wayne and matched to the club areas on the basis of demographic features associated with crime and commercial property composition. The number of calls to the police from 1997-2000 in the areas surrounding the exotic dance nightclubs that served alcohol was compared to the number of calls found in the matched comparison areas. Our analysis showed little difference, overall, between the total number of calls to the police reported in the areas containing the exotic dance nightclubs and the total number of offenses reported in the comparison areas. We concluded from these findings that there was no evidence of adverse secondary effects associated with this form of adult business,

Also relevant here is an additional study conducted in Charlotte North Carolina which I undertook with my assistant Bryant Paul and Kenneth C. Land, Jay R. Williams and Michael E. Ezell of Duke University. This paper is entitled: *An Examination*

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of the Assumption that Adult Businesses are Associated with Crime in Surrounding Areas: A Secondary Effects Study in Charlotte, North Carolina. The report of this study has been published in the peer reviewed scientific journal *Law and Society Review*, March 2004. This report is the only secondary effects study published in a peer-reviewed journal. This published article is attached as **Exhibit D.**

This study sought to determine if a relationship exists between adult erotic dance clubs in Charlotte, North Carolina that feature topless dancing and serve alcohol and negative secondary effects in the form of increased numbers of crimes reported in the areas surrounding the adult businesses. Specifically, the study addressed the following research question: Once variables known to be related to crime events suggested by social disorganization and routine activities theories have been taken into account we asked: does the presence of an adult business in a localized area increase the concurrence in space and time of offenders motivated to commit crimes together with suitable targets for the crimes in the absence of guardians capable of preventing or deterring the crimes? This is the only peer reviewed published study testing routine activity theory as it applies to alleged secondary crime effects and adult businesses.

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For each of 20 businesses, a control site (matched on the basis of demographic characteristics related to crime risk) was compared for crime events over the period of three years (1998-2000) using data on crime incidents reported to the police. We found that the presence of an adult nightclub does not increase the number of crime incidents reported in localized areas surrounding the club (defined by circular areas with 500 and 1,000 feet radii) as compared to the number of crime incidents reported in comparable localized areas that do not contain such an adult business. Indeed, the analyses imply the opposite, namely, that the nearby areas surrounding the adult business sites have smaller numbers of reported crime incidents than do corresponding areas surrounding the three control sites studied.

What accounts for these findings? Why did the local areas surrounding the adult nightclubs in Charlotte have lower numbers of reported crime incidents than corresponding areas around the control sites? Why did we not find empirical evidence of the social disorganization/crime opportunity spillover of these adult establishments? First, the adult nightclub business beginning in the late-1990s in many respects may be quite unlike that of the 1960s and 1970s when these establishments were relatively new forums of entertainment in American society. Adult nightclubs have been subjected to over two decades of municipal zoning

restrictions across the country, and they usually must comply with many other regulations as well. These clubs do not appear to be locations where potential offenders gather to prey on desirable targets in the absence of crime suppressors, such as employees whose role is to ensure the safety of customers and the maintenance of order within the clubs. The establishments themselves have evolved more closely into legitimate businesses establishments with management attention to profitability and continuity of existence. To meet these objectives, it is essential that the management and/or owners of the clubs provide their customers with some assurance of safety.

Accordingly, adult nightclubs, including those in Charlotte, often appear to have better lighting in their parking lots and better security surveillance than is standard for non-nightclub business establishments. These may be factors producing fewer crime opportunities and lower numbers of reported crime incidents in the surrounding areas of the clubs. The extensive management of the parking lots adjoining the exotic dance nightclubs, in many cases including guards in the parking lots, valet parking, and other control mechanisms, may be especially effective in reducing the possibility of violent disputes in the surrounding area. In addition, unlike other liquor-serving establishments (bars and taverns that do not offer adult entertainment) that may be present in the control

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areas, violent disputes in the areas surrounding exotic dance clubs between men over unwanted attention by other males to dates or partners are minimal due to the fact that the majority of patrons attend the clubs without female partners. Thus, the possibility of interpersonal aggression may be greatly reduced in the vicinity of adult dance clubs, compared to most other locations where adults congregate, such as bars or taverns that do not feature adult entertainment.

Findings from a qualitative, anthropological case study of several of the exotic dance clubs included in this study undertaken by Hanna (2001) are consistent with these speculations. Three adult clubs were chosen to reflect three different kinds of economically developed neighborhoods. Neighborhood residents had few complaints about the adult businesses and most neighboring business owners were quick to note that the reason they felt the adult clubs had few negative effects was because of very efficient management of the property and facilities.

Another empirical study entitled, *A Secondary Effects Study of Peep Show Establishments in San Diego, California*, by myself and Bryant Paul, Department of Telecommunications, Indiana University, was undertaken to test whether there is a greater incidence of crime in the vicinity of peep show establishments in San Diego, California than comparable "control" areas which do

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not contain peep show establishments, and to determine whether any secondary crime effects of peep show establishments in San Diego are disproportionately greater between the hours of 2 a.m. and 6 a.m. The city of San Diego was chosen for study because of a recently passed ordinance that makes it unlawful for any person to operate a "peep show booth" or "peep show device" between the hours of 2:00 a.m. and 6:00 a.m. The city claimed that the ordinance was needed to further a substantial government interest in combating crime. "Calls for service" to the police within a 1000-foot area on either side of the peep show establishment (i.e., involving an uninterrupted 2000 foot wide area) were compared to comparably sized control areas. The levels of crime within a 1000-foot area on either side of peep show establishments during the 2a.m. to 6 a.m. hours of operation were also compared to levels for the entire day.

We found neither evidence of differences in crime levels, nor any evidence of disproportionately greater amounts of crime within the 2 a.m. to 6 a.m. time period. We conclude that this study constitutes evidence that the city of San Diego does not have a special problem with crime at the peep show establishments generally, nor is there a heightened problem with crime during the 2 a.m. to 6 a.m. period. This study, also ignored by Dickinson County has been peer reviewed and presented at the annual

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meeting of the Western Region Conference of the Society for the Scientific Study of Sexuality, in San Diego, California, in April 2004. This study has been peer reviewed once again and is now published in the *Journal of Sex Research*. This study is attached hereto as **Exhibit E.**

Another peer-reviewed paper is now available. It is entitled, *Examining the Link Between Sexual Entertainment and Sexual Aggression: The Presence of Adult Businesses and the Prediction of Rape Rates in Florida*, by Randy D. Fisher, Bryant Paul and myself. This paper was presented to the Law and Policy Division at the 2004 annual meeting of the International Communication Association: New Orleans, LA.

The purpose of this study was to systematically examine whether rates of rape and other crimes are associated with the presence of adult businesses in each of the 67 counties of Florida once other variables known to be related to crime are controlled. Three kinds of crime are examined: UCR Index crimes, rape, and domestic violence. In addition, three measures of adult businesses are included: the total number of adult businesses that offer some form of live nude or semi-nude entertainment, the number of such businesses that provide nude entertainment, and the number of nude dancing clubs. In the case of the crimes of rape and domestic violence, zero order correlations between all three measures of

nude entertainment and rates of rape and domestic violence were essentially zero. In the case of the relationship between index crimes and nude entertainment, there is evidence of a significant correlation between these variables. The statistically significant correlations between measures of nude entertainment and Index crimes disappear when other variables are considered. The results of this study show that a causal link between nude entertainment and secondary effects as measured by crime rates at the county level is extremely improbable. This study is attached hereto as **Exhibit F.**

We have recently undertaken an investigation of crime rates (and contributing factors to the crime rates) in and around four major Ohio cities. Our study shows a lack of correlation between the presences of liquor-serving establishments featuring nude or semi-nude dancing and crime. Hierarchical regression analysis in Toledo revealed that the presence or absence of adult cabarets in a given neighborhood did nothing to explain the presence of crime in that same neighborhood. Similarly, in Columbus, the addition of alcohol-serving adult cabarets as a factor in our analysis resulted in zero explanatory power. The work in Dayton revealed a negative correlation between adult cabarets and incidents of rape, such that the presence of an alcohol-serving adult entertainment establishment is actually indicative of

fewer rather than more rape events. Finally, in Cleveland, we found that the addition of alcohol-serving adult cabarets as a factor in his analysis also added no ability to explain crime incidents. We suggest that the negative correlation between adult establishments and violent crime might be explained by the fact that in alcohol serving establishments that do not feature adult entertainment, people fight with one another particularly men over women. None of that exists in an adult entertainment venue. This peer-reviewed paper is attached as **Exhibit G.**

Finally, in order to test the assumption that adult cabarets are associated with negative secondary effects, an extensive and detailed empirical study of criminal activity in and around these businesses in Daytona Beach, Florida was undertaken utilizing data provided by the Police Department. We first asked: Does the presence of an adult cabaret in a neighborhood increase the occurrence of crime in Daytona Beach?

In order to answer this question we considered the entire city using census blocks as the unit of study. We examined demographic variables previously used by criminologists and found to be related to criminal activity, such as a local area's population, age structure (especially the presence of young adults) and race/ethnic composition. We also examined indicators of social disorganization such as housing vacancies and female-

headed households. Finally, congruent with routine activities theory we included a variable that measured the number of alcohol retail sale establishments in each block.

These variables, as expected, were statistically strongly related to crime events in the final analysis. We are able to account for crime events in Daytona Beach with a relatively high level of accuracy (explaining approximately 60 percent of the variability). The social disorganization and routine activity variables and especially the presence of an alcohol beverage retail sale establishments in the blocks accounts largely for this explanatory power. The presence of an adult cabaret in the census block accounted for an insubstantial amount of explanatory power.

We then asked: Does the presence of adult cabarets contribute to increased crime in the local vicinity of these establishments. We focused on the areas surrounding the adult cabarets (1000 foot radius). We found that far from being the source of crime activity, only one to three and half-percent of the crime events could be attributed to the adult cabarets themselves. Instead, other businesses in the area, primarily alcohol-serving establishments that do not feature adult entertainment, accounted for far more crime events.

Because the City of Daytona Beach specifically maintained that the primary justification for it's regulation of nudity was

because it was associated with increases in prostitution and sexual assaults we undertook a separate set of analyses using each sex crime type as an outcome variable. We found that often the adult cabarets accounted for zero or near zero percent of the sex crime activity in the near vicinity. Consequently, we concluded that there is not support for the City of Daytona Beach's theory that nudity is associated with increases in sex crime incidents such as prostitution or sexual assault. A copy of this study and the subsequent US District Court ruling and opinion concerning this study is attached as **Exhibits H and I.**

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SUMMARY

In summary, modern criminological theory and past research that has been peer reviewed and published in scientific journals does not suggest that gentleman's clubs such as "Hott 22' are neither more or less likely to require special police attention proportionately compared to other businesses. That the gentlemen's club "Hott 22" is not a particularly salient source of criminal activity in the Township of Union is completely consistent with Cohen and Felson's (1979) routine activities theory of crime. We conclude that the gentlemen's club "Hott 22" presents no special problems for the police and the community and therefore should not be associated with so-called adverse secondary effects of adult businesses.

Respectfully Submitted.

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Daniel Linz

Figure 1a: A map of the adult cabaret "Hott 22" and the comparison locations in the Township of Union.

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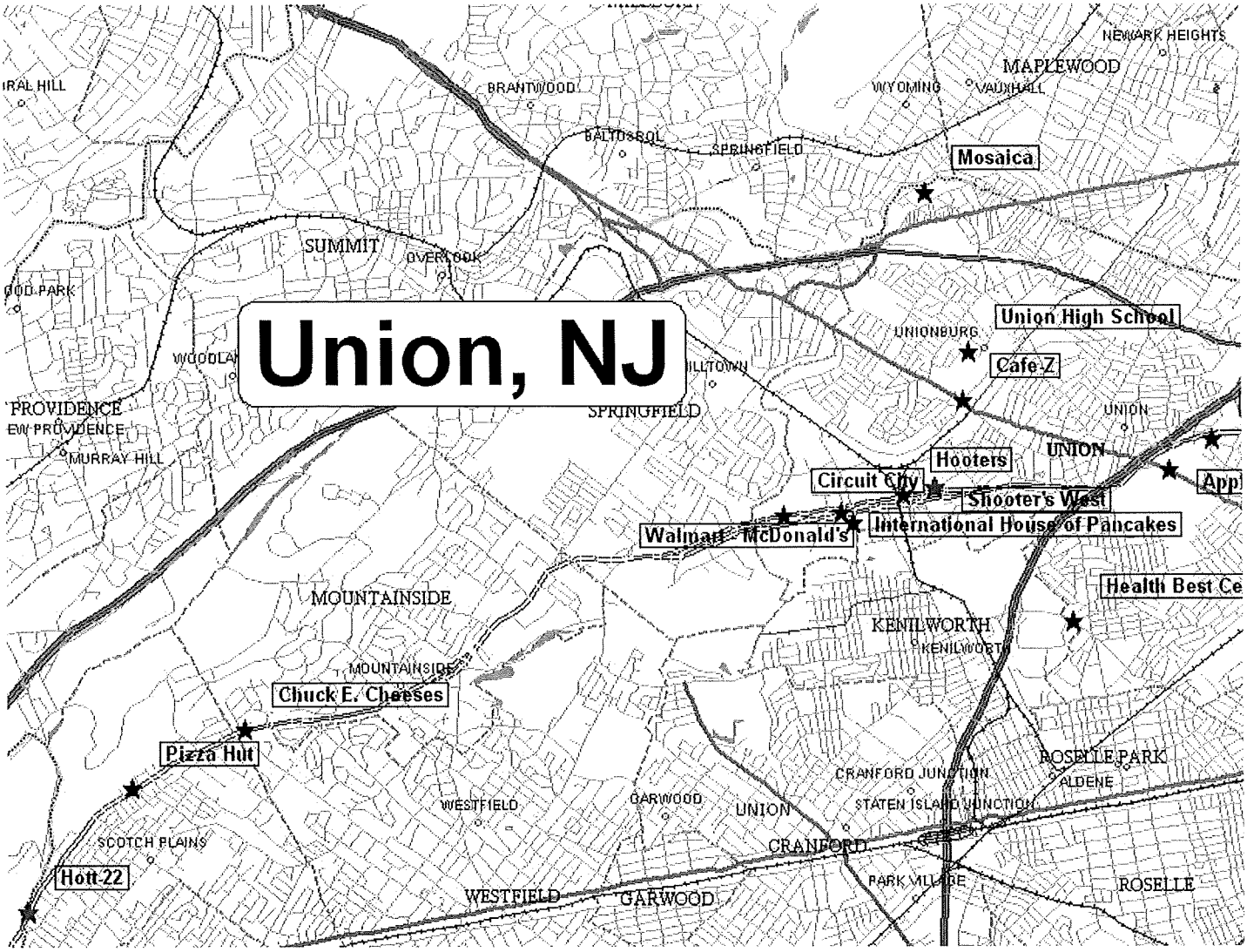

Figure 1b: A map of the adult cabaret "Hott 22" and the comparison locations in the Township of Union.

15-158

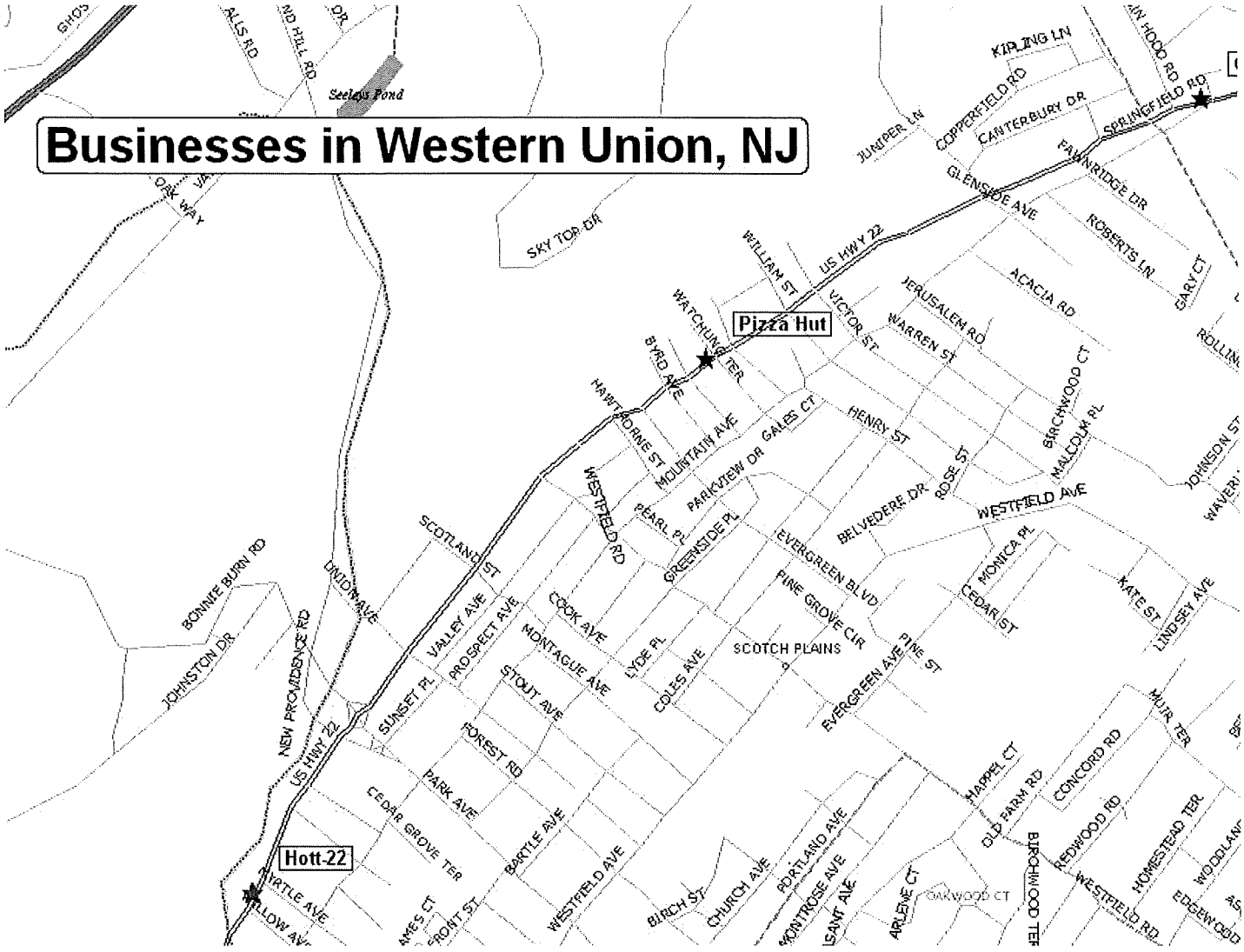
Businesses in Western Union, NJ
Pizza Hut
Hott-22
Seeleys Pond
SCOTCH PLAINS
US HWY 22
WESTFIELD AVE
SPRINGFIELD RD
GLENSIDE AVE
WESTFIELD RD
SCOTLAND ST
NEW PROVIDENCE RD
UNION AVE
BONNIE BURN RD
JOHNSTON DR
SKY TOP DR
WILLIAM ST
WATCHUNG TER
BYRD AVE
HAWTHORNE ST
MOUNTAIN AVE
PARKVIEW DR
GALES CT
HENRY ST
JERUSALEM RD
WARREN ST
VICTOR ST
ACACIA RD
ROBERTS LN
GARY CT
FAIRRIDGE DR
KIPLING LN
COPPERFIELD RD
CANTERBURY DR
JUNIPER LN
BIRCHWOOD CT
MALCOLM PL
ROSE ST
BELVEDERE DR
PEARL PL
GREENSIDE PL
EVERGREEN BLVD
PINE GROVE CIR
EVERGREEN AVE
PINE ST
CEDAR ST
MONICA PL
KATE ST
LINDSEY AVE
VALLEY AVE
PROSPECT AVE
SUNSET PL
COOK AVE
MONTAGUE AVE
STOUT AVE
FOREST RD
PARK AVE
CEDAR GROVE TER
BARTLE AVE
LYDE PL
COLES AVE
MUIR TER
CONCORD RD
HAPPEL CT
OLD FARM RD
REDWOOD RD
HOMESTEAD TER
BIRCH ST
CHURCH AVE
PORTLAND AVE
MONTROSE AVE
ISANT AVE
ARLENE CT
OAKWOOD CT
BIRCHWOOD TER
WESTFIELD RD
WOODLAND
EDGEWOOD

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Figure 1c: A map of the comparison locations in the Township of Union.

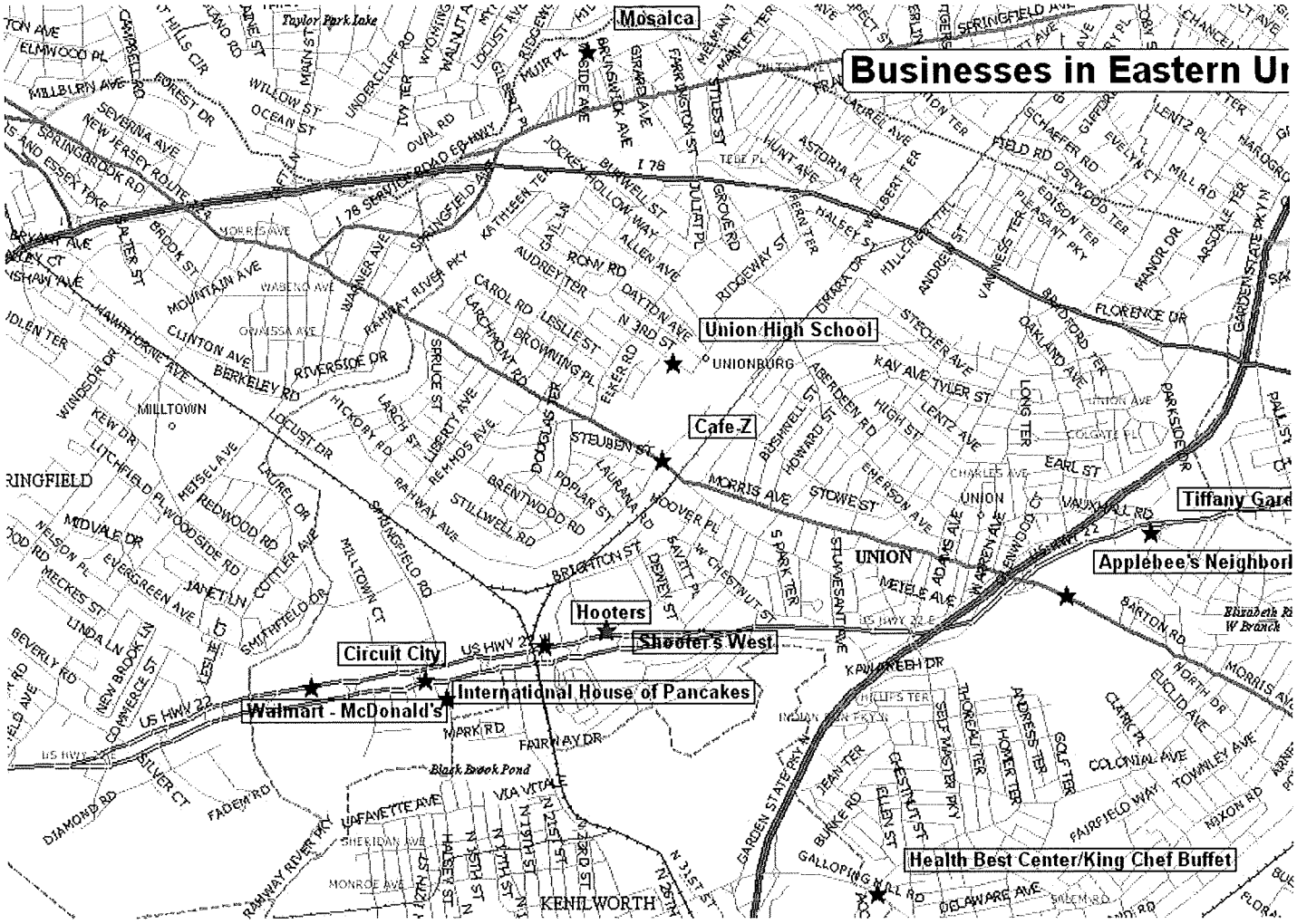

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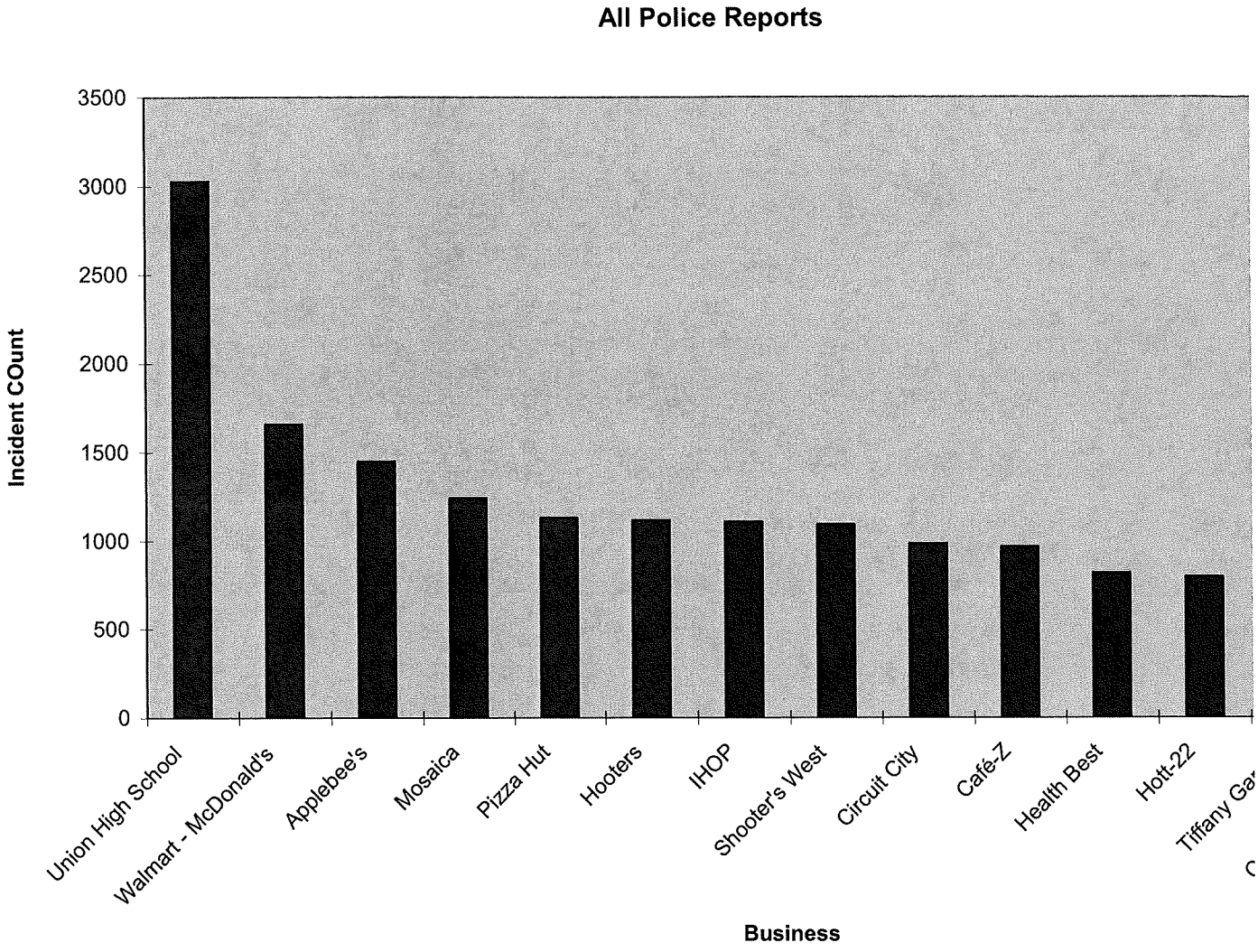
Figure 2: A breakdown of calls for service to the police for all of the study addresses.



15-161

Figure 3:

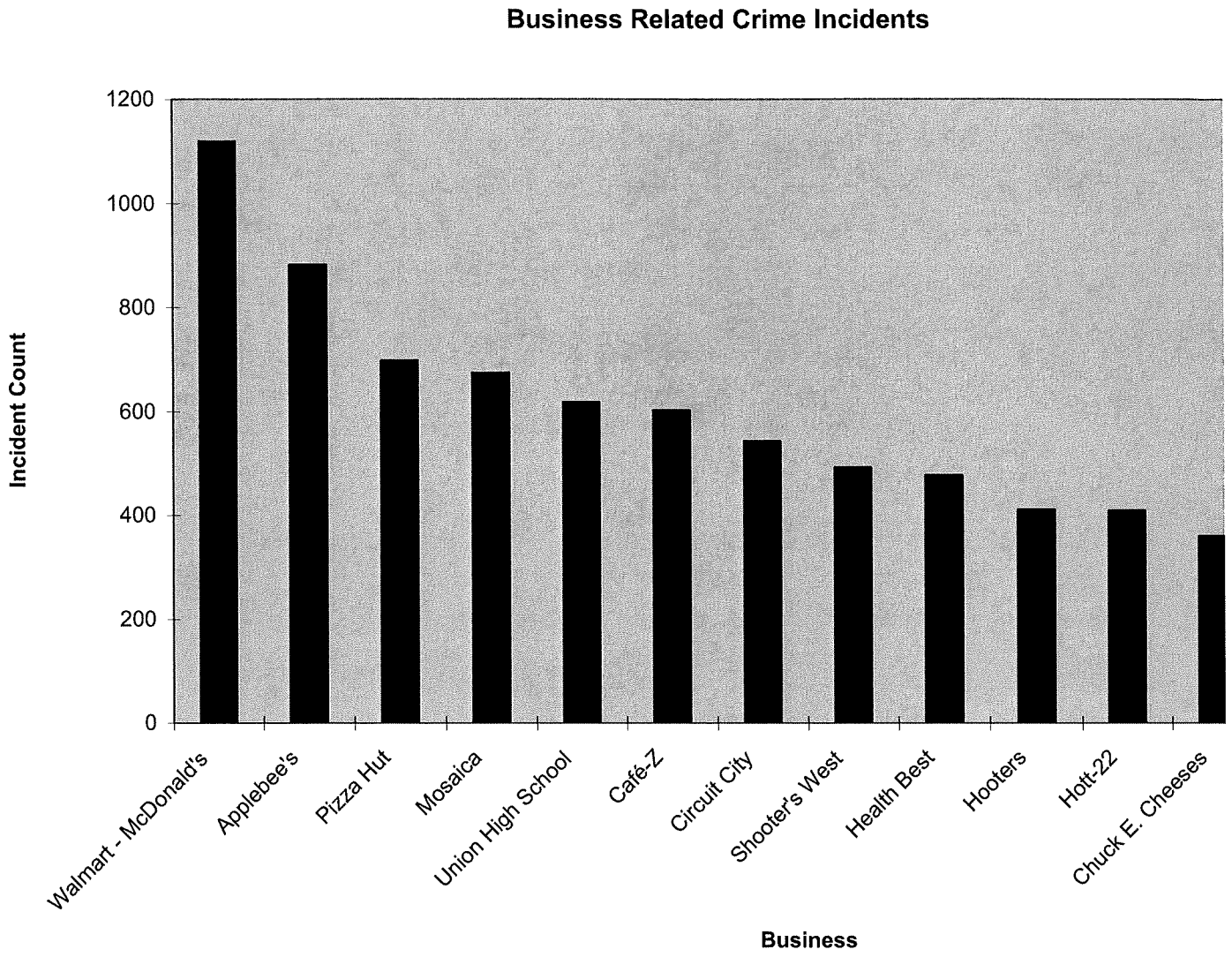


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Table 1: Total Number of All Reported Incidents Before and After Filtering All Obviously Non-criminally Related Reports for Adult and Comparison Areas.

Business Name	Address	All Incidents
Union High School	2400 3rd street N, Union, NJ	3027
Walmart - McDonald's	900 Springfield Rd, Union, NJ	1658
Applebee's	1721 Morris Ave, Union, NJ	1447
Mosaica	2933 Vauxhall Rd, Union, NJ	1241
Pizza Hut	2401 US Highway, 22 W/B, Union	1130
Hooters	2319 Route 22 W, Union, NJ	1114
IHOP	2500 Us Highway 22 E, Union, NJ	1106
Shooter's West	1235 W Chestnut St # I, Union, NJ	1090
Circuit City	2700 US Highway 22, Union, NJ	982
Café-Z	2333 Morris Ave, Union, NJ	965
Health Best	1350 Galloping Hill Road, Union, NJ	816
Hott-22	1731 US Highway 22, Union, NJ	795
Tiffany Garden	1637 Vauxhall Rd, Union, NJ	708
Chuck E. Cheese's	1616 US Highway 22, Union, NJ	486

* This value was obtained by filtering the following specific call types out of the data totals: Directed Patrol, Parking Violations, Parking Complaints, 911 Excused, Parking Complaints, Traffic Stop, Disabled Vehicle, Accident, Medical Aid, Fire Inspection, Fire Inspection, Duplicate Call, Unfounded Call, Lockout Vehicle, Premise Check, False Alarm, Tow/Private, Sewer.

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FULTON COUNTY POLICE

Study of Calls for Service to Adult Entertainment Establishments Which Serve Alcoholic Beverages

January 1995 - May 1997

[EXCERPTS]

Prepared by: Capt. Ron Fuller
Lt. Sue Miller
Date: June 13, 1997

RESOLUTION RELATING TO REGULATION OF ALCOHOL CONSUMPTION IN ADULT ENTERTAINMENT ESTABLISHMENTS

WHEREAS, the Board of Commissioners of Fulton County has reason to believe that the consumption of alcoholic beverages in adult entertainment establishments may contribute to increased crime in the vicinity of such adult entertainment establishments; and

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WHEREAS, the Board of Commissioners of Fulton County further has reason to believe that adult entertainment establishments which serve alcoholic beverages may have a negative impact on surrounding real property values; and

WHEREAS, Article III, Section VI, Paragraph VII, Constitution of the State of Georgia, delegates authority to counties and municipalities A. . . for the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages. . .@; and

WHEREAS, the Supreme Court of Georgia, on March 17, 1997, in the consolidated cases of Goldrush II, et. al., v. City of Marietta, et. al.; Varsalona's Italian Restaurant d/b/a Boomer's et. al.; v. City of Marietta, et. al.; and Tudor d/b/a Cyprus Lounge v. City of Marietta, et. al. upheld a City of Marietta, Georgia, ordinance which prohibits the serving or consumption of alcoholic beverages in adult entertainment establishments; and

WHEREAS, the Georgia Supreme Court, in Chambers v. Peach County, 266 Ga. 318 (1996), has previously held that, before enacting an ordinance to combat undesirable secondary effects of adult entertainment, a legislative body is required to consider specific evidence of the undesirable secondary effects that it reasonably believes relevant to the problems it seeks to address by passing the ordinance; and

WHEREAS, the Board of Commissioners desires that the Fulton County Police Department prepare a report concerning calls for police assistance and crimes occurring at, or in the vicinity of, adult entertainment establishments where alcohol is consumed; and

WHEREAS, the Board of Commissioners desires that the Fulton County Police Department and the Department of Planning and Economic Development, in consultation with the County Attorney, assemble any studies available which identify and document negative secondary effects related to the serving and consumption of alcoholic beverages in adult entertainment establishments; and

WHEREAS, the Board of Commissioners further desires that the County Attorney prepare proposed amendments to Sections 33-1-16 through 33-1-23, Code of Fulton County, Georgia, relating to licensing of adult entertainment establishments, and to Article A, Chapter 5, Code of Fulton County, Georgia, relating to alcoholic beverage licenses, and any related proposed ordinance amendments which will have the effect of prohibiting the serving or consumption of alcohol at adult entertainment establishments, and which will be consistent with the above-cited March 17, 1997, ruling of the Georgia Supreme Court, and with the constitutional, statutory, and decisional law of the State of Georgia and the United States; and

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WHEREAS, it is the intent of the Board of Commissioners to enact, if warranted by the said studies, a carefully tailored regulation to minimize the negative secondary effects of the serving and consumption of alcoholic beverages at adult entertainment establishments; and

WHEREAS, it is not the intent of the Board of Commissioners, in enacting any such ordinance amendment, to deny to any person rights to speech or expression protected by the United States or Georgia Constitutions, nor is it the intent to deny or restrict the rights of any adult to obtain or view any sexually oriented performance or materials protected by the United States or Georgia Constitutions, but to adopt a content neutral measure to address the secondary effects of adult entertainment establishments where alcoholic beverages are served or consumed;

NOW, THEREFORE, BE IT RESOLVED that the Fulton County Police Department is hereby directed to prepare within forty-five days hereof a study concerning calls for police assistance to, and crimes occurring at, areas wherein adult entertainment establishments which serve alcoholic beverages are located;

BE IT FURTHER RESOLVED that the Fulton County Police Department and the Planning and Economic Development Department, in consultation with the County Attorney, are hereby directed to assemble within forty-five days any studies available which document the negative secondary effects of the serving and consumption of alcohol in adult entertainment establishments;

BE IT FURTHER RESOLVED that the County Attorney is hereby directed to prepare within sixty days proposed amendments to Sections 33-1-16 through 33-1-23, Code of Fulton County, Georgia, relating to licensing of adult entertainment establishments, and to Article A, Chapter 5, Code of Fulton County, Georgia, relating to liquor licenses, and any related proposed ordinance amendments which will have the effect of prohibiting the serving or consumption of alcohol at adult entertainment establishments, and which are consistent with the March 17, 1997, opinion of the Georgia Supreme Court, and consistent with the constitutional, statutory, and decisional law of the State of Georgia and the United States;

PASSED AND ADOPTED this sixteenth day of April, 1997.

BOARD OF COMMISSIONERS OF FULTON COUNTY, GEORGIA

By:_____

Mitch J. Skandalakis, Chairman

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By:_____

Commissioner Gordon L. Joyner

District 2

ATTEST:

_____

Clerk to the Board

APPROVED AS TO FORM AND LEGALITY:

_____

County Attorney

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Table Of Contents

SECTION 1

INTRODUCTION

Brief Summery of

Goldrush II, et al., v. City of Marietta, et al.;

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Varsalona=s Italian Restaurant d/b/a Boomer=s, et al., v. City of Marietta, et al.; and Tudor d/b/a Cyprus Lounge v. City of Marietta, et. al.

1. Amendment to Georgia Constitution provides that counties and municipalities shall have authority A . . . for the purpose of regulating, restricting, or prohibitng the exhibiton of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages...@ [Article III, Section VI, Paragraph VII, Georgia Constitution.]
2. In January, 1995, the City of Marietta amended its adult entertainment license ordinance to prohibit the serving, selling, distributing or consumption or possession of liquor in adult entertainment establishments.

   The prohibition ultimately was intended to extend to existing adult entertainment establishments serving alcohol.
3. The Georgia Supreme Court upheld the Marietta ordinance on March 17, 1997, and approved the Marietta ordinance's application to already existing businesses.
4. The Georgia Supreme Court, citing Chambers v. Peach County, 266 Ga. 318 (1996), reiterated that a legislative body must have appropriate studies before it documenting the Anegative secondary effects@ (e.g., such as crime, diminishing property values, and increased urban blight) before legislating any regulation of such negative secondary effects.

Introduction

On April 16, 1987, [*sic*] a Resolution Relating to Regulation of Alcohol Consumption in Adult Entertainment Establishments was passed and adopted.

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This resolution directed the Fulton County Police Department to prepare a report concerning calls for police assistance and crimes occurring at, or in the vicinity of adult entertainment establishments where alcohol is sold and consumed. This was based on the reasonable belief that the consumption of alcoholic beverages in adult entertainment establishments may contribute to increased crime in the vicinity of these establishments.

The statistical information included in this study was obtained through the Fulton County Police Departments [*sic*] computerized incident and calls for service reporting program.

Each call for police assistance, if taken over 911 enhance, is captured by a communication assisted dispatch (CAD) system. This information is available on every address in Unincorporated Fulton County where the police department is dispatched.

Each report that is generated from a police call for service is identified with a departmental case number that is unique to that reported incident. (It should be noted that a police report is <u>not</u> generated for every call for service, and that officer initiated calls are <u>not</u> captured on the CAD system).

The time period covered by this study is for January 1, 1995 through May 31, 1997.

There are twelve (12) establishments included in this study. Six (6) are adult entertainment establishments that serve alcoholic beverages. The others are those establishments that serve alcoholic beverages with <u>no</u> adult entertainment.

Several of the locations B Frankie's, Crow's Nest, Mardi Gras, Riley's, Babes, Fannies and Club Twenty Grand B have addresses that are common to other businesses on the same property. For this reason, the number of police calls for service to these locations cannot be attributed soley to the specific business that serves alcoholic beverages.

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SECTION 5

CONCLUSIONS

Statement of Facts

The following data has been based on several known facts. They are as follows:

From **January 1, 1995, to May 31, 1997** the Fulton County Police Department responded to **199,324** calls for service North and **152,002** calls for service South. The total calls for service being **351.326**.

From **January 1, 1995, to May 31, 1997** the Fulton County Police Department made **34,680** incident reports North and **29,060** incident reports South. The total number of incident reports taken being **63,740**.

From **January 1, 1995, to May 31, 1997** there were **no Murders or Kidnappings** [*sic*] reported at any of the establishments listed in this study. There were **2 Rapes, 11 Robberies and 10 Aggravated Assaults** reported in the establishments that served alcoholic beverages but **do not** have adult entertainment. There was **1 Rape, 16 Robberies and 5 Aggravated Assaults** reported in the adult entertainment establishments that serve alcoholic beverages.

Conclusions

From **January 1, 1995, to May 31, 1997** the Fulton County Police Department responded to **728** calls for service to incidents reported at or in the vicinity of adult entertainment establishments that serve alcoholic beverages in this study. During the same time period the police department responded to **1718** calls for service to establishments in this study that serve alcoholic beverages but **do not** provide adult entertainment.

Conclusion: There were 990 more calls for service to the establishments that did not provide adult entertainment.

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The total number of calls for service to establishments in this study totaled **2446**. Of those, **259** were alcohol related by call sign only. Signal 28 Public Drunkenness, Signal 29 Drunk and Disorder/Fight, Signal 30 Driving Under the Influence, and Signal 38 Illegal Alcohol/Drugs. **178** of these calls were to non-adult entertainment establishments that serve alcohol. **81** were to adult entertainment establishments that serve alcohol.

Conclusion: There were 97 more alcohol related calls for service to those establishments that did not provide adult entertainment.

Based on this statistical study of calls for service and reported crime at adult entertainment establishments, there is no statistical correlation that shows that there is an increase in crime at adult entertainment establishments that serve alcoholic beverages. However, there is a statistical correlation that would indicate that there is greater instances of calls for service and reported crime at non-adult entertainment establishments that serve alcoholic beverages.

There is nothing in the statistics of this study that would indicate why there is such a discrepancy in the calls to service and reported crimes in these types of establishments.

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Examining the Link Between Sexual Entertainment and Crime:

The Presence of Adult Businesses and the Prediction of Crime Rates in Florida

By

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One version of this paper was presented to the Law and Policy Division at the 2004 annual meeting of the International Communication Association: New Orleans, LA and another version was presented to the 2004 annual meeting of the Southeastern Psychological Association in Atlanta, GA.

Abstract

The Supreme Court of the United States has recently considered the constitutionality of anti-nudity legislation passed by municipalities and states. In *City of Erie v. Pap's A.M.*, the Court held that municipalities may under certain circumstances pass anti-nudity ordinances on the assumption that nudity causes adverse secondary effects such as increased crime. The purpose of the present study was to examine whether rates of crime are associated with the rates of adult businesses in the 67 counties of Florida once other variables related to crime are controlled. Three kinds of crime were examined: UCR property crimes, UCR violent crimes, and rape. Rates per 100K people in the population were also computed for the numbers of nonsexual adult businesses: drinking establishments, gambling establishments, and hotels and motels in each county. These measures, along with measures of social disorganization and demographic variables, were examined for their relative ability to predict the three rates of crime. Regression analyses were performed to determine the unique contributions made by the control variables, rates of nude or semi-nude businesses, and rates of nonsexual adult businesses to prediction of the three rates of crime. Results revealed that rates of nude or semi-nude businesses were not significantly related to rates of property crimes or violent crimes. However, they were significantly, though inversely, related to rates of rape when other variables were taken into account. By contrast, rates of nonsexual adult businesses showed strong positive relationships with rates of both property crimes and rape. These results are consistent with previous research using different methodologies and they support the predictions of routine activity theory. However, they may cast doubt upon the validity of the doctrine of the adverse secondary effects of businesses offering nude or semi-nude entertainment.

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Government Regulation of Erotic Expression

Through Anti-nudity Ordinances

The Supreme Court of the United States has over the last fifteen years considered the constitutionality of anti-nudity legislation passed by municipalities, counties and states. The Court in *Barnes v. Glen Theatre, Inc.* (1991) held that the State of Indiana could regulate nudity generally, and in adult cabarets and other adult businesses.

Negative Secondary Effects Justification For the Regulation of Erotic Expression

In a concurring opinion in *Barnes* Justice Souter offered his justification for the State's ban on nudity. He argued that the State could ban nudity on the basis of the *presumed* negative secondary effects on the surrounding community such as the occurrence of sex crimes. Thus, in *Barnes* the secondary effects "doctrine" was expanded to include not only the "zoning" of adult businesses to certain localities in the community but now the regulation of the content of expression within these establishments.

The rationale for the secondary effects doctrine had earlier been laid out in a prior decision *Renton v. Playtime Theatres, Inc.*, in 1986. In *Renton*, the Supreme Court considered the validity of a Renton Washington municipal ordinance that prohibited any adult theater from locating within 1,000 feet of any residential zone, family dwelling, church, park, or school. The Court's analysis of the ordinance proceeded in three steps. First, the Court found that the Renton ordinance did not ban adult theaters altogether, but merely required that they be a certain distance from so-called "sensitive locations." The ordinance, the Court said, was properly considered to be a time, place, and manner regulation. The Court next considered whether the ordinance was content neutral or content based. If the regulation were content based, it would be considered presumptively invalid and subject to the strict "scrutiny" standard. The Court held, however, that the ordinance was not aimed at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely at crime rates, property values, and the quality of the city's neighborhoods.

Following the *Barnes* ruling the Court once again invoked the secondary effects doctrine in the case *City of Erie v. Pap's A.M.* (2000). The Court again held that municipalities have the right under certain circumstances to pass anti-nudity ordinances. The Court was fractured in its opinion although the secondary effects doctrine figured more prominently in the Court's decision making. Three justices agreed with Justice O'Connor's opinion that combating negative secondary effects (specifically, crime effects) that were supposedly associated with adult businesses was a legitimate basis for the imposition of an anti-nudity regulation.

The Link Between Sexual Entertainment and Crime

Several correlational studies have focused on sex-related crime such as rates of rape across states, as indicated by FBI Uniform Crime Reports, and their relationship to circulation rates of various forms of sexually explicit materials within those same states (Bauserman,1996). For example, Baron and Straus (1987, 1989) obtained circulation rates of "soft core" men's magazines, such as Penthouse, Oui, and Playboy for each of the 50 states. They then calculated the correlation between these figures and the rates of rape per 100K population for the same states. Their results revealed a significant, positive correlation between circulation rates of "soft core" magazines and rates of rape. This correlation remained statistically significant after other variables related to rape were entered into the regression equation. Other researchers (Jaffee and Straus, 1987; Scott and Schwalm, 1988) have also obtained positive correlations between sex magazine circulation rates and rates of rape.

Despite the positive correlations obtained by different researchers examining data from different years, Baron and Straus (1989) eschew the interpretation that these results indicate consumption of sexually explicit materials increases levels of rape. They note that the experimental literature examining the effects of various sexually explicit media (See Davis and Bauserman, 1993; Linz, Donnerstein, and Penrod, 1987: Linz, 1989 for reviews of this literature.) has consistently found that nonviolent sexually explicit materials do not affect viewers in ways that would encourage them to rape. Second, they note that studies in other countries (Kutchinsky, 1985; Ben Veniste, 1971) examining the rate of sex crimes

following the legalization of sexually explicit materials have failed to find increases in sex crimes, including rape. Third, they note that the circulation rates of Playgirl magazine, which appeals primarily to women and gay men, are also highly correlated (r=. 68) with rates of rape. They argue that some other factor, which researchers have not measured sufficiently by any of their statistical indices, must be responsible for the correlation between sex magazine circulation rates and rates of rape.

Several additional findings challenge any interpretation that sexually explicit entertainment contributes to increased levels of rape. Gentry (1991) also examined the correlation between sex magazine circulation and rates of rape, but she did so at the level of Metropolitan Statistical Areas (MSAs), rather than states. She found that the significant relationship between rape and sex magazine circulation dropped to zero when several other variables, such as proportion of the population that is youthful (15-24 years of age), were entered into the regression equation. Gentry (1991) argues that the relationship between sex magazine circulation rates and rape rates is spurious. She contends that these two variables are correlated because both are related to the proportion of young people in the population. An additional challenge to the hypothesis that sexual entertainment causes rape comes from the work of Scott and Schwalm (1988) who examined the relationship between rates of rape by states and the number of adult movie theaters showing "hard core" sex films in each state and found no significant relationship.

These studies have either focused on a relatively narrow range of forms of sexual entertainment, such as "soft core" magazines, or adult theaters which have largely disappeared. Many forms of erotic entertainment are now available to anyone with an online computer, and auditory erotica is available to anyone with a telephone and a credit card. The study of the relationship between the extent of consumption of sexual entertainment and rates of rape in a specified geographic area will be improved to the extent that a wider range of sexual entertainment is included in the assessment.

A significant source of erotic entertainment in the United States is provided in so called gentlemen's clubs that feature nude or semi-nude dancers who entertain patrons with live performances.

In many communities, similar entertainment is available on an out-call basis. These forms of entertainment proliferated in the 1970s, along with adult bookstores and theaters. In its earliest form, the "topless bar," the featured entertainment was primarily women dancing bare-breasted. Today, "gentlemen's clubs" provide a wide range of sexual entertainment, from women dancing on stage in bikinis or wearing pasties, to fully nude performances with bodily contact between patrons and dancers, i.e., "lap dances." Similar performances are also provided by performers in "lingerie modeling" or massage salons. These are stand-alone businesses that typically do not serve alcohol, but do feature nude or semi-nude performances in a less public setting.

Empirical tests of the relationship of nude or semi-nude live entertainment on crime in the community have yielded mixed effects. Unpublished reports by municipalities across the county have claimed to find empirical evidence of adverse secondary effects in the form of greater crime in the areas surrounding adult nude and semi-nude entertainment businesses. These studies, relied on by other communities throughout the country, do not adhere to professional standards of scientific inquiry and nearly all fail to meet the basic assumptions necessary to calculate an error rate--a test of the reliability of findings in science. Those studies that are scientifically credible demonstrate either no negative secondary effects or a reversal of the presumed negative effect (Paul, Linz and Shafer, 2001).

Additional empirical studies have yielded results that contradict the claims of municipalities. The only published, peer reviewed study of secondary effects (Linz, Land, Williams, Paul and Ezell, 2004) examined the presence of adult dance clubs featuring topless dancing and possible negative secondary effects in the form of increased crime in Charlotte, North Carolina. They found no more crime incidents in areas surrounding the clubs than in matched control areas that do not contain such an adult business. Indeed, the analyses implied the opposite, namely, that the nearby areas surrounding the adult business sites have smaller numbers of reported crime incidents than do corresponding areas surrounding the control sites studied. Unpublished studies of secondary effects have also yielded no evidence of adverse secondary effects (see for example: Paul and Linz, 2002).

One other published study, not specifically addressed to the adverse secondary effects of adult businesses, but potentially relevant reports similar findings. Ford and Beveridge (2004) used survey data from over forty-two thousand respondents to estimate the levels of visible drug sales in 1,166 census tracts. Various demographic variables and measures of the presence of various types of businesses, both "desirable" and "undesirable," were then used in an attempt to account for variation in levels of drug sales. The only type of business that offered sexual entertainment included in their analysis was "massage parlors/escort services." They found that the presence of massage parlors/escort services was not related to levels of drug sales. They concluded that visible drug sales were generally unrelated to the presence of "undesirable" businesses, such as massage parlors/escort services, liquor stores and pawnshops, but were related to the relative absence of more "desirable" businesses, such as movie theaters, supermarkets, and clothing stores. They also found that visible drug sales tended to be significantly higher in census tracts with high numbers of fast food restaurants.

The present study extends the prior research in several ways. First, this study includes a test of the association of both nude and semi-clothed sex-related entertainment and rape rates as well as other crime events. Previous studies by Linz et al have included only topless or pasties and g-string dancer entertainment facilities. Other researchers such as Ford and Beveridge (2004) limited their research to the presence of massage parlors/escort services. Second, this study investigates several theoretical explanations that may account for either increases or decreases in crime in geographical areas containing adult entertainment venues. Third, the present study is an attempt to provide an empirical test of the claims made about secondary effects and nude and semi nude entertainment on a statewide rather than a more localized basis by investigating the claim that crime in the state of Florida, especially rape and sexual assault is associated with the presence of adult businesses that feature nude and seminude performances. Such statewide analyses are critical in order to inform law and policy makers attempting to formulate statewide legislation to regulate, for example, alcohol service at partially clothed or nude entertainment facilities. The regulation of alcohol serving establishments is often a statewide rather than

localized matter. The legality of statewide regulation of alcohol serving that feature adult entertainment is the subject of recent federal court decisions (see: J.L. Spoons, Inc., et al., v. Kenneth Morckel, et al. 314 F Supp. 2nd 746, ND Ohio, April 1, 2004).

Theoretical Mechanisms

Social learning theory. Implicit in the search for an association between pornography and live sex entertainment and sexual assault is the idea that exposure to erotic performances, sexual messages and other materials either create a desire to engage in sexual activity including forced sex and molestation, or these performances attract individuals who are already predisposed to such antisocial activities. This approach is a variant of the notions put forth by social psychologist Albert Bandura and his original formulations of "social learning theory." Social learning theory emphasizes the effect that vicarious experiences (observation) of actors (models) on the behavior of observers. (See example experiment by Bandura, Ross, and Ross; 1961; also see Bandura, 1973; Mischel & Shoda, 1995; and Seto et al, 2001.)

Very briefly, observing models can have several effects on observers: New responses can be learned or acquired by observing the model. A response that otherwise may be made is changed or inhibited when the observer sees a model being punished. Already learned responses may be disinhibited due to a reduction in fear by observing a model's behavior go unpunished. Or a model may elicit from an observer a response that has already been learned. Observing several models performing and then adapting a combination of characteristics or styles may lead to the creation of completely new behaviors.

A social learning approach is often implicitly embraced by local municipalities and articulated in testimony by citizens who appear before legislators considering zoning regulation of adult businesses. The citizens are concerned that customers of adult businesses will either learn new sexually deviant behaviors, become disinhibited and engage in antisocial behaviors that they would not have save for exposure to sexual performances or are concerned about adult businesses facilitating antisocial behavior

by serving as a magnet for those willing to engage in antisocial activities in their community. The anecdotal testimony of a citizen in New Albany, Indiana serves as an example of the reliance of many municipalities on a social learning justification for restriction of adult businesses. One citizen addresses the city council, which was considering a ban on adult bookstores, with the following plea:

> "I urge you, I beseech you, to vote for the delay to this establishment and any other type of business in this field from our community. I urge you to develop policies that for the good of our children will prevent this type of business from opening in New Albany. And I ask you to research the occurrences of -- like things as incest, rape, molestation and abductions and the effect of easy availability of this type material on the behavior of pedophiles who often are known to frequent these businesses (pg.13 lines 5-15).

Social learning theory would point to sex crimes as an especially likely form of adverse secondary effect and the theory would predict that these crimes would be likely to increase in vicinities that included adult erotic performances. The theory would tend to deemphasize other criminal activity such as theft or robbery or even nonsexual violent crimes against persons as modeling may not extend very far beyond the specific sex related messages.

Routine activities theory. A more general crime theory, routine activities theory suggests that the causes of crime may be independent of many of social learning and cultural contexts that are often stressed by other approaches. Cohen and Felson (1979) hypothesized crime clustering as a result of routine activities including the convergence in both space and time of motivated offenders, suitable targets, and the absence of capable guardians against a violation. Criminal activities often cluster in places under certain conditions, and these high-crime areas are referred to as "crime hot spots" (Shermen, 1995).

Places that have been identified in the academic literature as attracting or generating crime include liquor stores and taverns (Roncek and Bell, 1981; Roncek and Maier, 1991), public housing (Roncek et al., 1981), high schools (Roncek and Faggiani, 1985), and certain types of commercial

businesses (Walsh, 1986). Other studies on crime and space have identified "crime hot spots" or "clusters of criminal activities" that include nightlife areas, restaurants, convenience store areas and isolated club or tavern establishments (Sherman et al, 1989; Sherman, 1995; Block and Block, 1995). Sherman et al. (1989) found that crime hot spots (with just 3% of the total places) accounted for more than 50% of the total calls for assistance made to the police in a one-year period in Minneapolis, Minnesota, showing a high degree of crime clustering. He further showed that five of the top ten "hot spots" for per capita crime were alcohol-serving establishments.

High concentration of inner-city males and alcohol consumption may create a place-specific critical mass resulting in violence (Crutchfield, 1989). Norstrom (1998) using time series data spanning over 38 years found that the assault rate is significantly related to consumption of beer and spirits in bars and restaurants, while the homicide rate is linked to spirit(s) consumption in private contexts. Some studies report a strong association between heavy drinking and sexual assault among college-age men and women (Miller and Marshall, 1987; Koss and Dinero, 1988; Nicholson, 1998). In another attempt to identify drinking as a risk factor for robbery, Leppa (1974) noted that people who have been drinking offer attractive targets for robbery because they are often unable to protect themselves or their judgment is impaired.

Adult businesses such as nude and semi-nude entertainment facilities have not been identified as crime hotspots by those researchers most often employing a routine activities approach. Instead, this theoretical approach and the past empirical research employing it would suggest that alcohol serving establishments, hotels and restaurants associated with nightlife activities would most likely be crime hotspots.

McCleary (2004) offers a variation on routine activities theory that applies to adult entertainment establishments. He hypothesizes that sexually oriented businesses, including nude and seminude live entertainment businesses pose high crime risks. McCleary contends that sexually oriented businesses constitute crime "hotspots" both because of the quantity and quality of people drawn to the "hotspot."

In terms of quantity, McCleary maintains that standard business practices designed to attract customers (sales, advertising, "giveaways," etc.) aggravate the crime risk by making the location more attractive to predatory criminals. In terms of quality, McCleary asserts that sexually oriented business patrons travel to distant locations (presumably far from their own neighborhoods); use aliases; pay in cash; and when victimized, tend not to complain to or seek assistance from the police. According to McCleary the steps that sex business patrons take to maintain their anonymity make them attractive targets for predatory criminals. This theory would predict higher rates of all forms of crime in geographical areas with concentrations of adult cabarets.

Social disorganization theory. Sociologists have enumerated several variables indicative of social disorganization that are useful in predicting the risk of crime. These include measures of racial composition (number of African Americans and racial heterogeneity), family structure (as measured by number of single-parent households), economic composition (as measured by family income), and the presence of motivated offenders including males between the ages of 18 and 25 (Miethe & McDowall 1993). These social disorganization variables have been examined on the basis of the assumption that a local area's population age structure (especially the presence of young adults) and its race/ethnic composition can affect both the size of the pool of motivated crime offenders and the presence of suitable targets for predatory crimes (Miethe & Meier 1994). Similarly, the socioeconomic status of individuals in a local area can affect both the prevalence of motivated offenders and crime targets. For example, Cohen, Gorr, and Olligschlaeger (1993) found that crime hot spots tended to be in areas with higher levels of poverty or low income, and were likewise associated with low family cohesion, an indication of the prevalence of both motivated offenders and crime targets.

This approach, rather than specifically predicting effects for the presence of adult businesses, suggests that demographic variables and household composition variables shown in previous studies to be related to rates of crime and disorder such as total population of the counties, proportion of population between the ages of 15 and 24, the proportion of the population divorced, the proportion of

the population that is nonwhite, the proportion of female headed households, and an index of income inequality need to be considered as control variables.

Summary of Hypotheses

Social learning theory would predict that sex crimes would be most likely to increase in vicinities that included adult erotic performances. The theory would be neutral with regard to other criminal activity such as theft or robbery or even nonsexual violent crimes against persons. Second, the positive relationship between sex crimes and the presence of an adult businesses in a specified geographic area should remain statistically significant after the variance due to demographic and social disorganization variables is taken into account.

Routine activities theory would predict that the presence of liquor stores and taverns or other "crime hot spots" or "clusters of criminal activities" that include nightlife areas, restaurants, convenience store areas and isolated club or tavern establishments would be associated with criminal activities. High concentrations of inner-city males and alcohol consumption may create a place-specific critical mass resulting in violence. Some studies report a strong association between heavy drinking and sexual assault among college-age men and women. People who have been drinking offer attractive targets for robbery because they are often unable to protect themselves or their judgment is impaired.

McCleary's (2004) variation on routine activities theory applied to nude and seminude live entertainment, which states that these businesses constitute crime "hotspots" both because of the quantity and quality of people drawn to the "hotspot" predicts several outcomes. If McCleary's (2004) view is correct, several results should be obtained in our analyses. First, the results should reveal significant, positive correlations between the number of nude or semi-nude businesses and all forms of crime. Second, these positive relationships should remain statistically significant after the variance due to demographic and social disorganization variables and numbers of nonsexual, adult businesses are taken into account. Finally, the proportion of unique variance accounted for in the prediction of crime

rates should be greater for the numbers of nude and semi-nude businesses than for the numbers of nonsexual adult businesses.

Method

Numbers of Nude and Semi-nude Businesses Per County

We attempted to create the most comprehensive and accurate listing possible of adult businesses that feature nude or semi-nude entertainment by female performers. We consulted a total of 16 sources and then cross-referenced the listings they provided. We began our listing with all of the adult cabarets listed in Exotic Dancer's Guide to Adult Nightclubs 2003-2004 for the state of Florida. This industry publication claims to list over 2300 "gentlemen's clubs" in the U. S. We also consulted nine websites that advertise adult businesses, some with listings just for adult businesses in Florida, and others, such as Naughtynightlife.com and Exoticnites.com with listings for the entire U. S. In addition, we consulted several print publications, both mainstream (weekly papers) and those serving the adult industry. The name of each business identified in any of these sources was entered into a data-file that also included the type of business (nude dance club, swing club, lingerie modeling salon etc.), whether it offered nude or semi-nude live performances, and the county, city and MSA of its address. We also included street addresses and telephone numbers to check for duplication.

We focused on those businesses that provide live performances by nude or partially clothed women. We restricted our listing to those businesses that have a fixed location. This is a somewhat arbitrary distinction, and it eliminates some businesses that offer nude entertainment, such as escorts and some "out-call" erotic models, from consideration. Three arguments can be made in favor of this restriction. First, the impact of businesses such as escorts is probably much less than an adult cabaret that has many dancers and many patrons in a given evening. A single escort will presumably have only one or at least only a few patrons in a given evening. Second, escorts or other "outcall" businesses that lack a business address may advertise in several areas of the state. It is difficult or arbitrary deciding which county this "business" is located in. Finally, if an adult business has no address, then it has no

"surrounding community" in which its effects can be felt. Thus the legal arguments for restricting such a business must be based on other considerations.

Our analyses focus only on comparisons between counties. There are several reasons for this selection. First, there are only 20 MSAs in Florida, and a statistical analysis based on so small a sample would lack the statistical power necessary to adequately test for the hypothesized relationships. Cities on the other hand are numerous, but their populations are often so small that their crime rates can fluctuate dramatically from one year to the next. County crime rates tend to be much more stable. Second, counties are more socially and demographically meaningful geographical areas than either MSAs or cities. Divisions between cities can often create a contrast between two contiguous areas that are identical in virtually all ways, save for their arbitrary boundaries. Cities can also be so small that the characteristics of one city can have a powerful effect on adjoining, or even nearby cities. On the other hand, MSAs can be so large that they arbitrarily combine counties that are quite different from each other. Finally, if there is any validity to the concept of "adverse secondary effects," such effects would seem to emanate at least moderate distances from adult businesses. These effects could extend beyond the boundaries of a small city, or even a large one if the business is near its border. On the other hand, they would be unlikely to extend across the counties of a large, multi-county MSA.

Crime Rates

The focus of this analysis is on rates of crime in the 67 counties of Florida. All of these data were downloaded from the Florida Department of Law Enforcement (FDLE) website (*www.fdle.state.fl.fsac*) for the period from 1998 to 2002. Our analysis focuses on three types of crimes: UCR property crimes (burglary, theft, auto theft and arson), UCR violent crimes (murder, assault, and robbery), and forcible rape. Rape is typically included as one of the UCR violent crimes. However, rates of rape were of interest by themselves, so they were analyzed as a separate category. All crime rates were computed as annual rates per 100K people in the population. Examination of these rates reveals that they are quite consistent from one year to the next. Consequently the average rate for each

county for the period 1998-2002 was computed for use in subsequent analyses. This time span was used because it centered on the year 2000 for which U. S. Census data is readily available.

Control Variables

A considerable amount of previous research has established that several characteristics of geographical areas, such as states, MSAs, and counties are associated with their rates of crime. These can be seen as falling into one of three theoretical domains.

"Urbanness." The first theoretical domain contains measures of the degree of urbanness or population density of the area. It is obvious that areas with more persons will have higher absolute numbers of crimes. But, it is also true that the rate of crime is typically higher in areas that have higher populations. For example, Baron and Straus (1989) found that rates of rape were higher in states where a higher percentage of the population resided in MSAs. Kposawa, Breault, and Harrison (1995) found that "urbanness" and population density were related to rates of both property crimes and violent crimes. We computed population densities (persons per square mile) from Census Bureau data.

Demographic characteristics of population. A second set of variables related to crime are those that describe demographic characteristics of the population. These include the relative youthfulness of the population, its ethnic composition, and the income distribution. The highest rate of rape perpetration is found among males aged 15-24, and the highest rate of rape victimization is found among females aged 15-24. Consequently, the higher the percentage of persons in the population of an area who are in this age range, the greater the rate of rape is likely to be (Baron and Strauss, 1987 & 1989; Gentry, 1991). Young persons are also more likely to commit other forms of violent crime and property crimes (Cohen and Land, 1987, Cohen, Felson and Land, 1980). To assess the youthfulness of county populations, we computed the percentage of persons between the age of 15 and 24 for each county from data from the 2000 Census.

In absolute numbers, most crimes are committed by people of European origin. Still, African-Americans commit a higher number of rapes and other violent crimes than would be expected based on

their proportion of the population (Amir, 1971; Katz and Mazur, 1979). Other researchers found the percentage of the population that is African-American to be associated with rates of both violent crimes and property crimes (Kposawa, Breault, and Harrison, 1995; Patterson, 1991). Kposawa, Breault, and Harrison (1995) also found that the percentage of persons identifying themselves as Hispanic was related to rates of property crime. To capture the level of ethnic diversity of counties, we used Census data to compute the percentage of the total population who were non-white (either African-American or Hispanic).

Many researchers have noted a link between poverty and crime (Allen, 1996; Blau and Golden, 1986). Some researchers have found that communities with high proportions of both poor and affluent citizens are especially likely to have high rates of property crimes (Kposawa, Breault, and Harrison, 1995) and rape (Baron and Straus, 1989). Thus, any attempt to explain variations in levels of crime rates across geographical areas should take into account some measure of income variance. We constructed an index of income inequality from Census data giving percentages of the population over the age of 15 who fell above or below the poverty line. Specifically, we computed the product of the percentage of these persons who whose annual incomes were .74 or below the poverty line and those whose incomes were 2.0 the poverty line or above. Thus our measure of income inequality reflects the variability in incomes, with counties that have the highest proportions of both poor and affluent persons scoring highest.

Social disorganization variables. A third set of variables that is related to crime are those that describe the degree of social disorganization of the area. A higher proportion of separated or divorced persons indicates a greater degree of social disorganization, and this is typically associated with a breakdown in conformity to social norms, including the tendency to abide by law. Further, separated and divorced women may be especially vulnerable to sexual assault and other crimes against persons. Separated and divorced men may also be more likely to be perpetrators of crimes, including rape. Finally, the adolescent offspring living in single parent (female headed) households may be less closely

supervised. This variable has been found to be associated will both violent and property crimes by Kposawa, Breault, and Harrison (1995) at the county level. Rice and Smith (2002) also found that single parent households were related to auto thefts at the "face block" level, especially when a hotel or motel was near. Thus, a thorough attempt to account for variations in crime rates should also take measures of social disorganization into account. To partially assess levels of social disorganization we computed two variables from Census data. The first was simply the percentage of persons over the age of 15 who were separated or divorced. The second was the percentage of households headed by females.

Numbers of nonsexual adult businesses. We included in our analyses measures of several types of businesses that cater mostly or exclusively to adults, but do not provide any form of sexual entertainment. On the one hand, these measures are included to serve simply as control variables. As with the social disorganization and demographic variables, they may account for much of the variance in crime rates. In addition, these businesses are similar in nature to the many of nude or semi-nude businesses, and provide useful comparisons to these businesses. If it is true, as the doctrine of adverse secondary effects holds, that businesses that offer sexual entertainment have adverse effects over and above those associated with any large and successful business, then we should observe stronger associations between measures of sexually oriented businesses and crime rates than we observe between measures of nonsexual adult businesses and crime rates.

Bars and taverns are especially appropriate controls for many nude businesses. In some cases the sole difference between an alcohol only bar and a "topless" bar, or nude cabaret that offers alcohol for consumption on the premises, is the presence of sexual entertainment in one but not the other. Several studies have found that bars and taverns tend to be associated with elevated rates of crimes. For example, Sherman, Gartin and Buerger (1989) found that both bars and convenience stores were disproportionately likely to be locations from which calls for police service were made. Roncek and Maier (1991) also reported that crime rates were higher on blocks that contained bars or taverns. We attempted to apply this logic at the level of counties. We obtained the numbers of drinking

establishments for Florida counties from the survey of County Business Patterns performed each year by the Census Bureau for inclusion in the analysis.

Nicholls (1976) argues that tourists are more likely to commit crimes because they have less investment in the community and/or view themselves as on a "vacation" from norms that usually govern their behavior. In addition, tourists may be more vulnerable for a variety of reasons. Visitors may be unaware of dangerous areas or practices that locals routinely avoid. Hotel or motel rooms may be less secure than the homes that visitors left behind. If the tourists drove their vehicles, the vehicles are likely to be more vulnerable to auto thefts or burglaries than they would have been in the visitor's garages at home as shown by Rice and Smith (2002). They examined the likelihood of auto thefts in nearly eight thousand "face blocks" in a medium sized southeastern city, and found that the presence of hotels and motels was by far the best predictor of the number of auto thefts. The second best predictor of auto thefts in their study was the combination of the presence of a hotel or motel and a high number of single parent households.

A large number of non-residents visiting a community may contribute to heightened crime rates in a more basic way. The FBI calculates crime rates per 100K population by dividing the number of known crimes by the stable population of the community, as indicated by Census Bureau. If a sizable number of persons, whether tourists or business travelers, are found in a geographical area on a given day, these persons may contribute to the number of crimes in the area either as victims or perpetrators. However, their numbers are not included in the population used to compute crime rates. Thus, even if these non-residents are no more likely than permanent residents to be either victims or perpetrators, they can increase the reported "crime rate." Finally, if tourists are more likely to be victims or perpetrators, then their impact on the crime rate is even greater.

There is no readily available indicator of this level of increase in the aggregate number of persons in a community on an average day. One indirect measure of this impact is the number of businesses that provide accommodations for these visitors, such as hotels and motels. It may be

reasonable to assume that those communities that have higher numbers of hotels and motels are those that have higher numbers of visitors, and that the number of visitors these communities have is roughly proportional to the number of hotels and motels. We obtained the numbers of hotels and motels for Florida counties from the survey of County Business Patterns performed each year by the Census Bureau.

Several researchers (Beale & Goldman, 1975; Fujii & Mak, 1980; Miller & Schwartz, 1998, Ochrym, 1990; and Wilson, 2001) have examined the impact of gambling establishments, both traditional casinos and riverboat gambling establishments, on crime. While the results of their studies are somewhat inconsistent, almost all have detected evidence that the presence of gambling establishments increases one or more types of crime. Thus, it is reasonable to anticipate that the number of gambling establishments in each county is likely to be related to rates of crimes in that county. The numbers of gambling establishments for each county were also derived from the survey of County Business Patterns performed annually by the Census Bureau.

Results

Numbers of adult businesses per county

Table 1 displays the counts of nude and semi-nude businesses of various types by county. Table 1 shows only those counties that have at least one adult business; counties not found in the table had no adult businesses with physical locations listed in any of our sources. While we are aware of at least some adult businesses that have physical locations that are not listed here, it is reasonable to believe that Table 1 captures the vast majority of such businesses found in the state of Florida. Certainly the relative differences between counties in number and type of adult businesses are reflected accurately in the table.

Examination of Table 1 reveals that 401 adult businesses were listed by at least one of the various sources consulted. Nude dance clubs (33.7% of the total) are the most common form, followed by topless dance clubs (26.2%), and lingerie modeling salons (20.7%). It is also clear that nude and semi-nude businesses are not randomly distributed across counties. Rather, the highest numbers are

clearly found in the more populous counties. For example, of all such businesses, 90 (22.4%) are in Hillsborough County, 54 (13.5%) are in Dade County, 40 (10.0%) are in Pinellas County, and 36 (9.0%) are in Broward County. Thus these four counties contain over half of these businesses, while the 42 counties not listed in Table 1 have no such businesses. Clearly, Florida counties vary considerably in the number of nude and semi-nude businesses they contain. The total number of nude and semi-nude businesses in each county was selected as the clearest indicator of these businesses. This measure was converted to a rate similar to the UCR crime rates by dividing the number of nude and semi-nude businesses by the population of the county and multiplying by 100,000. This variable was used in all subsequent analyses. Rates of nonsexual adult businesses, such as drinking establishments, were also computed in the same way.

Rates of property crime 1998-2002. Rates of property crimes per 100K people in the population averaged across this five-year period show considerable variability, ranging from a low of 119.17 to a high of 7198.87. The mean for this distribution is 3574.78, with a standard deviation of 1505.50. Rates of property crime showed great stability across the five years, □ = .977.

Rates of violent crime(other than rape) 1998-2002. Rates of violent crimes per 100K population averaged across this five year period also show considerable variability across counties, ranging from a low of 106.94 to a high of 1265.18. The mean for this distribution is 627.94, with a standard deviation of 251.30. Rates of violent crime also showed great stability, □ = .954

Rates of rape 1998-2002. Rates of rape per 100K population averaged across this five year period ranged from a low of 9.30 to a high of 135.35. The mean for this distribution is 73.94, with a standard deviation of 26.57. Rates of rape also showed considerable stability, □ = .847.

Data cleaning

Prior to any statistical analysis, descriptive statistics for all predictor variables were examined to determine whether these variables met the assumptions underlying multiple regression analysis. These descriptive statistics are shown in Table 2. Many of the variables showed high levels of skew, kurtosis,

or both. Following the advice of Tabachnick and Fidell (2000), variables with that strongly deviated from normality were subjected to log (10) transformations, while variables with less severe deviations were transformed by computing the square root of the raw scores. These transformed scores were then used in all subsequent analyses.

Zero order correlations among the predictor variables

Table 3 shows the zero order correlations between the predictor variables used in the initial regression analyses. Quite notable are the very high, positive correlations between the three variables that assess types of nonsexual, adult businesses and between these variables and population. Clearly, more populous counties are those that also have more hotels and motels, drinking establishments, gambling establishments and businesses offering nude and semi-nude entertainment. The high correlations raised the likelihood that the results of the planned regression analyses could be affected by multicollinearity. Given the very high correlations between the three measures of nonsexual businesses (hotels and motels, drinking establishments, and gambling establishments), it was reasoned that it would be impossible to distinguish between these variables in a multivariate analysis in which more than one of them was included, so the decision was made to perform the initial analyses using only one of these variables (drinking establishments per 100K population). Secondary analyses were planned in which this variable would be deleted and one of the other two measures of rate of nonsexual adult businesses used in its place. In other words, 3 regression analyses would be performed and only one measure of nonsexual adult businesses would be entered into each equation.

Zero order correlations between the predictor variables and crime rates

Table 4 shows the zero order correlations between the crime outcome variables and the predictor variables. The rates of nonsexual adult businesses per 100K population are significantly correlated with both rates of violent and property crimes but not with rates of rape. Rates of nude and semi-nude businesses per 100K are not significantly related to rates of any type of crime.

The purpose of the regression analyses that follow was two fold. The first purpose was to determine whether numbers of nude and semi-nude businesses per 100K contributed to the prediction of rates of crime after variance accounted for by the remaining variables was taken into account. The second was to compare the amounts of unique variance accounted for in prediction of crime by numbers of nude and seminude businesses per 100K and with that accounted for by numbers of nonsexual adult businesses per 100K.

Regression analyses with UCR property crime rates as the dependent variable

Rates of property crimes were used as the outcome variable in a standard regression analysis with the following variables entered in a single step: county population density, the % of the population nonWhite, the % of the population between the ages of 15 and 24, the % or the population separated or divorced, the % of households headed by females, income inequality, the number of drinking establishments per 100K population, and the number of nude and semi-nude businesses per 100K population. The results of this analysis are shown in Table 5. The model including these eight predictor variables is clearly significant, R =.756, F (8, 58) = 20.606, p<.001, and accounts for 64.3% of the variance in UCR property crime rates. Three variables make a unique, significant contribution to prediction of rates of property crimes: population density (*sr* = .214), income inequality (*sr* = .214), number of drinking establishments per 100K (*sr* = .194). The number of nude and semi-nude businesses per 100K does not make a significant contribution to prediction of UCR property crimes when the other variables are taken into account, (*sr* = -.095).

Two similar analyses were performed. In the first, number of hotels and motels per 100K was substituted for number of drinking establishments per 100K, and in the second number of gambling establishments per 100K was used as the variable representing nonsexual adult businesses. As expected, given the high correlations between the three measures of nonsexual adult businesses, both analyses yielded quite similar results. The unique contributions of hotels and motels per 100K (*sr* = .331), and gambling establishments per 100K (*sr* = .331), were significant, while the contributions of the remaining

variables were similar to the initial analysis. All three measures of nonsexual adult businesses thus have a similar ability to account for rates of property crime.

Regression Analyses With UCR Violent Crimes as Dependent Variable

Rates of UCR violent crimes were also used as the outcome variable in a standard regression analysis similar to that described above. The same eight predictor variables were entered in a single step. The results of this analysis are shown in Table 6. The model including these variables is significant, $R = .713$, $F(8, 58) = 7.500$, $p < .001$, and accounts for 50.8% of the variance in UCR violent crime rates. Only population density ($sr = .212$), % of female headed households ($sr = .192$), and income inequality make significant, unique contributions to prediction of rates of violent crimes. Neither the number of drinking establishments per 100K ($sr = .082$), nor the number of nude and semi-nude businesses per 100K ($sr = -.014$) makes a significant contribution to prediction of UCR violent crimes when the other variables are taken into account.

Once again, two similar analyses were performed. In the first, number of hotels and motels per 100K was substituted for number of drinking establishments per 100K, and in the second number of gambling establishments per 100K was used as was the variable representing nonsexual adult businesses. The unique contributions of hotels and motels per 100K ($sr = .135$) and gambling establishments per 100K ($sr = .125$) were both non-significant. The contributions of the remaining variables were similar to the initial analysis.

Regression Analyses With UCR Rape Rates as Dependent Variable

UCR rates of rape also were submitted to a regression analysis identical to those described above. Table 7 shows that the model predicted 34.3% of the variance in rates of rape, $F(8, 58) = 3.780$, $p < .001$. Three variables make unique, significant contributions to prediction of rates of rape: % of the population nonWhite ($sr = -.223$), number of drinking establishments per 100K ($sr = .216$), and the number of nude and semi-nude businesses per 100K ($sr = -.260$).

Once again, secondary analyses substituting number of hotels and motels per 100K or number of gambling establishments per 100K for number of drinking establishments per 100K were performed. In the first analysis, neither the contribution of hotels and motels per 100K (*sr* = .145) nor that of numbers of nude and semi-nude businesses per 100K (*sr* = -.212) reached the conventional level of statistical significance ($p<.05$), though their magnitudes were similar to those of the initial analysis. In the second, both gambling establishments per 100K (*sr* = .229) and numbers of nude and semi-nude businesses per 100K (*sr* = -.250) made significant, unique contributions to prediction of rates of rape. Percentage of the population that is nonwhite made a significant, unique contribution in both analyses.

Discussion

The Supreme Court of the United States has considered the constitutionality of anti-nudity legislation passed by municipalities or states that have relied on the negative secondary effects doctrine as justification. One negative secondary effect often cited is an increase in crime. The present study examined the empirical support for this assumption at the level of counties in the state of Florida. We examined the relationship between crime rates and the prevalence of nude or semi-nude businesses with other variables known to be related to crime controlled. Three kinds of crime were examined: UCR property crimes, UCR violent crimes, and rape. A single measure of the rate of nude and semi-nude businesses per 100K ppeople in the population was computed. Four demographic variables (population density, percentage of the population non-white, percentage 15-24, and income inequality) previously shown to be related to crime were used as control variables. Similarly, two social disorganization variables (percentage of female headed households and percentage of the population separated or divorced) were also entered as control variable. Measures of the numbers of nonsexual adult businesses (hotels and motels, drinking establishments, and gambling establishments) were also computed as rates per 100K population. Due to their high correlations with each other, these variables were entered in separate regression equations. These variables were entered into a series of regression analyses to

determine whether the measure of nude or semi-nude businesses showed significant relationships with rates of crime after the other variables were controlled.

These results provide no support for the prediction from social learning theory that rates of rape would be positively associated with the prevalence of businesses offering nude or semi-nude entertainment. On the contrary, when all variables were entered in the equation, the relationships between nude and semi-nude businesses and rates of all three crimes were negative. *In the case of rape, this negative relationship was statistically significant when rates of drinking establishments and gambling establishments were entered,* and approached significance when rates of hotels and motels were entered. On the other hand, rates of drinking establishments and gambling establishments both showed significant relationships with rates of rape when other variables were taken into account.

Predictions derived from McCleary's (2004) version of routine activities theory applied to erotic businesses did not fare well either. The relationships between rates of nude and semi-nude businesses were negative and non-significant when other predictor variables were taken into account. Further, rates of nonsexual adult businesses showed substantial positive associations with rates of both property crimes and rape when other variables were taken into account. McCleary's (2004) speculations about the quality and quantity of the patron's of adult businesses making them especially likely to be targets of predatory criminals are not supported by these data.

Predictions derived from work within the mainstream of routine activities theory was reasonably well supported. As predicted by this view, rates of both violent crime and rape were positively associated with the prevalence of nonsexual adult businesses, such as drinking establishments, hotels and motels, and gambling establishments. Our results also revealed negative associations between crime rates and the prevalence of nude and semi-nude businesses when other variables were controlled. A similar pattern of results was obtained for violent crimes other than rape, but the semi-partial correlations for these variables did not reach conventional significance.

Better management of potential crime hotspots

Cohen and Felson (1979) hypothesized crime clustering required motivated offenders, suitable targets, and the *absence of capable guardians against a violation*. Emphasis on the capable guardians portion of routine activities theory suggests that adult cabarets may not be sites where motivated offenders prey on victims. Why do we not find empirical evidence of the social disorganization/crime opportunity spillover of these adult establishments? While many interpretations of the different patterns of associations with crime rates shown by nude and semi-nude clubs and nonsexual adult businesses are possible, we suggest that the role of capable guardians is likely to be important.

The adult nightclub business in the late-1990s in many respects may be quite unlike that of the 1960s and 1970s when these establishments were relatively new forums of entertainment in American society. Adult nightclubs have been subjected to over two decades of municipal zoning restrictions across the country, and they usually must comply with many other regulations as well. The establishments themselves have evolved more closely into legitimate businesses establishments with management attention to profitability and continuity of existence. To meet these objectives, it is essential that the management and/or owners of the clubs provide their customers with some assurance of safety. Accordingly, adult nightclubs, including those in Florida often appear to have better lighting in their parking lots and better security surveillance than is standard for non-nightclub business establishments. These may be factors producing fewer crime opportunities and lower numbers of reported crime incidents in the surrounding areas of the clubs.

Architectural features of businesses may also play a role. Carter, Carter, and Dannenburg (2003) advocate an approach they call Crime Prevention Through Environmental Design. This approach emphasizes changes in properties that make the activities of persons more visible from the street and reinforce distinctions between public and private places. Carter et al noted a decrease in prostitution following the institution of their program while crime in the remainder of Sarasota, Florida remained unchanged or increased.

Support for the secondary effects doctrine

Our results are not consistent with the doctrine of adverse secondary effects. The prevalence of nonsexual adult businesses is more powerfully associated with rates of crime than the prevalence of nude and semi-nude businesses. Empirical findings that fully support the secondary effects notion should have shown not only that businesses offering nude entertainment are associated with crime, but also that they are associated with levels of crime over and above those associated with nonsexual businesses. The results of the present study show the opposite pattern: the prevalence of nonsexual adult businesses is more powerfully associated with rates of crime than the prevalence of nude and semi-nude businesses.

However, some caveats should be made regarding these results as applied to the debate about the secondary effects of adult businesses. We were able to identify 401 adult businesses in the state of Florida. While this is substantial, it is clear that the actual number is even greater. We did not include in our listing businesses for which we could identify no physical location. This eliminates many out-call modeling and massage businesses. Indeed, we observed many massage businesses that advertise only a phone number, though their ads suggest they have a physical location, e.g., by listing a general area, such as "Disney vicinity." It is also undoubtedly the case that some businesses with actual physical locations were not found, because they advertise in ways not captured in our search. We also did not include adult bookstores, though some may feature live performances, at least occasionally. Certainly, there are many adult businesses in the state of Florida that provide nude or semi-nude female performers for (mostly) male patrons. Our listing of 401 should be considered the lower limit on their number.

An additional concern that one might have about this data set is that the number of counties examined limits the likelihood of detecting adverse effects because it places a limit on the degree of statistical power that can be obtained. Several analytic decisions were based on a concern with statistical power. This concern is why the number of predictor variables was limited and crime rates were observed over a five-year period. However, the pattern of these results argues against this criticism. We did find statistically significant associations between both property crime and rape and the prevalence of

nonsexual adult businesses. Thus our data apparently provide sufficient power to detect these robust associations. Further, these data have sufficient statistical power to reveal that relationships between crime rates and rates of nonsexual adult businesses are significantly more positive than the relationships between crime rates and rates of nude or semi-nude businesses.

A related concern is the possibility that adverse effects such as crime emanate only a short distance from nude businesses, and that they are thus not detectable when a much larger unit of analysis, such as whole counties, is examined. This view suggests that these adverse effects can be detected only with designs that examine crime activity within a small radius, such as 1,000 feet, from the business. Such a position might have some merit, but it assumes that any adverse effects such businesses have on crime are weak and local. Still, one might argue that even weak and local effects, if accumulated over 90 or so businesses, such as in Hillsborough County, ought to have a detectable effect at the county level. If these effects cannot be detected at the level of analysis at which policy decisions are being made, that is, cities or counties, then it is difficult in our view to argue that the possibility of such effects should affect policy decisions made at that level. This is especially true when powerful "effects" of nonsexual businesses on crime are suggested by the robust associations between their prevalence and crime rates.

One final concern can be raised about the generalizability of these results. We found no evidence of a positive association between rates of crime and the prevalence of nude and semi-nude businesses. However, one can express some doubt about whether the patterns observed here will be found in other regions of the country. Tourism is a very important part of the Florida economy, and Florida arguably has a greater population of tourists as well as higher densities of hotels and motels than most other states. It is possible that the associations observed here are affected in part by the relatively high numbers of nonsexual adult businesses in Florida as compared to other states.

A comprehensive examination of the validity of the concept of adverse secondary effects on crime rates should employ a variety of methods. Different measures of crime (calls for service and UCR rates), analytic strategies (multivariate and quasi-experimental), and units of analysis (from counties to

census tracts and "face blocks") should be used. However, until studies using valid sources of data and appropriate methods provide credible evidence that businesses offering sexual entertainment contribute to increased crime in the areas that surround them, the doctrine of adverse secondary effects must be regarded as unsupported in the published scientific literature.

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Table 1.

Types of businesses featuring nude or semi-nude live performances by female performers by county.

	Type							
County	Bikini	Lingerie	Massage	Nude	Pasties	Swing	Topless	Total
Alachua	0	0	0	2	0	0	0	2
Bay	0	0	0	0	1	0	6	7
Bradenton	0	1	0	0	0	0	0	1
Brevard	0	0	0	1	0	0	8	9
Broward	0	3	0	16	1	6	10	36
Charlotte	1	0	0	1	0	0	0	2
Collier	0	0	0	0	0	1	0	1
Dade	0	2	1	43	0	2	6	54
Duval	21	0	0	3	0	0	3	27
Escambia	0	0	0	1	0	0	8	9
Hillsborough	3	43	8	24	0	2	10	90
Lee	1	0	0	0	0	1	5	7
Manatee	0	11	0	0	0	0	2	13
Marion	0	0	0	0	1	1	0	2
Monroe	0	0	0	5	0	1	2	8
Okaloosa	0	0	0	1	0	0	4	5
Orange	4	0	3	5	2	0	10	24
Palm Beach	0	1	2	15	0	0	4	22
Pasco	1	2	0	2	0	0	5	10
Pinellas	5	13	0	10	1	0	11	40
Sarasota	0	7	0	1	0	0	2	10
Seminole	0	0	1	1	1	0	4	7
St. Johns	1	0	0	0	0	0	0	1
St. Lucie	1	0	0	2	0	0	1	4
Volusia	1	0	0	2	2	1	4	10
Total	39	83	15	135	9	15	105	401

Legend: Bikini=dance club with women in bikinis, Lingerie=lingerie modeling salon, Massage=massage salon, Nude=dance club with nude dancers, Pasties=dance club with dancers wearing pasties, Swing=swingers club, Topless=dance club with topless dancers

Note: Forty–two counties not shown above had no nude or semi-nude businesses listed in any of our sources.

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Table 2.

Descriptive statistics for predictor variables.

Predictor variables	Mean	Std. Deviation	Skewness	Kurtosis	transformation
County population density	288.73	491.23	4.036	21.142	logarithm
% Non-white	.198	.102	1.410	3.173	square root
% aged 15-24	6.27	1.70	1.741	5.698	logarithm
% Separated or divorced	9.45	1.746	2.595	11.492	logarithm
% households headed by females	11.41	2.855	1.086	2.318	square root
Income inequality	.062	.015	.736	.255	--
Nude or Semi-Nude businesses per 100K	1.051	2.007	2.695	8.443	logarithm
Drinking establishments per 100K	29.993	41.397	2.682	7.688	logarithm
Hotels and motels per 100K	49.291	75.479	2.632	7.215	logarithm
Gambling establishments Per 100K	58.067	85.661	2.665	7.369	logarithm

Table 3.

Zero order correlations between predictor variables.

Variables	Var.1	Var.2	Var.3	Var. 4	Var. 5	Var. 6	Var. 7	Var. 8	Var. 9	Var. 10
1. Population density (log10)	--	-.130	.203	-.070	-.115	-.400*	.152	.788*	.748*	.843*
2. % nonwhite (square root)		--	.571*	-.083	.807*	.717*	.218	-.091	-.061	-.166
3. % aged 15-24 (log10)			--	-.117	.621*	.654*	.067	-.130	-.091	-.233
4. % Separated or Divorced (log10)				--	.131	-.121	.370*	.182	.168	.065
5. % households headed by females (square root)					--	.589	.251*	-.101	-.029	-.212
6. Income inequality						--	.117	-.270*	-.234	-.390*
7. Nude & semi-nude businesses per 100K (log10)							--	.412*	.473*	.334*
8. Number of drinking establishments per 100K (log10)								--	.889*	.929*
9. Number of hotels and motels per 100K (log10)									--	.915*
10. Number of gambling establishments per 100K (log10)										--

* $p < .05$

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Table 4.

Zero order correlations between predictor variables and crime rates.

	Type of crime rate[a]		
Predictor variables	UCR property	UCR violent	Rape
Population density	.607*	.413*	.162
% Nonwhite	.203	.426*	.101
% aged 15-24	.129	.272*	.337*
% separated or divorced	-.134	-.097	.129
% of households headed by females	.160	.437*	.256*
Income inequality	.128	.304*	.200
Number of nude or semi-nude businesses per 100K	.171	.218	-.108
Number of Drinking Establishments per 100K	.586**	.369*	.229
Number of Hotels and Motels per 100K	.669*	.417*	.218
Number of Gambling Establishments per 100K	.640*	.349*	.183

[a] All crime rates are expressed as numbers of crimes per 100K population.

* $p<.05$, two tailed.

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Table 5.

Hierarchical regression analysis with rate of property crimes 1998-2002 as the outcome variable

Predictor Variables	*B*	*SE B*	ß	*p*	*sr*
Population density	1135.07	455.71	.442	.016	.214
% Non-white	606.51	2489.50	.044	.808	.021
% population 15-24	-611.87	1796.23	-.044	.735	-.029
% separated or divorced	-2058.59	2343.66	-.096	.383	-.075
% of female headed households	958.85	2584.23	.066	.712	.032
Income inequality	37293.64	14973.30	.381	.016	.214
Nude or semi-nude Businesses per 100K	-356.16	331.66	-.129	.275	-.095
Drinking Estab.s per 100K	1381.38	611.44	.424	.028	.194

$R^2 = .643$, $F(8,58) = 13.079$, $p<.001$.

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Table 6.

Regression analysis with rate of violent crimes (other than rape) 1998-2002 as the outcome variable.

Predictor Variables	*B*	*SE B*	ß	*p*	*sr*
Population density	177.82	78.17	.438	.027	.212
% Non-white	-91.40	427.04	-.042	.831	-.020
% population 15-24	-208.72	308.12	-.094	.501	-.063
% separated or divorced	-383.70	402.02	-.113	.344	-.089
% of female headed households	911.98	442.98	.397	.044	.192
Income inequality	5778.75	2568.46	.373	.028	.210
Nude or semi-nude Businesses per 100K	-8.31	56.89	-.019	.884	-.014
Drinking Estab.s per 100K	91.98	104.89	.179	.384	.082

$R^2 = .506$, $F(8,58) = 7.419$, $p < .001$.

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Table 7.

Regression analysis with rate of rape 1998-2002 as the outcome variable.

Predictor Variables	*B*	*SE B*	ß	*p*	*sr*
Population density	1.041	9.962	.023	.917	.011
% Non-white	-113.96	54.42	-.468	.041	-.223
% population 15-24	59.35	39.27	.241	.136	.161
% separated or divorced	55.92	51.23	.148	.280	.116
% of female headed households	104.20	56.45	.407	.070	.196
Income inequality	578.16	327.23	.335	.083	.188
Nude or semi-nude Businesses per 100K	-17.23	7.25	-.355	.018	-.260
Drinking Estab.s per 100K	27.14	13.37	.473	.047	.216

$R^2 = .343$, $F(8,58) = 3.780$, $p<.001$.

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Testing Supreme Court Assumptions in *California v. la Rue*: Is There Justification for Prohibiting Sexually Explicit Messages in Establishments that Sell Liquor?

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Abstract

The United States Supreme Court has upheld the idea that a state may prohibit the communication of sexually explicit messages and adult entertainment in establishments licensed to sell liquor (*California v. la Rue*, 409 U.S. 109 (1972). State liquor control boards across the country rely on this decision in order to regulate alcohol serving businesses that feature adult entertainment. These boards have accepted the untested premise that combining liquor service with adult entertainment leads to greater adverse secondary effects than merely serving liquor alone. In order to test the assumption a study of prostitution, sexual assault and other sexual offenses in Toledo, Dayton, Columbus and Cleveland Ohio was undertaken utilizing crime event data provided by the police. The results revealed that adult businesses were not the primary source of sex crime events. Often these businesses showed zero crime events. Instead, alcohol serving, non-adult establishments are a significant source of such events. The consistency of the results of the present study with past research and the implications of this study and past research for assumptions made about state regulations of sex related communication are discussed.

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Testing Supreme Court Assumptions in *California v. la Rue*: Is There Justification for Prohibiting Sexually Explicit Messages in Establishments that Sell Liquor?

SUPREME COURT DECISION MAKING AND NEGATIVE SECONDARY EFFECTS OF ADULT BUSINESSES

Since 1976, the United States Supreme Court has decided a series of cases focusing on whether the Free Speech clause of the First Amendment allows cities and states to enact legislation controlling the location of "sexually oriented" businesses (See e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *City of Renton v Playtime Theatres Inc.*, 475 U.S. 41 (1986). "Zoning" regulations, laws or ordinances that prevent a sex-related business from operating within certain defined areas and/or within a certain number of feet of so-called "sensitive" locations (e.g., residential neighborhoods, schools, houses of worship and/or other "adult establishments") have been predicated on the notion that municipalities have a substantial interest in combating so-called "negative secondary effects" on the neighborhoods surrounding exotic dance businesses. These secondary effects are generally said to include alleged increases in crime, decreases in property values, and other indicators of neighborhood deterioration in the area surrounding the adult establishment.

The rationale for the secondary effects doctrine was most completely laid out in *Renton v. Playtime Theatres, Inc.*, in 1986. In *Renton,* the Supreme Court considered the validity of a Renton municipal ordinance that prohibited any "X-rated" theater from locating within 1,000 feet of any residential zone, family dwelling, church, park or school. The Court stated that the ordinance would be upheld so long as the city of Renton showed that its ordinance was designed to serve a substantial government interest such as a reducing crime rates or maintaining property values.

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Social Disorganization Theory and Crime

Structural characteristics of a community or neighborhood often influence crime. Social Disorganization theory was established by Shaw and McKay (1942) and has been used by criminologists to understand the causes of crime rates across urban neighborhoods. Social disorganization theory specifies that economically impoverished local communities characterized by residential instability and made-up of ethnically diverse citizens are more likely to lack social organization when compared to more affluent, homogenous neighborhoods with stable populations (Shaw & McKay, 1942).

Contemporary research has mounted considerable evidence in support of Social Disorganization theory. Scholars have reformulated and refined Shaw and McKay's (1942) classic model (Bursik, 1988; Kornhauser, 1978; Sampson & Groves, 1989; Sampson et al., 1997; Sampson & Raudenbush, 1999; Osgood & Chambers, 2000), and have applied the principles of social disorganization to explain the link between local institutions (e.g., bars) and crime (Peterson, Krivo, & Harris, 2000; Alaniz, Cartmill, & Parker, 1998). For example, Sampson and Groves (1989) reported that family disruption (measured as divorced families), low socio-economic status, residential stability, and heterogeneity accounted for much of the effect on rates of burglary. In addition, recent studies show that burglary is influenced by other community characteristics, such as single parent households (Smith & Jarjoura, 1989; Rountree et al., 1994; Lynch & Cantor, 1992).

Alcohol Outlet Businesses and Crime

Local institutions and businesses are also associated with crime is based on the principles of social disorganization (Byrne & Sampson, 1986, p. 5). Peterson et al. (2000, p. 33; see also Nielsen & Martinez, 2003) argue that socially disorganized communities are less likely to attract

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and sustain conventional institutions such as banks, libraries, and recreational centers that help control crime; whereas, businesses such as bars are likely to be more prevalent in disorganized neighborhoods that undermine crime control efforts (see also, Covington, 1999; Zahn, 1998). The alcohol outlet-crime connection is also consistent with Bursik and Grasmick's (1993) assertion that neighborhood life is influenced by external parochial forces, such as social networks among residents who may share weak local institutions (e.g., bars). It is among these weak institutions, operating within the broader urban context, that induce crime. The presence of bars have been characterized as an indirect indicator of social disorganization (Petersen et al., 2000, p. 35) and more recently conceptualized as crime "generators" (Quimet, 2000, p. 41). Watts and Rabow (1983) found a higher concentration of alcohol outlets in 213 socially disorganized California cities. The combination of weak institutions and social disorganization attributes are likely to foster crime (Wilson, 1987; Sullivan, 1993; Short, 1997; Parker & Rubhum, 1995; Scribner, MacKinnon, & Dwyer, 1995).

Several studies have focused on the number of bars (i.e., weak institutions) in local areas as a major source of crime. Some studies have posited a stronger effect for bars on crime, compared to other social disorganization predictors (Roncek & Bell, 1981; Roncek & Maier, 1991). These studies have used a variety of different census units of analysis (e.g., tracts, block groups, and blocks) that vary by geographic size. For example, studies indicate a positive correlation between blocks occupied with a higher number of bars and higher rates of crime (Roncek & Bell, 1981; Roncek & Maier, 1991; Roncek & Pravatiner, 1989; Zahn, 1998; Quimet, 2000). Nielsen and Martinez (2003) reported that alcohol establishments (operationalized as total outlet rate) had a significant effect on non-lethal violence at the census tract level. Quimet (2000) also found that the number of bars predicted offender rates at the census tract. However,

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using 1990 census, crime, and alcohol outlet data at the block group level, Alaniz et al. (1998) examined the connection between immigrants and violence across three California communities. The authors reported that violence was a function of alcohol availability and family breakdown (i.e., percent divorced) at the block group level.

Overall, researchers have marshaled impressive evidence indicating that alcohol outlets influence crimes of rape, assault, homicide, robberies, auto-theft, public intoxication, and drunk driving (Scribner et al., 1995; Sherman, Gartin, & Buerger, 1989; Roncek & Maier, 1991; Watts & Rabow, 1983; Nielsen & Martinez, 2003). Some studies also report that alcohol availability has such a profound effect on crime, namely homicide, that it intensifies the effect of poverty (Parker, 1995, 1993; Parker & Rebhum, 1995).

Combining Alcohol Service and Adult Entertainment

The Supreme Court has maintained that States may regulate sexually explicit messages and adult entertainment in liquor serving establishments. This opinion, articulated in *California v. la Rue*, 409 U.S. 109 (1972) involved the California Department of Alcoholic Beverage Control which had issued regulations prohibiting explicitly sexual live entertainment and films in bars and other establishments licensed to dispense liquor by the drink. A three-judge District Court held the regulations invalid under the First and Fourteenth Amendments, concluding that under standards laid down by this Court some of the proscribed entertainment could not be classified as obscene or lacking a communicative element. Among the regulations at issue were those prohibiting the performance of simulated sexual intercourse, actual or simulated "touching, caressing or fondling of the breast" or "the actual or simulated displaying of the public hair, anus, vulva or genitals." (*California v. la Rue*, 409 U.S. at 112). The Supreme Court held that in the context, not of censoring dramatic performances in a theater, but of licensing bars and

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nightclubs to sell liquor by the drink, the States have broad latitude under the Twenty-first Amendment to control the manner and circumstances under which liquor may be dispensed, and here the conclusion that sale of liquor by the drink and lewd or naked entertainment should not take place simultaneously in licensed establishments was not irrational nor was the prophylactic solution unreasonable.

Although *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), disavowed *La Rue's* "reasoning insofar as it relied on the Twenty-first amendment, "the Supreme Court stressed in that case that *LaRue's* holding remained intact. See *44 Liquormart*, 517 U.S. at 516.

The doctrine established in *LaRue* that states may legally regulate sex related communication in alcohol serving establishments has been relied upon by liquor control boards across the country to justify regulation of adult entertainment in alcohol serving businesses. These boards have often accepted the untested premise that combining liquor service with adult entertainment leads to greater adverse secondary effects than merely serving liquor alone. The rationale relied upon by the Liquor Control Commission of the State of Ohio is exactly this premise. At a public hearing involving the Proposed Rule No. 4301:1 -1- 52 (a measure to limit the display of simulated sex acts in liquor serving establishments throughout Ohio) on September 11, 2003 the testimony of Mr. Bruce Taylor prosecutor for the U.S. Department of Justice was presented. Mr. Taylor opined:

> "There have been studies that were done in cities across the country for the past 30-some years, most of which have involved adult bookstores, but other kinds of sexually-oriented businesses like strip joints and adult theatres and porno book stores that sell sexually-oriented materials or permit sexually-oriented entertainment like strip acts, like nude dancing." (pg. 15).
>
> "So this idea that the harmful secondary effects that have existed and have been noticed by reports or by studies around the country

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> is something that is (sic) sort of become a body of common knowledge." (pg 17-18)
>
> "But the studies...did conclude that the harmful secondary effects are, if anything worse when you combine -- you have some when you have just the nudity and sex shows and stripping. But, there are more effects and more greater degree of intensity (sic) and harm on the community and on the people in it when you mix the alcohol and the sex with alcohol and the nudity." (pg. 66)

THE PRESENT STUDY: FOUR OHIO CITIES

The purpose of the present study is to conduct an empirical study to determine if a relationship exists between adult businesses that serve alcohol and harm done to the community in terms of sex crimes in four Ohio cities--Toledo, Dayton, Columbus and Cleveland. The following question is asked: Once variables known to be related to crime events suggested by Social Disorganization theory have been statistically controlled, does the presence of adult entertainment in an alcohol serving establishment increase sex related crimes above and beyond those crimes at alcohol serving establishments that do not present such entertainment?

Overview of Methods

The methodological approach taken here involves three procedures. First, the Computer Aided Dispatch or NIBRS data involving sex crimes in the cities of Toledo, Dayton, Columbus and Cleveland Ohio are obtained and aggregated within census block groups defined by the 2000 United States Census Bureau. Second, we measured the presence or absence of community features derived from Social Disorganization theory, including the presence of alcohol serving non-adult businesses that may be related to criminal activity. Third, these two sources of information are combined for analyses.

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Block Group Level U.S. Census Demographic Information

The 2000 United States Census measures general demographic characteristics of each block group. These variables include, among others, measures of population, sex and age, race, relationships in household, household type measured at the block level. Using a Geographic Information System (GIS) program, Maptitude 4.5, we were able to link demographic characteristics of each census block group as measured by the 2000 United States Census to their geographical locations. The crime incident data were then plotted in the same map according to police records. Finally, a data file was constructed which included the demographic and crime incident frequencies for each block group.

Analyses Overview

Our analysis strategy entails first entering these census variables into a statistical analysis to control for the effects of these characteristics on crime incidents. After we control for demographic features, we then examine the relative contribution of the presence of an alcohol selling establishment in the neighborhood. Finally, after we have controlled for this variable, we then examine the impact of having an adult cabaret in the block group area on crime incidents. These analyses are undertaken on a city-by-city basis.

Criterion Variables

The analysis reported below was designed to answer the question: Once we have controlled for characteristics of the immediate "neighborhood" (census block group) known to be related to crime and community disorder, including alcohol serving establishments, what is the effect of the presence of an adult cabaret in a census block group on crime events? This comprehensive form of analysis is necessary to insure that once other sources of variability in

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crime incidents, known from past research, are statistically controlled the effect of the adult business as a source of crime and disorder in the area may manifest itself.

As we noted in the introduction several variables investigated by others have been found to be important as predictors of crime activity. These include measures of population density, racial composition, and neighborhood characteristics. These social variables have been examined on the basis of the theory that a local area's population age structure (especially the presence of young adults), and its race/ethnic composition can affect both the size of the pool of motivated crime offenders and the presence of suitable targets for predatory crimes. Variables that have been investigated and have been found to be most important as predictors of crime activity include measures of racial composition (number of African Americans and racial heterogeneity), family structure (as measured by number of single-parent households, female headed households), economic composition (as measured family income), and the presence of motivated offenders, primarily males between the ages of 18 and 25 and socioeconomic status as measured by level of education (see, e.g., Miethe & Meier, 1994).[1]

In addition, it is necessary to control for neighborhood business and housing characteristics that may contribute to social disorganization such as the presence of vacant houses and lots and rental housing units and measures of neighborhood integration such as number of owner occupied housing units. Specific land uses are not only important in themselves but they also operate in interaction with variables that are indicative of social disorganization. The presence of alcohol serving establishments or bars identifies areas that might be particularly attractive for potential offenders (Roncek and Maier, 1991; Sherman et al., 1989; Stark, 1987).

[1] Menthe, T. D., & Meier, R. F. (1994). Crime and Its Social Context: Toward an Integrated Theory of Offenders, Victims, and Situations. Albany, NY: State University of New York Press.

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The list of population, general demographic characteristics, social disorganization variables and alcohol serving private club establishments measured at the census block group level included in the analyses appears immediately below.

Variable Group 1
POPULATION
AREA

Variable Group 2
MEDIAN_AGE OF POPULATION
NUMBER OF NONWHITES
FEMALE HEAD OF HOUSEHOLD, NO HUSBAND
MARRIED HOUSEHOLD FAMILIES
MEDIAN AGE

Variable Group 3
HOUSEHOLD MEDIAN INCOME
OWNER OCCUPIED HOUSING UNIT VALUE-MEDIAN
FAMILIES BELOW POVERTY LEVEL
ADULTS (25+) WITH LESS THAN 9^{TH} GRADE EDUCATION
PERCENT OF ADULTS (25+) WITH BACHELOR'S DEGREE OR HIGHER

Variable Group 4
HOUSE HOLD UNITS VACANT
OCCUPIED HOUSEHOLDS-OWNER OCCUPIED

Variable Group 5
NUMBER OF ALCOHOL SERVING PRIVATE CLUBS

Variable Group 6
PRESENCE OF ADULT CABARETS

Once the demographic and social disorganization variables are statistically controlled, the effect of the variables measuring the presence or absence of adult cabarets (variable group 6) in the block group is examined.

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The Toledo Study

Method

Locating the Adult Cabarets and Alcohol Serving Establishments

A comprehensive list of adult cabaret businesses was obtained for the City of Toledo. Three alcohol serving adult cabarets establishments were identified and examined in the present study. We also obtained a comprehensive list of private club alcohol serving licensees in Toledo who were issued licenses to sell alcoholic beverages by the Ohio Department of Commerce, Division of Liquor Control. The addresses of these businesses were located within the census block groups by using the GIS mapping program.

Measuring Crime and Disorder Incidents

For the analyses below we rely on crime incident report data collected by the City of Toledo Police Department Computer Automated Dispatch (CAD). This included records of dispatches or calls for service (CFS) that were either police-initiated or calls from the public from January 1, 1998 to December 31, 2002--five years. Each record contained the date, time, location, and the disposition of the call. In this study we employ only the calls for service for which a report or arrest is made. During the period between January, 1998 and December, 31, 2002, the Toledo Police Department had dispatch records for 1074 incidents of sexual assault and rape, 248 prostitution incidents, and 377 obscene activities. The sex crime breakdown by type in Toledo is displayed immediate below.

Locating the Crime Incident Calls for Service by Address

The crime incident data were then plotted by address in Toledo using Maptitude 4.5. Initially, an attempt was made to plot all calls based upon the street name and address using the "very strict" location criterion option (i.e., only those addresses for which an exact street name and

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number match to those stored in Maptitude are plotted). This resulted in the plotting of roughly 90% of all calls for service. We then use the "normal" criterion to locate the rest of incidents by allowing for some misspelling of street names by the police. This procedure allowed the GIS program to plot an additional 8% of calls for services. The remaining 2% of the calls were not plotted.

Results

A series of hierarchical ordinary least squares (OLS) regression were conducted. The population, demographic and social disorganization variables were entered into the regression equation in the first four blocks. The alcohol serving private club predictor variable (adult business cabarets that were private clubs were eliminated from this stage) was then entered into the model. This was followed by a block measuring the presence or absence of adult cabarets. A summary of results of the hierarchical regression analyses for sexual assault and rape, prostitution, and obscene activity calls for service events in Toledo are displayed in Table 1.

Sexual Assault and Rape

In Toledo, the hierarchical regression model explained 54-percent of the variability in sexual assault and rape incidents across census block groups ($R^2 = .54$). The first variable cluster measuring population and geographic area accounted for 5-percent of the variability. The addition of the demographic variables set added another 39-percent to the explanatory power of the model. The addition of the next block of variables contributed 5-percentage points to the model's explanatory power. The block measuring the housing variables was statistically significant and explained an additional 4-percent of variability. The addition of the single variable measuring alcohol-serving establishments added approximately 2-percent to the model's

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predictive power. Finally, the variable measuring the presence of an adult cabaret added no statistically significant predictive power to the model.

Prostitution

As can be seen from Table 1, the hierarchical regression analyses for prostitution calls for service events in Toledo accounted for 30-percent of the variability in these crime incidents across census block groups. The first variable cluster measuring population and geographic area was not a significant contributor to predicting prostitution incidents in Toledo. In the second step, the addition of the demographic variables set added a statistically significant 15-percent explanatory power to the overall model. The addition of the next block of variables significantly contributed 9-percentage points to the model's total explanatory power. The block measuring the housing variables was statistically significant and contributed an additional 4-percent to the model. The addition of the single variable measuring alcohol-serving establishments added approximately 3-percent to the model's predictive power. Finally, the variable measuring the presence of an adult cabaret added no statistically significant predictive power to the model.

Obscene activities

The hierarchical regression analyses for public obscene events in Toledo explained 33-percent of the variability in these crime incidents across census block groups. The first variable cluster measuring population and geographic area is significant contributor accounting for almost 5-percent of the total variability in the model. In the second step, the addition of the demographic variables set added a statistically significant almost 13-percent explanatory power to the overall model. The addition of the next block of variables significantly contributed about 4.5-percentage points to the model's total explanatory power. The block measuring the housing variables was statistically significant and contributed an additional 7-percent to the model. The

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addition of the single variable measuring alcohol-serving establishments added approximately 3-percent to the model's predictive power. The variable measuring the presence of an adult cabaret added was significant and added around 1.3-percentage point to the explanatory power of the model. Overall the result of this regression analysis suggests that although the presence of an adult cabaret may be a statistically significant factor, social economic status, demographics, and the presence of non-adult alcohol serving private clubs are far better predictors of where these obscene activities occur in Toledo.

Comparison of alcohol serving and cabarets in terms of sex crimes

Although our regression analyses revealed that the presence of non-adult alcohol serving establishments is a far better predictor of sex related crime incidents than the presence of adult cabarets in Toledo, one may still argue that sex crimes may occur on the premises of these cabarets more frequently than non-adult alcohol serving businesses. In other words adult cabarets may not be located in areas where sex crimes frequently occur, but these cabarets themselves may be the "hotspots" of such crimes incidents as compared to a non-adult alcohol serving club. To test this possibility, we compared the number of sex crime related police dispatches to non-adult alcohol serving establishments and adult cabarets in Toledo. The result of this analysis suggests 13 non-adult alcohol serving businesses in Toledo reported at least one sex-related incident in the period of 5 years. In contrast, zero sex-related crime incidents were reported at the three adult cabarets in Toledo, OH.

The Columbus Study

Method

A comprehensive list of adult cabaret businesses was obtained from the City of Columbus, OH. 15 alcohol serving adult cabarets establishments were identified and included in

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the present study. We also obtained a comprehensive list of private club alcohol serving licensees in Columbus who were issued licenses to sell alcoholic beverages by the Ohio Department of Commerce, Division of Liquor Control. These business addresses were located within each of census block groups using a Maptitude 4.5.

Measuring Crime and Disorder Incidents

For the analyses below we relied on crime incident report data collected by the City of Columbus Police Department Computer Automated Dispatch (CAD). This included records of dispatches or calls for service that were either police-initiated or calls from the public in a period of five years from January 1, 1998 to December 31, 2002. Each record contained the date, time, and location of the call and the disposition of the call. In this study we employ only the calls for service for which a report or arrest is made. Due to the nature of radio codes used by Columbus Police Department, further categorization of sex offenses is impossible. A general sex offenses category was used to indicate all sex crimes in progress and sex crime reports. A total of 3580 sex offense incidents were included in the police calls for service data during the five year period.

Locating the Crime Incident Calls for Service by Address

The crime incident data were plotted by address in Columbus using Maptitude 4.5. Initially, an attempt was made to plot all calls based upon the street name and address using the "very strict" location criterion option. This resulted in the plotting of roughly 92% of all calls for service. Next, we used the "normal" criterion that allows for some misspelling of street names by the police the remaining addresses to plot an additional 7% of total calls for service. The remaining 1% of the calls was not plotted.

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Results

Using the same groups of variables described in the Toledo analysis above, a hierarchical multiple regression analysis was conducted to predict sex offense incidents in Columbus, OH. The population, demographic and social disorganization variables were entered into the regression equation in the first four blocks. The alcohol serving private club predictor variable (adult business cabarets that were private clubs were eliminated from this stage) was then entered into the equation. This was followed by a variable measuring the presence or absence of adult cabarets.

The result of this hierarchical regression analysis is displayed in Table 2. The table displays the variables that were entered at each of the six different stages and how much variance in sex assaults and rape events across the census block groups in Columbus is accounted for at each stage. As can be seen from the table, the overall regression model successfully accounted for 40-percent of the variability in sex offense incidents across census block groups.

The first variable cluster measuring population and geographic area accounted for 1.5-percent of the variability. The addition of the demographic variables set added another 28-percent to the explanatory power of the model. The next block of variables measuring social economic status and education contributed a statistically-significant six-percentage points to the model's explanatory power. The block measuring the housing variables, although was statistically significant, only contributed an additional two-percent to the model. The addition of the single variable measuring alcohol-serving establishments added approximately three percentage points to the model's predictive power.

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Finally, the variable measuring the presence of an adult cabaret added no statistically significant predictive power to the model. In fact, reveals a *negative* beta coefficient for the variable measuring the presence of adult cabarets in the last step of the regression model.

Comparison of alcohol serving and cabarets in terms of sex crimes

To test this possibility that sex offenses may have higher occurrences at the adult cabarets than at the non-adult alcohol serving private clubs despite of the fact that they are not located in areas where such incidents frequently occur, we conducted a analysis comparing the number of sex offense police dispatches to non-adult alcohol serving establishments and adult cabarets in Columbus. This analysis revealed that the 22 non-adult private clubs were associated with a total of 30 sex offenses in five years of available data. However, there were only 2 sex incidents during the same five-year period at the 15 alcohol-serving adult cabarets.

The Dayton Study

Method

Locating the Adult Cabarets and Alcohol Serving Establishments

A comprehensive list of adult cabarets, adult video/bookstores and other adult businesses was obtained from the City of Dayton, OH. The 5 alcohol-serving adult cabarets establishments were examined in the Dayton study. A comprehensive list of private clubs in Dayton with alcohol serving licenses issued by the Ohio Department of Commerce, Division of Liquor Control was also obtained. These business addresses were located and plotted within the census block groups.

Measuring Crime and Disorder Incidents

In the Dayton study, we relied on crime data reported by the Dayton Police Department to the National Incident Based Reporting System (NIBRS) in a four-year period of time from

1/1/1999 to 12/31/2002. Being a part of the widely used Uniform Crime Reporting (UCR) program, NIBRS is an incident-based reporting system for crimes known to the police. For each crime incident coming to the attention of law enforcement, a variety of data are collected about the incident. These data include the nature and types of specific offenses in the incident, characteristics of the victim(s) and offender(s), types and value of property stolen and recovered, and characteristics of persons arrested in connection with a crime incident.

Unlike CAD, which is a comprehensive index of both police activity and crime activity, NIBRS provides a large amount of information only about crime activities. The information is also organized in complex ways, reflecting the many different aspects of a crime incident. Based on the codebook provided by the National Archive of Criminal Justice Data, three categories of sex crimes were devised in this study: 1) Forcible Rape, which included Forcible Rape, Forcible Sodomy, Sexual Assault with an Object, and forcible fondling. 2) Prostitution, and 3) Other Sex Crimes, which included Obscenity, Statutory Rape, Incest, and Peeping Tom. During the four years for which we had data, there were 940 forcible rape incidents, 1970 prostitution incidents, and 111 other sex crimes.

Locating the Crime Incident Calls for Service by Address

The crime incident data were plotted by address in Dayton, OH, using Maptitude GIS software. Because each crime incident included the NIBRS data was recorded with high levels of precision, we were able to plot all 100% of crime incidents using the "very strict" mapping criterion.

Results

Using the same groups of geographical, demographic, and social economic variables used in the Toledo and Columbus analyses above, a series of hierarchical multiple regression analyses

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were conducted to predict sex crimes in Dayton, OH (see Table 3). The population, demographic and social disorganization variables were entered into the regression equation in the first four blocks. The alcohol serving private club predictor variable (adult business cabarets that were private clubs were eliminated from this stage) was then entered into the equation. This was followed by a variable measuring the presence or absence of adult cabarets.

Predicting forcible rape crime incidents

The result of this hierarchical regression analysis successfully accounted for 50-percent of the variability in forcible rape crime incidents across census block groups. The first variable cluster measuring population and geographic area accounted for 4-percent of the variability. The addition of the demographic variables set added another 27-percent to the explanatory power of the model. The next block of variables measuring social economic status and education accounted for 14-percent of the total variability in rape crime. The block measuring the housing variables, although was statistically significant, only contributed an additional 4-percent to the model. The addition of the variable measuring alcohol-serving establishments added approximately 3.5-percent to the model's predictive power. Finally, the variable measuring the presence of an adult cabaret added no statistically significant predictive power to the model.

Similar to the Columbus results, the hierarchical regression analysis for forcible rape revealed a *negative* but non-significant beta coefficient for the variable measuring the presence of adult cabarets in the last step of the regression model.

Predicting prostitution incidents

The overall regression model successfully accounted for 33-percent of the variability in prostitution incidents crimes across census block groups. The first variable cluster measuring population and geographic area accounted for 3-percent of the variability. The addition of the

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demographic variables set added another 5-percent to the explanatory power of the model. The next block of variables measuring social economic status and education accounted for 9-percent of the total variability in rape crime. The block measuring the housing variables, although was statistically significant, only contributed an additional 7.6-percent to the model. The addition of the variable measuring alcohol-serving establishments added approximately 7.8-percent to the model's predictive power. Finally, the variable measuring the presence of an adult cabaret added no statistically significant predictive power to the model.

In addition, we again found a *negative* beta coefficient for the variable measuring the presence of adult cabarets in the last step of the regression model.

Predicting other sex crimes

The result of a third hierarchical regression analysis suggests that the overall model successfully accounts for almost 30-percent of the variability in rape crimes across census block groups. The first variable cluster measuring population and geographic area was not statistically significant. The addition of the demographic variables set added a significant 14-percent to the explanatory power of the model. The next block of variables measuring social economic status and education accounted for 6-percent of the total variability in rape crime. The block measuring the housing variables, although was statistically significant, only contributed close to 3-percent to the model. The addition of the variable measuring alcohol-serving establishments added approximately 5.5-percent to the model's predictive power. Finally, the variable measuring the presence of an adult cabaret added no statistically significant predictive power to the model. Once again, we found a *negative* beta coefficient for the variable measuring the presence of adult cabarets in the last step of the regression model.

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Comparison of alcohol serving and cabarets in terms of sex crimes

To test the possibility that sex crimes may occur more frequently at the adult cabarets than at the non-adult alcohol serving private clubs despite of the fact that they are not located in areas where sex crimes frequently occur, we conducted a analysis comparing the number of different types of sex crimes at non-adult alcohol serving establishments and adult cabarets in Dayton. We found that 14 non-adult alcohol-serving private clubs reported a total of 41 sex offenses during 1/1/1999 and 12/31/2002. However, there is not a single sex crime at the five adult cabarets during the same four-year period. It is clear that adult cabarets in Dayton, OH, do not have a higher sex crime rate than non-adult alcohol serving private clubs.

The Cleveland Study

Method

Locating the Adult Cabarets and Alcohol Serving Establishments

The Cleveland analysis examined 12 alcohol-serving adult establishments. We obtained a comprehensive list of private club alcohol serving licensees in Cleveland who were issued licenses to sell alcoholic beverages by the Ohio Department of Commerce, Division of Liquor Control. These business addresses were located and mapped within the census block groups by using Maptitude 4.5.

Measuring Crime and Disorder Incidents

The City of Cleveland Police Department's CAD records from December 31, 1997 to February 28, 2003 were examined in this study. Each record contained the date, time, type, and location of the call. Due to limitations of the dataset provided by the Cleveland Police Department, we were not able to select only those calls for service for which a report or arrest is

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made. For the 5-years available CAD data, there were 953 rape incidents, 1205 prostitution incidents, and 1803 pubic indecency incidents.

Locating the Crime Incident Calls for Service by Address

The sex crime incident data were plotted by address using Maptitude 4.5. The initially attempt plot all calls based upon the street name and address using the "very strict" location criterion option resulted in the plotting of roughly 86% of all incidents. Next, we used the "normal" criterion to allow for an additional 8% plotting rate. The remaining 6% of the calls were not plotted.

Results

A series of hierarchical multiple regression analyses were conducted to predict three types of sex crimes in Cleveland, OH (see Table 4). The population, demographic and social disorganization variables were entered into the regression equation in the first four blocks. The alcohol serving private club predictor variable (adult business cabarets that were private clubs were eliminated from this stage) was then entered into the equation.

Predicting rape incidents

The overall regression model successfully accounted for 44-percent of the variability in rape crimes across census block groups. The first variable cluster measuring population and geographic area accounted for almost 3-percent of the variability. The addition of the demographic variables set added another 30-percent to the explanatory power of the model. The next block of variables measuring social economic status and education accounted for 7.5-percent of the total variability in rape crime. The block measuring the housing variables, although was statistically significant, only contributed an additional 1.3-percent to the model. The addition of the variable measuring alcohol-serving establishments added approximately 2-

percent to the model's predictive power. Finally, the variable measuring the presence of an adult cabaret added no statistically significant predictive power to the model.

Predicting Prostitution Incidents

The overall regression model successfully accounts for 23-percent of the variability in prostitution incidents across census block groups. The first variable cluster measuring population and geographic area accounted for one-percent of the variability. The addition of the demographic variables set added another 14 percent to the explanatory power of the model. The next block of variables measuring social economic status and education accounted for five-percent of the total variability in rape crime. The block measuring the housing variables, although was statistically significant, only contributed an additional three-percent to the model. The addition of the variable measuring alcohol-serving establishments added approximately seven tenth of a percent to the model's predictive power. Finally, the variable measuring the presence of an adult cabaret added no statistically significant predictive power to the model.

Predicting Public Indecency and Indecent Exposure

The overall regression model successfully accounts for almost 45 percent of the variability in public indecency incidents across census block groups. The first variable cluster measuring population and geographic area was statistically significant and contributed close to three percent of the total variability in indecent exposure and public indecency calls for service. The addition of the demographic variables set added a significant 28 percent to the explanatory power of the model. The next block of variables measuring social economic status and education accounted for 9-percent of the total variability in rape crime. The block measuring the housing variables, although was statistically significant, only contributed close to two percent to the model. The addition of the variable measuring alcohol-serving establishments added

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approximately three percent to the model's predictive power. Finally, the variable measuring the presence of an adult cabaret added no statistically significant predictive power to the model.

Comparison of alcohol serving and cabarets in terms of sex crimes

To test this possibility that sex crimes may occur more frequently at the adult cabarets than at the non-adult alcohol serving private clubs despite of the fact that they are not located in areas where sex crimes frequently occur, we conducted a analysis comparing the number of different types of sex crimes at non-adult alcohol serving establishments and adult cabarets in Cleveland. The result of this analysis suggests that 28 non-adult alcohol-serving private clubs reported a total of 36 sex related calls for service during 12/31/1997 and 2/28/2003, while there were only 2 sex related calls for service from the 12 adult cabarets during the same five-year period. It is clear that adult cabarets in Cleveland, OH, do not have a higher sex crime rate than non-adult alcohol serving private clubs.

Discussion

In order to test the assumption that adult cabarets that serve alcohol are associated with negative secondary effects, an empirical study of prostitution, sexual assault and other sexual offenses in Toledo, Dayton, Columbus and Cleveland Ohio was undertaken utilizing crime event data provided by the police (computer aided dispatch and NIBRS data). The following research question was posed: Once variables known to be related to crime events suggested by Social Disorganization and Routine Activities theories have been statistically controlled, does the presence of adult entertainment in an alcohol serving establishment increase sex related crimes above and beyond those crimes at alcohol serving establishments that do not present such entertainment? The results revealed that the adult businesses were not the primary source of sex

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crime events. Often these businesses actually showed zero sex crime events. Instead, alcohol serving, non-adult establishments are often a significant source of such events.

Consistency with Previous Research

Few studies have been undertaken to test the assumption made by state liquor control boards that there are more effects and the effects are of a greater degree of intensity and harm in communities with business establishments that serve alcohol and feature exotic dancing and nudity. The research that has been undertaken in other states is consistent with the results obtained in the present study of Ohio cities. Linz, Fisher, and Yao (2004) estimated the effects of social disorganization variables, alcohol sites, and adult cabarets on police calls for service at the census block level in Daytona Beach Florida. The authors also matched (based on census socioeconomic and demographic characteristics) 1000-foot perimeter control-sites, with those of the adult cabaret perimeters to help isolate the sources of crime. The regression analysis showed no association between adult cabarets serving alcohol and crime at the census block level. Rather, the results indicated that social disorganization and alcohol establishments that did not feature sexually explicit communication or entertainment were better predictors of crime. Similarly, Linz, Land, Williams, Ezell, & Paul (2004) found that adult businesses that served alcohol were not associated with crime in Charlotte, North Carolina.

Fisher, Linz, & Paul (2004) examined the link between sexual entertainment, sexual aggression and the presence of adult businesses and the prediction of rape rates in Florida. This study examined whether rates of crime are associated with the rates of adult businesses in the 67 counties of Florida once other variables related to crime are controlled. Rates per 100K people in the population were computed for the numbers of nonsexual adult businesses: drinking establishments, gambling establishments, and hotels and motels in each county. These measures,

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along with measures of social disorganization and demographic variables, were examined for their relative ability to predict UCR. The model estimated in this research explained 34.3% of the variance in rates of rape with three variables make unique, significant contributions to prediction of rates of rape: percentage of the population that is classified as nonWhite, the number of drinking establishments per 100K population and the number of nude and semi-nude businesses per 100K population. However, the correlation for the presence of adult businesses as was the case in the analyses for two of the Ohio cities examined above was negative.

Implications for Assumptions Underlying *California v. la Rue*

The United States Supreme Court has ruled that a state may prohibit "the actual or simulated touching, caressing, or fondling of the breast, buttocks, anus or genitals" in establishments licensed to sell liquor (*California v. la Rue*, 409 U.S. 109 (1972). State liquor control boards across the country and specifically, in Ohio have accepted the premise that combining liquor service with adult entertainment leads to greater adverse secondary effects than merely serving liquor alone. This premise is not supported by either the current research or past studies.

What does the lack of empirical evidence of a relationship between sexually oriented businesses in the community and secondary crime effects mean, regarding the Ohio liquor control board's underlying rationale for regulating sex oriented businesses despite a lack of empirical evidence of adverse secondary effects? It may be an incidence of what Justice Souter in the *City of Los Angeles v. Alameda Books, Inc.* (2002) has referred to as a weak demonstration of facts indicating viewpoint discrimination.

In *Alameda* Justice Souter has said that sound empirical investigations of presumed adverse secondary effects are helpful in guarding against unconstitutional restrictions of freedom

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of sexual speech. Lacking empirical proof of its own the state of Ohio may be engaging in disapproval of adult speech rather than attempting to regulate sex communication out of concern for adverse secondary effects.

Explaining the Lack of Crime

Results from previous studies and the results from the present study suggest either no relationship or even a negative relationship between the presence of alcohol serving adult entertainment establishments and adverse secondary effects in the form of sex related crime activity. These findings may not be surprising given developments in the adult nightclub business over the last decade. First, the adult nightclub business in the late-1990s in many respects may be quite unlike that of the 1960s and 1970s when these establishments were relatively new forums of entertainment in American society. Adult nightclubs have been subjected to over two decades of municipal zoning restrictions across the country, and they usually must comply with many other regulations as well. These clubs do not appear to be locations where potential offenders gather to prey on desirable targets in the absence of crime suppressors, such as employees whose role is to ensure the safety of customers and the maintenance of order within the clubs.

The establishments themselves have evolved more closely into legitimate businesses establishments with management attention to profitability and continuity of existence. To meet these objectives, it is essential that the management and/or owners of the clubs provide their customers with some assurance of safety. Accordingly, adult nightclubs, including those in the Ohio cities under investigation often appear to have better lighting in their parking lots and better security surveillance than is standard for non-nightclub business establishments. These may be factors producing fewer crime opportunities and lower numbers of reported crime incidents in

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the surrounding areas of the clubs. The extensive management of the parking lots adjoining the exotic dance nightclubs, in many cases including guards in the parking lots, valet parking, and other control mechanisms, may be especially effective in reducing the possibility of violent disputes in the surrounding area. In addition, unlike other liquor-serving establishments (bars and taverns that do not offer adult entertainment) that may be present in the control areas, violent disputes in the areas surrounding exotic dance clubs between men over unwanted attention by other males to dates or partners are minimal due to the fact that the majority of patrons attend the clubs without female partners. Thus, the possibility of sexual aggression may be greatly reduced in the vicinity of adult dance clubs, compared to most other locations where adults congregate, such as bars or taverns that do not feature adult entertainment.

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Tables

Table 1

Summary of hierarchical regression analyses for natural-logged sex crime calls for service incidents in Toledo, OH. (N = 340).

	Sexual Assault & Rape		Prostitution		Obscene	
	R^2 Change	F Change	R^2 Change	F Change	R^2 Change	F Change
Step 1	0.052	9.27***	0.008	1.33	0.046	8.08***
Step 2	0.387	57.55***	0.146	14.44***	0.126	12.75***
Step 3	0.048	6.15***	0.086	7.4***	0.044	3.74**
Step 4	0.035	11.87***	0.041	9.33***	0.071	16.22***
Step 5	0.018	12.57***	0.027	12.66***	0.032	15.511***
Step 6	0.002	1.67	0.004	1.72	0.013	6.36*

Note. The total R^2 for the regression model predicting sexual assault and rape is .54; the total R^2 for the regression model predicting prostitution is .31; the total R^2 for the regression model predicting obscene activities is .33.

* $p < .05$, ** $p < .01$ *** $p < .001$

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Table 2

Summary of hierarchical regression analyses for natural-logged sex crime calls for service incidents in Columbus, OH. ($N = 737$).

	Sex Crimes	
	R2 Change	F Change
Step 1	0.015	5.67**
Step 2	0.280	72.57***
Step 3	0.058	13.04***
Step 4	0.019	10.82***
Step 5	0.033	40.49***
Step 6	0.000†	0.07

Note. The total R^2 for the regression model predicting sex crimes is .41.

† The Beta coefficient for Step 6, a single variable for the presence and absence of adult cabarets in a census block is -.008, $p = .792$.

** $p < .01$, *** $p < .001$

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Table 3

Summary of hierarchical regression analyses for natural-logged sex crime calls for service incidents in Dayton, OH. (N = 405).

	Forcible Rape		Prostitution		Other Sex Crimes	
	R^2 Change	F Change	R^2 Change	F Change	R^2 Change	F Change
Step 1	0.042	8.80***	0.030	6.31**	0.013	2.58
Step 2	0.266	38.13***	0.052	5.68***	0.139	16.39***
Step 3	0.135	19.13***	0.090	8.58***	0.061	6.07***
Step 4	0.040	14.97***	0.076	19.96***	0.028	7.25***
Step 5	0.035	28.34***	0.078	45.14***	0.053	29.31***
Step 6	0.003†	2.66	0.003††	1.52	0.001†††	0.54

Note. The total R^2 for the regression model predicting forcible rape is .52; the total R^2 for the regression model predicting prostitution is .33; the total R^2 for the regression model predicting other sex crimes is .30.

† The Beta coefficient for Step 6, a single variable for the presence and absence of adult cabarets in a census block is -.06, $p = .10$.

†† The Beta coefficient for Step 6, a single variable for the presence and absence of adult cabarets in a census block is -.053, $p = .22$.

††† The Beta coefficient for Step 6, a single variable for the presence and absence of adult cabarets in a census block is -.033, $p = .46$.

** $p < .01$, *** $p < .001$

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Table 4

Summary of hierarchical regression analyses for natural-logged sex crime calls for service incidents in Cleveland, OH. (N = 1029).

	Rape		Prostitution		Indecency	
	R^2 Change	F Change	R^2 Change	F Change	R^2 Change	F Change
Step 1	0.027	14.28***	0.012	5.99***	0.029	15.34***
Step 2	0.300	113.90***	0.138	41.40***	0.279	103.07***
Step 3	0.075	25.64***	0.050	12.69***	0.092	31.28***
Step 4	0.013	10.93***	0.034	22.62***	0.021	18.77***
Step 5	0.020	35.52***	0.007	9.76**	0.031	57.69***
Step 6	0.001	1.01	0	0.001	0	0.003

Note. The total R^2 for the regression model predicting rape is .44; the total R^2 for the regression model predicting prostitution is .24; the total R^2 for the regression model predicting public indecency is .45.

** $p < .01$, *** $p < .001$

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THE ECONOMIC IMPACT OF THREE ADULT-ORIENTED CLUBS IN RANCHO CORDOVA

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PURPOSE OF STUDY

The purpose of this study is to examine the economic impact of three adult-oriented businesses – Gold Club Centerfolds, Pure Gold, and Risky Business (the "Clubs") -- in Rancho Cordova, California. To assess the economic impact of these clubs, we addressed the following research questions: (1) what effect do these Clubs have on surrounding property values? and (2) what effect do the Clubs have on the local economy?

RESULTS IN BRIEF

The existence of the Clubs has no statistically significant effect on property values in the surrounding areas. Data was collected on all sales of residential properties within a two-mile radius of each club. Additionally, data was collected on all sales of commercial and industrial properties within a one-mile radius of each club. This data contains detailed characteristics of each property such as proximity to each club, square footage, age of structure, and the type of property. The data was utilized in a multi-variable statistical test to determine if proximity to the club had any effect on property values. The results indicate that there is no statistically significant relationship between the values of residential, commercial, or industrial property near the Clubs compared to properties that are located further away after accounting for differences in property characteristics and market conditions.

The Clubs have a substantial positive effect on the local economy. The current combined annual revenue of the Clubs is approximately $15 million. Approximately 97 percent of the Clubs' patrons are from outside of Rancho Cordova. These patrons not only spend dollars at the Clubs, they also spend dollars at local businesses. The results of our study on expenditures inside and outside the Clubs show that the Clubs generate approximately $30.5 million of income within Rancho Cordova.

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BACKGROUND

Adult-oriented businesses have been criticized as having a negative impact on property values. This criticism stems from a belief that the nature of activities taking place in an adult-oriented business spill over into the local community and stigmatize the area. The stigma associated with property in close proximity to adult-oriented businesses is that the patrons of these establishments will increase crime and conduct other damaging behavior to the surrounding area. These claims have yet to be established in a scientific manner. The critics of adult-oriented businesses tend to rely on anecdotal information and ad hoc reasoning to establish their claims.

The owners of adult-oriented businesses have tended to defend their businesses by invoking their freedom of expression rights under the First Amendment. This protects expression that some people may find objectionable. For example, Supreme Court Justice Anthony Kennedy wrote in U.S. v. Playboy Entertainment Group that the "history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly."[1]

This report relies neither on anecdotal or legal claims. It is a scientific investigation into the economic impact of an adult-oriented business utilizing relevant data and examining the data using generally accepted statistical methods. Detailed data on property values based upon characteristics of the property is available. Scientific statistical methods that differentiate between the effects of different variables on property values are available. The effect of proximity to an adult-oriented business on property values can be tested by placing a variable in a statistical equation that accounts for the proximity of property to an adult-oriented business.

[1] Source: Hudson, David L. "Nude Dancing," www.firstadmendmentcenter.org.

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Utilizing these data and statistical techniques, one can project the effects of adult-oriented businesses on property values.

Economic science is also available to project the effect of the proximity of an adult-oriented business on revenues for local businesses. Businesses can be divided into two categories – base and non-base. Base businesses bring in dollars from outside the local community. An adult-oriented business can be considered a base business if the majority of its revenue comes from patrons outside the local area. Non-base businesses serve the local community by providing goods and services within the local community. Dollars from non-base businesses tend to flow circularly within the community. The dollars that are attracted by base industries enter this circular flow and then multiply. Economists have developed methods to measure the extent of this multiplier effect.

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THE CLUBS HAVE NO STATISTICALLY SIGNIFICANT EFFECT ON PROPERTY VALUES

The existence of the Clubs has no statistically significant effect on property values in the surrounding areas. Data was collected from a leading real estate software tool called RealQuest. The data contains information on all sales of residential, commercial, and industrial properties within a two-mile radius of each club for a five-year period. This data was utilized in multi-variable statistical tests to determine if proximity to a club had any effect on property values. The results indicate that after accounting for property characteristics and market conditions, no statistically significant outcome indicates a linear relationship between the values of properties near the Clubs compared to the values of properties that are located further away.

Data & Methods

Data was collected from RealQuest on all sales of residential properties within a two-mile radius of each club from January 1, 2000 to February 28, 2005. RealQuest collects and maintains a comprehensive real estate data information base. This data was separated into two groups: (1) residential property, and (2) commercial and industrial property. For residential properties the data was separated into two categories within both groups: (1) property within one mile of a club and (2) property that is one mile to two miles from a club. The Clubs are in close proximity to each other and some properties could fit both criteria. The properties that fit both criteria were assigned to category one. Thus, category two is a unique group of properties that are only one mile to two miles away from any of the Clubs. For commercial and industrial properties, the categories were: (1) properties within a half a mile from a club, and (2) properties that are a half mile to one mile from a club.

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The data from RealQuest were utilized in the statistical models. The variables extracted from the residential property data set are (1) the sale price, (2) age of the structure, (3) square feet of the structure, (4) square feet of the lot, and (5) type of property (single family, duplex, or condominium). The same variables were extracted from the commercial and industrial data set except the type of dwelling was defined as commercial or industrial. A variable in the residential property data set was constructed to account for the general increase in the value of property over time: the median value of home prices for the month of sale.[2] In the commercial and industrial property data set a similar variable was created. A variable to account for proximity to the Clubs was created in both data sets. This variable takes the form of a "dummy" variable in the residential property model meaning it takes on the value of one if it is within one mile of a club and zero if it is within one to two miles of a club. The variable specifying type of property was also constructed as a dummy variable. In the residential data set it took the value of one if it was a condominium and zero if it was a single family home or duplex. In the commercial and industrial data set it took the value of one if the property was industrial and zero if it was commercial.

The statistical model for analyzing the data is multivariate regression. This type of statistical model projects the value of a dependent variable – in this case the sale price of a property – on several independent variables. In other words, the model explains the "dependence" of the dependent variable on several variables. It quantifies the effect of each independent variable on the dependent variable by assigning a numerical coefficient to the variable. The statistical method utilized within the multivariate regression is ordinary least squares (OLS). This method projects the effect of each of the variables on the dependent variable by getting the best "fit" for the model. A measure of the fit of the model is the R^2

[2] Source: California Association of Realtors.

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coefficient. A high R^2 signifies that the variation in the dependent variable is explained by the independent variables (the highest possible R^2 is 1). In an OLS model, each variable will have a projected coefficient that describes the effect of the variable on the dependent variable. The model will also generate a projected statistical significance known as a t-value. It is a commonly held projection among statisticians that a coefficient with an absolute t-value of 1.96 or greater is a statistically significant variable.[3] If a variable is statistically significant, the projected value of its effect on the dependent variable is the value of the coefficient generated by the model. If a variable is not statistically significant, its effect on the dependent variable has not been established. Thus, that variable can be eliminated from the equation as its explanatory value is in question.

The theoretical basis for the specification of the models is derived from microeconomic price theory. This theory examines the price of a commodity (such as a home price) to be dependent on the utility (enjoyment or satisfaction) that the commodity provides to the consumer. The utility derived from the consumption of the commodity can be dependent upon the attributes of the commodity.[4] Examples of attributes, or characteristics associated with houses, are living area, lot size, and age of the property. By incorporating these characteristics in a model to determine an expected home price, the analyst can then distinguish the composition of a home's characteristics from general property appreciation.[5] Economic research has also shown that there is a relationship between home prices and the location of the home.[6]

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[3] An absolute t-value is a positive value greater than 1.96 or a negative value less than -1.96.
[4] Lancaster, K.J., 1996. A New Approach to Consumer Theory. *Journal of Political Economy*, 74: 132-157.
[5] Calhoun, C.A., 2001. Property Valuation Methods and Data in the United States. *Housing Finance International*, 16: 12-23.
[6] Frew, J. and B. Wilson, 2000. Estimating the Connection Between Location and Property Value, Essay in Honor of James A. Graaskamp, Boston, MA: Kluwer Academic Publishers.

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Effect of Proximity to a Club on the Value of Residential Property

Two statistical models were specified according to the theory delineated above to test for the effect of proximity to one of the Clubs on residential property prices. Both models relied on the following equation:

$$Y = \alpha + X_1\beta_1 + X_2\beta_2 + X_3\beta_3 + X_4\beta_4 + X_5\beta_5 + X_6\beta_6 + \varepsilon$$

Variable X_1 is the month of purchase in model number 1 and the value of the median home price in model number 2. Variables X_2 to X_6 are the same in both models. The variables are defined as:

Y = sales price (dependent variable)
α = intercept
X_1 = month of sale (model #1) or median home price for the month of the sale (model #2)
X_2 = square feet of the structure
X_3 = age of the structure
X_4 = proximity to one of the Clubs
X_5 = square feet of the lot
X_6 = type of property (condo or single family home)
ε = error term

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Table 1 summarizes the results of the first model and table 2 summarizes the results of the second model.

Table 1: The effect of proximity to one of the Clubs on residential property values (Model #1).

Variable	Effect of Variable on Property Values based on Statistical Significance	T-statistic of the Variable (absolute value)
Intercept	Negative	12.20
month of sale (X_1)	Positive	60.89
square feet (X_2)	Positive	37.83
age of the structure (X_3)	Negative	11.95
proximity to one of the Clubs (X_4)	No Significance	1.41
square feet of the lot (X_5)	Positive	36.93
type of property (X_6)	Negative	5.43
$R^2 = .83$		

Table 2: The effect of proximity to one of the Clubs on residential property values (Model #2).

Variable	Effect of Variable on Property Values based on Statistical Significance	T-statistic of the Variable (absolute value)
Intercept	Negative	29.18
median home price (X_1)	Positive	64.08
square feet (X_2)	Positive	38.86
age of the structure (X_3)	Negative	13.95
proximity to one of the Clubs (X_4)	No Significance	1.74
square feet of the lot (X_5)	Positive	38.35
type of property (X_6)	Negative	5.48
$R^2 = .84$		

In each table, the column labeled "T-statistic" indicates the estimated strength of the variables in the model. To evaluate the strength of the regression model, it is necessary to test the hypothesis that the coefficients are equal to zero which would indicate that they have no

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effect on property values. In other words, a statistical test must be run on the regression results to project whether the results have significance.[7] The following hypotheses were tested:

- null hypothesis: coefficient = 0 (there is no linear relationship)
- alternative hypothesis: coefficient not equal to 0 (there is a linear relationship)

The t-test is utilized to test the alternative hypothesis. The critical value for the t-test is 1.96. If the t-value is greater than 1.96 then the null hypothesis is rejected at a confidence level of 95 percent.

The results of both models show t-statistics with absolute values that are far greater than 1.96 for variables X_1, X_2, X_3, X_5, and X_6. Thus, the null hypothesis is rejected for each of these variables. The linear relationship demonstrated for each of these coefficients is statistically significant. The median home price in the area, the month of the purchase, the square footage of property, and the square footage of the lot were positively correlated with property values. The age of the structure and the type of property as a condominium were negatively correlated with the property value.

The results of both models show a t-statistic with an absolute value that is less than 1.96 for variable X_4. Thus, we fail to reject the null hypothesis. There is no statistically significant linear relationship identified between proximity to one of the clubs and property values and this variable should be discarded from the model.

The overall results of the model are robust. The R^2 statistic shows that greater than 83 percent of the variation in property values is explained by the model. The combination of a high R^2 and the t-tests lead to the following overall conclusion from the models: after accounting for differences in property characteristics and property appreciation, there is no significant

[7] Gaynor, P.E. and R. Kirkpatrick. 1994, Time Series Modeling and Forecasting in Business and Economics, New York: McGraw-Hill, Inc. Pindyck, R.S. and D.L. Rubinfeld. 1991, Econometric Models & Economic Forecasts, New York: McGraw-Hill Inc.

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difference in the value of residential property near the Clubs compared to property that is located further away.

Effect of Proximity to a Club on the Value of Commercial and Industrial Property

The effect of proximity to a Club on the value of commercial and industrial property was projected using the following equation:

$$Y = \alpha + X_1\beta_1 + X_2\beta_2 + X_3\beta_3 + X_4\beta_4 + X_5\beta_5 + \varepsilon$$

where,

Y = sales price (dependent variable)
α = intercept
X_1 = gross area of the property
X_2 = sale date
X_3 = age of the structure
X_4 = proximity to one of the Clubs
X_5 = type of property (industrial or commercial)
ε = error term

Table 3 summarizes the results of the model.

Table 3: The effect of proximity to one of the Clubs on commercial and industrial property values.

Variable	Effect of Variable on Property Values based on Statistical Significance	T-statistic of the Variable (absolute value)
Intercept	Negative	2.82
gross area of the property (X_1)	Positive	3.98
sale date (X_2)	Positive	2.85
age of the structure (X_3)	No Significance	0.25
proximity to one of the Clubs (X_4)	No Significance	1.04
type of property (X_5)	No Significance	1.38
$R^2 = .48$		

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The same hypothesis testing that was applied to the residential property results was applied to the commercial and industrial property results. The t-statistic on the variable that projects the effect of proximity to one of the Clubs on the value of commercial and industrial property is 1.04. Thus, we fail to reject the null hypothesis -- there is no linear relationship between proximity to one of the Clubs and the value of commercial or industrial property.

THE CLUBS HAVE A POSITIVE EFFECT ON THE LOCAL ECONOMY

Economic science can project how the presence of an adult-oriented business can affect the revenues of other local businesses. Businesses can be divided into two categories – base and non-base. Base businesses bring in dollars from outside the local economy. An adult-oriented business can be considered a base business if the majority of its revenue comes from patrons outside the local area. Non-base businesses serve the local community by providing goods and services that are staples of the local economy. Dollars from non-base businesses tend to flow circularly within the community. The dollars that are attracted by base industries enter this circular flow and then multiply. Economists have developed methods to measure the extent of this multiplier effect.

Data & Methods

Base businesses bring in dollars from outside the local communities. An example of a pure base business is tourism. Tourists bring dollars from outside a local community and spend them at businesses within the community. These dollars not only raise the revenue of the businesses directly serving the tourists, but the dollars also flow to businesses outside the tourism industry – the non-base businesses.

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Non-base industries are often referred to as the service or domestic sector. These industries serve local markets and are a staple of the local economy. Examples of non-base industries include retail stores, hair salons, grocery stores, medical services, local government and local financial institutions. Non-base industries rise and fall with the increase or decrease of base industries, as non-base industries simply circulate dollars within the local economy. Therefore, it follows that the local economy is directly tied to the region's production of base goods and services. If the local economy has strong base industries, then extra dollars are generated to purchase imported goods and services. Conversely, if a local economy's base industries are weak, then the local economy will have a difficult time importing the goods and services required to create a strong economic region.

The Clubs generate services that are almost a pure base business. Approximately, 97 percent of patrons of the Clubs are from outside of Rancho Cordova.[8] Thus, the Clubs bring dollars to the local communities that then flow within the local businesses. The amount of income that is generated by these dollars can be approximated by projecting the amount of non-basic employment that is created by base employment. In other words, base employment has a multiplying effect – it brings in dollars from outside the local community and then these dollars transfer into non-basic employment.

The base employment of Rancho Cordova was established using the minimum requirements methodology.[9] Employment data was collected from the Labor Market Information Division ("LMID") of the California Employment Development Department ("EDD"). The LMID provides employment totals for specific industries within all California

[8] This was established from data gathered at the Clubs on the zip codes of the patrons.
[9] Ullman, E. 1960, The Minimum Requirements Technique Approach to Urban Economic Base, Papers: Regional Science Association. Ullman, E. 1968, Minimum Requirements after a Decade: A Critique and an Appraisal, *Economic Geography*, 44. Ullman, E., M. Dacey, and H. Brodsky. 1969, *The Economic Base of American Cities*, Seattle: University of Washington Press.

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counties on an annual basis. The data was utilized to calculate the percentage of employment in the different industries within each county. Data was compiled on employment in California counties using LMID's 2002 *County Snapshots* reports. The fraction of employment for each industry within that county was then compared to all other counties. This determined the lowest fraction of employment within California for each particular industry. These fractions provide an estimate of the minimum percentage of total employment that would allow any region to be self-reliant in that particular industry. Counties were then identified that most closely resembled Rancho Cordova for each industry in order to establish the minimum fractions necessary for self sufficiency. The amount that an employment fraction exceeds the self-sufficiency fraction is the projection of excess employment in that industry. The excess employment is defined as the estimate of employment in export production. Counties were then identified that most closely resembled Rancho Cordova for each industry in order to establish the minimum fractions necessary for self sufficiency. The final step was to calculate, within each industry, the difference between the percentage employment in Rancho Cordova and the county with the minimum requirements divided by the percentage employment in Rancho Cordova. The resulting quotient provides an estimate of base employment in each industry.

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Results

Table 3 summarizes the calculations of the regional economy multiplier. This multiplier projects the effects of base dollars coming into the local economy.

Table 3: The Regional Economy Multiplier for Rancho Cordova.

RANCHO CORDOVA ECONOMIC BASE (2003)

Employment by Industry	Industry Employment[1]	% of Total	Minimum Requirement[2]	% of Industry in Base Activity[3]	% of Industry Workforce in Base Activity[4]	Base Employment[5]
Agriculture	621	1.85%	0.34%	1.51%	81.58%	507
Natural Resources	37	0.11%	0.08%	0.03%	27.24%	10
Construction	3,013	8.95%	3.53%	5.42%	60.57%	1,825
Manufacturing	6,071	18.04%	5.46%	12.58%	69.73%	4,234
Trade, Transportation and Utilities	7,312	21.73%	16.13%	5.60%	25.76%	1,884
Information	-	0.00%	0.00%	0.00%	0.00%	-
Financial Activities	3,982	11.83%	3.29%	8.54%	72.20%	2,875
Professional and Business Services	4,947	14.70%	3.93%	10.77%	73.27%	3,624
Educational and Health Services	3,730	11.08%	8.99%	2.09%	18.89%	705
Leisure and Hospitality	2,194	6.52%	6.52%	0.00%	0.00%	-
Other Services	976	2.90%	1.44%	1.46%	50.35%	491
Government	769	2.29%	2.29%	0.00%	0.00%	-
Total	33,652	100.00%	51.99%	48.01%		16,155
Regional Economy Multiplier[6]						2.1

1. Source: California Employment Development Department.
2. Projected from counties that are comparable to Rancho Cordova.
3. % of Total – Minimum Requirement.
4. % of Industry Workforce in Base Activity.
5. % of Total x % of Industry Workforce in Base Activity.
6. Total Industry Employment / Total Base Employment.

The annual revenue of the Clubs was projected by the average number of dancer shifts per month per club, the average dollars earned by each dancer per shift, and the average video sales per month from each club. Based upon these estimates, the Clubs' projected revenue ranged from $15 million to $18 million for the most recent twelve months. Taking the low end

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of the range and multiplying it by the percent of the patrons at the clubs from outside the area (97 percent), projects the base dollars generated from the Clubs at approximately $14.5 million. The base dollars multiplied by the regional county multiplier of 2.1 projects the total revenue for Rancho Cordova generated by the Clubs at $30.5 million annually.

CONCLUSION

The results of the statistical analysis show that the existence of Gold Club Centerfolds, Pure Gold, and Risky Business does not have a significant effect on residential, commercial, or industrial property values in the surrounding areas. Moreover, these clubs have a positive impact on the economy of Rancho Cordova. These clubs generate approximately $30.5 million dollars of income. Less than half of these dollars are spent directly in the clubs. Thus, the economic benefit from the existence of these clubs does not solely flow to the employees and owners of the clubs. Local business profits and local employment are increased by the existence of these clubs.

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TECHNICAL APPENDIX: THEORY OF THE ECONOMIC BASE OF A COMMUNITY

The nature of a local economy has steadily evolved over time. Centuries ago, when travel, communication, and trade were primitive, a local community had to satisfy its material needs exclusively out of its own local resources. As technology has improved, trade has allowed local economies to increase their standard of living. Through trade, localities have become able to gain access to resources outside their borders. In the modern world, a region does not have the resources on its own to acquire the mass of goods of services it has grown to expect and require. Trade is needed to satisfy its full requirements. A local economy with little to trade lacks the means to develop a strong economy with a high standard of living.

For a modern community to sustain a high standard of living, it must continue to produce goods which can be exported to other regions. The value of a community's exportable goods is called its *economic base.*

Base industries are generally in activities such as manufacturing, fishing, logging, agriculture, private colleges, state or federal government activities, and financial services headquarters. Other examples are hotels and restaurants catering to non-residents, wholesalers supplying out of region customers, financial institutions lending to national markets, residents drawing income from outside the region, and consultants or individuals providing services to clients outside the community. The dollars that come in from the outside through the export of base goods and services provide the dollars to purchase items which are not produced from within.

Non-basic industries, often referred to as the service or domestic sector, are made up of businesses which serve local markets, such as retail stores, medical services, legal services, hair salons, grocery stores, local finance institutions, and local government. The size of the domestic

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sector depends on the level of base industry. Shopping centers, housing, and real estate agents are created in response to increase in base industry—i.e. the creation of dollars flowing into the community. Domestic industries simply circulate dollars within the community. For a community to buy products and services produced outside of its boundaries, base production is necessary to generate the inflow of dollars to make these purchases. The long-term rise and fall of regional income and welfare shifts with a region's production of base goods and services.

When economists decide to measure the structure of a regional economy, several estimating techniques are available. Three common techniques are the economic base model, the input-output model, and the econometric model. The technique chosen depends on the objective of the study, the data that is available, and the time and/or money available to gather the data.

The technique chosen in this analysis is the economic base model. It provides a technique to measure the current economic structure of the area. A perfect base study requires extensive surveys, but the data presently available generates base estimates which provide meaningful insight into a local area's economy.

The graph shown here (Figure 1, next page) illustrates the essential structure of a regional economy using the base model. The horizontal axis, denoted **Y**, shows the value of net regional income. Since regional income is generated by payments to resources used in the production process, **Y** is equivalently equal to the value of production. Hence, **Y** is also represented on the vertical axis as local production. Note that the line **Y** goes through the origin and has a slope of one, which indicates the value of local income equals the value of local production.

The other variable shown on the vertical axis is denoted **D**, the demand for local goods. Mathematically, $\mathbf{D} = \mathbf{x} + \mathbf{sY}$. **x** is the demand for local goods by entities outside the region—i.e.

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export demand. The sale of x provides the initial dollars for local entities to spend on imported goods or their own domestic goods.

The second component of **D**, which is **sY**, sets the relationship between the demand for local goods and local income. As local income rises, there is a concomitant increase in the demand for local goods. This is reflected in the movement along d. As **Y** increases, **D** rises. For each $1 increase in **Y**, **D** will increase by **s**, where **s** is the fraction of a dollar increase in income spent on local goods (Note : (1 – **s**) is the fraction of a dollar's increase in income which flows out of the region to purchase imported goods.) The objective of a base study is to measure **s** – i.e. (non-basic spending) / (non-basic spending + basic spending).

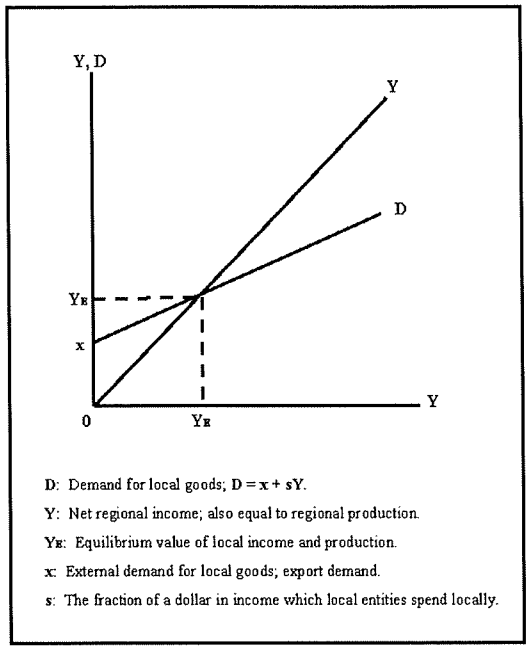

Figure 1

Returning to the graph in Figure 1, note that when local production is less than the level at Y_E, **D** (Demand) is greater than **Y** (supply). Local producers will respond by raising production.

Conversely, at those levels of production greater than Y_E, **D** (demand for local goods) is less than **Y** (the supply of local good production). Producers will then experience surplus inventories and respond by cutting back on production.

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Only at production level $\mathbf{Y_E}$, will supply and demand converge and reach an equilibrium level of income. Note that export demand (**x**) determines the position of **D**, and hence, the equilibrium level of production and income for the region.

Mathematically, $\mathbf{Y_E}$ can be determined as shown below:

$\mathbf{Y = D}$

$\mathbf{Y = x + sY}$

$\mathbf{Y(1 - s) = x}$

$\mathbf{Y_E = x / (1 - s)}$, the equilibrium condition.

The equilibrium condition implies that changes in export demand (**x**) will set off changes in local income ($\mathbf{Y_E}$). Interestingly, the change in local income will be some multiple of the change in export demand. This multiple is commonly called the *local spending multiplier* and is equal to : $1 / (1 - \mathbf{s})$.

Recall s is equal to (non-basic spending) / (non-basic spending + basic spending). It can be shown algebraically that the *multiplier*, $1 / (1 - \mathbf{s})$, is equal to (non-basic spending + basic spending) / (basic spending). Stated mathematically, $1 / (1 - \mathbf{s}) = \mathbf{Y_E / x}$.

The *multiplier* can then be used in forecasting the impact on local income resulting from a change in export (base) demand. The relationship between a region's economic base and the value of regional production and income is quantified by the *multiplier*. For example, if the base production in a community (**x**) is \$1,000 and the total production ($\mathbf{Y_E}$) is \$2,5000, then the *multiplier* is 2,500 / 1,000 = 2.5. This means that an increase in the base production of \$100 will generate a total increase in community income and production of \$100 x 2.5 = \$250.

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In summary, the economic base ultimately determines the total production and income of a region. A county is not self-sufficient and must import many of its goods and services. The ability to import products is dependent upon the amount which it exports. The value of imports can not exceed the value of exports for an extended period.

The domestic sector provides the support and services to workers in base industries and to themselves. The relationship between the value of a county's economic base and the base plus the domestic sector is quantified by a number which is defined as the local *multiplier*. The larger the base of exported goods produced in a community, the greater will be the long-term economic wealth and stability of the community. The ability of a community to consistently create income depends on how well it can sustain or enhance its base.

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GOVERNMENT REGULATION OF "ADULT" BUSINESSES THROUGH ZONING AND ANTI-NUDITY ORDINANCES: DEBUNKING THE LEGAL MYTH OF NEGATIVE SECONDARY EFFECTS

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Municipalities that prohibit "adult" businesses from operating in certain areas have justified these "zoning" regulations by advancing the idea that the presence of the business will have so-called "adverse, or negative secondary effects" on the surrounding community. Most recently, a plurality of the United States Supreme Court has upheld the extension of this doctrine beyond the zoning of adult businesses to the symbolic behavior within them in the form of ordinances banning nudity. This article abstracts and analyzes the methods and major empirical findings of studies conducted by United States municipalities, purporting to detect adverse secondary effects of adult businesses. With few exceptions the methods used in the most frequently cited studies are seriously and often fatally flawed. These studies, relied on by other communities throughout the country, do not adhere to professional standards of scientific inquiry and nearly all fail to meet the basic assumptions necessary to calculate an error rate—a test of the reliability of findings in science. Those studies that are scientifically credible demonstrate either no

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negative secondary effects associated with adult businesses or a reversal of the presumed negative effect. The implications of the lack of evidence of adverse secondary effects for the regulation of performances within adult businesses are discussed.

Since 1976, the United States Supreme Court has decided a series of cases focusing on whether the free speech clause of the First Amendment allows cities and states to enact legislation controlling the location of "adult" businesses.[1] These "zoning" regulations, which may prevent a sex-related business from operating, for example, within a certain number of feet from residences, schools and houses of worship or a given distance from one-another, have been predicated on the notion that cities and other municipalities have a substantial interest in combating so-called "negative secondary effects" on the neighborhoods surrounding adult businesses. These secondary effects have most often included alleged increases in crime, decreases in property values, and other indicators of neighborhood deterioration in the area surrounding the adult business. Typically, communities have either conducted their own investigations of potential secondary effects or have relied on studies conducted by other cities or localities.

In more recent years, the Court has considered the constitutionality of anti-nudity legislation passed by municipalities or states that have relied on the negative secondary effects doctrine as justification.[2] The Court in *Barnes v. Glen Theatre, Inc.* held that the State of Indiana could regulate nudity; with a plurality of the Court concluding that the government could undertake such regulation to protect the public order and morality.[3] In a concurring opinion, however, Justice Souter argued that the State had justified the ban on the basis of the *presumed* negative secondary effects on the surrounding community.[4]

Most recently, in *City of Erie v. Pap's A.M.*, the Court again held that municipalities have the right under appropriate circumstances to pass anti-nudity ordinances.[5] Again, however, the Court was fractured. Three justices agreed with Justice O'Connor's opinion that

[1] *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976).

[2] *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); City of Erie v. Pap's A.M., 120 S. Ct. 1382 (2000).

[3] 501 U.S. at 567–68.

[4] *Id.* at 582–84 (Souter, J., concurring).

[5] 120 S. Ct. 1382.

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combating negative secondary effects supposedly associated with adult businesses was a legitimate basis for the imposition of an anti-nudity regulation.[6] Most notable for the purposes of this article was, however, Justice Souter's partial concurrence and partial dissent, in which he significantly revised the position he took regarding secondary effects in *Barnes*. In *Pap's*, Justice Souter admitted that the evidence of a relationship between adult businesses and negative secondary effects is at best inconclusive.[7] He called into question the reliability of past studies that purported to demonstrate these effects and suggested that municipalities wishing to ban nudity must show evidence of an actual relationship between adult businesses and negative effects.[8]

The recent expansion of the secondary effects "doctrine" to include not only the zoning of adult businesses but now the regulation of the content of expression within these establishments, raises the question: How reliable and valid are the so called "studies" conducted by individual municipalities and shared nationwide with other municipalities attempting to regulate the location of, and most recently, erotic expression within, adult businesses? Examined in this article is the scientific validly of the research considered by municipalities across the country as a justification for the regulation of adult businesses.

THE SUPREME COURT ON OBSCENITY

Early attempts to regulate adult businesses involved enforcement of obscenity laws. The United States Supreme Court rendered its first authoritative decision on obscenity in *Roth v. United States*.[9] The Court ruled that obscene material was not protected by the First Amendment to the Constitution. It defined obscene materials as those that "appeal to a prurient interest" in sex (defined as a shameful, morbid and unhealthy interest in sex) and are presented in a "patently offensive way."[10]

Through the 1960s, the *Roth* test was refined to reflect objections to the suppression of erotica. In *Kingsley International Pictures Corp. v. Regents*, the Court found that a film based on the erotic novel, *Lady Chaterly's Lover*, was not obscene under the *Roth* test.[11]

[6] *Id.* at 1393 (O'Connor, J., concurring).
[7] *Id.* at 1404–05 (Souter, J., concurring in part and dissenting in part).
[8] *Id.* at 1402–03 n.3.
[9] 54 U.S. 476 (1957).
[10] *Id.* at 488.
[11] 360 U.S. 684, 689–90 (1959).

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The Court greatly expanded the scope of permissible sexual portrayals with its decision in *Memoirs v. Massachusetts*.[12] At issue was the literary work, *Memoirs of a Woman of Pleasure*, commonly known as *Fanny Hill*, by John Cleland. The Court ruled that the prosecution must prove to the jury's satisfaction that the work in question is "utterly without socially redeeming value." In the Court's view the First Amendment protection given to "socially redeeming ideas" was sufficient to override the accompanying portrayals of sexual activity.[13] Later, the Court further broadened its notion of permissibility by striking down another obscenity conviction in *Stanley v. Georgia*.[14] In this case, the defendant had been found guilty of possessing obscene materials in his home. The Supreme Court ruled that the First Amendment provides protection for the individual's right to receive information and ideas about sex.[15]

The body of social science research sponsored by the 1970 Presidential Commission on Obscenity and Pornography in the United States was the first systematic academic foray into the study of exposure to sexually explicit materials.[16] Consistent with the more liberal Supreme Court rulings in the 1960s, the Commission concluded that there were no scientifically demonstrated harmful effects from pornography and recommended legalization of all forms of sexually explicit communication.

A more politically conservative Court ruled, in *Miller v. California*, that "contemporary community standards" must be used to resolve the underlying questions of fact regarding "prurient interest" and "patent offensiveness."[17] By the late 1980s and early 1990s empirical studies estimating community standards for sexually explicit materials suggested that even in politically conservative communities, the majority of citizens actually found such materials non-obscene.[18]

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[12] 383 U.S. 413 (1966).

[13] *Id.* at 418.

[14] 394 U.S. 557 (1969).

[15] *Id.* at 567–68.

[16] PRESIDENTIAL COMM'N ON OBSCENITY AND PORNOGRAPHY, TECHNICAL REPORTS OF THE PRESIDENTIAL COMM'N ON OBSCENITY AND PORNOGRAPHY (1970).

[17] 413 U.S. 15, 24–25 (1973).

[18] *See* Daniel Linz et al., *Estimating Community Tolerance for Obscenity: The Use of Social Science Evidence*, 55 PUB. OPINION Q. 80 (1991); Daniel E. Linz et al., *Measuring Community Standards for Sex and Violence: An Empirical Challenge to Assumptions in Obscenity Law*, 29 L. & SOC'Y REV. 127 (1995). Social science research suggests that communities may tolerate and/or accept for others, sexually explicit material involving consenting adults. However, sexual violence, the use of children in pornography and extreme forms of nonsexual violence are not tolerated. *See id.*

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Recently, some feminists have argued that the traditional obscenity perspective, with its emphasis on sexual explicitness and its notion of offensiveness, moral corruption and shame, is misguided.[19] In their view, the regulation of pornography should not be a means for the government to preserve public morals. Instead, regulation should prevent harms to women, including sexual harassment, discrimination and sexual assault.

Efforts to change the legal system to allow women to address pornography's supposed harms were undertaken in the 1980s. The purpose of these laws was to permit women to address the harms claimed to have been done to them by pornography, both as individuals and as a class of persons. In the early 1980's, a model ordinance was introduced in Minneapolis, where it was rejected, and in Indianapolis, where it passed and became law for a time. The ordinance defined pornography as the "graphic sexually explicit subordination of women." Immediately after its passage, the Indianapolis ordinance was challenged. A federal district court declared the Indianapolis ordinance unconstitutional in *American Booksellers Association v Hudnut,* arguing that an ordinance that makes injuries of pornography actionable is unconstitutional under the First Amendment because the law prohibits expression of a point of view.[20] Social science research testing feminist socio-legal theory has examined pornography's effect on attitudes that justify violence towards women, undermine viewer sensitivity to female victims of rape and violence and increase discriminatory and sexually explicit behavior.[21]

Most recently, governments have shifted away from obscenity prosecutions and are attempting to regulate live performances in adult nightclubs across the United States. These regulations have often been based on the notion that government is permitted to ban behavior, such as nude dancing, if such laws can be shown to be "content neutral" and directed at curbing the so-called adverse secondary effects allegedly associated with adult businesses.[22] Law-

[19]*See* IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS (Andrea Dworkin & Catherine A. MacKinnon eds., 1988); Catherine MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984).

[20]Am. Booksellers Ass'n v Hudnut, 598 F. Supp 1316, 1320 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

[21]*See* EDWARD DONNERSTEIN ET AL., THE QUESTION OF PORNOGRAPHY (1987).

[22]*See* Daniel Linz et al., *Testing Legal Assumptions Regarding the Effects of Dancer Nudity and Proximity to Patron on Erotic Expression*, 24 L. & HUM. BEHAV. 507 (2000). This social science investigation demonstrated that contrary to the assumption made by Chief Justice Rehnquist in *Barnes*, 501 U.S. 560 (1991), laws that prescribe putting pasties and G-string on exotic dancers are, in fact, not seen as content neutral. Results of a field experiment in which dancer nudity (nude vs. partial

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makers across the country have referred to a number of secondary effects studies undertaken by municipalities interested in "zoning" adult businesses as justification for regulating nudity in the business. The scientific validity of this research is the subject of this study.

THE ZONING OF ADULT ENTERTAINMENT BUSINESSES AND THE FIRST AMENDMENT

Beginning with the 1976 case, *Young v. American Mini Theatres, Inc.*,[23] several United States Supreme Court decisions have provided guidance as to what constitutes permissible government regulation of the location of adult entertainment establishments, given the protection provided by the Free Speech Clause of the First Amendment.[24] The Court has normally subjected ordinances that restrict the location of adult businesses to an evaluation under the framework for content restrictions on symbolic speech set forth in the four-part test in *United States v. O'Brien*.[25]

Justice Powell applied the four-part *O'Brien* test in his plurality opinion in *Young*.[26] In that case, the Court upheld a Detroit zoning ordinance that regulated the location of adult theaters. The ordinance mandated that adult theaters not locate within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area. The Detroit ordinance did not attempt to eliminate adult entertainment; rather its aim was to disperse such businesses in an effort to minimize so-called negative secondary effects. In uphold-

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clothing) and dancer proximity significantly altered the message of erotic performances. *See* Linz et al., *supra* note 22.

[23]427 U.S. 50 (1976).

[24]*See id.*; City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); City of Erie v. Pap's A.M., 120 S. Ct. 1382 (2000).

[25]391 U.S. 367, 376–77 (1968). The landmark decision sets forth a series of criteria courts must consider when determining the constitutionality of government suppression of speech. For a restriction to pass the *O'Brien* test, the courts must consider (1) whether the regulation is within the constitutional power of government, (2) whether it furthers an important or substantial governmental interest, (3) whether that interest is unrelated to suppression of free expression and (4) whether the restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.*

[26]*Young*, 427 U.S. at 79–82 (Powell, J., concurring). Most important for present purposes, the Court suggested that the Detroit ordinance passed the second prong of the *O'Brien* test because it was aimed at preserving the stability of the city's residential and commercial neighborhoods. *Id.* at 73. The Court noted that a city's interest in protecting the quality of urban life is one that must be accorded high respect. *Id.*

ing this ordinance, the plurality opinion of the Court reaffirmed the doctrine that a government regulation must have a real and substantial deterrent effect on legitimate expression before it will be invalidated.[27] The Court said the ordinance was not an invalid prior restraint on protected expression because it had neither the intent nor the effect of suppressing speech but was aimed at controlling the secondary effects caused by adult businesses on surrounding uses.[28]

In another landmark decision regarding a municipality's attempt to control secondary effects allegedly caused by adult businesses, *City of Renton v. Playtime Theatres, Inc.*, the Court upheld a Renton, Washington, zoning ordinance that, although not banning adult businesses altogether, did prohibit them from locating within 1,000 feet of any residential zone, church, park or school.[29] The Court held that the Renton ordinance did not restrict First Amendment rights, as the purposes of the ordinance were unrelated to the suppression of speech and the restrictions were the least intrusive means by which to further the government's interests.[30] Part of the precedent set by *Renton* is a three-prong test stipulating that an ordinance must: (1) Be content neutral and aimed only at curbing secondary effects, (2) provide alternate avenues of communication and (3) further a substantial governmental interest.[31]

Further, the Court stated for the first time that a city interested in restricting the operation of adult businesses was not required to show adverse impact from the operation of adult theaters in its own community, if no such experience existed, but could instead rely on the experiences of other cities as a rationale for supporting the passage of an ordinance.[32] The court of appeals had found that "because the Renton ordinance was enacted without the benefit of studies specifically relating to 'the particular problems or needs of Renton,' the city's justifications for the ordinance were 'conclusory

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[27]*Id.* at 60.

[28]*Id.* at 73 n.34 (plurality opinion). The Court remarked that the city of Detroit had offered evidence that a concentration of "adult" movie theaters causes the area to deteriorate and become a focus of crime. Further, no such relationship was found for theaters showing other types of films. *Id.* This marks the first time the Court explicitly mentions the term "secondary effects." The Court suggests that "[i]t is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech" that allows the Court to find the Detroit ordinances constitutionally sound. *Id.*

[29]475 U.S. 41 (1986).

[30]*Id.* at 53.

[31]*Id.*

[32]*Id.* at 50–53.

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Supreme Court maintained that the court of appeals had placed an unnecessary burden of proof on the city, ruling that Renton—which had no adult businesses—could rely primarily on experiences of and studies produced by the nearby city of Seattle as evidence of a relationship between adult uses and negative secondary effects.[34] Thus, the Court ruled that the First Amendment does not require a city to conduct new studies or produce new evidence before enacting an ordinance, so long as the evidence relied upon is reasonably believed to be relevant to the problem the city faces.[35]

Since *Renton,* a number of cities, counties and states have undertaken investigations intended to establish the presence of such secondary effects and their connection to adult facilities. These studies have, in turn, been shared with other municipalities and generally serve as the basis for claims that adult entertainment establishments are causally related to harmful secondary side effects, such as increased crime and decreases in property values. Many local governments across the United States have relied on this body of shared information as evidence of the secondary effects of adult businesses. Further, in most cases, cities and other governmental agencies have used the findings of a core set of studies from other locales as a rationale for instituting regulation of such businesses in their own communities.

Recent Applications of the Secondary Effects Doctrine

In 1991, the U.S. Supreme Court began down the road to expanding the "secondary effects" doctrine as a justification for a total ban on nude dancing. In *Barnes v. Glen Theatre, Inc.,*[36] the

[33]City of Renton v. Playtime Theatres, Inc., 748 F. 2d 527, 537 (9th Cir. 1984), *rev'd*, 475 U.S. 41 (1986).

[34]*Id.* at 50–51. *See* Northend Cinema, Inc. v. Seattle, 585 P.2d 1153 (1978). In *Northend*, the Washington State Supreme Court held that the city of Seattle had provided sufficient evidence of a need for a zoning code amendment aimed at preventing the secondary effects on the neighborhoods surrounding adult theaters. This evidence came in the form of "a long period of study and discussion of the problems of adult movie theaters in residential areas of the City." *Id.* at 1154–55. The city offered the Washington court a report, among other things, analyzing the City's zoning scheme and describing land uses around existing adult motion picture theaters. In addition, the trial court heard "expert testimony on the adverse effects of adult motion picture theaters on neighborhood children and community improvement projects." *Id.* at 1156. In *Renton*, the United States Supreme Court found that the city in question was entitled to rely on the evidence summarized in the Washington court's opinion. 475 U.S. at 50–53.

[35]*Renton*, 475 U.S. at 51–52

[36]501 U.S. 560 (1991).

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enforcement of Indiana's public indecency law, which prevented totally nude dancing by indirectly requiring a dancer to perform in no less than pasties and a G-string, did not violate the First Amendment's guarantee of freedom of expression.[37] Led by Chief Justice Rehnquist, a plurality found the anti-nudity ordinance in question was constitutional because it was aimed at protecting societal order and morality.[38] The Court had held in previous cases that such an objective represented a sufficient government interest.[39] Couching the decision as simply supporting a constitutionally protected time, place and manner restriction of expression, the plurality argued that the Indiana statute did not proscribe erotic dancing. Instead, the Chief Justice argued, it simply ensured that any such performance would include the wearing of scant clothing.[40]

Justice Souter's concurring opinion gave particular attention to the notion of a state's substantial interest in combating the secondary effects of adult entertainment establishments.[41] Justice Souter stated that the type of entertainment the Indiana statute was aimed at regulating was clearly of the same character as that at issue in a number of past decisions by both the Supreme Court[42] as well as lower courts.[43] He went on to suggest that it was therefore no leap to say that live nude dancing of the sort at issue in *Barnes* was "... likely to produce the same pernicious secondary effects as the adult films displaying 'specified anatomical areas' at issue in *Renton*."[44] Souter then applied the precedent set forth in *Renton*, stating:

> In light of Renton's recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment of the type offered at ... the Glen Theatre's "bookstore" furthers its interest in preventing prostitution, sexual assault and associated crimes.[45]

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[37]*Id.* at 561.

[38]*Id.* at 569.

[39]*See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973).

[40]*Barnes*, 501 U.S. at 587.

[41]*Id* at 582 (Souter, J., concurring).

[42]*See, e.g.*, California v. LaRue, 409 U.S. 109, 111 (1972); Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986); Young v. Am. Mini Theatres, Inc., 501 U.S. 560 (1991).

[43]*See, e.g.*, United States v. Marren, 890 F.2d 924, 926 (7th Cir. 1989) (arguing that prostitution is associated with nude dancing establishments); United States v. Doerr, 886 F.2d 944, 949 (7th Cir. 1989) (same).

[44]*Barnes*, 501 U.S. at 584.

[45]*Id.*

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Thus, Justice Souter wrote that municipalities could *assume* that negative secondary effects result from nude dancing establishments when justifying regulation of such expression.

The Supreme Court most recently addressed the constitutionality of regulating adult entertainment in *City of Erie v. Pap's A.M.* A fractured majority upheld an Erie, Pennsylvania, ordinance that, like the statute considered in *Barnes*, required a dancer to wear at least pasties and a G-string during a performance.[46] A majority of five Justices agreed that the case called for the application of the *O'Brien* test. Further, a majority held that the Erie ordinance was aimed at the important government interest of combating the harmful secondary effects associated with nude dancing.[47] A plurality of four justices—*not* a majority of the Court—held that Erie had met this burden by relying on the evidentiary foundation[48] set forth in both *Renton* and *Young*.[49]

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[46]120 S. Ct. 1382, 1384 (2000). In *Barnes*, Justice Souter used the secondary effects doctrine as a justification of the anti-nudity ordinance. 501 U.S. at 584 (Souter, J., concurring). In *Pap's*, the city adopted Justice Souter's reasoning and argued that the same devaluation of the surrounding areas attributed to adult businesses can be attributed to establishments featuring live nude entertainment. *See* 120 S. Ct. at 1394. The city argued that the government's vital interest in protecting and preserving the desirability of residential neighborhoods and business districts is a sufficient justification for the ordinance's incidental encroachment on protected expression. *See id.* at 1394.

[47]*Id.* at 1394. The Court cited the *Renton* precedent allowing municipalities to rely on secondary effects evidence produced by other, similar municipalities to fulfill the evidentiary burden. *Id.* None of the justices in the fractured majority explained, however, how the requirement of wearing pasties and a G-string would in fact reduce prostitution, sexual assaults or other problems associated with places where dancers appear nude.

[48]*Id.* Justice Scalia, joined by Justice Thomas, concurred with the Court's majority opinion, but for different reasons. The justices held that the Erie ordinance prohibits not merely nude dancing but the act of going nude at all–irrespective of whether it is engaged in for expressive purposes. *Id.* at 1398 (Scalia, J., concurring). He found the statute constitutionally permissible because it was a general law regulating conduct and not specifically directed at expression. *Id.* at 1401. As such, the ordinance was not subject to First Amendment scrutiny at all. *See id.* at 1401–02. Justice Scalia suggested that there was no need to consider the presence or absence of "secondary effects" because the government was well within its rights in regulating non-expressive behavior. *Id.* The opinion of Justice Scalia, when combined with that of Justice O'Connor, with whom Chief Justice Rehnquist, Justice Kennedy and Justice Breyer joined, left the Court with a 6–3 majority that the law was consititutional. Yet, there was no controlling opinion. In other words, the Court agreed that Erie can regulate nudity, but could not agree on why.

[49]*Renton*, 475 U.S. at 83; *Young*, 501 U.S. at 564.

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Justice Souter's Partial Dissent in Pap's

Only a plurality of justices agreed that the city of Erie had demonstrated *evidence* of a compelling government interest. Justice Souter disagreed.[50] In *Barnes*, he opined that the government could assume that "pernicious secondary effects" would result from the presence of nude dancing establishments.[51] In *Pap's*, however, Justice Souter demanded that cities such as Erie, interested in regulating nude dancing on the basis of adverse secondary effects, should be required to provide germane evidence of a relationship between nude dancing and these secondary effects.[52] Ruefully, Justice Souter stated:

> Careful readers ... will of course realize that my partial dissent rests on a demand for an evidentiary basis that I failed to make when I concurred in *Barnes*. ... I should have demanded the evidence then, too, and my mistake calls to mind Justice Jackson's foolproof explanation of a lapse of his own, when he quoted Samuel Johnson, "Ignorance, sir, ignorance." McGrath v. Kristensen, 340 U.S. 162, 178 (1950) (concurring opinion). I may not be less ignorant of nude dancing than I was nine years ago, but after many subsequent occasions to think further about the needs of the First Amendment, I have come to believe that a government must toe the mark more carefully than I first insisted. I hope it is enlightenment on my part, and acceptable even if a little late.[53]

In his opinion, Justice Souter questions the evidence used by municipalities of a relationship between adult businesses and negative secondary effects, concluding that such a relationship can no longer be presumed from past studies.[54] In support of his position, Justice Souter cited an amici brief that contained a condensed summary of the critique of existing secondary effects studies reported below.[55]

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[50]*Id.* at 1402 (Souter, J., concurring in part and dissenting in part).

[51]*Barnes*, 501 U.S at 584 (Souter, J., concurring).

[52]120 S. Ct. 1382 at 1403–04 (Souter, J., concurring in part and dissenting in part).

[53]*Id.* at 1405–06.

[54]*Id.*

[55]Brief for First Amendment Lawyers Association at 16–23, *id.* (No. 98–1161). Justice Souter stated:

> The proposition that the presence of nude dancing establishments increases the incidence of prostitution and violence is amenable to empirical treatment, and the city councilors who enacted Erie's ordinance are in a position to look to the facts of their own community's experience as well as to experiences elsewhere. Their failure to do so

Evaluating the Validity of Secondary Effects Studies

Since the secondary effects doctrine appears to be expanding, it is imperative that it be based on solid evidence that the operation of an adult entertainment business has a deleterious effect on the surrounding community. Unfortunately, when municipalities have conducted studies in the past, there has not been a set of methodological criteria or minimum standards, to which the cities were required to adhere. Without such standards, cities may be relying on flawed databases. This problem is further compounded when courts allow previous studies, conducted in other cities, to supplant data collected in the city where the ordinance is being proposed. A flawed study replicates errors across localities. It makes little sense to generalize to the experiences of other cities on the basis of what may be an invalid investigation in the first place.

The basic requirements for the acceptance of scientific evidence, such as secondary effects studies, were prescribed by the Supreme Court in the 1993 case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[56] In *Daubert,* the Court held that there are limits on the admissibility of scientific evidence offered by "expert witnesses" in federal courts. The Court noted that scientific knowledge must be grounded in the methods and procedures of science and must be based on more than subjective belief or unsupported speculation.[57] Offering observations as to how this connection can be made, the Court provided a list of factors that federal judges could consider in ruling on a proffer of expert scientific testimony, including the notion of falsifiability, peer review and publication, error rate and adherence to professional standards in using the technique in question.[58]

Since a core set of studies has been and continues to be relied upon by hundreds of local municipalities as evidence of negative secondary effects, a central concern must be the methodological rigor, and therefore trustworthiness, of these studies. This is particularly true when the Supreme Court requires that a municipality establish that such regulations are necessary to further the governmental interest

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> councilors who enacted Erie's ordinance are in a position to look to the facts of their own community's experience as well as to experiences elsewhere. Their failure to do so is made all the clearer by one of the *amicus* briefs, largely devoted to the argument that scientifically sound studies show no such correlation.

Id. (Souter, J., dissenting).

[56] 509 U.S. 579 (1993).

[57] *Id.* at 590.

[58] *Id.* at 593–95.

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of ameliorating secondary effects and that such regulations are no broader than is essential to the furtherance of such interest.[59]

To evaluate the validity of the secondary effects studies cited by communities across the country, this article will abstract and analyze the methods and major empirical findings in the relevant research. With few exceptions, the methods most frequently used in these studies are seriously and often fatally flawed. Specifically, these studies do not adhere to professional standards of scientific inquiry and nearly all universally fail to meet the basic assumptions necessary to calculate an error rate—a test of the reliability of findings in science. More importantly, those studies that are scientifically credible demonstrate either no negative secondary effects associated with adult businesses or a reversal of the presumed negative effect.

The Core Set of Frequently Cited Scientific Studies of Secondary Effects

Amassed for this study were a large body of laws enacted for the regulation of adult entertainment businesses and as many as possible of the empirical and non-empirical reports examining potential secondary effects of such businesses produced or purportedly relied upon by municipalities considering the issue. Often, the laws—usually municipal ordinances—contain "preambles" that specifically set forth which of the various "secondary effects studies" the municipality is relying on as justification for enacting the particular regulation. Presumably, these studies are listed in order to comply with the *Renton* requirement that a municipality rely upon evidence "reasonably believed to be relevant to the problem that the city addresses."[60]

The interest is in examining the methodological legitimacy of every "study" cited by municipalities as containing evidence of the relationship between adult entertainment businesses and negative secondary effects. Several steps were taken to obtain as many such studies as possible. First, several attorneys known for their experience and expertise in the arena of adult business regulation were contacted and asked to provide lists and, when possible, printed copies of studies that they were aware had been cited in municipal and state zoning ordinances. Second, the citations found in each of the obtained studies and zoning ordinances were scanned for additional studies on secondary effects. Finally, several additional individuals

[59]*See* Renton v. Playtime Theater, Inc., 475 U.S. 41 (1986); Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976); United States v. O'Brien, 391 U.S 367 (1968)

[60]*Renton*, 475 U.S. at 51–52 n.26.

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that have expert knowledge in the area of adult business regulation were asked to supplement the list of "studies."[61] In all, a total of 107 reports were eventually obtained. To be included in the analysis, each report must have been cited by at least one municipality as evidence of a relationship between adult entertainment businesses and negative secondary effects. Although it is more than likely that not every single "secondary effects study" is included in this review, the extensive literature search nevertheless resulted in a large and, more importantly, a representative number of such reports. This study has located, collected and analyzed the vast majority of "studies" that communities purport to rely upon when enacting regulations of adult businesses.[62]

First considered in detail are the four most frequently cited (and relied upon) studies of secondary effects: Indianapolis, Indiana (1984),[63] Phoenix, Arizona (1979),[64] Los Angeles, California (1977)[65] and St. Paul, Minnesota (1978).[66] As can be seen in Table 1, these studies have been cited as evidence of the relationship between adult entertainment businesses and negative secondary effects by no less than 27 different municipalities. The problems that have been found in these four reports in regard to misunderstandings of their "findings" and methodological failings (discussed in detail below) pertain as well to the next six most frequently relied-upon reports. Discussed next are these six studies, in brief, at the end of the review of the four

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[61]All of the reports included in the analysis were obtained by contacting the specific communities and municipalities that originally sponsored or produced them.

[62]It should be noted that although the study began with 107 municipal reports addressing the relationship between adult entertainment businesses and negative secondary effects, and although a large percentage of these claim to report "scientific" evidence of such a relationship, this analysis found only 29 of these studies to contain empirical data. A number of the remaining 78 reports simply contained the minutes of city planning committee meetings during which options for the regulation of adult businesses were discussed. Others simply contained samples of arrest reports from inside adult entertainment businesses. Needless to say, such information did not meet even the most basic criteria for empirical evidence. However, such studies have been used (often consistently) as representing empirical evidence of the relationship between adult entertainment businesses and negative secondary effects.

[63]CITY OF INDIANAPOLIS, INDIANA, ADULT ENTERTAINMENT BUSINESSES IN INDIANAPOLIS—AN ANALYSIS (1984).

[64]CITY OF PHOENIX, ARIZONA, RELATION OF CRIMINAL ACTIVITY AND ADULT BUSINESSES (1979).

[65]CITY OF LOS ANGELES, CALIFORNIA, STUDY OF THE EFFECTS OF THE CONCENTRATION OF ADULT ENTERTAINMENT ESTABLISHMENTS IN THE CITY OF LOS ANGELES (1977).

[66]CITY OF ST. PAUL, MINNESOTA, NEIGHBORHOOD DETERIORATION AND THE LOCATION OF ADULT ENTERTAINMENT ESTABLISHMENTS IN ST. PAUL (1978).

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TABLE 1: TEN MOST FREQUENTLY REFERENCED STUDIES AND MUNICIPALITIES THAT REFERENCED THEM IN DRAFTING LEGISLATION REGULATING ADULT BUSINESSES

1. Indianapolis, Ind. (1984): Dallas (1986), The Bronx (1995), Ramsey (1990), Manchester, N.H., Brooklyn, Minn. Beaumont (1982), St. Paul, Minn. (1987/1988), Times Square, N.Y. (1993), Newport News, Va. (1996), Kansas City, Mo. (1998), Falcon Heights, Minn. (1994), Fridley, Minn., Brooklyn Park, Minn., Manatee County, Fla., Lynnwood, Wash. (1990), Oklahoma City (1986), New Hanover County (1989), Rochester/Olmsted (1988), Seattle (1989), St. Cloud, Minn. (1982), St. Croix (1993), St. Paul (1994)
2. Phoenix, Ariz. (1979): Dallas (1986), The Bronx (1995), St. Paul (1994), Ramsey (1990), Manchester, N.H., Brooklyn, Minn., St. Paul, Minn. (1987/1988), Times Square, N.Y. (1993), Newport News, Va. (1996), Minnesota (1989), Kansas City, Mo. (1998), Falcon Heights, Minn. (1994), Fridley, Minn., Brooklyn Park, Minn., Manatee County, Fla., New Hanover County (1989), Rochester/Olmsted (1988), St. Cloud, Minn. (1982)
3. Los Angeles, Cal. (1977): Dallas (1986), The Bronx (1995), Broward County, Fla., Times Square, N.Y. (1993), Newport News, Va. (1996), Garden Grove (1991), Bellevue, Wash. (1987), Manhattan (1994), Seattle (1989), St. Cloud, Minn. (1982), St. Paul, Minn. (1994), St. Croix (1993), Brooklyn Park, Minn.
4. St. Paul, Minn. (1987): Dallas (1986), Ramsey (1990), St. Paul, Minn. (1987/1988), Times Square, N.Y. (1993), Minnesota (1989), Bellevue, Wash. (1987), Brooklyn, Minn., Falcon Heights, Minn. (1994), Brooklyn Park, Minn., Manatee County, Fla., Lynnwood, Wash. (1989), Rochester/Olmsted (1988)
5. Austin, Tex. (1986): Dallas (1986), The Bronx (1995), Manchester, N.H., Broward County, Fla., Kansas City, Mo. (1998), Manatee County, Fla., Manhattan (1994), Seattle (1989), St. Cloud, Minn. (1982), St. Paul, Minn. (1994)
6. St. Paul, Minn. (1987/1988): Brooklyn, Minn., Times Square, N.Y. (1993), Minnesota (1989), Kansas City, Mo. (1998), Falcon Heights, Minn. (1994), Fridley, Minn., Rochester/Olmsted (1988), St. Cloud, Minn. (1982), St. Paul, Minn. (1994)
7. Amarillo, Tex. (1977): Dallas (1986), Beaumont (1982), Newport News, Va. (1996), Manatee County, Fla., New Hanover County (1989), St. Croix (1993), St. Paul, Minn. (1994)
8. Detroit, Mich. (1972): Beaumont (1982), Times Square, N.Y., (1993), Bellevue (1987), New Hanover County (1989), St. Croix (1993)
9. Beaumont, Tex. (1982): Dallas (1986), Newport News, Va. (1996), Manatee County, Fla., New Hanover County (1989), St. Croix (1993)
10. Kent, Wash. (1982): Des Moines, Wash., Bellevue, Wash. (1987), Lynnwood, Wash. (1990), Seattle (1989)

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most frequently cited studies. Accordingly, the concerns that are outlined below apply to all of the "top ten" relied upon "secondary effects studies." And, virtually all of the reports that have been analyzed have these same failings, often because they themselves relied upon earlier "studies" that contained the same flaws discussed below.

THE BASIC REQUIREMENTS FOR THE ACCEPTANCE OF SCIENTIFIC EVIDENCE

In an attempt to prevent the proliferation in courtrooms of "junk science," the United States Supreme Court in *Daubert* held that there are limits on the admissibility of scientific evidence offered by "expert witnesses" in federal courts.[67] The Court opined that scientific knowledge must be grounded "in the methods and procedures of science" and must be based on more than "subjective belief or unsupported speculation."[68] Thus, the Court said, "the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability."[69] In a footnote, the Court observes that "[i]n a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*."[70] Offering "some general observations" as to how this connection can be made, the Court provided a list of factors that federal judges could consider in ruling on a proffer of expert scientific testimony: (1) The "key question" is whether the theory or technique under scrutiny is testable, borrowing Karl Popper's notion of falsifiability.[71] (2) Although publication was not an absolute essential, the Court noted that peer review and publication increased "the likelihood that substantive flaws in methodology will be detected."[72] (3) Error rate.[73] (4) Adherence to professional standards in using the technique in question.[74] (5) Finally, though not the sole or even the primary test, general acceptance could "have a bearing on the inquiry."[75]

While it may not be necessary to hold municipalities to each of these considerations when weighing the validity of evidence substan-

[67]Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 (1993).
[68]*Id.* at 599.
[69]*Id.* at 590.
[70]*Id.* n.9.
[71]*See id.* at 593 (citing KARL POPPER, CONJECTURES AND REFUTATIONS 37 (5th ed. 1989)).
[72]*Id.*
[73]*See id.* at 594.
[74]*See id.*
[75]*Id.* at 593–94.

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tiating the existence of secondary effects research with adult businesses, at least two factors are indispensable. It is at least a testable proposition that secondary effects may result from adult establishments, or else a study would not have been undertaken in the first place. It can be further presumed that a lengthy peer review and publication process may be unlikely due to the sense of urgency when communities tend to address these issues. In addition, the general acceptance requirement is held to have a bearing but is not an absolute consideration. The third and fourth factors, however, the calculation of an error rate and adherence to professional standards in using techniques or procedures, need to be applied to these studies in order to ensure "evidentiary reliability." Without this reliability, there is no basis to determine whether there is a substantial or important governmental interest involved, whether a specific piece of legislation is "necessary" in order to further that interest, or whether it is "reasonable" for a municipality to rely upon such a study as a basis for enacting legislation.[76]

In a scientific study, the error rate refers to the probability of accepting a result as true, when in fact it is false.[77] The rate is an indication of the reliability of a finding. An error rate is determined by first calculating an estimation of a population characteristic (a statistic) that summarizes the data that have been collected and then asking how likely it is that that statistical value would be obtained by chance alone. The error rate is the degree of chance a scientist will allow. In the social sciences, it is conventional to set the error rate at five percent or less (that is, a researcher will tolerate an error rate of five times out of 100 that the results may be obtained by chance).[78]

Unless certain assumptions are met, statistical tests cannot be applied to the data, and an error rate cannot be calculated. Most impor-

[76]This is perhaps the most important notion underlying this research. Results suggesting no reliable and/or valid evidence of a relationship between negative secondary effects and adult entertainment businesses would mean that the courts would need seriously to reconsider whether municipalities indeed have a substantial interest in regulating such uses. At the very least, it would suggest that most, if not all, municipalities with codified restrictions on adult uses have based their justification of such restrictions (according to the requirements set forth in *Young* and *Renton*) on inaccurate data.

[77]*See* JACOB COHEN & PATRICIA COHEN, APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES 166–76 (2d ed. 1983); DAVID C. HOWELL, STATISTICAL METHODS FOR PSYCHOLOGY 349–50 (4th ed. 1997); GEOFFREY KEPPEL, DESIGN AND ANALYSIS: A RESEARCHER'S HANDBOOK 164–65 (3d ed. 1991); ROBERT R. PAGANO, UNDERSTANDING STATISTICS IN THE BEHAVIORAL SCIENCES 215–16, 384 (5th ed. 1998).

[78]*See* COHEN & COHEN, *supra* note 77, at 21.

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tant of these assumptions in regard to, for example, survey research, is that the units of analysis (for example, survey respondents) are randomly selected from the population, or in regard to an experiment, that the units of analysis (for example, subjects) are randomly assigned to experimental and control or comparison groups.[79] The results of properly conducted experiments and surveys are always couched in terms of an error rate.

In many cases, especially in field research, it is not possible to randomly assign units of analysis to an experimental group and a control group.[80] This is universally true of "secondary effects" studies.[81] When this is the case, adherence to a set of professional standards that have been devised by scientists in a particular area of inquiry to insure methodological integrity and thus the validity of a study is all the more necessary. These standards vary somewhat depending on the area of inquiry or social science discipline, but they are generally known as professional standards for conducting "quasi-experiments."[82]

Four Criteria for Insuring a Scientifically Valid Study of Secondary Effects

The majority of the secondary effects studies reviewed in this article generally assume the following form. Researchers assemble crime statistics and calculate average property values and other general measures of neighborhood quality or deterioration (for example, residential turnover rate, local tax revenue, etc.) in the geographical area surrounding adult entertainment businesses. In a few studies these measures are compared to other areas that do not contain adult businesses. Another popular data gathering method is to perform a survey in which residents or business owners are asked for their opinions of the likely impact of adult entertainment businesses on their neighborhoods.

Four criteria are crucial in insuring that a scientifically valid study of secondary effects has been conducted. First, in order to insure accurate and fair comparisons, a control area must be selected that is truly "equivalent" to the area containing the adult entertainment busi-

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[79] *See* EARL BABBIE, THE PRACTICE OF SOCIAL RESEARCH 202–10 (8th ed. 1998); ROYCE A. SINGLETON, JR. ET AL., APPROACHES TO SOCIAL RESEARCH 136–51 (2d ed. 1993).

[80] *See* DONALD T. CAMPBELL & JULIAN C. STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH 34 (1963).

[81] Obviously, it is not possible randomly to assign adult businesses to some neighborhoods and hold other neighborhoods as controls.

[82] *See* CAMPBELL & STANLEY, *supra* note 80, at 34–71.

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ness.[83] Since most studies of secondary effects attempt to uncover increases in crime or neighborhood economic deterioration, professional standards dictate that the control (non-adult) site must be comparable (matched) with the study (adult) site on variables related to crime and deterioration. Of particular importance when studying crime is that the study and control areas are matched for variables such as ethnicity and socioeconomic status of individuals in both areas. Additionally, economic factors, such as median home value and total individuals employed and unemployed, should be comparable in both areas. A concerted effort should also be made to include only comparison areas with similar real estate market characteristics including property values, rental rates and proportion of unused commercial and industrial space in either area. The study and control areas in a crime study should be approximately equal in total population. Finally, because of the effect of businesses that serve alcoholic beverages on increases in crime and neighborhood deterioration, the study and control area should be matched on the presence of alcohol-serving establishments.[84]

Second, a sufficient period of elapsed time, ideally both prior to and following the establishment of an adult entertainment business, is necessary when compiling data in order to ensure that the study is not merely detecting an erratic pattern of social activity. Most methodologically sound, quasi-experimental, time-series analyses rely on at least a one-year period prior to and after the introduction of the event under study to test for significant changes. Generally, the longer the time period before and after the event under consideration, the more stable (and more valid) the estimates of the event's effects tend to be.[85]

Third, the crime rate must be measured according to the same valid source for all areas considered.[86] Studies on secondary effects typically focus on two general types of crime in relation to adult entertainment businesses. These two types of crime are "general criminal activity" (including, but not limited to, robbery, theft, assault, disorderly conduct and breaking and entering) and "crimes of a sexual nature" (including, but not limited to, rape, prostitution, child molestation and indecent public exposure). It is especially important that the measurement of these crimes is based on the same information source for both sites and throughout the entire study period. For

[83] *See* BABBIE, *supra* note 79, at 213–14.
[84] *See, e.g.*, CITY OF ST. PAUL, MINNESOTA, *supra* note 66.
[85] *See* SINGLETON ET AL., *supra* note 79, at 213–41.
[86] *See* CAMPBELL & STANLEY, *supra* note 80, at 5, 9.

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example, if the study area measures crime by the number and type of calls made to the police department, the control area must also rely on such a measure when the two areas are compared.

In addition, the crime information source must be factually valid and reliable, such as a daily log kept by police or a compilation of the number of arrests. Many studies claim to measure area crime by asking survey respondents about their estimates of the likelihood of being a victim of crime. Such data are not preferred because of their subjectivity and as such, cannot be trusted as a valid representation of actual criminal activity in a particular area. Social scientists should hesitate to rely upon such "evidence" to establish a causal link between adult businesses and secondary effects. The *Daubert* standard suggests such information may not have sufficient "trustworthiness" to be admissible in a federal court. However, if such subjective opinion research on crime is to be undertaken, it should conform to the standards for conducting reliable and valid survey research.

Researchers must also acknowledge any change in police surveillance techniques once an adult entertainment business has been established in a particular community. Obviously, increased surveillance of an area simply because an adult business is located there will have an impact on the amount of crime detected by the police. If increased police surveillance and the opening of an adult business in a particular area are confounded in this way, it is impossible to tell whether crime has increased due to the presence of the adult entertainment business or increased surveillance police discovering more crime.

Finally, survey research, if relevant to the question at all, must be properly conducted. Most survey research in this area involves asking real estate professionals, local property owners, law enforcement officers and/or community residents to estimate the effect of the presence of an adult entertainment business on a particular community. Less frequently, surveys of citizens' perception of crime and victimization are also undertaken. While subjective surveys may provide a sense of the general opinion of a particular group regarding the impact of adult entertainment businesses on surrounding neighborhood property values or criminal activity, this kind of survey does not provide sound empirical evidence of any true relationship between these businesses and their actual impacts on the surrounding areas. For instance, while the opinions of real estate professionals are legitimate and important in regard to other matters, they have a particularly strong interest in the issue and as such, may produce biased results.

Survey evidence is not comparable to, nor can it replace, the evidence supplied by objective comparisons of, for example, property

values and/or crime statistics compiled by the police within areas containing adult entertainment businesses, with property values or crime statistics within areas containing no such businesses. Such a comparative analysis is the preferable social scientific means by which to establish a relationship between the presence of adult entertainment businesses and either decreases in property values or increases in crime for the surrounding areas.

Even if some survey research may be relevant to the issue at hand—although we doubt whether it truly is—it must be properly conducted in order for the researcher to calculate an error rate. Professional standards do exist for performing methodologically valid social scientific survey research so that it possesses some degree of reliability and trustworthiness. Adherence to these standards is essential if researchers hope to obtain legitimate unbiased survey results. First, it is important to ensure that a random sample of potential respondents is included in the study.[87] Second, a sufficient response rate must be reached, and those who do respond must not be a biased sub-portion of the sample.[88] Finally, there must be a sufficient number of respondents to provide a stable statistical estimate.[89]

THE FOUR MOST FREQUENTLY CITED STUDIES

The four most frequently cited studies and the degree to which they are scientifically valid according to the criteria laid out above are summarized in Table 2. The studies are described below, including their findings and conclusions as well as their methodological strengths and weaknesses, in reverse order of how often they have been cited by municipalities.

St. Paul, Minnesota (1978)[90]

This study represents the most methodologically sound of all of the empirical research reviewed. Ironically, the St. Paul study does not claim to have found any support for the existence of a relationship between sexually oriented adult entertainment businesses and negative secondary effects.

The study was methodologically stronger than most others for at least two reasons. First, the researchers examined all 76 census

[87] *See* BABBIE, *supra* note 79, at 176–82.
[88] *See id.* at 240.
[89] *See id.*
[90] *See* CITY OF ST PAUL, *supra* note 66.

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TABLE 2. HOW THE FOUR MOST FREQUENTLY REFERENCED STUDIES FULFILL THE CRITERIA NECESSARY FOR VALID RESEARCH CONCERNING SECONDARY EFFECTS

Criteria	Study and Control Areas Properly Matched	Valid Measures of Crime Statistics	Sufficient Time Lag	Change in police surveillance	Correct survey methodology	Evidence of negative secondary effects
Study						
Indianapolis, Ind. (1986)	Significant differences in population size, zoning mix, and property value. (–)	Measures appear valid. (+)	Used only a 3-year average for crime rates and property values. No measures taken prior to existence of adult businesses. (–)	No change in police surveillance mentioned. (+)	Used random sample of real estate appraisers. Though only asked for reaction to a hypothetical scenario. (+)	Contains evidence both for and against a relationship.
Phoenix, Ariz. (1979)	Significant differences in average income and age of housing stock. (–)	Measures appear valid. (+)	No significant time series data considered. No measures taken prior to existence of adult businesses. (–)	No change in police surveillance mentioned. (NA)	No survey data collected. (NA)	Contains some equivocal evidence of a relationship.
Los Angeles, Cal. (1977)	Areas were comparable. (+)	Measures appear valid. (+)	Data from over a six year period were considered. During that time a number of businesses both opened and closed. (+)	Admit to "stepped up" police surveillance. (–)	Used completely biased, nonrandom sample of local residents and real estate professionals who lived or worked within 500 feet of an adult business. (–)	Contains absolutely no objective evidence of a relationship.
St. Paul, Minn. (1978)	Areas were comparable. (+)	Did not consider crime as a variable. (NA)	Data from over a six year period were considered. During that time a number of businesses both opened and closed. (+)	Did not consider crime as a variable. (NA)	No survey data collected. (NA)	Contains absolutely no evidence of a relationship.

tracts within the St. Paul region. The authors compared all tracts containing adult entertainment establishments with all of those that did not. As such, the study examined the entire geographical "study universe," negating the need for random assignment of control areas or the appropriate matching of selected control areas to the study area. Second, the study, which compared levels of neighborhood deterioration for study and control areas, maintained a substantial time lag between the first measures of deterioration and the second. Deterioration was determined by examining crime counts, housing values and market and legal influences over the study period. Therefore, changes in neighborhood climate between the first and second measures are more likely representative of reliable neighborhood changes rather than erratic fluctuations in social activity.

The most important aspect of this study is that it found absolutely no relationship between sexually oriented businesses and neighborhood deterioration. In fact, the study found that the only factor that was predictive of neighborhood deterioration was whether an alcohol-serving establishment was operating within the area. No relationship was found, however, between neighborhood deterioration and the presence of establishments that both served alcoholic beverages and offered live nude entertainment.

Los Angeles, California (1977)[91]

This study is perhaps the most often incorrectly referenced of any empirical research investigating the effects of adult-oriented businesses on surrounding areas. In fact, although it is the third most relied-upon piece of research that was found supposedly establishing the relationship between adult-oriented businesses and negative social repercussions, the researchers actually never claim any significant support for such a connection.

The study report consists of four parts. In the first part of the study, the researchers openly admit that they found no evidence of a relationship between the operation of adult entertainment businesses and potential negative effects. These conclusions were based on the results of a comparison of the average property value changes for five study areas and four control areas. Each of the five study areas was chosen because it contained a known cluster of adult entertainment businesses. The four control areas were chosen because of their proximity and supposed similarity to at least one of the study areas and because they did not have an adult entertainment business

[91] *See* CITY OF LOS ANGELES, *supra* note 65.

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operating within their borders. All of the study and control areas were in Hollywood, North Hollywood or Studio City.

The researchers reported that it was difficult to find any consistent increase or decrease in property values associated with adult businesses. Results of the comparisons found that for some study and control area comparisons, there was a far larger decrease in the control (non-adult) area. Such a result is contrary to the assumption underlying the secondary effects doctrine (that adult establishments themselves cause a decrease in property values). Similarly, at least one study (adult) areas increased in value by more than 400% over their comparable control (non-adult) area. Again, this result is directly opposite to what one would expect to see by assuming a connection between adult businesses and secondary effects. Given these objective findings, the researchers stated that there is "... insufficient evidence to support the contention that concentrations of sex oriented businesses have been the primary cause of these patterns of change in assessed valuations between 1970 and 1976."[92] It seems that those who have incorrectly referenced this study as supporting the relationship between adult entertainment businesses and lower property rates have simply disregarded the preceding statement by the study's authors.

The second part of the Los Angeles study claimed that survey results suggest that public opinion is strongly opposed to the operation of adult businesses. Such a "study" does nothing more than attempt to gauge subjective opinions and does not then serve to answer the more relevant question of whether adult businesses actually cause secondary effects. In addition, even in this subjective endeavor, the researchers failed to adhere to minimum professional standards by failing to conduct the research in accordance with proper survey techniques–most importantly, they failed to obtain a random sample of respondents. Without adherence to the requirement that a random sample of respondents be obtained, the study authors cannot calculate an error rate, and the reliability of the results cannot be determined. Instead, the Los Angeles study authors are left with a non-random survey of the opinions of potentially biased property owners and real estate professionals who each lived and/or worked within 500 feet of an adult entertainment business. Such a "survey" offers no insight as to whether adult establishments engender secondary effects and is not even representative of the broader public opinion on the issue.

[92] *Id.* at 25.

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In the third part of the Los Angeles study, the researchers openly acknowledge that they found no significant differences in crime rates between the census tracts encompassing the areas containing adult entertainment businesses and areas containing no such establishments. This part of the study consisted of an examination of the crime and population statistics for each of the census tracts containing clusters of adult entertainment businesses. Only tracts containing the clusters of adult businesses considered within the study areas for the first part of the study (discussed above) were considered. These data were then compared to those obtained from the census tracts containing each of the comparison control (non-adult) areas used in the first part of the study. Both sets of data were analyzed and compared over time in order to determine any significant differences concerning crime rates. The study authors concluded that in general there were no significant differences in crime rates between the census tracts encompassing the study (adult) and control (non-adult) areas and that no firm conclusions relevant to the study could be developed.

The fourth and final part of the Los Angeles study involved a "special" police study of the areas of Hollywood containing clusters of adult entertainment businesses. However, the researchers failed to adhere to even the most basic and rudimentary professional standards by failing to attempt to make a comparison of crime statistics in these areas with those in comparable control (non-adult) areas. The researchers failed to compare the areas surrounding adult businesses with comparable control (non-adult) areas. In addition, the researchers admitted to a substantial change in police surveillance of the area under study, which renders any results at least suspect and most likely meaningless. Although the findings of this study suggested high levels of criminal activity within these clusters, any implication that this is connected to the presence of adult businesses is invalidated by the fact that the researchers admitted to "stepped up" surveillance within these areas. Put simply, the police most likely found greater amounts of crime in the adult establishment areas because they were trying harder to find it. These failings and problems take this portion of the study outside of the reliability criteria of *Daubert* discussed above.

Phoenix, Arizona (1979)[93]

This report presents the findings of a study performed in Phoenix that attempted to examine the relationship between adult entertain-

[93] *See* CITY OF PHOENIX, *supra* note 64.

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ment businesses and local crime rates. This study claimed to find higher overall crime rates in study areas containing adult-oriented businesses compared to control areas containing no such businesses. However, the evidence of negative secondary effects was equivocal at best. In addition, the study fails to adhere to professional standards because the control sites are not sufficiently comparable with the study site and there was not a sufficient period of time for the collection of data, both prior to and following the establishment of an adult entertainment business. The time control is necessary to ensure that the study is not merely detecting an erratic pattern of social activity.

The researchers selected three geographically diverse study areas, each comprised of one census tract in which at least one adult entertainment business was in operation. They further selected three control (non-adult) tracts located directly adjacent to the study tract. An attempt was made to match each of the three control areas with the study areas on several dimensions, including the number of buildings built since 1950, the median family income, median population age, percentage of acreage used residentially and percentage of population that was non-white.

It is essential that the selected study and control areas be accurately matched, but the matching of study and control census tracts for this study was unacceptable. The median income for study area 1 was 30% lower than that in the matching control, control area 1 had a substantially greater number of buildings built since 1950 than the corresponding study area, and study areas 2 and 3 each had significantly lower median income levels than did their matching control areas. Since income and crime levels are generally inversely related one might expect to see higher crime rates with lower income irrespective of the presence of adult businesses. These failures to sufficiently match the study and control areas suggest that this study does not adhere to acceptable professional standards for scientific research.

In addition, there was an insufficient period of time, both prior to and following the establishment of an adult entertainment business for reliable measures of crime or economic deterioration to be obtained. The study was limited to crime rates for a one-year period. Because of the extremely short period of time, one cannot be sure that the study was not merely detecting an erratic pattern of social activity.

Finally, although the study findings suggested that overall crime rates were higher in each of the study areas than those for each matching control area, a composite index of "violent crimes," which included murder, robbery, assault and rape, was also constructed.

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Each study (adult) area showed a lower rate of violent crime (including rape) than the matched control (non-adult) area. In addition, the rate of child molestation was higher in the control (non-adult) areas than in the matched study (adult) areas. The results of the study offered, at best, equivocal evidence of the relationship between crime rates and the operation of adult entertainment businesses.

Indianapolis, Indiana (1984)[94]

This study appeared to be the report most widely cited and relied upon by municipalities as evidence of negative secondary effects. Regardless of the problems with this report as outlined in this summary, the overall study offered equivocal findings regarding the supposed relationship between adult businesses and negative secondary effects. More importantly, in a sub-area analysis most relevant to the question of the relationship between adult businesses and secondary effects, lower rather than higher crime rates were found in all study (adult business) areas when compared to control (no adult business) areas. In addition, the overall study failed to adhere to rudimentary professional standards of scientific evidence, and an error rate could not be calculated due to a failure to meet basic statistical assumptions.

The methodological problems with this study can be summarized as follows: (1) The control sites were not sufficiently comparable (properly matched) with the study sites. (2) No measurements were taken prior to the establishment of an adult entertainment business to ensure that the study was not merely picking up an already established crime pattern that is independent of the adult businesses in the area. (3) There was a potential confounding effect caused by adult entertainment businesses that supplied both sexually oriented entertainment and alcoholic beverages. (4) The researchers did not adhere to minimum professional standards by failing to conduct a survey study of real estate professionals in accordance with proper survey techniques. Beyond being purely subjective, the most striking limitations of this survey study were that it asked a national sample of real estate appraisers who were not from Indianapolis to consider only a hypothetical scenario concerning adult businesses in an unspecified community. Thus, the survey results are not applicable to the question of whether an adult

[94] *See* CITY OF INDIANAPOLIS, *supra* note 63.

business would have a negative (even subjective) effect upon property values in the Indianapolis area.

The Indianapolis study contained reports of four separate analyses. Each had significant methodological problems that undercut its reliability.

While the first set of analyses purported to show that higher crime rates were associated with adult entertainment businesses, the researchers failed to adhere to minimum professional standards by not properly matching study and control areas and by not including a sufficient period of time prior to the establishment of an adult entertainment business for collection and analysis of data. In this portion of the report, the researchers compared crime rates for six study areas containing at least one adult entertainment business with crime rates for six control areas containing no adult entertainment businesses. The study authors attempted but failed properly to match control and study areas on a number of criteria, including zoning mix, population size and age of housing stock. Significant differences existed in reference to the zoning mix within the majority of study versus control sites. In addition, the control sites were 37% more heavily populated than the study sites. Since population density and zoning mix are often associated with higher crime rates, any differences found between the study and control areas could very well have been due to these factors rather than the presence of adult businesses.

Another problem with the study was that it did not include a sufficient period of time prior to the establishment of an adult entertainment business for the collection and analysis of data. This lack of a measurement some time before the adult business located in the area made it impossible to determine whether findings of higher or lower crime rates in either area were associated with the operation of adult entertainment businesses or whether the study was simply detecting an already established pattern of criminal activity.

Finally, also problematic was the fact that at least one establishment that served alcoholic beverages was included within each of the study areas, while this was not the case for each of the control areas. As at least one study has found evidence that the presence of alcohol-serving establishments are associated with higher rates of criminal activity,[95] this must be viewed as a potentially serious flaw (confound) to the study's validity. One would expect to see higher crime rates in areas that contained establishments that served alco-

[95]CITY OF ST. PAUL, *supra* note 66.

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holic beverages, regardless of the presence or absence of any sexually oriented businesses.

Particularly interesting was the fact that the Indianapolis report included a sub-area analysis that found lower rather than higher crime rates in all areas where adult businesses were located compared to control (non-adult) areas. This analysis involved a comparison of crime statistics for a smaller sub-area of the larger areas considered in the first analysis described above. The researchers examined crime rates in a 1000-feet radius around the adult businesses in the study areas. They compared these crime rates to those within a 1000-feet radius around a random centroid located within the control areas used in the first analysis. This portion of the study would then appear to be the most relevant of all to the question of whether adult businesses create or cause secondary effects in the areas immediately surrounding them. However, this sub-area analysis found lower crime rates in all study areas compared to control areas.

The Indianapolis report authors also claimed to have found a substantially smaller increase in property values for the study areas than for the control areas. However, the researchers failed to adhere to minimum professional standards by not properly matching study and control areas for this analysis. This portion of the study was therefore unreliable from a scientific standpoint.

The analysis compared the average home mortgage value and average number of homes sold for the control and study areas discussed in the first study, as well as those for the center township area. Since the data came from the same study and control areas discussed in the first analysis, these data are fraught with the same methodological problems associated with that data set (that is, the study and control areas were not properly matched). The average mortgage values in the study areas were initially 49% higher than those in either the control areas or the central township area. As such, the finding that the average mortgage value for the control areas and central township area increased by 77% and 56%, respectively, while the study areas saw only an average increase of 26%, can be explained as the result of what is known as a ceiling effect. The study area values may have initially been far more inflated than the two comparison areas. Thus, it would come as no surprise that the study areas saw a smaller increase in property value than the comparison areas. The vast differences in initial mortgage values associated with the failure to properly match control and study areas rendered the two areas far too dissimilar to consider as suitable comparison groups. Finally, it should also be noted that despite the greater increase in mortgage values for the control and

center township areas in comparison to the study (adult) areas, the study area still maintained a higher average mortgage value when the final measures were taken.

The fourth analysis described in the Indianapolis report included the results of a national survey of members of the American Institute of Real Estate Appraisers. The data collection for this analysis was flawed in three ways. First, survey research on perceived likely deterioration effects is completely subjective and does not answer the question as to whether there are secondary effects associated with adult establishments in terms of actual property values, such as average home prices or other economic indicators. Second, even in this subjective analysis, the researchers failed to adhere to minimum professional standards by failing to conduct the study in accordance with proper survey techniques. Although a random sample of real estate professionals was obtained, the response rate was unacceptably low (only one third of the respondents returned the questionnaire). Further, no error rate was calculated for the percentages reported in the study. Without the calculation of an error rate, the researchers cannot establish a "confidence interval" around the percentages calculated in the study. This is especially troublesome given the fact many of the findings hovered around the 50% mark. Without some indication of the confidence one can place in these estimates, it is unclear if the majority or a minority of respondents projected a negative impact if adult businesses were to locate in a community.

Third, and even more problematic, the sampled appraisers were asked only to consider a brief hypothetical situation concerning a middle class family that lived in an area in which an adult bookstore would soon be opening in a nearby building. The respondents were asked five questions concerning the potential effects on the value of the family's home. A fatal flaw in this study is that it asks a nationally selected group of appraisers—none of whom were from Indianapolis—to consider only a hypothetical scenario. Thus, it has little to say about how an Indianapolis community appraiser might actually view the value of a home in Indianapolis (if such a question was even truly relevant to the secondary effects doctrine).

Summary of the Six Other Most Frequently Referenced Reports

Table 3 provides a brief description of the methodological features of each of the remaining studies in the "top ten," and illustrates the de-

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TABLE 3. HOW WELL THE TOP TEN REFERENCED STUDIES MEET THE NECESSARY CRITERIA FOR GOOD SOCIAL SCIENTIFIC RESEARCH

Study	Criteria					
	Matched Control	Valid Measure of Crime Statistics	Sufficient Time Lag	Change in Police Surveillance	Correct Survey Methods	Evidence of Secondary Effects
Indianapolis (1984)	No (–)	Yes (+)	No (–)	No (+)	Yes (+)	Equivocal
Phoenix (1979)	No (–)	Yes (+)	No (–)	No (+)	NA	Equivocal
Los Angeles (1977)	Yes (+)	Yes (+)	Yes (+)	Yes (–)	No (–)	None
St. Paul (1978)	Yes (+)	NA	Yes (+)	NA	NA	None
Austin (1986)	No (–)	Yes (+)	No (–)	No (+)	Yes (+)	Equivocal
St. Paul (1987), (1988)	No (–)	Yes (+)	No (–)	NA	NA	None
Amarillo (1977)	No (–)	Yes (+)	No (–)	No (+)	NA	Yes
Detroit (1972)*	NA	NA	NA	NA	NA	None
Beaumont (1982)*	NA	NA	NA	NA	NA	None
Kent (1982)	NA	NA	NA	NA	No (–)	Equivocal

*Not an empirical study.

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gree to which the studies are scientifically valid. The remaining six most frequently referenced studies in descending order were reports produced by Austin, Texas (1986),[96] St. Paul, Minnesota (1987, 1988),[97] Amarillo, Texas (1977),[98] Detroit, Michigan (1972),[99] Beaumont, Texas (1982)[100] and Kent, Washington (1982).[101] Two of these, the reports by Beaumont and Detroit, are not empirical studies. The Beaumont "study," for example, is merely a report prepared by the planning department of that municipality, suggesting a need for regulation of adult businesses. The remaining four reports did not adhere to minimum professional standards of valid scientific research by failing to meet one or more of the four necessary criteria discussed above.

The studies produced by Austin, St. Paul and Amarillo all failed to compare neighborhood characteristics (crime rates or property values) for areas containing adult entertainment businesses with control areas containing no such businesses. In addition, these three studies failed to include measures of neighborhood characteristics over a sufficient period of time, both prior to and following the establishment of adult entertainment businesses. Further, the Kent study, which contained a report of an attempt to query neighbors of adult business establishments, failed to adhere to even the most minimal professional standards for proper survey research.

CONCLUSIONS

This article has abstracted and analyzed the methodology and major empirical findings of studies purporting to detect secondary effects of adult businesses. It has demonstrated, with few exceptions, that the scientific validity of the most frequently used studies is questionable and the methods are seriously and often fatally flawed. These studies, relied on by communities throughout the country, do not adhere to professional standards of scientific inquiry and nearly all fail to meet the basic assumptions necessary to calculate an error rate. Those studies that are scientifically credible demonstrate either

[96]CITY OF AUSTIN, TEXAS, REPORT ON ADULT ORIENTED BUSINESSES IN AUSTIN (1986).

[97]CITY OF ST. PAUL, MINNESOTA, ADULT ENTERTAINMENT—A 40-ACRE STUDY (1987); CITY OF ST. PAUL, MINNESOTA, ADULT ENTERTAINMENT—SUPPLEMENT TO THE 1987 ZONING STUDY (1988).

[98]CITY OF AMARILLO, TEXAS, REPORT ON ZONING AND OTHER METHODS OF REGULATING ADULT ENTERTAINMENT IN AMARILLO (1977).

[99]CITY OF DETROIT, MICHIGAN, DETROIT'S APPROACH TO REGULATING "ADULT" USES (1972).

[100]CITY OF BEAUMONT, TEXAS, REGULATION OF ADULT USES (1982)

[101]CITY OF KENT, WASHINGTON, CITY OF KENT ADULT USE ZONING STUDY (1982).

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no negative secondary effects associated with adult businesses or a reversal of the presumed negative effects.

Specifically, this article applied four criteria for methodological validity and found that the majority of studies failed to meet at least one, and often all, of these criteria. First, a number of studies attempting to compare areas containing adult businesses to areas containing no such businesses failed to include comparison (control) areas that were sufficiently matched regarding important characteristics, such as age of housing stock or racial make-up. This lack of comparability between study and control areas prevents researchers from determining whether neighborhood deterioration is related to the operation of adult businesses in an area or that some other confounding variable is responsible for the outcome. Second, a number of the studies using neighborhood crime measures have collected these statistics improperly. Although many studies gathered legitimate and consistent measures of crime statistics, such as police arrest reports over a sufficient period of time, a number of others used less scientifically acceptable measures, such as cross sectional survey results of residents' opinions of levels of crime. Third, the majority of studies failed to include a sufficient period of elapsed time, both prior to and following the establishment of an adult entertainment business, when measuring the relationship between the presence of adult businesses and a number of negative outcomes, such as higher crime rates and lower property values. Without a sufficient study period, it is difficult to determine whether a relationship exists between adult entertainment businesses and negative secondary effects, or whether the data are simply a reflection of an erratic pattern of local activity. Finally, most of the studies that included survey results utilized non-random and therefore biased samples of residents and/or business owners, rendering them scientifically invalid. Even if methodologically valid, such studies offer only subjective opinions concerning the impact of adult businesses and provide little, if any, evidence of actual negative secondary effects.

The studies reviewed here have been (and continue to be) shared across communities. As such, the methodological flaws found in these studies prevent them from being used to establish a sufficient government interest in the regulation of adult businesses within a particular community. However, these unsound studies have been repeatedly misused as evidence across a large number of other municipalities. For example, the Indianapolis study is cited by no fewer than 22 communities as evidence of a relationship between adult businesses and negative secondary effects. This study contained several substantial methodological flaws and found evidence both sup-

porting as well as rejecting negative secondary effects. Thus, the potential exists that as many as 22 zoning ordinances have been founded on a false premise about the substantial government interest in regulating the location of these businesses.

Although not specifically mandating such, the United States Supreme Court in *Pap's* may be perceived by some municipalities as permitting the extension of use of these flawed studies to the regulation of expressive conduct *within* an adult business as a basis for upholding an ordinance to regulate nudity on the ground that such a restriction would serve to eliminate negative secondary effects of such expression. Such regulation would be based on the same false premise as the zoning regulations addressed in *Young* and *Renton*—that there is valid evidence of a substantial government interest at stake, and that these types of laws further those interests (if they indeed exist).[102]

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[102]In his dissent in *Pap's*, joined by Justice Ginsburg, Justice Stevens argued that no rationale existed for an extension of the secondary effects doctrine as a justification for censoring nude dancing. City of Erie v. Pap's A.M., 120 S. Ct. 1382, 1406 (2000) (Stevens, J., dissenting). This doctrine was originally developed in *O'Brien* and extended to the regulation of adult businesses as a justification for zoning in *Young*. Stevens wrote that, although two fractured majorities of the Supreme Court have found such an application of the secondary effects rationale acceptable, the assumption that these secondary effects studies, even if they were not methodologically flawed, could be applied to justify regulation of forms of expression such as nude dancing may be unfounded. *Id.* at 1408–09. He suggested that the secondary effects doctrine, as it had previously been applied to adult businesses, was tailored towards zoning, that there existed no clear rationale for extending this doctrine as a justification for the regulation of expressive content, and that doing so represented a dangerous extension of censorship. *Id.* Stevens wrote:

> Until now the "secondary effects" of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. For the first time, the Court has now held that such effects may justify the total suppression of protected speech. Indeed, the plurality opinion concludes that admittedly trivial advancements of a State's interests may provide the basis for censorship. The Court's commendable attempt to replace the fractured decision in *Barnes* ... with a single coherent rationale is strikingly unsuccessful; it is supported neither by precedent nor by persuasive reasoning.

Id. at 1406. Justice Stevens also stated:

> To believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible. It would be more accurate to acknowledge, as JUSTICE SCALIA does, that there is no reason to believe that such a requirement "will at all reduce the tendency of establishments ... to attract crime and prostitution, and hence to foster sexually transmitted disease."

Id. at 1409 (citing *id.* at 1402 (Scalia, J., concurring)). Justice Stevens, therefore, viewed Erie's anti-nudity ordinance as an unwarranted and ineffective restriction on expression. Justice Souter noted that there had been an adult business zoning ordinance on the books in Erie for 23 years before the anti-nudity ordinance in question

Even if the studies undertaken to justify zoning were not scientifically flawed, there are a number of other reasons why it may be inappropriate to extend the secondary effects doctrine to the regulation of nudity. First, and perhaps most obvious, there have been no studies that have been specifically designed to measure the impact of nudity per se on adverse secondary effects. Of most use would be studies wherein rates of adverse secondary effects for areas surrounding nude dancing establishments are compared to those surrounding establishments where pasties and a g-string are required. In the absence of such a direct test, it cannot and should not be assumed that the studies reviewed here, even if methodologically sound, would generalize to the regulation of nudity.

In fact, from a social psychological standpoint there are several factors that may prevent the generalization of the evidence collected to justify the application of zoning regulations to the regulation of nude dancing. For example, there may be substantial differences in the characteristics of the patrons who frequented the adult establishments studied to justify zoning compared to those who now visit establishments offering live nude dancing. Further, the earlier secondary effects studies were conducted to address the problem of adult businesses that purveyed explicit depiction of sexual intercourse and other sexual acts, whereas nude dancing does not involve such explicit performances. In addition, live entertainment may produce substantially different effects than filmed or videotaped acts. Finally, the interpersonal element of live nude dance establishments must be considered. Viewing a live dancer and later perhaps interacting with that dancer may produce significantly different outcomes than viewing erotic movies or the other fare usually purveyed in businesses considered in earlier secondary effects studies. Until these questions are addressed through scientifically valid empirical research, the applicability of the secondary effects doctrine to yet another area of speech regulation is highly questionable.[103]

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had been used to censor nude dancing. However, the city had not enforced this ordinance. Justice Souter indicated that the anti-nudity ordinance did not represent the least restrictive means for curtailing secondary effects because the city had not enforced its less restrictive zoning ordinance and had instead chosen to apply a total ban on nude dancing. As such, the anti-nudity ordinance failed the fourth prong of the *O'Brien* test. *Id.* at 1405 (Souter, J., dissenting).

[103]*See* Alameda Books, Inc. v. Los Angeles, 222 F.3d 719 (9th Cir. 2000). The Ninth Circuit has addressed the applicability of studies conducted on adverse secondary effects for a particular purpose to another, arguably unrelated concern. *Id.* at 724–28. The appeals court affirmed a lower court's decision to strike down a Los Angeles ordinance prohibiting the operation of adult businesses that both sell adult products and contain facilities for the viewing of adult movies or videos. *Id.* at 728.

The Application of Social Science Evidence to the Regulation of Nude Dancing

Because the anti-nudity ordinance under scrutiny in *Pap's* was so similar to that considered in *Barnes*, it seems likely that with its *Pap's* decision, the Supreme Court had hoped to replace the fractured decision in *Barnes* with a clear majority ruling. Such a ruling may have offered the lower courts, lawmakers, adult business owners and First Amendment scholars a coherent precedent towards which to look when considering the constitutionality of anti-nudity regulations based on the secondary effects rationale. Yet, while the Court's decision in *Pap's* appears to be another fractured decision, there may be more coherence to the ruling than is at first apparent.

Five justices and thus a majority embraced the secondary effects doctrine in *Pap's*. Justice Souter, who dissented in part, not only agreed with the plurality's application of the *O'Brien* test to nude dancing as a form of symbolic speech, but, in theory, he also supported the secondary effects doctrine. Justice Souter merely disavowed his assertion in *Barnes* that secondary effects may be *presumed*. In *Pap's*, he questioned whether such a relationship has been empirically demonstrated in previous studies. It appears that Justice Souter is willing to accept application of the secondary effects doctrine to regulation of nudity in a particular community, if empirical evidence of a relationship between nude dancing and negative secondary effects can be obtained and, since his concurrence is necessary to obtain a majority that the O'Brien secondary efforts doctrine applies, this opinion may in fact be the Constitutional holding of *Pap's*.

Neverless, in *Pap's*, the plurality provides room for challenges, based on the collection of empirical evidence, to the assertions made by municipalities regarding a relationship between adverse secondary effects and nude dancing. The plurality noted that the adult business in question in *Pap's* could have challenged the City of Erie's assertion that nudity led to ill effects but that it did not do so. This leaves room for the introduction of secondary effects evidence col-

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The court rejected Los Angeles's attempt to use a study conducted in 1977 (reviewed above), which examined the relationship of adverse secondary effects and the concentration of adult businesses as evidence of a compelling government interest to regulate single business with combined uses. The court reasoned that the 1977 study offered no information on the effects of the combination of product-video booth within a single business. *Id.* at 724. "For the purposes of the secondary effects identified in the Los Angeles study, a solitary bookstore/arcade combination is hardly of the 'same character' as a grouping of multiple adult business establishments in a given geographical area." *Id.* at 726 n.7. As such, the court refused to allow a leap in logic similar to that of the plurality in *Pap's*.

lected by adult businesses both in city council hearings and as a basis for court litigation.

It is likely, based on the plurality's decision in *Pap's*, (that is, that the secondary effects doctrine pertains to nudity regulations), coupled with Justice Souter's admonition that secondary effects must be demonstrated convincingly (that is, empirically), that future court rulings concerning the constitutionality of regulations of nudity within adult businesses will continue to involve an application of some form of the *O'Brien* test. In considering the compelling government interest prong of the *O'Brien* test, lower courts intending to remain consistent with the Supreme Court's holding in *Pap's* may be forced to consider the methodological legitimacy of any evidence of a relationship between negative secondary effects and adult businesses collected by municipalities and by business owners who attempt to challenge governmental regulations predicated upon the allegation of such a connection.

In evaluating the admissibility of this evidence, the courts may be best served by turning to standards laid out in *Daubert* for the admissibility of scientific evidence. The application of such standards, bolstered by Justice Souter's opinion in *Pap's*, may force the courts to reject the studies previously relied upon as evidence of negative secondary effects, and require new, more methodologically sound, studies to demonstrate a compelling government interest in regulating nudity.

The courts should be mindful of the criteria designated above for collecting empirical evidence in a methodologically sound manner. Specifically, only evidence obtained using relatively closely matched control and experimental comparison areas should be acceptable. Further, where possible, a time-series analysis should be undertaken. All indicators of neighborhood quality (for example, crime rate and property values) must also be consistently measured across the study conditions. Courts may then accept any evidence (or lack thereof) that met all of the above criteria as definitive. Only such evidence of a relationship between adult entertainment businesses and negative secondary effects should be acceptable, both social scientifically as well as legally.

In this article, it has been demonstrated that there is sufficient room for a serious challenge to the assumption made by communities across the United States that past studies of secondary effects show an empirical relationship between adult businesses and negative effects. Further, there is presently no legitimate basis for extending the secondary effects doctrine to the regulation of expression within adult businesses based on these studies. City councils, municipalities and the courts are best served by the collection of new evidence based on sound scientific standards.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WET SANDS, INC., et al.	*	
Plaintiffs	*	
vs.	*	CIVIL ACTION NO. MJG-06-2243
PRINCE GEORGE'S COUNTY, MARYLAND	*	
Defendant	*	
INTERNATIONAL NITE LIFE ENTERPRISES, INC.	*	
vs.	*	CIVIL ACTION NO. MJG-06-2581
JACK JOHNSON, et al.	*	
Defendants	*	

MEMORANDUM OF DECISION

These cases, consolidated for trial, were tried to the Court without a jury. The Court now issues this Memorandum of Decision as its findings of fact and conclusions of law in compliance with Rule 52(a) of the Federal Rules of Civil Procedure. The facts set forth herein are found based upon the Court's evaluation of the evidence and the reasonable inferences derived therefrom.

I. BACKGROUND

A. Parties

Plaintiffs Wet Sands, Inc. ("Wet Sands"), CD15CL2001, Inc. ("CD"), Nico Enterprises, Inc. ("Nico"), and International Nite Life Enterprises, Inc. ("Nite Life") are Maryland Corporations that, at all times relevant hereto, have provided nude or semi-

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nude dancing in Prince George's County, Maryland.[1] The sole Defendant at trial[2] was Prince George's County, Maryland (hereinafter "the County").

The adult entertainment provided by Plaintiffs herein includes entertainers[3] performing dances on a stage while nude or scantily attired. There is physical contact or proximity between customers and entertainers during the stage dancing if customers approach - or touch - the dancers while giving tips. Plaintiffs also permit customers to have female entertainers perform "lap dances" in which a female entertainer moves on a male customer's lap. Plaintiffs extensively monitor physical contact between patrons and entertainers to prevent overt sexual activity and other intimacies.

Plaintiffs (and others in the same business) typically generate revenue by charging admission,[4] selling beverages (including alcoholic beverages if licensed to do so), selling of some edibles[5] and charging fees for lap dances. The entertainers

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[1] "John Doe" and "Jane Doe" plaintiffs, identified as representative patrons of the corporate Plaintiffs' establishments by Wet Sands, CD and Nico, have not participated actively in the proceeding and are assumed to lack standing herein.

[2] Nite Life sued Defendant Jack Johnson, but stipulated to the dismissal of all claims against him. [Paper 19]

[3] Most of the businesses provide female dancers; Wet Sands provides male, not female, dancers.

[4] The admission charge is sometimes euphemistically expressed as a membership fee or the like.

[5] Typically, chips, pretzels and the equivalent.

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are typically not paid by the business. Indeed, the entertainers normally pay the business a fee for the privilege of entertaining and earning tips that, it appears, can amount to considerable sums in the course of an evening.

B. The Legislation

On July 18, 2006, the County Council of Prince George's County ("the Council") enacted CB-31-2006 ("CB-31"), a zoning regulation that granted the Prince George's County Police and Fire Chiefs the power to require operators to cease and desist the operation of activities that are dangerous to the public health or safety, or being conducted without a premises license.

On the same date, the Council enacted CB-61-2006 ("CB-61"), an ordinance that established conduct restrictions and licensing requirements for "adult entertainment" businesses.

As discussed more fully herein, CB-61 places certain conduct restrictions on adult entertainment premises, providing, inter alia, that any nude dancer must perform on a stage raised at least eighteen inches off of the ground six feet away from all patrons. Contact between certain specified anatomical areas of performers and patrons is prohibited, as is providing a gratuity while performances are ongoing. CB-61 also requires an adult entertainment business to obtain a license and meet specified safety standards. The ordinance further requires the licensing of managers and entertainers working in the business.

C. Procedural Background

Wet Sands, CD, and Nico filed suit against the County on August 29, 2006. They contend that CB-31 and CB-61 violate the United States Constitution's First Amendment, the Takings and Due Process Clauses of the Fifth Amendment, and the Equal Protection Clause of the Fourteenth Amendment as well as the Maryland Declaration of Rights. They further claim that the aforesaid provisions are unconstitutionally vague and overbroad. They requested a declaratory judgment, as well as preliminary and permanent injunctive relief against the enforcement of CB-31 and CB-61. On September 15, 2006, Judge Chasanow,[6] deferred ruling on a request for a broad restraint against the legislation, but preliminarily enjoined enforcement of the provision in CB-61 requiring the public posting of licenses required thereunder. Hr'g. Tr.[7] 102, 104-05.

Nite Life filed suit on October 5, 2006 presenting essentially the same contentions with regard to CB-61.[8]

On October 5, 2006, these cases were transferred to the undersigned Judge. On October 18, 2006, this Court issued a Preliminary Injunction providing that, by agreement of the parties, Prince George's County would not take action to enforce CB-61 until the conclusion of the trial.

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[6] To whom the case was then assigned.

[7] References to "Hr'g Tr." are to the transcript of the September 15, 2006 hearing before Judge Chasanow.

[8] Nite Life does not present any claim with regard to CB-31.

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The cases were tried in a consolidated proceeding on November 20 and 21, 2006. Thereafter, a hearing was held and counsel presented post-trial arguments.

II. DISCUSSION

A. CB-31 (Zoning)

Wet Sands, CD, and Nico present an "as-applied facial challenge" to CB-31, contending that, although CB-31 is a generally applicable health and safety law that is neutral on its face, it is unconstitutional "as applied to First Amendment forms of businesses." Pl.'s Pretrial Mem. [Paper 30] at 8. The essence of the argument is that CB-31 affords Prince George's County officials "unbridled discretion" that they could use unconstitutionally to censor speech (including expressive conduct) of which they disapprove.

On its face, CB-31 does not differentiate between adult entertainment establishments and other businesses. The law allows the Chiefs of the Police and Fire Departments to force the closure of any type of business or activity if a use and occupancy permit is lacking, or if the activity presents an immediate danger to public health or safety. CB-31, §§ 27-260, 27-264.01. Should a business be closed by virtue of this authority, a Zoning Hearing Examiner must hold a hearing within four days on the validity of the closing, and must render a decision two days after the hearing. Id. §§ 27-264.01 (d), (g).

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Decisions of the Zoning Hearing Examiner may be appealed to the Circuit Court for Prince George's County. Id. § 27-264.01(i).

Wet Sands, CD, and Nico rely primarily on Lady J Lingerie v. City of Jacksonville, 176 F.3d 1358 (11th Cir. 1999), wherein the city of Jacksonville enacted zoning laws that allowed adult entertainment establishments to operate as of right in just one area of the city. Id. at 1361. Moreover, the legislation further required that an adult entertainment establishment be located a specified distance from other such businesses. As a practical matter, only two limited areas remained available for adult entertainment businesses within the permissible zone. Id. Adult entertainment businesses could apply for a zoning exception that would permit them to operate in a second zone of the city. Id. However, the approval of applications for this exception was subject to the discretion of the zoning board, guided only by nebulous standards such as "compatibility" or "environmental considerations." Id. at 1362.

The Eleventh Circuit held that this "unbridled discretion" did not pass constitutional muster because the zoning board's decision was not subject to "precise and objective" criteria. Id. Due to the danger that this broad discretion could be use to stifle certain forms of expression, the court held that the subjective zoning exception criteria could not be used with regard to applicants whose businesses are entitled to First Amendment protection. Id.

The decision in Lady J Lingerie concerned legislation that, unlike CB-31, subjected adult entertainment businesses to standards different from those applicable to other businesses. These businesses were relegated to accepting a location in a part of a small zone in Jacksonville or being subject to the vagaries of a zoning board exception application process. In sharp contrast, CB-31 makes no distinction between types of businesses. It does not disadvantage businesses - such as Plaintiffs' - that would be subject to First Amendment Protection.

Furthermore, CB-31 allows closure of any business only if that business has violated certain county safety codes or failed to obtain a use and occupancy permit. The closure can then be appealed to the Zoning Hearing Examiner and heard within four days; a decision must follow two days later. A dissatisfied party may appeal the decision of the Zoning Hearing Examiner to the Circuit Court for Prince George's County. Thus, there is rapid administrative review and prompt access to the courts for any business closed pursuant to CB-31.

Of course, as Judge Chasanow noted in her ruling in regard to preliminary relief, should CB-31 be implemented in a manner that discriminates against adult entertainment establishments, Plaintiffs (or any other affected person) may present an "as-applied" challenge to CB-31. Hr'g. Tr. 104. However, the instant case does not present any such challenge.

In sum, CB-31 does not distinguish between types of businesses, provides for prompt administrative and judicial

review of any closure and, therefore, is not unconstitutional on its face as violative of Plaintiffs' First Amendment freedoms.

B. CB-61 (Conduct Restrictions and Licensing)

CB-61 includes conduct restrictions and a licensing scheme.

1. The Conduct Restrictions

a. The Restrictions at Issue

CB-61 includes provisions prohibiting minors' access to the premises (§ 2613), preventing entertainers from being visible from any public place while employed on the premises (§ 2609(a)(8)), prohibiting operation of the adult entertainment business from 1 a.m. to 10 a.m. (§ 2612), and imposing certain restrictions on the conduct of the business (§ 2609(a)(1)-(7), (9)-(11).

Plaintiffs do not raise any objection to the prohibitions relating to access to minors or public visibility of entertainers. Nor do they raise any objection to several safety provisions in CB-61.[9] Moreover, Plaintiffs concede that some restriction on the hours of operation would be acceptable, but argue that the hours restrictions on their clients must be reasonable.

Accordingly, the term "conduct restrictions" is utilized herein to refer to CB-61-2006 §§ 5-2609(a)(1)-(7) and (a)(9)-(11), but not §§ 5-2609(a)(8), 5-2609(b), 5-2612 and 5-2613.

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[9] See § 5-2609(b).

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The conduct restrictions require that employees who are nude, semi-nude, or simulating any state of nudity be separated from the patrons. To accomplish this result, the legislation provides:

> (1) No employee or entertainer shall be unclothed, clothed in less than opaque attire, or shall move or remove such attire, or allow such attire to be moved or removed so as to expose to view any portion of the breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva or genitals, except upon a stage at least eighteen inches (18") above the immediate floor level and removed at least six feet (6') from the nearest patron.
>
> * * *
>
> (3) No employee or entertainer mingling with the patrons shall be unclothed or clothed in less than opaque and complete attire, costume or clothing as described in Section [5-2609](a) of this Section.
>
> * * *
>
> (6) No employee or entertainer shall wear or use any device or covering exposed view which simulates the breast below the top of the areola, vulva or genitals, anus, buttocks, or any portion of the pubic region.

CB-61, §§ 5-2609(a)(1), (a)(3), (a)(6). Accordingly, nudity[10] is not banned in adult entertainment establishments, so long as each nude entertainer is on a stage eighteen inches higher than the patron floor level and no patron is within six feet of a nude entertainer.

CB-61 provides further that:

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[10] The terms "nude," "nudity," etc. are used herein to refer to the state of "nudity" defined in CB-61.

(2) No employee or entertainer shall perform acts of or acts which simulate:

(A) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts which are prohibited by law;

(B) The touching caressing or fondling of the breasts, buttocks or genitals; or

(C) The displaying of the pubic region, anus, vulva or genitals; except as provided for in Subsection (a) of this Section.

* * *

(4) No employee or entertainer shall knowingly:

(A) Touch, caress or fondle the breast, buttocks, anus, genitals or pubic region of another person; or

(B) Permit the touching, caressing or fondling of his or her own breasts, buttocks, anus genitals or pubic region by another person; or

(C) Permit any person upon the premises to touch, caress, or fondle the breasts, buttocks, anus, genitals or pubic region of another person.

(5) No manager shall knowingly permit any person upon the premises to touch, caress, or fondle the breasts, buttocks, anus, genitals or pubic region of another person.

* * *

(7) No employee or entertainer shall use artificial devices or inanimate objects to depict any of the prohibited activities described in this section.

* * *

(9) No entertainer shall solicit, demand or receive any payment or gratuity from any patron for any act prohibited by this chapter.

(10) No entertainer shall demand or collect any payment or gratuity from any patron for entertainment before its completion.

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Id. §§ 5-2609(a)(4)-(5), (a)(7), (a)(9)-(11).

These provisions prohibit entertainers from touching themselves or others in certain parts of the body, from performing sexual acts and from engaging in, or simulating, sexual conduct. Moreover, patrons are prohibited from tipping the entertainers during a performance. Furthermore, the establishment must conspicuously display a sign stating the existence of certain of the conduct restrictions.

However, CB-61 contains a critical provision (the "Savings Clause") that limits the applicability of the foregoing conduct restrictions to obscene behavior.

b. The Savings Clause

The Savings Clause of CB-61 provides:

> (c) This Division shall not be construed to prohibit protected expression, such as:
>
> (1) Plays, operas, musicals, or other dramatic works that are not obscene;
>
> (2) Classes, seminars and lectures held for serious scientific or educational purposes that are not obscene; or
>
> (3) Exhibitions, performances, expressions or dances that are not obscene.
>
> (d) For purposes of this Division, an activity is "obscene" if:
>
> (1) Taken as a whole by an average person applying contemporary community standards the activity appeals to a prurient interest in sex;
>
> (2) The activity depicts patently offensive representations, as measured against the community standards, of:

> (A) Ultimate sexual acts, normal or perverted, actual or simulated; or
>
> (B) Masturbation, fellatio, cunnilingus, bestiality, excretory function, or lewd exhibition of the genital areas; or violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and
>
> (3) The activity taken as a whole lacks serious literary, artistic, political, or scientific value.

Id. § 5-2609 (emphasis added).

In view of the Savings Clause, the only restriction upon the expressive conduct aspect of Plaintiffs' business imposed by CB-61 is a prohibition against performances that are "obscene." The Savings Clause defines "obscene" in accordance with the Supreme Court's definition in Miller v. California, 413 U.S. 15, 24 (1973). Accordingly, except to the extent that such action may be found to constitute "obscenity" under Constitutionally acceptable standards, CB-61 does not restrict "nude" dancing or lap dancing, regardless of stage height, patron proximity or physical contact.

Of course, any conduct that constitutes "obscenity" under the Miller test can properly be prohibited under the legislation because there is no First Amendment protection for such conduct.

In sum, the Savings Clause performs its stated function; it saves the conduct restrictions of CB-61 from constitutional challenge.

c. Equal Protection

Nite Life[11] contends that CB-61 denies it the equal protection of the law because it distinguishes between "for-profit" and "non-profit" businesses on its face. Specifically, Nite Life points to the Public Indecency provision of CB-61 that prohibits persons from engaging in sexual intercourse or appearing in a state of nudity "in a public place or in a place open to the public." CB-61, § 14-139.02. CB-61 defines "place open to the public" as "any privately-owned place of business operated for a profit to which the public is invited." § 1-102(25.1) (emphasis added). Nite Life argues that CB-61 thus allows sexual intercourse or nudity in a place that is open to the public but not operated for a profit, creating an unconstitutional distinction between the two. However, § 14-139.02 prohibits nudity and sexual intercourse not only in any "place open to the public," but also in any "public place." The term "public place" is defined by CB-61 as including "any . . . place [whether or not operated for a profit] commonly open to the public." § 1-102(25.1). Therefore, the nudity prohibition in CB-61 does not distinguish between for-profit and non-profit operations; there is no Equal Protection clause violation.[12]

d. Vagueness

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[11] The other Plaintiffs do not present this contention.

[12] It may be true that a for-profit business is subject to the ban under two separate provisions while a not for profit operation is subject tot the ban by only one. However, since both types of operations are subject to the very same treatment, there is no equal protection violation.

Statutory language is void for vagueness if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct" the statute prohibits, or if "it authorizes or even encourages arbitrary and discriminatory enforcement." Hill v. Colorado, 530 U.S. 703, 732 (2000).

Plaintiffs argue that CB-61 is void because it is unconstitutionally vague. Plaintiffs do not specify what parts of the ordinance they contend are impermissibly vague, but generally refer to the Middle District of North Carolina's holding in Giovani Carandola, Ltd. v. Fox that the terms "fondle" and "simulate" (both used in CB-61) were unconstitutionally vague. 396 F. Supp. 2d 630, 660 (M.D.N.C. 2005)(hereinafter "Carandola I"), rev'd in part, Carandola v. Fox, No. 05-2308, slip. op. (4th Cir. December 15, 2006) (hereinafter "Carandola II").

Like the North Carolina statute at issue in Carandola I, CB-61 prohibits an entertainer in an adult entertainment establishment from performing, inter alia, "acts which simulate" sexual intercourse, masturbation, and sodomy. CB-61, § 5-2609(a)(2). Additionally, entertainers cannot perform or simulate the "touching, caressing or fondling of the breasts, buttocks or genitals." Id.; see id. §§ 5-2609(a)(4), (a)(5).

In Carandola II, the Fourth Circuit held that the verb "'simulate' is sufficiently precise to notify persons of ordinary intelligence of the conduct prohibited by the statute and to prevent the risk of arbitrary or discriminatory enforcement."

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Carandola II, No. 05-2308, slip. op. at 8. "An act only constitutes simulated sexual intercourse or simulated masturbation if it creates the realistic impression of an actual act." Id. at 9 (emphasis in original). Moreover, the verb "fondle" is "sufficiently clear to put persons of ordinary intelligence on notice as to what conduct the statute prohibits and to prevent the risk of arbitrary enforcement. Id. at 9-10. The Fourth Circuit noted that the term "fondling" occurred only in conjunction with a "specified erogenous zone, indicating that it aims to prevent overt sexual conduct." Id. at 9.

In light of Carandola II, the Court must hold that CB-61 is not void for vagueness.

e. Overbreadth

Plaintiffs claim that CB-61 is unconstitutionally overbroad because it "reaches a substantial number of impermissible applications." New York v. Ferber, 458 U.S. 747, 771 (1982). However, when legislation limits conduct and not just speech, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). Should a statute suffer the overbreadth infirmity, any enforcement is totally forbidden. Id. at 613. Therefore, the Supreme Court has warned that the overbreadth doctrine is "strong medicine" that should be used "sparingly and only as a last resort." Id.

Plaintiffs challenge the prohibition in CB-61 against the simulation of certain sexual acts. CB-61, § 5-260(a). However, in Carandola II the court held that essentially identical language was not overbroad because the prohibition on simulated sexual acts did not apply "when the performances that are presented are expressing matters of serious literary, artistic, scientific, or political value." Carandola II, No. 05-2308, slip. op. at 6. The Savings Clause in CB-61 has the same effect as the exception in the Carandola II legislation and saves CB-61 from being unconstitutionally vague.

f. Hours of Operation

Plaintiffs do not challenge the existence of a restriction on hours of operation in CB-61. They contend, however, that any restriction on the hours of operation of their businesses must be reasonable and that it is fundamentally unfair to impose upon their providing of adult entertainment more stringent hours of operation than those imposed on businesses selling alcoholic beverages with (or without) other types of entertainment.

The ordinance requires that adult entertainment businesses operate only between the hours of 10:00 a.m. and 1:00 a.m. CB-61, § 2612. However, businesses that serve alcohol in Prince George's County may operate, with limited exceptions, between 6:00 a.m. and 2:00 a.m. Thus, an adult entertainment business with a liquor license may continue to serve alcohol until 2 a.m. but at 1 a.m. must cease its adult entertainment.

The County has presented nothing whatsoever to support a conclusion that any secondary effects of adult entertainment - as distinct from other types of entertainment - require or even warrant an earlier closing time than business that provide alcoholic beverages. On the other hand, the Court finds - as Plaintiffs conceded - that it is appropriate to impose reasonable restrictions on their hours of operation. The Court finds that, on the record in the instant cases, the County's adoption of an hours of operation restriction on all places that serve alcohol without regard to the content or absence of entertainment provides an adequate basis for the adoption of the same restrictions on adult entertainment businesses.

Accordingly, the hours of operation restrictions in CB-61 are facially valid and enforceable, but only to the extent of the generally applicable restrictions imposed on businesses that are licensed to sell alcoholic beverages.

g. Sign Posting

The sign posting provision of CB-61 shall be treated consistently with the decision regarding the substance of the items required to be stated thereon. Accordingly, § 5-2609(a)(11) is held facially valid and enforceable only with regard to the requirement that there be a sign stating that the premises are licensed and that entertainers are not permitted to engage in any type of sexual conduct.

2. The Licensing Scheme[13]

CB-61 provides that an individual who desires to operate or work in an "adult entertainment premises" as a manager or entertainer must obtain a license before doing so. CB-61, §§ 5-2602 - 5-2603.

"Adult entertainment" is defined as:

> any exhibition, performance or dance of any type conducted in a premises where such exhibition, performance or dance involves a person who:
>
> (1) is unclothed or such attire, costume or clothing as to expose to view any portion of the breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva or genitals; or
>
> (2) touches, caresses or fondles the breasts, buttocks, anus, genitals or pubic region of another person, or permits the touching, caressing or fondling of his/her own breasts, buttocks, anus, genitals or pubic region by another person, with the intent to sexually arouse or excite another person.

Id. § 5-2601(a).

"Adult entertainment premises" are "any premises to which the public, patrons or members are invited or admitted and wherein an entertainer provides adult entertainment to a member of the public, a patron, or a member." Id. § 5-2601(b). To obtain an "adult entertainment premises license," an applicant must submit personal biographical data, the names and biographical data of all business partners and corporate officers and directors, a description of the adult entertainment business

[13] The licensing scheme is contained in CB-61 §§ 5-2602 - 5-2608, 5-2610 - 5-2611, 5-2614 - 5-2616.

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history of the applicant, and a description of the employment of the applicant for the three previous years.[14] Id. § 5-2605(a). Applicants for a premises license must also submit with their application proposed plans for security, traffic management and parking, a parking lot lighting plan, and a proposed life safety evaluation of the space in which the performance will be held, if the occupancy exceeds 250 persons. Id. § 5-2606.

Managers and entertainers applying for a license must provide biographical information, as well as the name of any business where the applicant intends to work and proof that the applicant is at least eighteen years old. Id. § 5-2605(b).

Within five days of receipt of a completed application, the Chief of Police "shall issue the applicable license," so long as the building in which the entertainment will occur has all required licenses, the applicants and all agents or employees have made no false statements, and all parties involved are at least eighteen years of age. Id. § 5-2608. Should the Chief deny an application, the aggrieved party may appeal the adverse decision to the Price George's County Board of Administrative Appeals, and then to the Circuit Court for Prince George's County, should the first appeal not succeed. Id. §§ 5-2608, 5-2615 - 5-2616.

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[14] Biographical data includes an applicant's address, telephone number, and date and place of birth. CB-61, § 5-2605(a)(1). The applicant must also give addresses for the previous five years. Id. § 5-2605(a)(4). With regard to business history, the applicant must report the suspension or revocation of any other business licenses in the past. Id. § 5-2605(a)(5).

Once a club is fully licensed and operational, the licenses of the owner, managers and entertainers must be posted in a place that is readily available for inspection. Id. § 5-2610. Additionally, the manager is required to maintain a log of all entertainers and managers working at the club each day. Id. A licensed manager must be present at all times the club is in operation. Id. § 5-2611.

The Chief of Police may close the club if there are violations of any part of CB-61. The Police Chief's closure decision may be appealed in the same manner as a denial of a license. Id. §§ 5-2614 - 5-2616.

a. First Amendment Protection of Sexually Oriented Businesses

The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech." U.S. Const., Amend. I. The Free Speech Clause of the First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925). The First Amendment "bars the government from dictating what we see or read or speak or hear." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245 (2002). Expressive conduct is protected by the First Amendment, but it enjoys less protection than does pure speech and restrictions on its exercise are more likely to be constitutionally permissible. See e.g., United States v. O'Brien, 391 U.S. 367, 376 (1968). Restrictions on expressive conduct are typically aimed at suppressing the secondary effects of the non-

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expressive aspect of the conduct instead of the expression itself. Steakhouse, Inc. v. City of Raleigh, 166 F.3d 634 (4th Cir. 1999).

Sexual expression which is "indecent but not obscene is protected by the First Amendment." Reno v. ACLU, 521 U.S. 844, 874 (1997). Nude dancing such as the type at issue here can be protected expressive conduct, but the Supreme Court has stated that "customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression." Barnes v. Glen Theatre, Inc., 501 U.S. 560, 564 (1991). As stated by Justice Stevens in Young v. American Mini Theaters, the First Amendment will not allow the total suppression of erotic expression, but "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." 427 U.S. 50, 70 (1976).

Regulations enacted for the purpose of restraining speech due to the content of that speech presumptively violate the First Amendment. Carey v. Brown, 447 U.S. 455, 462-63, 463 n.7 (1980); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972). If Prince George's County's purpose in enacting the statutes in question is "related to the content of the expression," then it must be justified under the "more demanding" strict scrutiny, which few statutes survive. City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000), Texas v. Johnson, 491 U.S. 397, 403 (1989). However, "if the governmental purpose in exacting the regulation is unrelated to the suppression of expression, then the

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regulation need only satisfy the 'less stringent'" intermediate scrutiny. Pap's A.M., 529 U.S. at 289, Johnson, 491 U.S. at 403.

It is well established that a government may place restrictions on erotic expression if its goal is to prevent the deleterious secondary effects of the adult entertainment establishments, not suppress the erotic message. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438 (2002) (stating that it is a "settled position" that municipalities must be able to address the secondary effects of protected speech); Boos v. Barry, 485 U.S. 312, 320 (1988) (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)); Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 513 (4th Cir. 2002) (hereinafter cited as "Bason"); Carandola II, No. 05-2308, slip. op. at 11. The Fourth Circuit stated in Bason:

> The Supreme Court has instructed that measures to regulate sexually explicit entertainment outside the home receive intermediate scrutiny if they are not premised on a desire to suppress the content of such entertainment, but rather to address the harmful secondary effects of such entertainment: higher crime rates and lower property values, and unwanted interactions between patrons and entertainers, such as public sexual conduct, sexual assault, and prostitution.

Bason, 303 F.3d at 513.

b. Prior Restraint

A law "subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." Shuttlesworth v. City of Birmingham, 394 U.S.

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147, 150-51 (1969). "[O]therwise valid content-neutral time, place, and manner restrictions that require governmental permission prior to engaging in protected speech must be analyzed as prior restraints and are unconstitutional if they do not limit the discretion of the decision maker and provide for the proper procedural safeguards." 11126 Balt. Blvd., Inc. v. Prince George's County, 59 F.3d 988, 995 (4th Cir. 1995).

Before CB-61 is analyzed under the O'Brien content-neutral framework, the licensing scheme must be examined as a prior restraint. Id.; see id. at 997 (noting that the desire of Prince George's County in enacting the licensing ordinance was to "ameliorate the adverse secondary effects of adult bookstores" but still employing the prior restraint analysis of Freedman v. Maryland, 380 U.S. 51, 58-60 (1965). If the licensing scheme meets the Freedman requirements, it is not an unconstitutional prior restraint.

Licensing restrictions on adult businesses will be upheld so long as "(1) any restraint prior to judicial review can be imposed only for a brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990) (O'Connor, J.) (citing Freedman, 380 U.S. 58-60); Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288, 296-97 (5th Cir. 2003). The review procedure prior to issuance of the

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license and judicial review of a denial must "cabin the decision-maker's discretion" so as to prevent the censorship of disfavored speech. Steakhouse, 166 F.3d at 638. Once the administrative review is completed, the second prong of Freedman requires an aggrieved applicant to have access to a prompt judicial determination of the merits of the claim. City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 781 (2004); 11126 Balt. Blvd., 59 F.3d at 999-1000. However, the need for prompt judicial determination may be provided by an appeal of the adverse decision to the state's court system through the usual procedures. Z.J. Gifts, 541 U.S. at 781-82. Applying these standards, it is evident that the CB-61 licensing scheme is not an unconstitutional prior restraint.

The determination of the decision-maker[15] is sufficiently limited so as to cause no concern that the ordinance may give rise to arbitrary enforcement or censorship. An application for an adult entertainment premises license requires only that the applicant provide biographical information and past business information germane to the present issuance of a license to do business. CB-61, § 5-2605. The requirement that an applicant submit parking and security plans and a life safety evaluation is not so nebulous as to render the discretion of the Chief of Police unlimited. Furthermore, so long as the application is complete, the applicant will have a decision within five days. Id. § 5-2608.

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[15] Here, the Chief of Police.

Applicants for a manger's or entertainer's license need only submit proof of age, biographical data, and the list of locations at which the applicant intends to work. Within five days of such an application, the applicant will have a decision. While there always exists the possibility that some decision-maker might render arbitrary rulings based on whim and personal proclivities, the ordinance does not grant that power. In order to stave off abuses, Prince George's County has provided an additional level of administrative review.

Should an application be denied or a license revoked, the adverse action must first be appealed to the Prince George's County Board of Administrative Appeals within ten days. On November 1, 2006, just a few weeks after CB-61 was to take effect, the Board of Appeals adopted a rule requiring the Board to hear any appeals from license denials under CB-61 within twenty days of receipt of appeal. After the argument is heard, the Board must, by its own rules, render a decision on manager or entertainer licenses within five days and on adult entertainment premises licenses within ten days.

Assuming an aggrieved applicant appeals as soon as possible, the administrative review will be completed thirty to thirty-five days after the initial application. This review period is not so long as to render the licensing scheme unconstitutional. Viewed in light of the Fourth Circuit's affirmation of the propriety of a ninety-day administrative review period in Steakhouse, the present review period certainly satisfies Freedman's first prong.

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Addressing Freedman's second prong, the judicial review period in CB-61 is directly analogous to that in Z.J. Gifts. 541 U.S. at 777. There, the Colorado town of Littleton passed an ordinance requiring that adult bookstores and adult video stores apply for a license before doing business. Id. A denial of a license could be appealed to the Colorado state courts pursuant to the state rules of civil procedure. Id. Though the ordinance did not provide an accelerated briefing schedule or a time by which the decision had to be rendered, the Supreme Court held that the state's "ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly." Id. at 781-82.

CB-61 allows an appeal of the denial of a license to the Circuit Court for Prince George's County. The appeal is governed by the state rules of procedure. Just as in Z.J. Gifts, "ordinary court procedures [provide] judicial tools sufficient to avoid delay-related First Amendment harm." Id. at 781. Additionally, this Court has every confidence that the Prince George's County Circuit Court judges will "execute [their] powers wisely so as to avoid" such serious threats of harm. Id. In the highly unlikely case that the Circuit Court does not administer its procedures in a constitutional manner, Plaintiffs or other injured parties can mount a case-specific challenge. Id. at 782.

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3. Applying the O'Brien Test

Plaintiffs allege that CB-61 is unconstitutional on its face because it includes conduct restrictions and a licensing scheme that blocks the free expression of their erotic dancing. Ordinances that "regulate sexually explicit entertainment outside the home receive intermediate scrutiny if they are not premised on a desire to suppress the content of such entertainment, but rather to address the harmful secondary effects of such entertainment: higher crime rates and lower property values." Bason, 303 F.3d at 513; see also Alameda, 535 U.S. at 434.

So long as it is conceivable that a jurisdiction sought to alleviate secondary effects of sexually oriented conduct, the Court will assume[16] that "one purpose of [the regulation] is to address the secondary effects that follow from lewd conduct on licensed premises, and that hostility to erotic expression, if a purpose of the restrictions at all, does not constitute the predominant purpose." Id. at 515 (emphasis added).

Supreme Court jurisprudence regarding the regulation of adult businesses based on their secondary effects has primarily focused on two types of regulations: public nudity ordinances and zoning ordinances. Carandola I, 396 F. Supp. 2d at 636.

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[16] In Bason, North Carolina provided "no record evidence," "submitted no direct evidence of legislative motive," and did not "proffer a single study of secondary effects relied upon by the legislature or the Commission" to support their claim that they enacted the regulations to address secondary effects, "protect 'public decency' and to prevent 'disorderly conduct' and 'blatant bacchanalian revelries.'" 303 F.3d at 514.

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Currently, the Renton test is used to examine zoning ordinances[17] that affect sexually explicit businesses, and the O'Brien test is employed to analyze public nudity statutes.[18] Renton, 475 U.S. at 46-50; Alameda, 535 U.S. at 433-34. The Renton test asks:

> 1) if the law is a time, place and manner regulation, or a total ban,
>
> 2) if a time, place and manner regulation, what is the appropriate level of scrutiny, and
>
> 3) if intermediate scrutiny is appropriate, whether the law serves a substantial government interest and allows for reasonable channels of communication.

Renton, 475 U.S. at 46-50; Carandola I, 396 F. Supp. 2d at 636-37. The four-part O'Brien test examines whether:

> 1) the government has the constitutional power to enact the statute,
>
> 2) the statute furthers an important or substantial government interest,
>
> 3) the governmental interest is unrelated to suppressing free expression, and
>
> 4) the statute restricts First Amendment freedoms no greater than necessary to further the government's interest.

Barnes, 501 U.S. at 567 (citing O'Brien, 391 U.S. at 376-77); Carandola I, 396 F. Supp. 2d at 637.

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[17]It should be noted that Renton is used to analyze zoning ordinances that target adult businesses, not generally applicable zoning ordinances, such as CB-31. Renton, 475 U.S. at 46.

[18]As well as many other types of laws that affect speech. See, e.g., O'Brien, 391 U.S. at 369; Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 185 (1997).

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Though stated somewhat differently, the two tests are, in practical effect, nearly identical. See Barnes, 501 U.S. at 566 (stating that the Renton inquiry embodies the same standards as O'Brien); Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (stating there is little, if any, difference between the two tests); Ben's Bar, Inc. v. Vill. of Somerset, 316 F.3d 702, 714 (7th Cir. 2003) (noting that the Supreme Court's most recent cases make it "abundantly clear that the analytical frameworks and standards utilized by the Court in evaluating adult entertainment regulations, be they zoning ordinances or public indecency statutes, are virtually indistinguishable"); but see Peek-A-Boo Lounge of Bradenton v. Manatee County, 337 F.3d 1251, 1264 (11th Cir. 2003) (concluding that despite the similarities in O'Brien and Renton, zoning and public nudity ordinances "must be distinguished and evaluated separately").

CB-61 is neither a zoning nor a pure public nudity ordinance, but the O'Brien test is used to analyze restrictions on exotic dancing such as those at issue here. See Fantasy Ranch, Inc. v. City of Arlington, 459 F.3d 546, 558 (5th Cir. 2006), Carandola I, 396 F. Supp. 2d at 637.

Though CB-61 has escaped strict scrutiny, the intermediate scrutiny of O'Brien is meaningful, and the County bears the burden of persuasion. Bason, 303 F.3d at 515. Prince George's County must produce evidence that the conduct restrictions and licensing provisions of CB-61 "materially advance an important or substantial interest by redressing past harms or preventing

future ones." Satellite Broad. & Commc'ns Ass'n v. FCC, 275 F.3d 337, 356 (4th Cir. 2001). These harms "must be 'real, not merely conjectural,' and the regulation must 'alleviate these harms in a direct and material way.'" Id. (quoting Turner Broad. Sys., Inc., 512 U.S. at 664).

To survive intermediate scrutiny, CB-61 must further the County's substantial interest in regulating the secondary effects associated with the adult entertainment that occur at the adult entertainment clubs. O'Brien, 391 U.S. at 376-77; Barnes, 501 U.S. at 567; Renton, 475 U.S. at 47. Precisely how the County must demonstrate this substantial interest and the amount of evidence upon which the County may and must rely is articulated in the burden-shifting framework of Alameda Books, Inc. v. City of Los Angeles, 535 U.S. 425 (2002).

In Alameda, the City of Los Angeles enacted an ordinance that prohibited adult businesses from being located within 1,000 feet of each other or within 50 feet of a religious institution, school, or public park. Id. at 430. Writing for the plurality, Justice O'Connor stated that the City of Los Angeles did not have to "prove its theory about a concentration of adult operations attracting crowds of customers." Id. at 437. The plurality reiterated the holding in Renton that "a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." Id. at 438; Renton, 475 U.S. at 51-52. However, this low bar does not grant the municipality

carte blanche to rely on "shoddy data or reasoning." Alameda, 535 U.S. at 438. The evidence relied upon by the municipality "must fairly support [the] rationale for the ordinance." Id.

Once the municipality has produced such evidence, plaintiffs may then attempt to "cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings." Id. at 438-39 (emphasis added). Put another way, plaintiffs can cast doubt on the municipality's evidence either intrinsically - by undermining the logical connection between the evidence and the ordinance - or extrinsically - by presenting additional evidence that calls validity of the municipality's evidence into question.

If the plaintiffs are unsuccessful in casting doubt on the government's evidence of secondary effects, then the municipality has carried its burden under Renton and Alameda, and the inquiry is over. Id. at 439. However, if plaintiffs "succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance."[19] Id.

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[19] The plurality in Alameda held that the plaintiffs had not cast doubt on the city's evidence, and thus the city carried its burden. Id. However, it is important to note that the Alameda reached the Supreme Court on appeal from the grant of summary judgment, and the plaintiffs' only evidence consisted of counsel's arguments that the city's main study failed to prove that the city's justification was necessarily correct. Id.

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Although there is no majority opinion in Alameda, Justice Kennedy's concurrence is the narrowest opinion and thus has been recognized as controlling. See Peek-A-Boo Lounge, 337 F.3d at 1264; Ben's Bar, Inc., 316 F.3d at 722; SOB, Inc. v. County of Benton, 371 F.3d 856, 862 n.1 (8th Cir. 2003); Carandola I, 396 F. Supp. 2d at 638. Justice Kennedy wrote separately to state that in addition to asking how much evidence is required to support the government's position, the proper inquiry asks "what proposition does a city need to advance in order to sustain a secondary-effects ordinance?" Alameda, 535 U.S. at 449 (Kennedy, J., concurring in judgment). In Justice Kennedy's view, whatever proposition the city advances must have "the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." Id.

The Court must therefore inquire "whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance." Ben's Bar, Inc. 316 F.3d at 724. A municipality, then, may not justify the suppression of speech based on the bald assertion that the intent is to regulate secondary effects. A connection must be made between the "negative effects and the regulated speech" through the evidence produced by the municipality and must survive the burden-shifting framework. R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402, 408 (7th Cir. 2004). As noted by Justice Kennedy, "the necessary rationale for applying intermediate scrutiny is the promise that

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zoning ordinances . . . may reduce costs of secondary effects without substantially reducing speech." Alameda, 535 U.S. at 450.

In specific reference to CB-61, the County must produce evidence that the conduct restrictions and licensing scheme will reduce the secondary effects it identifies, and must do so with evidence that it "reasonably believed to be relevant" and which "fairly supports" its rationale. Id. at 438; see id. at 449. The rationale supported must be that limiting expression will have the "purpose and effect" of reducing the secondary effects identified by the County.

a. First Prong - Constitutional Power

The first prong of the O'Brien test requires that it be within the constitutional power of the Government entity to enact the regulation in question. Barnes, 501 U.S. at 567. It is undoubtedly within the power of the government to prevent public indecency and regulate, within constitutional limits, sexually oriented entertainment. Id. Moreover, Plaintiffs have not suggested that CB-61 fails in this respect.

b. Second Prong - Secondary Effects

1. County Evidence Relied Upon

The "Declaration of Findings and Public Policy" that begins CB-61 states that the ordinance is intended to "mitigate the secondary effects of adult-oriented businesses." CB-61, § 5-

2600(1). Among those secondary effects, the ordinance notes, are "(a) prostitution and other sex related offenses (b) drug use and dealing and (c) health risks through the spread of AIDS and other sexually transmitted diseases." Id. § 5-2600(3).

At trial, Prince George's County introduced the evidence that had been relied upon by the County Council. This evidence was of the type that Alameda and its progeny have recognized and may validly be relied upon by municipalities. See SOB, Inc., 317 F.3d at 862-63; Fantasy Ranch, 459 F.3d at 559.

The Council had before it copies of statutes regulating adult entertainment businesses from other jurisdictions, as well as anecdotal evidence of the deleterious effects of sexually oriented businesses. Def.'s Ex. 3. The Council also had before it various updates on legal precedent dealing with the regulation of sexually oriented businesses, and summaries of crime impact studies by municipal and state governments on the harmful secondary effects of sexually oriented businesses. The Council also had evidence specific to the County, including a list of calls for service and numbers of crimes at specific adult entertainment clubs, as well as statements from Colonel Jeffrey Cox of the County Police Department as to the problems that the County faces in dealing with adult entertainment businesses.

The County introduced at trial thirty-three "studies" from other jurisdictions on the effects of various types of sexually

oriented businesses.[20] Def.'s Ex. 4. Many of these "foreign jurisdiction" studies have been relied upon by other jurisdictions in prior cases. See Carandola I, 396 F. Supp. 2d at 643-45 (listing some of the studies relied upon by North Carolina that were also relied upon by Prince George's County).

The evidence relied on by the County is typical of the evidentiary support relied upon by other state and municipal governments in enacting legislation similar to CB-61. Gammoh v. City of La Habra, 395 F.3d 1114, 1126 (9th Cir. 2005) (upholding the reliance by a city on evidence very similar to that relied upon by Prince George's County); see also G. M. Enterprises, Inc. v. Town of St. Joseph, 350 F.3d 631, 633-34 (7th Cir. 2003); Fantasy Ranch, 459 F.3d at 559; Andy's Restaurant & Lounge, Inc. v. City of Gary, 466, F.3d 550, 555 (7th Cir. 2006); N.W. Enterprises, Inc. v. Houston, 352 F.3d 162, 175-75 (5th Cir. 2003); Encore Videos, 330 F.3d at 294-96; SOB, Inc., 317 F.3d at 862-63; but see R.V.S., L.L.C., 361 F.3d at 411-12 (finding a city's limited proffer of evidence insufficient to carry its initial burden under Alameda).

The evidence introduced by the County was sufficient to carry the initial burden under Alameda and Renton. The burden then shifted to Plaintiffs to offer evidence that rebuts the

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[20] Though termed "studies," Plaintiffs established that the different materials cited as "studies" by Defendants varied greatly in method and statistical significance. The Court finds the semantic question of what is a "study" to be insignificant and thus will simply refer to anything termed as a "study" as such.

Defendants' evidence either by demonstrating "that the municipality's evidence does not support its rationale" or by "disput[ing] the municipality's factual findings." Alameda, 535 U.S. at 438-39.

2. Plaintiffs' Evidence

Plaintiffs' primary witness was Randy D. Fisher, Ph.D., a member of the faculty of the Psychology Department of the University of Central Florida. He holds a Ph.D. in psychology from Vanderbilt University and was Director of the Survey Research Laboratory from 1998 until 2003. He has authored over 500 peer-reviewed articles and has performed fifteen to twenty reviews of the evidence put forth by municipalities for restrictions on adult businesses.

Dr. Fisher prepared a report entitled "An Analysis of the Predicate for CB-61-2006" critiquing the studies and evidence relied upon by Prince George's County. In performing his review of CB-61, Dr. Fisher reviewed the evidence supplied by the Plaintiffs to the County as well as the evidence submitted by Defendants as the County's trial record.

It is sufficient for purposes of the instant discussion to state that the Court finds that Dr. Fisher effectively demonstrated that the "evidence" relied upon by the County was manifestly inadequate to validate its secondary effects conclusion with regard to the conduct restrictions. Indeed, the County appears to have gone out of its way to avoid obtaining

readily available information that could have been significant in reaching a secondary effects conclusion with regard to conduct restrictions. For example, Wet Sands provides an all-male revue in which nude dancers perform a few nights a week, but also operates without adult entertainment on other nights, and even allows a church to use the premises for services on certain days. There is no doubt that anyone purporting to have a genuine interest in secondary effects of adult entertainment should at least compare the difference between "secondary effects" evidence at this location on adult entertainment nights and the times when there is other entertainment and/or church services.

3. County's Trial Evidence

The County presented the testimony of Lewis Gentile ("Gentile"), author of the study of the effects of adult businesses in Prince George's County on which the County relied when enacting CB-61. Gentile has had a long career in state and federal law enforcement, holds a bachelor's degree in criminology, a master's degree in public administration, and has nearly completed his Ph.D. in sociology. He is currently the president of Gentile, Meinert and Associates, a consulting firm.

The Gentile study was seriously flawed and was inadequate to support the County's secondary effects conclusion with regard to the conduct restrictions in CB-61. For example, Gentile acknowledged that "[y]ou can't categorize what I've done as

meeting a statistics methodology, rigorous scientific requirements. You would categorize it as a survey that has gone through a process." Trial Tr. 10-11 (Dec. 20, 2006). Moreover, Gentile conceded that some of the businesses in his study do not even provide adult entertainment. Gentile also stated that he had no empirical evidence to support the claim that there was a secondary effect of an increase in crime. His conclusion was supported "exclusively" by previous studies done by others, remote in place and time from the County of today.

Gentile testified that his conclusion that adult businesses cause a decrease in property values was based on "interviews with [some people] within relative close proximity"[21] and the "whole reasonableness of the issue." Trial Tr. 11-12. In sum, as Gentile himself testified, Dr. Fisher's critique of Gentile's report was "a fine piece of academic work." Trial Tr. 23.

Of course, the County "need not conduct local studies or produce evidence independent of that already demonstrated by other municipalities to demonstrate the efficacy of its chosen remedy, 'so long as whatever evidence [the County] relies upon is reasonably believed to be relevant to the problem it addresses.'" Peek-A-Boo Lounge, 337 F.3d at 1265 (emphasis added). However,

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[21] Gentile did not identify, and presumably did not know, where the interviewees lived or what connection, if any, they had to the vicinity of the business in question. It appears that all that was known was that they happened to be in the vicintiy when interviewed. Moreover, some of the businesses that Gentile studied were not even adult entertainment businesses. The interview "evidence" is, accordingly, essentially without probative value.

deference to the County must be balanced with the Court's "obligation to exercise independent judgment when First Amendment rights are implicated." Alameda, 535 U.S. at 440 (citing Turner Broad. Sys., Inc., 512 U.S. at 666). In accordance with that balance, this Court must require the County's actions to be narrowly tailored, such that the ordinance "be drawn to affect only that category of business shown to produce the unwanted secondary effects." Peek-A-Boo, 337 F.3d at 1272 (citing Renton, 475 U.S. at 52) (emphasis added).

4. The Conduct Restrictions

The County has not produced any credible evidence that the conduct restrictions it seeks to impose on adult entertainment businesses such as Plaintiffs' would reduce the alleged secondary effects it sought to alleviate, such as drug dealing, the spread of STDs, and an "atmosphere of deviance." See Trial Tr. 14. Indeed, there is nothing of any substance to support a conclusion that the secondary effects alleged by the County (such as rape, robbery, assault, theft from automobiles, etc.) would be reduced at all by requiring dancers to perform on an elevated stage, keeping patrons six feet away from performers, prohibiting tips during performances, banning any physical contact between patrons and entertainers, etc.

Accordingly, absent the Savings Clause, the conduct restrictions in CB-61 would not pass constitutional muster. As discussed above, however, the Savings Clause restricts the

applicability of the conduct restrictions to obscene conduct. Such conduct is not afforded First Amendment protection. Accordingly, by virtue of the Savings Clause, the conduct restrictions in CB-61 are valid and enforceable, but, of course, only with regard to conduct that is obscene under the Miller standards.

5. The Licensing Scheme

Plaintiffs were not successful in rebutting the evidence of secondary effects supporting a licensing scheme. The County considered evidence establishing that, absent licensing, it is not feasible to know of all adult entertainment clubs and impossible to know the identities of operators, employees and entertainers. Many of the problems rendering Gentile's study inadequate to support the County's conclusion regarding conduct restrictions could be overcome if he (and the County) were able to know which businesses provided adult entertainment.

The County has adequately demonstrated the secondary effects caused by an absence of a licensing scheme. These include the County's inability to identify the pertinent businesses and people, the need to ensure adequate security for patrons and neighborhoods in view of the number of persons attending these clubs at late hours, and the need to ensure that persons convicted of certain offenses are not engaged in the business. Additionally, it is apparent that imposing a licensing scheme enabling the identification of entertainers and others who

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generate substantial cash income is likely to have a positive effect upon the enforcement of the income tax laws. Most importantly, Plaintiffs' demonstration of many of the defects in the County's evidence plainly indicates that a licensing scheme would substantially assist the County in an effort to obtain reasonably reliable evidence of the presence or absence of asserted secondary effects.

Thus, the Court concludes that the licensing scheme addresses a substantial interest in avoiding the reasonably perceived secondary effects stemming from the absence of a licensing scheme.

3. Third Prong - Content Neutral

Under the third prong of the O'Brien, test, the ordinance must be "justified without reference to the content of the regulated expression." Barnes, 501 U.S. at 567. As discussed above, the County's stated purpose in enacting CB-61 was to combat secondary effects of adult entertainment. In view of that stated purpose, combined with the Fourth Circuit's assumption of that intent by the North Carolina legislature in Bason, the licensing scheme in CB-61 can be justified by the County's intent to regulate harmful secondary effects. See Bason, 303 F.3d at 515 (presuming, though no evidence was offered on the point, that the North Carolina legislature intended to address the secondary effects of nude dancing).

d. Fourth Prong - Unrelated to Suppression

Once a substantial interest is found that is unrelated to the suppression of free speech, O'Brien requires that "any incidental restriction on alleged First Amendment freedoms be no greater than is essential to further the government's interest." O'Brien, 391 U.S. at 376. The County is not required to choose the "least restrictive means" of serving the substantial interest, but it may not "burden substantially more speech than is necessary to further the government's legitimate interests." Id. The County may not "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Id.

The Court concludes that the existence of a licensing scheme in CB-61 is justified by the County's interest in preventing the above-described secondary effects resulting from totally unlicenced adult entertainment businesses of the type operated by Plaintiffs. The Court finds that except with regard to public posting of licenses identifying licensed individuals, the licensing scheme is no greater than is essential to justify the County's legitimate governmental interest.

The ordinance provides that entertainers' licenses shall be posted so as to be readily available for inspection by County authorities (§ 5-2610) and managers' licenses "in a conspicuous place and manner." Id. at § 5-2610(b). The ordinance is ambiguous as to whether there must be a posting of licenses in a manner that discloses the name and address of individual

licensees to members of the public. The Court finds no justification for the posting of licenses in a manner to make public the names and/or addresses of individual licensees.

Thus, consistent with Judge Chasanow's preliminary injunction, the Court will enjoin enforcement of a requirement requiring the posting of licenses in a manner that would make the names and addresses of licensed individuals visible to members of the public. On the other hand, the County might be able to adopt a public posting requirement that preserved the privacy of the names and addressees of individual licensees;[22] the posting provision could thus be adequately tailored to be valid and enforceable. Or, there presumably could be a requirement that licenses need not be posted but had to be readily accessible for inspection by authorized governmental personnel.

III. CONCLUSION

For the foregoing reasons, the Court decides that:

1. Prince George's County Ordinance CB-31-2006 is facially valid and enforceable.

2. The provisions of Prince George's County Ordinance CB-61-2006, §§ 5-2609(a)(8), 5-2609(b)-(d) and 5-2613 are facially valid and enforceable.

3. The hours of operation provision in § 5-2612 is facially valid and enforceable to the extent that it imposes on adult entertainment businesses the

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[22] For example, it may be feasible to provide that there be public posting of licenses identifying individual licensees by an assigned number, with management required to have available for inspection by appropriate government personnel the identity and address of each such licensee.

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same restrictions as applicable to businesses that are licensed to serve alcoholic beverages.

4. The sign posting provisions of Prince George's County Ordinance CB-61-2006, § 5-2609(a)(11) are facially valid and enforceable but only with regard to the display of a sign stating that the premises are licensed and that entertainers are not permitted to engage in any type of sexual conduct.

5. The provisions of Prince George's County Ordinance CB-61-2006, §§ 5-2609(a)(1)-(7), and (a)(9)-(10) are facially valid and enforceable with respect to conduct that is "obscene" but not as to conduct that is not "obscene."

6. The provisions of Prince George's County Ordinance CB-61-2006, §§ 5-2602 - 5-2608, 5-2611 and 5-2614 - 5-2616 are facially valid and enforceable.

7. The provisions of Prince George's County Ordinance CB-61-2006, § 5-2610 are facially valid and enforceable except as to the requirement for any public display of licenses disclosing the names and/or addresses of individual licensees.

8. By separate Orders the Court shall issue Permanent Injunctions and Judgments consistent herewith.

SO DECIDED, on Thursday, April 12, 2007.

/ s /
Marvin J. Garbis
United States District Judge

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Work Phone 785.528.4163, work fax 785.528.4795

JOHN SAMPLES

Experience:

2006-Present — Kan Build, Inc. — Osage City, KS
CEO, Chairman of the Board

2003-2006
Owner — Farming — General Muscle Car — Milanos, CMI TRC VIP Inc

2001-2003 — All American Homes of KS, LLC — Osage City, KS
General Manager — All American Homes of CO, LLC — Milliken, CO

1989-2001 — Kan Build, Inc. — Osage City, KS
President/ CEO

- Founded Corporation
- Lead L.B.O.
- Loveland, CO plant opened 2/94
- Walsenburg, CO plant opened 2/96
- 1997 $37M in sales

1984-1989 — Marley Continental Homes — Osage City, KS
General Manager

1981-1984 — Modular Technology, Inc. — Waco, TX
Plant/ Field Manager

1974-1981 — Fleetwood Enterprises — Emporia, KS
Salesman to Production Mgr. to Special Projects

Education: Butler County Community College — El Dorado, KS

Positions/Memberships:

- Turnaround Entrepreneur of the Year Missouri and Kansas 1994
- Regional VP Kansas Chamber of Commerce 1997
- VP Kansas Homebuilders 1996-997
- President Elect Kansas Homebuilders 1997-1998
- Member U.S. Chamber of Commerce
- National Small Business Board 1995-2001

Interests: Muscle Cars and other business interests

House Fed & State Affairs
Date: 3-18-2010

Attachment 16

John W. Samples
Outline of Testimony Opposing HB2633

I. Negative Economic Effects
   a. Loss of Jobs
   b. Loss of tax revenue

II. Much Ado About Nothing
   a. Lower Complaints
   b. Helping Law Enforcement
      i. Safe Environment
      ii. No ABC Violations
   c. Lost Opportunities
   d. A further load on State Budget
   e. No negative societal consequences

III. Make up of Customers