SURVEY OF TEXAS APPRAISERS

SECONDARY EFFECTS OF SEXUALLY-ORIENTED BUSINESSES ON MARKET VALUES

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FOREWORD

The Texas City Attorneys Association (TCAA) Board of Directors commissioned this study to address the problem created by *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003), a court case involving the regulation of retail-only sexually oriented businesses. This study was funded by TCAA and a host of TCAA member cities (see Acknowledgements).

THE CHALLENGE

Regulation of sexually oriented businesses has become a challenging task facing Texas communities today. At the heart of the challenge is the balancing of legitimate community concerns about sex businesses with the First Amendment protection afforded certain media, presentations and performances. The problem long faced by local officials and their advisors is that it is almost impossible to define a sexually oriented business without referring to the content of the presentation, performance or media; yet, regulations based on the content of messages are subject to increased scrutiny in the courts and can be difficult to defend.

The Supreme Court has provided a partial solution, but it is one that comes with its own challenges. In *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), the Court set out a four-part test that does not demand absolute content neutrality for such regulations. There it held that a regulation will be considered a (generally content neutral) time, place and manner regulation even if it includes some reference to content of a message if it meets all parts of the test:

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

(2) it furthers an important government interest;

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

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

391 U.S. 367, 377, 88 S. Ct. 1673, 1679, 20 L. Ed 672, 680.

The Court has subsequently followed that rule in a number of cases dealing with sex businesses, including, among others, *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000); and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002).

The generally accepted method of meeting parts 2 and 3 of the *O'Brien* test is to show that the businesses subject to the regulation or proposed regulation have negative secondary effects on the community. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986). Local officials and their advisors may cite a variety of such secondary effects. In the Detroit ordinance this became the subject of a major Supreme Court decision upholding local zoning regulations specific to sex businesses. The Detroit City Council set out this statement of purpose:

> In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose

> of preventing a concentration of these uses in any one area (i.e. not more than two such uses within one thousand feet of each other which would create such adverse effects).
>
> *Young v. American Mini-Theatres, Inc*., 427 U.S. 50, 55, 96 S. Ct. 2440, 2455, 49 L. Ed. 2d 310, 317 (1976), n. 6, quoting Section 66.000 of the 1972 Detroit Zoning Ordinance.

The problem with citing such general concepts as "blighting" or "downgrading" of neighborhoods is that they are difficult to document and can be impossible to prove. Although the Supreme Court upheld the Detroit ordinance, based in part on that statement of purpose, under continuing challenges from the industry the courts have set a higher standard for establishing such secondary effects. In a 2002 decision, the Supreme Court restated, reemphasized and somewhat expanded upon a test that it had first adopted in 1986:

> In *Renton*… 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… . This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in Renton. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.
>
> *City of Los Angeles v. Alameda Books*, 152 L. Ed. 2d at 683, 122 S.Ct. at 1736 (2002).

Although it is certainly possible to provide expert and other evidence of such concepts as "blight" and "downgrading," it is much safer for a local government to use evidence that is easily measurable. The two types of secondary effects that are most often associated with sexually oriented businesses and that are also measurable are effects on crime rates and effects on property values at and near such a business. This study takes place in that context.

Thus, before 2003, local governments seemingly had relatively broad discretion in determining what evidence was "reasonably relevant" to the effects of sexually oriented businesses on a community. Texas communities, as well as jurisdictions across the country, relied on these studies to demonstrate that sexually-oriented businesses, both retail-only and onsite entertainment, produce harmful secondary effects on surrounding neighborhoods.

In a 2003 decision, however, the Fifth Circuit accepted industry arguments that studies dealing with sexually oriented businesses generally were not necessarily relevant to the secondary effects of retail-only businesses that offered no on-site entertainment. *Encore Videos v. City of San Antonio*, 310 F.3d 812 (5th Cir., 2002), cert. denied, 124 S. Ct. 466, 157 L. Ed. 2d 372 (2003). In fact, as the industry pointed out and the court acknowledged, a number of the widely cited studies either involved only businesses with some form of on-site entertainment (often including peep shows or viewing booths in bookstores) or made no distinctions among the various types of businesses. Because the City of San Antonio did not rely on studies specifically addressing the category of retail-only with no on-premises entertainment, the court held that the city's regulations could not constitutionally be applied to an adult video store. Although there are later studies documenting clearly that retail-only sex businesses also have secondary effects on communities, the Texas City Attorneys Association, in the face of *Encore Videos* and its progeny, asked the authors of this study to make a specific assessment of this issue in Texas. This study thus focuses on retail-only businesses, although one part of it also provides useful data about the effects of other types of sex businesses and other land uses on market values of nearby properties.

Establishing an "important governmental interest…unrelated to the suppression of speech" is essential to the adoption, implementation or defense of regulations of sexually oriented businesses.

Documenting measurable, negative secondary effects is the most practical and most widely accepted method of establishing such a purpose. Courts once appeared to accept a mere recitation of negative secondary effects and later were willing to allow a community to rely on studies of such effects from other communities; today, in the context of often-effective legal challenges by the sex industry, courts have raised their expectations. Today they expect more. In this study, city attorneys and other officials in Texas will find substantial evidence of measurable negative secondary effects of retail-only sex businesses on both crime rates and property values, and additional evidence of the negative effects of other sex businesses on property values.

THE AUTHORS

Connie B. Cooper, FAICP, is president of Cooper Consulting Company, Inc., a planning firm based in Dallas. She is a former national president of the American Planning Association, with 30 years of experience in planning and community development at the state, county, and local levels. This has included extensive experience throughout the US in the areas of urban redevelopment, strategic planning; community goal setting and visioning, comprehensive planning, economic development, zoning and subdivision, and intergovernmental cooperation. Working with Eric Kelly, she has completed studies of sexually oriented businesses and prepared regulatory controls for Kansas City, MO; Biloxi, MS; Detroit, MI; Memphis-Shelby County, TN, Palm Beach County, FL; and Toledo, OH; Fort Worth, TX; and Kenton-Campbell Counties, KY. She is the author or co-author for a number of publications by the American Planning Association's Planning Advisory Service, including *Everything You Always Wanted to Know about Regulating Sex Businesses,* which she co-authored with Eric Kelly.

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INTRODUCTION

OVERVIEW

The Texas City Attorneys Association retained the consultant team described below to conduct a survey of real estate appraisers to determine their opinions of the effects certain land uses had on residential and commercial market values. The specific intent of the survey was to determine what impact, if any, sexually oriented businesses had on market values of residential and other commercial properties, particularly as it relates to retail-only operations. The internet-assisted survey was sent to 764 Texas appraisers who are Members of the Appraisal Institute[1] (MAIs - commercial/general appraisers) and Senior Residential Appraisers (SRAs - residential appraisers). Of those sent surveys, 195 responded for a response rate of 25.5 percent and an overall margin of error of 6.06 percent.

CONSULTANT TEAM

The Texas City Attorneys Association retained Cooper Consulting Company, in association with Duncan Associates, to undertake a study of certain secondary effects of sexually oriented businesses. Project manager for the study was Connie B. Cooper, FAICP, president of Cooper Consulting Company, Inc., in Dallas, Texas. Working with Cooper Consulting, were Eric Damian Kelly, Ph.D., FAICP, of Duncan Associates, Austin, Texas, and Shawn Wilson, MAI, of Compass Real Estate Consulting, Inc., Lakeland, Florida. Assisting the team in survey design and data analysis was David C. Keuhl, Ph.D., a faculty member at the University of Wisconsin, River Falls.

Cooper and Kelly are co-authors of the American Planning Association's Planning Advisory Service Report *Everything You Always Wanted to Know About Regulating Sex Businesses.* They are frequent collaborators in working with communities on the regulation of sexually oriented businesses to minimize their secondary effects.

[1] http://www.appraisalinstitute.org

REGULATING SEXUALLY ORIENTED BUSINESSES

Most regulations of sexually oriented businesses are directed at nude or topless bars, XXX video stores and other establishments devoted almost entirely to sexually oriented activities. However, many well-regarded mainstream retail businesses include in their stock a measurable proportion of arguably sexually oriented material; such businesses include the video rental stores with "adults only" backrooms, news dealers with isolated racks of adult magazines and a variety of specialty stores that may include certain sexually oriented items.

Although those who take the most negative view of sexually oriented activities and materials would lump all such businesses together, this creates an impossible situation, legally and politically. First, any broad limitation on any business with any "sexually oriented" materials or activities would ultimately apply to every bookstore, every movie rental store, every news dealer and, arguably, a variety of other merchants, such as Victoria's Secret, which trades on the fringes of this market in some of the nation's most upscale malls. Although those who would like to see such materials and activities eliminated completely from a community, the fact remains that there are technically x-rated scenes in major works of literature, and brief nudity and sexual activity in Academy award-winning motion pictures.

SECONDARY IMPACT STUDIES

Researchers have conducted studies of real estate appraisers and professionals regarding the secondary impacts of sexually oriented businesses, including those incorporated in studies for Indianapolis, Indiana,[2] Austin, Texas;[3] Garden Grove, California;[4] and Rochester, New York.[5] Experts for the industry have challenged the methodology used in those surveys on two primary grounds – first, that the form of the surveys and the cover letters suggested to respondents what result the researchers wanted; and second, that the questions on the surveys did not distinguish among types of sexually oriented businesses.

Cooper and Kelly, the lead consultants on this project, carefully considered those criticisms in conducting a survey of appraisers in the Fort Worth-Dallas Metroplex in 2004.[6] In that survey, three different types of sexually oriented business were included: adult arcade/peep booths; adult novelty/media store (retail only); and gentleman's club/cabaret. Those uses were included in an alphabetical list that included neutral land uses such as bookstores and religious institutions but also included other uses that are often considered LULUs ("Locally Unwanted Land Uses"). Potential

[2] Indianapolis: "Adult Entertainment Businesses in Indianapolis, An Analysis," 1984.

[3] Austin, Texas: "Report on Adult Oriented Businesses in Austin," prepared by Office of Land Development Services, May 19, 1986.

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

[5] Rochester, New York: "Survey of Appraisers in Monroe County, New York," Summer 2000, results published in Kelly and Cooper, *Everything You Always Wanted to Know about Regulating Sex Businesses,* Planning Advisory Service Report No. 495-96. Chicago: American Planning Association, 2000*;* pages 51-57.

[6] The formal report is "Survey of Appraisers, Fort Worth and Dallas: Effects of Land Uses on Surrounding Property Values," prepared for the City of Fort Worth; Duncan Associates, September 2004.

LULUs on the list included homeless shelters, bars/lounges, pawn shops, and convenience stores with beer and wine.

More than 95 percent of appraisers responding to the Fort Worth-Dallas Metroplex survey said that all three types of sexually oriented business would have a negative effect on the value of a single-family residence; only homeless shelters were viewed as negatively by the appraisers as sexually oriented businesses. In addition, 87.5 percent said that a bar/lounge and pawn shop would also have a negative effect and some 80 percent said that a convenience store with beer and wine would have a negative effect.

Asked about the effect of the same land uses on the value of a community shopping center, 92.5 percent said that an adult store with peep show would have a negative effect and 89.2 percent (not a statistically significant difference) said a gentleman's club or cabaret would have such an effect. The survey also indicated that retail-only sex businesses were a negative influence by 82.1 percent, ranking them with homeless shelters. The next closest use on the list of negative effects on the value of a community shopping center was a pawn shop, identified by 53.8 percent as having a negative effect.

The most commonly cited secondary effects of sexually oriented businesses on communities relate to incidence of crime and effects on surrounding property values. The incidence of crime was well documented in the Garden Grove study,[7] a study that would be difficult and expensive to replicate. Efforts to model the effects of particular uses on property values have proven to be very difficult to carry out effectively. The typical method, followed in sections of both the Indianapolis and Austin reports, is to compare trends in property values in an area with a sexually oriented business to trends in property values over the same period of time in a similar area without a sexually oriented business. There are multiple levels of comparison in such a study. One major challenge is trying to find "similar" areas. There will always be differences between the paired areas other than the sexually oriented business, and, without a large enough sample size to allow testing for other variables, it is difficult to determine how those other variables may be increasing or offsetting the apparent secondary effects of sexually oriented businesses. One area may have a park, while the other does not. One may have three small religious institutions while another has only two such institutions, but one of them turns out to be very large, with activities seven days a week. The area with the sexually oriented business may also have a pawn shop or a salvage yard or another use that may also have a negative effect on property values.

Even if researchers are able to identify truly comparable areas for the study, there is a further problem in tracking trends in property values. A study may use values assessed for tax purposes, a methodology that is itself fraught with problems and that often includes a number of factors other than market value. Tracking the values of properties that actually sell may make sense, but there is no guarantee that similar properties will sell in the two similar areas over any reasonable study period. The sale of one deteriorated home in one area or of a couple of upscale homes in another can distort the results of studies based on the values of properties that are actually sold. Understanding those problems is not particularly difficult. Solving them in the context of a specific study in a specific community is very difficult indeed.

[7] McCleary and Meeker, op. cit.

In contrast to the complexities of paired area studies, we believe that the opinions of appraisers provide an excellent and reliable measure of the effects of any kind of use or activity on market values. First, certified appraisers are experts in their fields, people who follow professional standards in making judgments about market values. Second, appraisers familiar with a local market look at the values of many properties every year and thus have a substantial data set not only in their files but also in their heads. Third, and perhaps most important, the opinions of appraisers are essentially self-fulfilling prophecies. Most real estate transactions that take place in this country involve mortgage loans. The amount available for a mortgage loan on a particular property depends on the market value of the property, as determined by an appraiser. Thus, to take an overly simple example, if most appraisers in a community believe that pink and green houses are worth, in general, 10 percent less than similar houses painted beige, the practical effect of that opinion will be to reduce the market value of pink and green houses.

RESULTS OF SURVEY OF TEXAS APPRAISERS

SCOPE AND DESIGN OF TEXAS SURVEY

This study consisted of a survey of MAI and SRA designated appraisers in Texas. E-mail addresses were available on the Appraisal Institute's website. Using this information, the survey consultant sent a link to an electronic survey form to 764 Texas MAI and SRA appraisers who had viable email addresses; we then sent follow-up e-mails as reminders. At the completion of the survey, we had 195 valid responses. The results were compiled electronically and then provided to us for analysis. The survey had a response rate of 25.5 percent and a margin of error of 6.06 percent. The survey instrument is included at the end of the report.

Through consultation with Florida appraiser, Shawn Wilson, MAI, with additional assistance from David Keuhl, Ph.D., this survey further refined earlier surveys of appraisers we had conducted. For this survey, Wilson suggested the addition of some uses that appraisers often find to be of concern in determining market values – most notably high tension power lines and landfills. We added an additional sexually oriented business – a lingerie and adult novelties store. We also split the bar/lounge category into two parts, asking separately about the effects of a lounge with live entertainment and of a bar without live entertainment.

EFFECT PROXIMITY HAS ON MARKET VALUE OF SINGLE-FAMILY RESIDENCE

Effect on Single-family home If Use Within 500 Feet

Question: If located within 500 feet, how would the listed land use potentially affect the market value of a Single-Family Home?

Land Use	Negative	Positive	No Impact	No Opinion
Adult Media & Video Store (retail sales only)	97.3	.5	.5	1.6
Gentleman's Club/Strip Club	96.2	0.0	1.6	2.2
Video Peep Booth Business	95.7	1.1	1.1	2.2
Landfill	95.7	1.1	1.6	1.6
Homeless Shelter	95.1	1.6	1.1	2.2
Lounge (with live entertainment)	92.4	.5	3.2	3.8
Lingerie & Adult Novelties Store	91.8	1.1	4.9	2.2
Bar (no live entertainment)	87.6	0.0	10.8	1.6
Pawn Shop	81.4	1.1	14.2	3.3
Package Liquor Store	79.2	1.6	15.8	3.3
High Voltage Power Lines	69.2	0.5	27.0	3.2
Convenience Store (beer/wine)	53.6	10.9	32.8	2.7
Grocery Store	38.0	31.0	27.7	3.3
Coffee Shop	26.9	18.7	50.0	4.4
Elementary School	20.7	56.0	21.7	1.6
Religious Institution	12.6	27.7	56.3	5.5
Neighborhood Playground	8.2	68.5	20.1	3.3

Uses are ranked by the percentage of respondents indicating that a particular use would have a "negative" effect on market values; in the original survey, the uses were alphabetized.

Totals do not always add to 100% due effects of rounding.

Examining the table above, it is evident that that an overwhelming percent (92 percent) of the appraisers responding believe that an Adult Media Video Store, a Gentleman's Club/Strip Club, a Video Peep Booth Business and a Lingerie & Adult Novelties Store have a negative effect on the market value of a single-family home if located within 500 feet.

Interestingly, respondents believe that a Landfill (96 percent) and a Homeless Shelter (95 percent) have almost identical impacts on the market value of a single-family home as do many sexually oriented businesses.

In summary, 88 percent or more of respondents believe that the following uses have the greatest negative impact on the market value of a single-family home if located within 500 feet:

- Adult Media & Video Store - retail sales only (97%)
- Gentleman's Club/Strip Club (96%)
- Video Peep Booth Business (96%)
- Landfill (96%)
- Homeless Shelter (95%)
- Lingerie & Adult Novelties Store (92%)
- Lounge - with live entertainment (92%)
- Bar - no live entertainment (88%)

In addition, 69 - 81 percent of respondents believe that the following uses are very likely to have a negative impact on the market value of a single-family home if located within 500 feet:

- Pawn Shop (81%)
- Package Liquor Store (79%)
- High Voltage Power Lines (69%)

In contrast, uses that are seen as having positive impacts on the market value of a single-family home if located within 500 feet are:

- Elementary School
- Neighborhood Playground

Uses that are seen as not much of an impact on the market value of a single-family home if located within 500 feet are:

- Coffee Shop
- Religious Institution

One use respondents seem the most divided as to the negative impact versus no impact on the market value of a single-family home if located within 500 feet is:

- Convenience Store that sold beer/wine - 54 percent negative impact versus 33 percent no impact

Effect on Single-Family Home by Increasing Separation Distances

Question: At what distance would there be No Measurable Impact on the Single-Family Home's market value?

Land Use	500 ft to ¼ mile	¼ mile to ½ mile	More than ½ mile	No Opinion
Landfill	2.2	4.4	83.5	9.9
Video Peep Booth Business	**2.2**	**6.6**	**81.8**	**9.4**
Gentleman's Club/Strip Club	**3.3**	**7.7**	**78.7**	**10.4**
Homeless Shelter	3.8	9.9	77.5	8.8
Lingerie & Adult Novelties Store	**3.3**	**9.8**	**76.1**	**10.9**
Adult Media & Video Store (retail sales only)	**3.3**	**14.7**	**71.7**	**10.3**
Lounge (with live entertainment)	4.4	15.4	70.9	9.3
Pawn Shop	6.7	21.1	60.0	12.2
Package Liquor Store	7.8	20.0	57.8	14.4
Bar (no live entertainment)	8.7	24.5	56.0	10.9
Grocery Store	19.1	32.9	31.8	16.2
Convenience Store (beer/wine)	18.0	33.1	31.5	17.4
High Voltage Power Lines	28.2	26.4	30.5	14.9
Elementary School	34.1	21.4	27.2	17.3
Neighborhood Playground	32.3	21.6	24.0	22.2
Religious Institution	31.6	24.6	21.1	22.8
Coffee Shop	31.4	28.4	17.8	22.5

Uses are ranked by the percentage of respondents indicating that a particular use would require "more than ½ mile" separation; in the original survey, the uses were alphabetized.

Totals do not always add to 100% due effects of rounding.

In response to the question "at what distance would there be no measurable impact," 77 percent or more of the respondents believe that the negative impact of the following land uses do not disappear until at least a distance separation of quarter-mile or more (1320 feet +) from a single-family home (calculations based on adding columns three and four):

- Video Peep Booth Business (88%)
- Landfill (88%)
- Homeless Shelter (87%)
- Adult Media & Video Store - retail sales only (86%)
- Gentleman's Club/Strip Club (86%)
- Lounge - with live entertainment (86%)
- Lingerie & Adult Novelties Store (86%)
- Pawn Shop (81%)
- Bar - no live entertainment (80%)
- Package Liquor Store (78%)

Looking at seven of the ten uses bulleted above, 71 percent or more of the respondents believe that the negative impact on market value do not disappear for the following uses until a separation distance of more than a half mile (2640 feet +) from a single-family home:

- Landfill (84%),
- Video Peep Booth Business (82%)
- Gentleman's Club/Strip Club (79%)
- Homeless Shelter (78%)
- Lingerie & Adult Novelties Store (76%)
- Adult Media & Video Store - retail sales only (72%)
- Lounge - with live entertainment (71%)

In most jurisdictions, zoning ordinances regulating sexually oriented businesses traditionally require separation distances from 500 – 1000 feet. Greater separation distances are less common, likely due in part to a concern over eliminating all viable sites for sexually oriented businesses within the jurisdiction – a practice that the courts have strictly prohibited.

Although this study is primarily concerned with the impacts of sexually oriented businesses, it is interesting to note that the distance effects of homeless shelters and landfills on market values are essentially similar to those for sexually oriented businesses, as they were in the previous question. Not surprisingly, a large percentage of appraisers believe that the negative effects of landfills and homeless shelters on market value diminish only after more than a half mile separation. In addition, a large percentage of those responding believe that the secondary effects on a single-family home's market value due to the proximity of a bar, lounge with live entertainment, pawn shop, and liquor store share many of the same impacts as sexually oriented business impacts.

EFFECT PROXIMITY HAS ON MARKET VALUE OF COMMUNITY SHOPPING CENTER

Effect on Community Shopping Center If Use Within 500 Feet

Question: If located within 500 feet, how would the listed land use potentially affect the market value of a Community Shopping Center?

Land Use	Negative	Positive	No Impact	No Opinion
Landfill	84.7	1.1	9.8	4.4
Video Peep Booth Business	**82.8**	**0.0**	**13.4**	**3.8**
Homeless Shelter	80.1	1.1	16.1	2.7
Gentleman's Club/Strip Club	**79.6**	**0.0**	**16.7**	**3.8**
Adult Media & Video Store (retail sales only)	**76.6**	**0.5**	**19.7**	**3.2**
Lingerie & Adult Novelties Store	**64.5**	**1.1**	**30.6**	**3.8**
Lounge (with live entertainment)	41.9	4.8	48.4	4.8
Package Liquor Store	35.7	2.7	56.2	5.4
Bar (no live entertainment)	30.3	4.8	60.6	4.3
High Voltage Power Lines	26.9	0.5	69.4	3.2
Pawn Shop	21.1	7.6	65.9	5.4
Elementary School	7.5	17.1	71.7	3.7
Religious Institution	5.1	9.6	85.3	0.0
Neighborhood Playground	4.8	16.7	74.2	4.3

Uses are ranked by the percentage of respondents indicating that a particular use would have a "negative" effect on market values; in the original survey, the uses were alphabetized. Totals do not add to 100% due effects of rounding.

As to the impact on the market value of a community shopping center, clearly many appraisers believe that there is less of a negative impact by sexually-oriented uses and other high-impact uses on a shopping center than on a single-family home. It is important to note, however, that, even after allowing for the margin of error, a significant majority of appraisers believe that all types of sexually oriented businesses identified in the survey have a negative effect on the market value of a community shopping center.

Interestingly, respondents believe that a Homeless Shelter (80 percent) and a Landfill (85 percent) have very similar impacts on the market value of a community shopping center if located within 500 feet of the center.

In summary, 64 percent or more of respondents believe that the following uses have a negative impact on the market value of a community shopping center if located within 500 feet:

- Landfill (85%)
- Video Peep Booth Business (83%)
- Homeless Shelter (80%)
- Gentleman's Club/Strip Club (80%)
- Adult Media & Video Store - retail sales only (77%)
- Lingerie & Adult Novelties Store (64%)

In stark contrast to the impact on single-family homes, 48 percent or more of respondents believe that the following uses have no impact on the market value of a community shopping center if located within 500 feet:

- Lounge - with live entertainment (48%)
- Package Liquor Store (56%)
- Bar - no live entertainment (61%)
- Pawn Shop (66%)
- High Voltage Power Lines (69%)
- Elementary School (72%)
- Neighborhood Playground (74%)
- Religious Institution (85%)

Effect on Community Shopping Center by Increasing Separation Distances

Question: At what distance would there be <u>No Measurable Impact</u> on the Community Shopping Center's market value?

Land Use	500 ft to ¼ mile	¼ mile to ½ mile	More than ½ mile	No Opinion
Video Peep Booth Business	**9.6**	**12.4**	**63.3**	**14.7**
Landfill	4.0	15.3	62.7	18.1
Homeless Shelter	8.0	20.0	56.0	16.0
Gentleman's Club/Strip Club	**8.4**	**25.7**	**49.7**	**16.2**
Adult Media & Video Store (retail sales only)	**10.4**	**23.6**	**48.4**	**17.6**
Lingerie & Adult Novelties Store	**14.3**	**18.3**	**44.6**	**22.9**
Lounge (with live entertainment)	15.9	21.8	34.7	27.6
Bar (no live entertainment)	24.9	17.2	28.4	29.6
Package Liquor Store	20.6	21.2	24.2	33.9
Pawn Shop	22.7	19.0	22.1	36.2
High Voltage Power Lines	28.5	12.7	21.8	37.0
Elementary School	28.5	13.9	18.8	38.8
Neighborhood Playground	27.4	15.2	14.6	42.7
Religious Institution	30.7	9.2	13.5	46.6

Uses are ranked by the percentage of respondents indicating that a particular use would require "more than ½ mile" separation; in the original survey, the uses were alphabetized.

Totals do not always add to 100% due effects of rounding.

In response to the question "at what distance would there be <u>no measurable impact</u>," 63 percent or more of the respondents believe that the negative impact of the following land uses do not disappear until at least a distance separation of <u>quarter-mile or more</u> (1320 feet +) from a community shopping center:

- Landfill (78%)
- Homeless Shelter (76%)
- Video Peep Booth Business (76%)
- Gentleman's Club/Strip Club (75%)
- Adult Media & Video Store - retail sales only (72%)
- Lingerie & Adult Novelties Store (63%)

Video Peep Booth Businesses, Landfills and Homeless Shelters were viewed as needing a separation distance of <u>more than a half mile</u> (2640 feet +) from a community shopping center before the negative impact on market value disappeared.

Overall response rates to this question were lower than to other questions. The significant number of respondents who expressed "no opinion" indicates that clear findings regarding impacts on shopping centers are more difficult to make. The percentages of respondents who believe that the negative effects extend a half mile or more are far lower than those shown for single-family homes.

As with the issue of separation distances from single-family homes, we would caution against increasing separation distances from commercial uses without checking to confirm you are not eliminating all viable sites for sexually oriented businesses within your jurisdiction – a practice that the courts have strictly prohibited.

EFFECT CONCENTRATION HAS ON SINGLE FAMILY HOMES AND SHOPPING CENTERS

Concentration of Uses Effect on Single-family home

Question: Would a concentration (2 or more uses within a couple of blocks) have additional impact on the Single-Family Home's market value?

Land Use	Yes Added Impact	No Added Impact	No Opinion
Gentleman's Club/Strip Club	**89.3**	**3.9**	**6.7**
Adult Media & Video Store (retail sales only)	**88.3**	**6.1**	**5.6**
Video Peep Booth Business	**87.2**	**6.1**	**6.7**
Landfill	85.4	6.7	7.9
Homeless Shelter	84.4	7.8	7.8
Lounge (with live entertainment)	**81.6**	**10.6**	**7.8**
Lingerie & Adult Novelties Store	**80.8**	**9.6**	**9.6**
Bar (no live entertainment)	78.1	14.0	7.9
Pawn Shop	70.5	19.3	10.2
Package Liquor Store	64.8	25.1	10.1
High Voltage Power Lines	59.4	27.4	13.1
Convenience Store (beer/wine)	42.3	44.0	13.7
Grocery Store	38.2	50.3	11.6
Neighborhood Playground	30.7	55.1	14.2
Elementary School	25.6	60.2	14.2
Religious Institution	25.4	59.0	15.6
Coffee Shop	25.4	59.9	14.7

Concentration of Uses Effect on Community Shopping Center

Question: Would a concentration (2 or more uses within a couple of blocks) have additional impact on the Community Shopping Center's market value?

Land Use	Yes Added Impact	No Added Impact	No Opinion
Video Peep Booth Business	75.6	17.2	7.2
Adult Media & Video Store (retail sales only)	74.0	19.2	6.8
Landfill	73.6	17.4	9.0
Gentleman's Club/Strip Club	73.4	18.1	8.5
Homeless Shelter	72.3	20.9	6.8
Lingerie & Adult Novelties Store	61.0	28.8	10.2
Lounge (with live entertainment)	43.9	45.1	11.0
Package Liquor Store	37.6	47.6	14.7
High Voltage Power Lines	35.8	49.7	14.5
Bar (no live entertainment)	34.3	53.1	12.6
Pawn Shop	28.7	55.6	15.8
Neighborhood Playground	16.9	65.7	17.4
Religious Institution	14.0	65.1	20.9
Elementary School	13.4	68.0	18.6

Uses are ranked by the percentage of respondents indicating that a particular use would have added impact due to a concentration of uses; in the original survey, the uses were alphabetized.

Totals do not always add to 100% due effects of rounding.

The question regarding the additional impact to a Single-Family Home or Community Shopping Center due to a concentration of certain uses was somewhat imperfect as it related to Landfills, Elementary Schools or Neighborhood Playgrounds. It is highly unlikely that there would be a concentration of these land uses. However, to maintain the integrity of the survey, we did not wish to delete a use from the alphabetized list of uses for purposes of a particular question.

As to the question of how a concentration of uses relates to such land uses as a Gentleman's Club/Strip Club, Adult Novelties Store, Video Peep Booth Business, Lounge, Bar, Adult Media Store, Pawn Shop, Package Liquor Store and Homeless Shelter, there is a high probability of them occurring in proximity to each other. Furthermore, other studies suggest that the concentration of sexually oriented uses and certain other types of uses increases disproportionately the effects on crime rates in the surrounding areas. Few studies have attempted to analyze the extent to which a concentration increases the negative effects on market values.

In the opinions of Texas appraisers, a concentration of sexually oriented businesses and similar adult-oriented uses (bars and lounges) clearly increases the negative effects on the market values of single-family homes. A concentration of sexually oriented businesses (and/or of homeless shelters) stands out as having the most potential negative effect on the market value of a community shopping center; a concentration of bars or lounges is considered by significantly less than a majority of appraisers to have a potentially negative effect on the market value of such a center.

The table below compares the impact respondents believe concentrations of certain uses have as they relate to proximity to a Single-Family Home or Community Shopping Center:

Concentration of Land Uses	Added Impact on Single-Family	Added Impact on Shopping Center
Gentleman's Club/Strip Club	**89.3**	**73.4**
Adult Media & Video Store (retail sales only)	**88.3**	**74.0**
Video Peep Booth Business	**87.2**	**75.6**
Homeless Shelter	84.4	72.3
Lounge (with live entertainment)	81.6	43.9
Lingerie & Adult Novelties Store	**80.8**	**61.0**
Bar (no live entertainment)	78.1	34.3
Pawn Shop	70.5	28.7
Package Liquor Store	64.8	37.6
High Voltage Power Lines	59.4	35.8

OTHER QUESTIONS

Effect of Operating Hours

Question: Would a retail business open AFTER 11 PM have a negative impact on the market value of Single-Family Homes located within a 5-minute walk (1500 feet)?

	Always	Sometimes	Never	No Opinion
Respondents	18	149	10	12
Percentage	9.5	78.8	5.3	6.3

Results reported here in percentage of respondents giving each answer. Some chose not to respond to question.

The survey asked if there would be negative impact created by a retail business open after 11 pm on the market value of Single-Family Homes located within a 5-minute walk. This was asked because a number of communities have included limitations on the operating hours of sexually oriented businesses as part of their local regulatory schemes. The responses clearly support some limitations on operating hours of businesses within 1500 feet of Single-Family Homes. Since a large majority (79 percent) responded "sometimes", the difficulty is determining which businesses should be required to have limitations on operating hours. Some guidance is found in the responses given to earlier questions regarding proximity and impacts on Single-Family Homes. For example, appraisers believe that retail operations such as Adult Media & Video Stores, Lingerie & Adult Novelties Stores, Pawn Shops and Package Liquor Stores have more of a negative impact on Single-Family Homes than Convenience Stores, Grocery Stores and Coffee Shops.

Thus, these responses should not be interpreted as supporting a limitation on operating hours of all businesses, but only on particular businesses that were identified as having greater negative impacts such as sexually oriented businesses, pawn shops, and liquor stores. A local government may, of course, have other data that suggests that the operating hours of sexually oriented retail businesses might legitimately need to be more limited than other businesses.

Effect of Garish Lighting or Signage

Question: If you indicated certain land uses had negative impacts on the market value of a Single-Family Home, would bright, animated, or garish lighting or graphics increase the negative impact?

	Always	Sometimes	Never	No Opinion
Respondents	84	92	2	9
Percentage	44.9	49.2	1.1	4.8

Results reported here in percentage of respondents giving each answer. Some chose not to respond to question.

The survey asked if bright, animated, or garish lighting or graphics increased the negative impact of certain land uses that had negative impacts on the market value of a Single-Family Homes. Although these findings are statistically significant, they are difficult to translate into ordinance provisions. We had great confidence in using the adjective "garish" and believe that appraisers would know what we meant; but attempting to limit "garish" lighting and graphics is far more difficult. "Garish" is simply not a regulatory term. Any attempt to regulate specific content of signs or graphics – beyond prohibiting obscene messages and nude images on signs – raises significant First Amendment issues. We have studied sex businesses in many communities, and we have never seen a sign on such a business that came close to our definition of "obscene." Some communities have tried to limit lighting and signage at

sexually oriented businesses, and the responses to this question would support such limitations at sex businesses and other high-impact uses (including pawn shops, which often have signs that we would consider garish).

WHO RESPONDED

Examining who responded to the survey, the consultant team was pleased to see that respondents were reasonably dispersed throughout Texas. However, it was not surprising to see the majority of the appraisers responding practiced in the Austin, Dallas, Fort Worth, Houston and San Antonio metropolitan areas.

Question: What are your general areas of practice? (You may choose up to two)

County of General Practice	Responses	Percent
Abilene- Midland-Odessa-San Angelo (Taylor, Midland, Ector and Tom Green Counties)	14	3%
Amarillo-Lubbock (Potter, Randall and Lubbock Counties)	9	2%
Austin (Hays, Travis and Williamson Counties)	46	10%
Brownsville-McAllen (Cameron and Hidalgo Counties)	8	2%
Bryan (Brazos County)	8	2%
Corpus Christi-Victoria-Laredo (Nueces, Victoria and Webb Counties)	12	3%
Dallas (Collin, Dallas and Ellis Counties)	106	23%
El Paso (El Paso County)	4	1%
Fort Worth (Denton, Johnson, Parker and Tarrant Counties)	50	11%
Houston -Galveston (Brazoria, Fort Bend Galveston, Harris, and Montgomery Counties)	124	26%
Longview-Tyler -Texarkana (Gregg, Smith and Bowie Counties)	15	3%
Port Arthur (Jefferson County)	3	1%
San Antonio (Bexar, Comal and Guadalupe Counties)	30	1%
Sherman-Wichita Falls (Grayson and Wichita Counties)	8	2%
Waco-Temple (McLennan and Bell Counties)	13	3%
Other Counties	21	4%

Responses total more than number of respondents due to some choosing more than one location of practice.

We found it interesting to find that over 92 percent of those responding to the survey had 20 or more years of real estate appraisal experience. Clearly we heard from the seasoned professionals.

Question: How many years of real estate appraisal experience do you have?

	1 – 9 years	10 – 19 years	20 – 29 years	30+ years
Respondents	1	14	96	81
Percentage	0.5	7.3	50.0	42.2

Results reported here in percentage of respondents giving each answer.

We have always found it worthwhile to ask if "personal, moral or ethical beliefs" affected responses. Having over 70 percent indicate "NO" strengthens the view that the responses are not influenced by individual biases.

Question: Do you believe that your personal, moral or ethical beliefs have affected your responses to any of the questions in this survey?

	Yes	No
Respondents	55	134
Percentage	29.1	70.9

Results reported here in percentage of respondents giving each answer.

RESPONSE RATE AND MARGIN OF ERROR

Links to the electronic survey were sent to the email addresses of 764 appraisers holding the SRA or MAI designation in Texas. Of those contacted, 195 completed the survey. This resulted in a response rate of 25.5 percent which yielded an overall margin of error of 6.06 percent.

We are comfortable and confident in the results of the survey given that the major findings regarding the effects of sex businesses on the market value of single-family homes were supported by 91 to 97 percent of the respondents. Even if the entire margin of error were applied negatively and the resulting responses were thus directly reduced (which is a worst-case example of possible error and not a statistically valid technique), the results would drop to a range of 85 to 91 percent of the respective respondents, a very strong and firm finding. The percentage of appraisers reporting that they believe that there would be a negative effect on the market value of a community shopping center was somewhat smaller (ranging from 64 – 83 percent), but, here, also, even applying the margin of error as an entirely negative factor would leave well over half the respondents reporting that most sex businesses will have a negative effect on the market value of a community shopping center.

Although we are pleased with the response rate, we acknowledge that other surveys of appraisers have garnered a higher response rate primarily because they were sponsored by an appraisal member association such as the Appraisal Institute or were surveys concerning issues about professional practices, not hypothetical questions about market values.

As experts and consultants, we certainly understand the reluctance of experts to respond to hypothetical questions in their area of expertise for a non-client, without compensation and with no full understanding of how the material will be used. When all of those factors are considered, we believe that the response rate is very satisfactory. Further, as noted above, the findings are so clear that a lower response rate has no effect on the substantive findings of the study.

SUMMARY OF APPRAISER SURVEY FINDINGS – SEXUALLY ORIENTED BUSINESSES

The following findings and conclusions can clearly be drawn from this survey:

- More than 91 percent of Texas appraisers surveyed believe that gentleman's clubs/strip clubs, adult media/video stores (retail only), video peep booth businesses and lingerie & adult novelties stores have a negative effect on the market value of a single-family home located within 500 feet of such a use;
- More than 71 percent believe that the negative effect on the market value of a single-family home due to the proximity of a sexually oriented business do not disappear until at least a half mile or more (2,640+ feet);
- More than 80 percent believe that the concentration of two or more sexually oriented businesses increases the negative effect on market values of a single-family home;
- A majority (64 percent) of Texas appraisers surveyed believe that a video peep booth business, a gentleman's club/strip club, adult media/video store (retail only) or a lingerie & adult novelties store will have a negative effect on the market value of a community shopping center located within 500 feet;
- More than 63 percent believe that the negative effect on the market value of a community shopping center due to the proximity of a video peep booth business, gentleman's club/strip club, adult media & video store (retail only) or a lingerie & adult novelties store do not disappear until at least a quarter of a mile or more (1,320+ feet);
- More than 63 percent believe that the negative effect on the market value of a community shopping center due to the proximity of a video peep booth business do not disappear until at least a half mile or more (2,640+ feet);
- Nearly 73 percent believe that the concentration of two or more gentleman's club/strip clubs, adult media & video stores (retail only) or video peep booth businesses increases the negative effect on the market value of a community shopping center;
- About 61 percent believe that the concentration of two or more, lingerie & adult novelty stores increases the negative effect on market value of a community shopping center;
- More than 89 percent of Texas appraisers surveyed believe that having a retail business that is open after 11 p.m. may have a negative effect on the market value of a single-family home located within 500 feet (10 percent responded "always" and 79 percent responded "sometimes");
- About 94 percent of Texas appraisers believe that "bright, animated, or garish lighting or graphics" may increase the negative impact on the market value of a single-family home (45 percent responded "always" and another 49 percent responded "sometimes");
- It should be noted that the findings related to lighting, signage and operating hours are not limited to sexually oriented businesses.

SEXUALLY-ORIENTED BUSINESSES AND THE COURTS

Regulation of sex businesses is one of the most litigated areas of land-use law today. Communities that have tried to bar most or all sex businesses have generally lost court challenges to their regulatory schemes. In that context, a community must make reasonable provision for the existence of some sexually oriented businesses; on the other hand, it is also clear that a community need not necessarily allow every such establishment to offer the full range of sexually oriented products or activities that its proprietors might like to offer. Courts have also recognized that a sexually oriented business (such as a bookstore handling adult media) is different from other businesses offering similar products that are not sexually oriented (such as a Barnes and Noble type bookstore). Likewise, courts have recognized that sexually oriented retail businesses have different impacts than those businesses with sexually oriented onsite entertainment. Texas cities and counties can adopt and implement different zoning regulations for such businesses, provided that the effect is not a complete ban on all such businesses.

Regulations that attempt to censor specific messages or that otherwise target the message itself are subject to "strict scrutiny" in the courts, a standard which places a heavy burden on a government to show a "compelling state interest" that justifies the regulations. See, for example, *Boos v. Barry*, 85 U.S. 312, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988). But where the regulations are aimed at the secondary effects of sexually oriented businesses, they will be treated as "content neutral" and subject only to "intermediate scrutiny," a far less burdensome standard for local governments to meet. See *City of Los Angeles v. Alameda Books, Inc*., 152 L. Ed. 2d 670, 122 S. Ct. 1728 (U.S. 2002).

FIRST AMENDMENT EFFECT ON LOCAL REGULATION OF SEX BUSINESSES – GENERALLY

The First Amendment provides in pertinent part, "Congress shall make no law … abridging the freedom of speech or of the press. . . ." The effect of that language has been construed by the Supreme Court to limit but not eliminate the authority of local governments to regulate land-use aspects of activities that are protected by the First Amendment, including those aspects of sexually oriented businesses that fall under the scope of that protection.

The Supreme Court has squarely upheld the authority of local governments to regulate the location of sexually oriented businesses through zoning. *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976). There are significant Constitutional boundaries for the manner and scope of local regulations that affect First Amendment rights. *Playtime Theatres, Inc. v. City of Renton, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed 2d 29 (1986),* involving zoning for a sexually oriented motion picture theater; *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988), successfully challenging a permitting system for placement of newspaper vending boxes on city sidewalks; and *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993), holding unconstitutional an attempt by the city to define "newspaper" in a way that limited the types of publications that could be placed in sidewalk vending boxes. Although two of those cases involve newsracks they are important cases in considering the interaction of local government with the First Amendment

Basic Constitutional Principles Regulating First Amendment-Protected Activity

The basic constitutional principles used in evaluating the constitutionality of regulations affecting First Amendment-protected activity were set forth by the Supreme Court as a four-part test in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed.

2d 341 (1980), restated by the plurality in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981), as follows:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.
>
> 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981).

If an ordinance is not in violation of First Amendment doctrine under one of the bases discussed above, then it is analyzed as a time, place, and manner restriction. The classic formulation of the four-part "time, place, and manner" test was presented by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968):

> (1) the regulation is within the power of the government;
>
> (2) it furthers an important government interest;
>
> (3) the government interest is unrelated to the suppression of speech; and
>
> (4) the incidental restrictions on free speech are no greater than are essential to further the interest.
>
> 391 U.S. 367, 377, 88 S. Ct. 1673, 1679, 20 L. Ed. 2d 672, 680 (1968).

The first modern decision in which the U.S. Supreme Court upheld local regulation of sexually oriented businesses was *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976), in which the Court upheld a Detroit zoning ordinance effectively requiring "dispersion" of adult motion picture theaters by requiring a 1,000-foot separation between any such theater established in the future and any existing such theater. Much of the analysis in that decision dealt with the extent to which the First Amendment protects sexually oriented communication. Moving on to issues more relevant here, the Court offered this summary of its position on that issue:

> Moreover, 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 interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.
>
> 427 U.S. at 70-71, 96 S. Ct. at 2452, 49 L. Ed. 2d at 326.

The Court then continued with this discussion, applying the four-part *O'Brien* test:

> The remaining question is whether the line drawn by these ordinances is justified by the city's interest in preserving the character of its neighborhoods. On this question we agree with the views expressed by District Judges Kennedy and Gubow. The record discloses a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect. [footnote in original here; quoted below] It is not our function to appraise the wisdom of its 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.

> Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures. [second footnote in last paragraph, omitted]
>
> 427 U.S. at 71-72, 96 S. Ct. at 2452-53, 49 L. Ed. 2d at 326-27.

The footnote in the extract above was material to the discussion here. It read in full:

> The Common Council's determination was that a concentration of "adult" movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this **secondary effect** which these zoning ordinances attempt to avoid, not the dissemination of "offensive" speech. In contrast, in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, the justifications offered by the city rested primarily on the city's interest in protecting its citizens from exposure to unwanted, "offensive" speech. The only secondary effect relied on to support that ordinance was the impact on traffic - an effect which might be caused by a distracting open-air movie even if it did not exhibit nudity. [emphasis added]
>
> 427 U.S. at 71, fn. 34, 96 S. Ct. at 2452, 49 L. Ed. 2d at 326.

Relying on Studies from Other Jurisdictions

Eight years after it upheld the Detroit zoning ordinance, the Court again dealt with zoning regulations affecting sexually oriented businesses. *Playtime Theatres, Inc. v. City of Renton*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed 2d 29 (1986). This time, the question of whether the First Amendment protected sexually oriented movies was essentially resolved, and most of the discussion focused on the effect of the First Amendment on local efforts to regulate where they could be shown. In this decision, the Court discussed *O'Brien* extensively but used an abbreviated form of the *O'Brien* test – "whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." 475 U.S. at 49, 106 S. Ct. at 930, 89 L. Ed 2d at 39 (1986). The second part of the abbreviated test, dealing with "reasonable alternative avenues" is not relevant to this report or this discussion, but it is worth reviewing the Court's discussion of the first part of its abbreviated test:

> 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 of studies specifically relating to "the particular problems or needs of Renton," the city's justifications for the ordinance were "conclusory and speculative." 748 F.2d, at 537. We think the Court of Appeals imposed on the city an unnecessarily rigid burden of proof. The record in this case reveals that Renton relied heavily on the experience of, and studies produced by, the city of Seattle. In Seattle, as in Renton, the adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood. See *Northend Cinema, Inc*. v. *Seattle*, 90 Wash. 2d 709, 585 P. 2d 1153 (1978). The opinion of the Supreme Court of Washington in *Northend Cinema*, which 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 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.
>
> "[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.
>
> We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the 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.
>
> 475 U.S. at 49-52, 106 S. Ct. at 930-31, 89 L. Ed 2d at 39-41.

Although the Court appeared to restate only the second part of the *O'Brien* test ("it furthers an important government interest") in its abbreviated test in *Renton,* the third part of the *O'Brien* test ("the government interest is unrelated to the suppression of speech") was implicit in that shorthand holding. Earlier in the decision, the Court said:

> 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 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.
>
> 475 U.S. at 48, 106 S. Ct. at 929, 89 L. Ed 2d at 38.

Regulation Narrowly Tailored

The Fifth Circuit has recently (2007) applied what it called a "hybrid" test (described in the extract immediately below), adopted by the district court and apparently accepted by both parties. Under that test, in *Illusions - Dallas Private Club, Inc. v. Steen*, 482 F.3d 299 (5th Cir. 2007), the Fifth Circuit held that a regulation affecting sexually oriented businesses is Constitutional if:

> (1) the State regulated pursuant to a legitimate governmental power; (2) the regulation does not completely prohibit adult entertainment; (3) the regulation is aimed not at the suppression of expression, but rather at combating negative secondary effects; and (4) the regulation is designed to serve a substantial governmental interest, is narrowly tailored, and reasonable alternative avenues of communication remain available, or, alternatively, the regulation furthers an important or substantial governmental interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest.

> 482 F.3d at 311, citing *Ben's Bar v. Village of Somerset*, 316 F.3d 702, 707 (7th Cir. 2003).

The second part of the *O'Brien* test of the validity of a local regulation of sex businesses ("it furthers an important government interest") and its third part ("the government interest is unrelated to the suppression of speech") have become inextricably intertwined, because it is clear that the only defensible governmental interest that will support regulation of such businesses is one that is "unrelated to the suppression of speech." If the state's purpose relates to the suppression of speech, the ordinance will be subject to "strict scrutiny," (see *Illusions - Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 308 (5th Cir. 2007)), a standard of review that reverses the presumption of validity, leaving the government with an almost insurmountable burden (see, for example, *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (U.S. 2001), striking down a Massachusetts ban on advertising tobacco products within a prescribed radius of schools, parks and other facilities; there the Court acknowledged the government's legitimate interest in curtailing youthful smoking but found the advertising ban unconstitutional)). Another issue which is closely related to the second and third parts of the *O'Brien* test is the issue of "narrow tailoring." See *Illusions - Dallas Private Club, Inc. v. Steen*, 482 F.3d 299 (5th Cir. 2007), where the court merged these issues into one, framing it:

> the regulation is designed to serve a substantial governmental interest, is narrowly tailored, and reasonable alternative avenues of communication remain available, or, alternatively, the regulation furthers an important or substantial governmental interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest.
>
> 482 F.3d at 311.

The "narrow tailoring" issue looks at the relationship between the secondary effects that the ordinance or law is designed to address and the apparent effect of the law. To give a simple example, if a city has a study that shows that nude dancing produces negative secondary effects and, as a result, decides to ban all dancing, it has a "narrow tailoring" problem. The issue has been presented and discussed in *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003) and *H & A Land Corp v. City of Kennedale*, 480 F.3d 336 (5th Cir. 2007), both dealing with the question of whether studies showing negative secondary effects of various sex businesses were adequate to support ordinances related to retail-only book and video stores. See, also, *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981), where a small town in New Jersey was concerned about the potential of nude dancing at a local establishment and thus banned all live entertainment in the town.

The authors view the "narrow tailoring" issue more as a drafting issue than as a pure "secondary effects" issue and, for that reason, it is not further discussed as a separate issue in this analysis. It is important to remember, however, and to remind elected officials that, the fact that a local government has evidence showing that a variety of sexually oriented businesses cause negative secondary effects may not support every type of ordinance that elected officials might like to adopt.

THE LAW OF SECONDARY EFFECTS

Context for "Secondary Effects" Studies

Given the above introduction, the focus of the remainder of this analysis is on the critical step of documenting and analyzing "negative secondary effects" as the basis for developing, adopting or defending[8] Constitutionally-valid regulations of sexually oriented businesses. It is critical to understand that the real issue is demonstrating a substantial governmental interest other than censorship as the basis for adopting regulations that infringe on First Amendment rights, thus, documenting the negative secondary effects of sexually oriented businesses is paramount. Although lawyers representing the sex industry often argue in court that local governments should be required to provide essentially scientific evidence regarding the relationship of sex businesses to the issues addressed by local zoning and licensing ordinances, the Supreme Court in upholding a Los Angeles zoning ordinance affecting sex businesses in *City of Los Angeles v. Alameda Books, Inc.*, a 2002 decision, set a much more reasonable test:

> 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.
>
> *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (U.S. 2002), at 122 S. Ct. 1735, 152 L.Ed. 2d 683, remanded for further proceedings at 295 F.3d 1024 (9th Cir. 2002), citing and quoting briefly from *Playtime Theatres, Inc. v. City of Renton*, 475 U.S. 41, at 51-52 (1986).

Later in the opinion, the Court provided this discussion of its decision to reject the Ninth Circuit's analysis of the data provided by the city and to accept the city's analysis instead:

> 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 because only in this manner can the city refute the Court of Appeals' logic.
>
> 152 L. Ed. 2d at 681, 122 S. Ct. at 1735.

To a similar effect, the Fifth Circuit has held in *N.W. Enters. v. City of Houston*:

> Because the constitutional standard of review depends only upon the City's predominate legislative concern, not its pre-enactment proof that the ordinance would work, there is no reason to parse each provision of the ordinance separately to determine the standard of review. The purpose and scope of the entire Ordinance are reflected in the preamble, which summarizes City Council's concern about multiple effects of SOBs. That all of such effects are targeted by the Ordinance's various provisions is clear, as it is also clear that none of the provisions directly censors adult speech. Thus, the Preamble, together with the

[8] Although ideally a local government will develop a record documenting its governmental interest in adopting such regulations before adopting them and include appropriate evidence in the legislative record, that is not an absolute requirement today; a local government can certainly supplement its legislative record in the process of defending its ordinance (City of Los Angeles v. Alameda Books, Inc., 122 S. Ct. 1728, 152 L. Ed. 2d 670 (U.S. 2002)) and it may be allowed to provide its entire analysis of the secondary effects addressed by the ordinance for the first time in litigation. See, for example, Illusions - Dallas Private Club, Inc. v. Steen, 482 F.3d 299, 310 (5th Cir. 2007, where the court held in part that "the plurality [in Alameda books] did not specify that a purpose unrelated to suppressing speech can only be demonstrated with a specific type of indicator such as legislative findings or a statutory preamble." But see extract from N.W. Enters. v. City of Houston, 27 F. Supp. 2d 754 (S.D. Tex. 1998), set out in text almost immediately below, where the court noted that it was relying on the legislative record and the preamble to the ordinance in finding for the city.

> legislative record, provides sufficient evidence to justify an intermediate scrutiny standard of review to the entirety of 97-75, as a content-neutral enactment.
>
> *N.W. Enters. v. City of Houston*, 27 F. Supp. 2d 754 (S.D. Tex. 1998), vac. in part, rev. in part, aff'd in part 352 F.3d. 162, (5th Cir. 2003); *rev. and vac. in part, reh. den*., 372 F.3d 333 (5th Cir. 2004) (vacation was minor and based on a technicality with no substantive effect on the material cited); *cert. den*. 543 U.S. 958, 125 S. Ct. 416, 160 L. Ed. 2d 321 (2004); cited discussion from trial court opinion at 27 F.Supp.2d at 76465.

It is in this context that the Texas City Attorneys Association retained Cooper Consulting Company and Duncan Associates to provide this analysis of one category of potentially negative secondary effects of sex businesses on communities – and that is the potential effect of the locations of these businesses on the market values of nearby properties, particularly the effects of retail only businesses.

It is important to remember that the legislative records in *Young* and *Renton* referred in more general terms, respectively, to the prevention of "neighborhood deterioration" and "blight." There was also a brief reference in *Young* to the concept that "crime" might follow the deterioration. Thus, in these leading cases, the elected officials adopting the ordinances were dealing more with trends and concepts than with easily documentable facts. Because some courts, particularly in the Fifth Circuit (of which Texas is a part), have become somewhat less willing to accept general assertions by local governments of their good intentions and have sought at least some evidence regarding the problems that the challenged ordinances are supposed to address, local governments have increasingly focused on secondary effects that can be measured and/or documented.

The two secondary effects that are sometimes[9] associated with sexually oriented businesses and that are most susceptible to measurement and documentation[10] are increases in crime rates and decreases (or slowed rates of increase) in property values in areas around such businesses.

Secondary Effects in the Fifth Circuit

In what appears to be its earliest post-*Renton* decision dealing with the Constitutionality of a local ordinance regulating sex businesses, in *SDJ, Inc. v. Houston,* the Fifth Circuit reversed a finding by the district court that Houston had not established a substantial governmental interest to support its adoption of the ordinance. *SDJ, Inc. v. Houston,* 837 F.2d 1268, (5th Cir. 1988), *reh'g en banc den*. 841 F.2d 107 (5th Cir. 1988), *cert. den. sub. nom. M. E. F. Enterprises, Inc. v. Houston,* 489 U.S. 1052, 109 S. Ct. 1310, 103 L. Ed. 2d 579 (1989).

The court set out its summary and analysis of the *Renton* test on this issue:

> Thus, as the Court explained in City of Renton, a city may establish its "substantial interest" in the regulation by compiling a record with evidence that it may be "reasonably believed to be relevant to the problem that the city addresses." We do not ask whether the regulator subjectively believed or was motivated by other concerns, but rather whether an objective lawmaker could have so concluded,

[9] We used the word "sometimes" to maintain an objective discussion in this report; in our experience, it would be fair to say "often" rather than sometimes, but without statistics to back up the use of the word "often," we chose the more conservative one.

[10] Again, there was a conscious choice of words here. In casual conversation, one might say "most easily measured," but that would not be accurate. As sex industry experts regularly remind us in their reports to various courts and their private comments to us, there is nothing "easy" about these measurements. Crime rates and property values are, however, at least susceptible to measurement – a characteristic that a general concept like "blight" or "deterioration" lacks.

> supported by an actual basis for the conclusion. Legitimate purpose may be shown by reasonable inferences from specific testimony of individuals, local studies, or the experiences of other cities. This level of scrutiny best accommodates the need to ensure proper purposes with the limited competence of courts to discern ephemeral legislative motivations.
>
> 837 F.2d at 1274, citing and quoting *Renton*, 475 U.S. at 51-52; 106 S. Ct. at 931; 89 L. Ed. 2d at 40.

The court then applied this analysis to the Houston ordinance and adoption process, citing the material facts on which it relied in holding that the ordinance and its adoption passed Constitutional muster:

> The record reflects that the City Council carefully considered the relationship between sexually oriented businesses and neighborhood effects. The City formed a special Committee on Sexually Oriented Businesses, which heard public testimony from both supporters and opponents of the Ordinance, as well as experts. The committee also considered studies conducted by other cities such as Detroit, Boston, Dallas, and Los Angeles. While it may not be enough simply to tailor one ordinance to another that has survived judicial review, we are persuaded that the City Council considered those studies themselves and not merely the ordinances for which the studies provided support. Although the 1986 supplemental report relates no empirical evidence of the effects of topless bars, that report incorporates the 1982 report, which does refer to topless bars. We are persuaded that the City met its burden under City of Renton to establish that there was evidence before it from which the Council was entitled to reach its conclusion and was "relevant to the problem that the city addresses." The district court did not err in finding that the City had proved a substantial interest in the regulation of businesses subject to the Ordinance.
>
> 837 F.2d at 1274-75.

In the paragraph following the extract immediately above, the court distinguished this case from its earlier decision in *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir.1982), in which it had struck down the Galveston ordinance, finding there that ""there is no evidence in the record that the Galveston City Council passed Ordinance 78-1 after careful consideration or study of the effects of adult theaters on urban life," 837 F.2d at 1275, citing and quoting *Basiardanes*, 682 F.2d at 1215.

Four years after its decision in *SDJ*, the court relied on its opinion in *SDJ* in upholding the Constitutionality of a Jackson, Mississippi, ordinance regulating sexually oriented businesses. *Lakeland Lounge v. Jackson*, 973 F.2d 1255 (5th Cir. 1992), *reh'g en banc den*.979 F.2d 211 (5th Cir. 1992), *cert. den.* 507 U.S. 1030, 113 S. Ct. 1845, 123 L. Ed. 2d 469 (1993). In this case, it provided somewhat more detailed analysis of the reasons that it found that Jackson had met the Constitutional requirements of *Renton* in the adoption of its ordinance. The case came to it in a similar posture to that of the Houston case – the district court had found the Jackson ordinance unconstitutional because, according to the appellate court, "The court held that the city council had an insufficient factual predicate by which to base its ordinance upon secondary effects; therefore, the city had not shown that the ordinance was content-neutral." 973 F.2d at 1258. The district court's primary concern was that there was no evidence that the city council, the legislative body which adopted the ordinance, had actually heard evidence regarding negative secondary effects. The appellate court responded with this analysis:

> We believe that the district court clearly erred and that the record shows that the city council had sufficient information before it to enact a permissible ordinance. First, the office of planning, city attorney's office, and the ordinance review committee (a subcommittee of the planning board) drafted the ordinance, and they unquestionably considered, and relied upon, the studies as to the secondary effects of sexually oriented business while they were drafting the amendment. Further, the council could properly place some reliance upon others to do research, as state law requires that the planning board make recommendations to the council regarding zoning amendments. We perceive no constitutional requirement that the council members personally physically review the studies of secondary effects; such a holding would fly in the face of legislative reality.
>
> Second, although the city council never received a written report or summary of the studies, the city planning board held a public meeting at which the planning director and other city staff members and

> citizens discussed secondary effects and the work that had gone into the preparation of the proposed ordinance. As testimony and the official minutes of the meeting show, five of the seven members of the city council were present at that meeting; as the ordinance passed by a six-to-one vote, a majority of the council must have both voted for the ordinance and attended the meeting.
>
> Third, the language of the amendment indicates the council's concern with the secondary effects. [footnote omitted]
>
> 973 F.2d at 1258-59.

The court then quoted with approval the relatively brief preamble referring to secondary effects but noted:

> This language might not save a statute that was formulated without specific attention to secondary effects. Nevertheless, in context here, where (1) the drafters of the ordinance did rely upon studies of secondary effects, (2) a majority of the council members did receive some information about the secondary effects during an open hearing of the planning board, and (3) nothing in the record otherwise suggests impermissible motives on the part of the council members, the language of the preamble shows the city council's awareness of the studies upon which the planning staff relied when framing the ordinance and reflects that a reasonable legislature with constitutional motives could have enacted the ordinance.
>
> 973 F.2d at 1259, citing *SDJ* 837 F.2d at 1274.

Although the decision in *Lakeland Lounge* is now more than 15 years old and has been followed by a number of other cases dealing with the same issues, the Fifth Circuit continues to cite and rely on *Lakeland Lounge.* See, for example, *Encore Videos, Inc., v. City of San Diego*, 330 F.3d 288 (5th Cir. 2003); *LLEH, Inc. v. Wichita County*, 289 F.3d 358 (5th Cir. 2002); and *J & B Entertainment v. City of Jackson*, 152 F.3d 362 (5th Cir. Miss. 1998), all cited and discussed later in this analysis.

In more recent years, the Fifth Circuit Court of Appeals has been somewhat more skeptical than other courts of the records that local governments have provided to document the secondary effects to which local ordinances are addressed. To put that comment in context, it is useful to review the basic facts of the Los Angeles case decided by the Supreme Court in 2002. In *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (U.S. 2002), the Court reversed decisions by a federal district court and the Ninth Circuit that had held in part that the city could not legitimately rely on a study that was several years old and that addressed a somewhat different problem than the city was now addressing. The study was 25 years old by the time the case reached the Supreme Court, but the Court found that the city's reliance on a study that it had conducted "several years before" was entirely reasonable.

The study itself had provided evidence that "concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities." 152 L. Ed. 2d at 678, 122 S. Ct. at 1732, citing 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)). The original ordinance adopted by the City in reliance on the study restricted the establishment, enlargement or transfer of ownership of any [defined] adult enterprise within 1000 feet of another adult enterprise. The City subsequently decided that the adopted ordinance was too narrow, and amended it to preclude the operation of multiple types of adult enterprises within one facility. The Supreme Court decision evolved from an enforcement action brought by the city against the operator.

The controlling language in the plurality opinion in *Alameda Books* said this:

> In *Renton* 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. This is not to say that a municipality can get away with shoddy data or reasoning. The

> municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in Renton. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.
>
> 152 L. Ed. 2d at 683, 122 S. Ct. at 1736.

Not surprisingly, the sex industry frequently uses expert witnesses to challenge studies and analyses provided in support of local ordinances and cite the language here saying that a local government cannot "get away with shoddy data or reasoning." See discussion of *H & A Land Corp v. City of Kennedale*, 480 F.3d 336 (5th Cir. 2007), below [partial citation here]. The industry seems somewhat less likely to cite the following and apparently clarifying sentence that follows, "The municipality's evidence must fairly support the municipality's rationale for its ordinance."

Relationship of Cited Studies to Adopted Ordinance

In seeming contrast to the Supreme Court's deference to a city's decision to rely on an earlier study that dealt with a related issue but that was not directly on point, the Fifth Circuit has looked much more critically at the relationship between the cited studies and the adopted ordinance. In *Encore Videos v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003), the Fifth Circuit found that the purely retail businesses are a different type of business from those with on-premises entertainment and that local governments need studies related to the impacts of such on-premises businesses as part of the basis for adopting regulations affecting such businesses. In reaching that decision, the appellate court found:

> The studies [cited by the city] either entirely exclude establishments that provide only take-home videos and books (as is the case with the Seattle study) or include them but do not differentiate the data collected from such businesses from evidence collected from enterprises that provide on-site adult entertainment as may have been the case with the Austin and Garden Grove studies. [footnote omitted]
>
> 330 F.3d at 294-95.

As the Fifth Circuit acknowledged in that decision, however, there is a split of authority on this issue. On the same issue, the Eighth Circuit held:

> 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."
>
> *ILQ Invs., Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994), cert. denied, 513 U.S. 1017, 115 S. Ct. 578, 130 L. Ed. 2d 493 (1994), citing and quoting *Young v. American Mini Theatres, Inc*., 427 U.S. 50, 71, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) (plurality opinion).

The Tenth Circuit held in response to a similar argument:

> 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.
>
> *Z.J. Gifts, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th Cir. 1998), reversed in part on other grounds, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (U.S. 2004).

The Fifth Circuit has applied critical analysis to the purposes for which governmental entities say they have adopted the ordinances, and to the relationship between the stated purposes and the effect of the

ordinance. It was asking tough questions even before the Supreme Court raised questions about "shoddy data and reasoning" in *Alameda Books.* In *J & B Entm't, Inc. v. City of Jackson, Miss*., 152 F.3d 362 (5th Cir. 1998), the court reversed a decision by a lower court granting summary judgment to the city in a challenge to a Jackson ordinance regulating sexually oriented businesses. The appellate court found that the record was "too bare" at this stage to conclude that the ordinance had been adopted to serve a substantial governmental purpose unrelated to the suppression of speech. 152 F.3d at 375. It rejected both factors that the district court cited in support of its conclusion to the contrary:

> The first piece of evidence that the district court relied upon to conclude that the City enacted the Ordinance to combat secondary effects linked to public nudity is the Ordinance's preambulatory clause stating that "the City of Jackson has a legitimate interest in combating secondary effects associated with public places where persons who are physically present appear nude amongst strangers." In *Lakeland Lounge*, we explained that the mere incantation of the words "secondary effects" may not save a statute "formulated without specific attention to specific secondary effects." *Lakeland Lounge*, 973 F.2d at 1259. No explanation of what specific secondary effects motivated Jackson to enact the Ordinance appears in its text, and the City Council failed to make any specific legislative findings prior to enactment.
>
> 152 F.3d at 373-74, citing *Lakeland Lounge v. Jackson*, 973 F.2d 1255 (5th Cir. 1992).

The court acknowledged that the city might be able to show a "current governmental interest" to support the ordinance even in the absence of appropriate findings, but it noted that the fact that the case had been decided on a pre-trial motion left the court without evidence to consider regarding that issue. 152 F.3d at 374. It went on to address the next piece of "evidence" cited by the district court:

> The second piece of evidence that the district court relied upon to find that the City enacted the Ordinance to combat secondary effects linked to public nudity was the City's experience in enacting the 1991 zoning ordinance. Prior to enacting the 1991 zoning ordinance, Jackson's City Council received information regarding studies on secondary effects associated with adult entertainment in other cities. See *Lakeland Lounge*, 973 F.2d at 1258-59. Other than the inference that Jackson must have had the same interests because the composition of the City Council that enacted the Ordinance was the same as the City Council that enacted the 1991 zoning ordinance, however, the City has offered no reasoned explanation linking the two ordinances, for how they seek to further similar interests, or for how it could reasonably conclude that banning public nudity might further its interests. Therefore, in light of Barnes, we find this single piece of evidence to be insufficient to justify the Ordinance as fulfilling a substantial governmental interest for the following reasons.
>
> 152 F.3d at 374.

The court provided this summary and conclusion to its analysis:

> In conclusion, as a result of the district court's premature grant of summary judgment, the record now before us is simply too bare to support its conclusion that the City enacted the Ordinance based on a desire to combat secondary effects linked to public nudity, as applied to nude dancing. We are not in a position to review this conclusion or determine whether the City could have a reasonable belief that the Ordinance might further its interests. Because the burden of proof under the intermediate scrutiny standard of review is on the City and insufficient evidence exists to indicate that the City has met its burden under this prong on the record now before us, we vacate the district court's grant of summary judgment in favor of the City.
>
> 152 F.3d at 375.

Although *J & B Entertainment* is a pre-*Alameda Books* decision, it has continued vitality – it was cited extensively and followed in part by the Fifth Circuit in its 2007 decision in *Illusions - Dallas Private Club, Inc. v. Steen*, 482 F.3d 299 (5th Cir. 2007). It was also followed in part by the court in the *Encore Video* decision that is discussed extensively in this section. Other recent decisions in which the

appellate court cited this 1998 case include *BGHA, LLC v. City of Universal City*, 340 F.3d 295, (5th Cir. 2003) and *N.W. Enters. v. City of Houston*, 352 F.3d 162, 175 (5th Cir. 2003).

Although the Fifth Circuit has consistently asked tough questions about the evidence of secondary effects and local governments' conclusions that particular ordinances are necessary to address those, it has often resolved that analysis in favor of the local government. In *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, a decision handed down by the appellate court shortly before the Supreme Court decision in *Alameda Books*, the court noted that:

> *Renton* teaches us that the government must produce some evidence of adverse secondary effects produced by adult entertainment in order to justify a challenged enactment using the secondary effects doctrine. Renton also instructs us that a government must present sufficient evidence to demonstrate "a link between the regulation and the asserted governmental interest," under a "reasonable belief" standard.
>
> *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471, 481 (5th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 16491 (5th Cir. 2002)[11], *cert. den. sub nom. Case & Point, Inc. v. City of Dallas*, 537 U.S. 1088, 123 S. Ct. 699, 154 L. Ed. 2d 632 (2002);

Here the appellate court was citing and quoting *J&B Entm't, Inc. v. City of Jackson*, 152 F.3d 36 . It went on, however, to uphold the challenged ordinance as Constitutional, finding and holding:

> That standard is satisfied. The Ordinance was enacted, in part, because the City had found that, through Chapter 14, entities that were, in effect, SOBs were avoiding that classification; and that concentrated SOBs "continue to contribute to … an increase in criminal activities in the surrounding community". Dallas, Tex., Ordinance 23137 (preamble). Among other relied-upon data, the 1997 Malin Study supports that increased-criminal-activities finding. From January 1993 through March 1997, there were 396 arrests for sex crimes ("Rape, Prostitution/Commercial Vice[,] and other Sex Offenses") in the study area (which included a concentration of seven SOBs), as compared to 133 such arrests in one control area (containing two SOBs located approximately a half-mile apart) and 77 such arrests in another control area (containing no SOBs).
>
> In short, sex crime arrests were three to five times more frequent in the study area. While the Malin Study is careful not to attribute this disparity entirely to SOBs, it did find a correlation between SOBs -- specifically, their "hours of operation and the type of people which SOBs attract" -- and higher crime rates.
>
> These findings are "reasonably believed to be relevant to the problem that the City addresses". *Renton*, 475 U.S. at 51-52 (emphasis added). The City relied upon specific evidence showing, inter alia, higher crime rates in the vicinity of SOBs. The City's attempts to deal with that reality had been continuously frustrated in the past, most recently by "exploitation of a 'loophole' in the City Code that permitted such businesses to avoid the location restrictions by obtaining dance hall licenses pursuant to Chapter 14, which was not originally designed to regulate such businesses". *Baby Dolls*, 114 F. Supp. 2d at 547 (emphasis added).
>
> 295 F.3d at 481-82, citing in part the lower court decision at 114 F. Supp. 2d 531 (N.D. Tex. 2000).

District courts in the Fifth Circuit have similarly applied critical analysis to the public policy arguments before them, not simply accepting the assertions of local governments that adopted ordinances were necessary to address a variety of identified secondary effects. For example, in *Allstars v. City of San Antonio*, 2003 U.S. Dist. LEXIS 8517 (W.D. Tex. May 19, 2003) (not published in official reporter), the court denied a preliminary injunction against enforcement of several parts of a local ordinance establishing requirements to place dancers on a stage and to provide buffers between dancers and

[11] Official citation for denial of rehearing not available.

patrons. It granted the preliminary injunction against the portion of the ordinance that also established a buffer between performers, holding that "However, at this early stage in the proceedings, it is not clear that evidence was before the city council to support this provision. Until such time as the City meets its evidentiary burden, the preliminary injunction as to touching between entertainers is GRANTED." 2003 U.S. Dist. LEXIS 8517, at 9.

In one of its first post-*Alameda Books* decisions, the Fifth Circuit showed considerable deference to the judgment of local legislators, holding that a local government must simply have a "rational basis" for adopting an ordinance regulating sex businesses. *N.W. Enters. v. City of Houston*, 352 F.3d. 162, (5th Cir. 2003); *rev. and vac. in part, reh. den.*, 372 F.3d 333 (5th Cir. 2004).[12] The court provided this clarifying discussion:

> The point of deference is this: legislators cannot act, and cannot be required to act, only on judicial standards of proof. Legislative zoning decisions are generally upheld on a rational basis standard. Imposing a level of inter mediate scrutiny, in cases like this, requires more conviction of the connection between legislative ends and means than does the rational basis standard, but only in the sense of "evidence [that] is reasonably believed to be relevant" to the secondary effects in question.
>
> 352 F.3d at 180-81.

The Fifth Circuit was also deferential to the legislative conclusions of a local government in a 2002 decision (*LLEH, Inc. v. Wichita County)* where the industry argued that studies of secondary impacts of sex businesses in urban areas did not fairly support a county's adoption of regulations of such businesses.

> The secondary effects that urban areas have experienced (well documented in the relied-upon studies) are precisely what the County is attempting to avoid. This is evinced by the Order's preambulary language. For example, the County sought to "minimize and control adverse effects" and "deter the spread of urban and rural blight".
>
> Accordingly, it is logical that the County would: (1) review the experiences of urban areas, as discussed in the studies; (2) consider what measures those areas have employed to combat secondary effects; and (3) tailor those corrective measures to the County's needs. By so doing, the County may, in its continued growth and development, successfully sidestep many of the problems encountered by urban areas. In this respect, the relied-upon studies are "reasonably believed to be relevant" to the problems the County seeks to address. See *Renton*, 475 U.S. at 51. 167
>
> See *LLEH, Inc. v. Wichita County*, 289 F.3d 358, 366 (5th Cir. 2002), *reh'g denied* 45 Fed. App. 324 (2002), reversing [on this point and others] *LLEH, Inc. v. Wichita County*, 121 F. Supp. 2d 513 (N.D. Tex. 2000). Although this decision pre-dated *Alameda Books*, the Fifth Circuit has recently held that it remains good law. *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546, 562 (5th Cir. 2006).

The court was similarly deferential to local government in a more recent case, *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546 (5th Cir. 2006). This case involved a challenge to an Arlington ordinance that, among other things, required that dancers in a sexually oriented cabaret must perform on a stage and maintain a five-foot buffer from patrons. In ruling for the city, the court addressed the question of the burden on the city to demonstrate that its ordinance was aimed at secondary effects. In response to the city's citation of a number of studies from other jurisdictions, the clubs challenging the

[12] Note that some of the reporting and citation on this case are misleading and inaccurate; the same 2004 opinion appears twice in Lexis (once in F.3d, as cited), and is cited three times in Shepard's, with a red stop sign, apparently resulting from the minor modification to the decision that was technically a partial reversal and vacation.

ordinance hired an expert who analyzed police records and found that "there were no arrests, citations, or police calls for prostitution, solicitation, assault, or narcotics." 459 F.3d at 560. In response to the plaintiffs' lawyers' argument that this showed that the reasoning of the city in its findings was "shoddy" under *Alameda Books*, the court responded:

> We find this evidence, even when viewed in a light most favorable to the plaintiff, plainly insufficient to preclude summary judgment. Indeed, "[a]lthough this evidence shows that [the City] might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the [City's] legislative process." *G.M. Enters. v. Town of St. Joseph*, 350 F.3d 631, 639 (7th Cir. 2003) (affirming summary judgment in favor of the Town's five-foot buffer and eighteen-inch stage-height requirement despite meaningful countervailing evidence presented by the plaintiffs). At best, Joe Morris's report suggests that no arrests at strip clubs had occurred for prostitution, drugs, or assault, a fact that is likely of little comfort to the City of Arlington, which passed this ordinance at least in part because dancer-patron proximity in a dimly-lit room made such crimes difficult to police. Ultimately, we are not empowered by *Alameda* to second-guess the empirical assessments of a legislative body, nor are we expected to submit such assessments to a jury for re-weighing; instead, the relevant "material fact" that must be placed at issue is whether the ordinance is supported by evidence that can be "reasonably believed to be relevant to the problem." See *Renton*, 106 S. Ct. at 931 (emphasis added); see also N.W. Enterprises, 352 F.3d at 180; Alameda Books, 122 S. Ct. at 1743 (Kennedy, J., concurring) ("[T]he Los Angeles City Council knows the streets of Los Angeles better than we do."). Because no such issue of material fact exists, we hold that Ordinance No. 03-044 satisfies the second prong of O'Brien.
>
> 459 F.3d at 561.

The Fifth Circuit also suggested a somewhat reduced bar for governments in a 2007 decision (*H & A Land Corp v. City of Kennedale)* in which it reversed a decision of a district court that had found a local ordinance unconstitutional under the rationale discussed above in *Encore Videos. H & A Land Corp v. City of Kennedale,* 480 F.3d 336 (5th Cir. 2007), *cert. den. Sub nom. Reliable Consultants, Inc. v. City of Kennedale,* 128 S. Ct. 196, 169 L. Ed. 2d 36 (U.S. 2007). The court first restated the public policy (not necessarily legal) premise of its decision in *Encore Videos:*

> On-site businesses (i.e., adult theaters or strip clubs) pose a greater threat of secondary effects than off-site sexually oriented businesses (i.e., adult bookstores). Therefore, a city that enforces an ordinance meant to prevent harmful secondary effects associated with the operation of an off-site business must rely on evidence showing that off-site businesses, rather than the broader category of sexually oriented businesses that includes on-site businesses, cause harmful secondary effects.
>
> 480 F.3d at 339.

In a footnote to the quoted material, the court quoted this language from *Encore Videos:*

> Off-site businesses differ from on-site ones, because it is only reasonable to assume that the former are less likely to create harmful secondary effects. If consumers of pornography cannot view the materials at the sexually oriented establishment, they are less likely to linger in the area and engage in public alcohol consumption and other undesirable activities."
>
> 480 F.3d at 339, quoting *Encore Videos,* 330 F.3d, 288, 295, n. 3 (5th Cir. 2003).

They noted that the case differed from *Encore Videos* because "because Kennedale, unlike San Antonio, offers evidence that purports to show a connection between purely off-site businesses, or 'bookstores,' and harmful secondary effects." It then set out this test for determining whether the evidence was sufficient:

> To determine whether the ordinance at issue is narrowly tailored, we must determine whether Kennedale could reasonably believe that the evidence is relevant to show the requisite connection to harmful secondary effects. *Alameda Books,* 535 U.S. at 438. In other words, we ask whether that evidence "fairly

> support[s] the [city's] rationale for its ordinance." Id. Applying our holding from *Encore Videos*, Kennedale cannot reasonably believe its evidence is relevant unless it sufficiently segregates data attributable to off-site establishments from the data attributable to on-site establishments. *Encore Videos*, 330 F.3d at 294-95.
>
> 480 F.3d at 339.

In reversing the trial court and finding that the city had established a substantial governmental interest and a clear relationship to the adopted ordinance, the Fifth Circuit stated:

> Kennedale's evidence consisted of studies from nine cities, as well as an opinion survey of land use appraisers conducted by the city's attorney, and citizen commentary from public meetings. Seven of Kennedale's nine studies from other cities fail to differentiate between on-site and off-site businesses. The 1984 Indianapolis and 1986 Oklahoma City studies, however, included surveys of real estate appraisers that focused strictly on "adult bookstores." The overwhelming majority of survey respondents in both studies predicted that the presence of an adult bookstore would negatively affect real estate value in the surrounding area. The Indianapolis survey, conducted by the City of Indianapolis in conjunction with Indiana University School of Business, Division of Research, polled 20% of the national membership of the American Institute of Real Estate Appraisers. Eighty percent of the respondents predicted that an adult bookstore would negatively impact residential property values, and seventy-two percent believed commercial property value would also be negatively effected [sic]. The Oklahoma City study, which surveyed one hundred Oklahoma City real estate appraisers, produced similar results: Seventy-four percent predicted a negative impact on real estate value in the surrounding area.
>
> 480 F.3d at 339-40.

The court also rejected a related argument that the sex industry has raised in other cases:

> Appellee Reliable argues that the term "bookstore," used in both surveys, is a term of art and does not sufficiently specify off-site premises. They argue instead that adult bookstores often include peep shows, arcades, and other forms of on-site entertainment, rendering them on-site establishments. However, the Supreme Court has previously used the term "bookstore" as distinguishable from "adult video arcades." *Alameda Books*, 535 U.S. at 442 (discussing city's prohibition on "combination of adult bookstores and arcades"). This was a survey sent to and completed by real estate appraisers, and so what matters is how those appraisers would have understood the survey's reference to an adult bookstore.
>
> Standing alone, it is reasonable to infer that the survey respondents interpreted "bookstore" as signifying an off-site establishment. Webster's Dictionary defines "bookstore" as "a place of business where books are the chief stock in trade." WEBSTER'S NEW INT'L. DICTIONARY [sic] 253 (3d ed. 1981). There is no reason to expect that simply adding the word "adult" to the term would completely transform the nature of the business activity described.
>
> 480 F.3d at 340.

The court concluded this part of its analysis this way:

> Kennedale's ordinances purport to protect against harmful secondary effects. The Indianapolis and Oklahoma City studies support the belief that off-site sexually oriented businesses cause harmful secondary effects to the surrounding area in the form of decreased property value. So long as they are not relying on shoddy data or reasoning, we afford substantial deference to cities with regards to the ordinances they enact. See *Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring) (noting that "a city must have latitude to experiment" and "courts should not be in the business of second-guessing fact-bound empirical assessments of city planners"). The Indianapolis survey, in particular, was drafted by experts, pretested, and administered to a large, national pool of respondents. It is not "shoddy." We therefore find that Kennedale has produced evidence that it could have reasonably believed was relevant, and thus could have properly relied upon. The ordinances are narrowly tailored to advance a substantial governmental interest.

480 F.3d at 340-41.

A federal court in the Northern District of Texas appeared to follow a similarly deferential attitude in denying a preliminary injunction to the prospective operator of a store to be called "Condoms & More," finding that studies provided by Dr. Richard McCleary were adequate to rebut the plaintiffs' argument that they were likely to succeed on the merits under *Encore Videos.*

In *Illusions - Dallas Private Club, Inc. v. Steen, a* 2007 decision involving the regulation of sexually oriented live entertainment, the Fifth Circuit conceded one point to the governmental defendant fairly easily but took a hard line on another issue, resulting in a decision adverse to the government. *Illusions - Dallas Private Club, Inc. v. Steen*, 482 F.3d 299 (5th Cir. 2007), dealt with a Texas state regulation that prohibited the service of alcohol in an establishment with defined adult entertainment if that establishment was located in a "dry" jurisdiction.[13] There was no legislative record. The appellate court was willing, nevertheless, to conclude from the context of the regulation (in the Alcoholic Beverage Code) that the purpose of the law was not the suppression of erotic speech but the regulation of establishments serving alcohol. 482 F.3d at 311. The court, however, held that, "we agree with the Clubs that the State has not justified a substantial governmental interest." 485 F.3d at 312.

The court went on to provide this discussion:

> The State's proffered substantial governmental interest is prohibiting the sale of alcohol in inappropriate locations and, thereby, protecting the "welfare, health, temperance, and safety of the people of the state" that would be harmed by the negative secondary effects flowing from the alcohol service/erotic dancing combination. See Tex. Alco. Bev. Code § 1.03. The State supported its substantial governmental interest at the summary judgment stage by (1) referencing, in a memorandum in support of its motion, information gleaned from judicial opinions and "common sense" and (2) by attaching various studies regarding the secondary effects of the alcohol/erotic dancing combination. The district court excluded all of the various studies as hearsay, and the State has not challenged this order on appeal. The district court nonetheless found that the State satisfied its burden by merely citing in its motion for summary judgment to judicial opinions and the discussions therein regarding the negative secondary effects of the alcohol/erotic dancing combination, when the judicial opinions cited were not in the record and were not relied on by the State prior to enactment.
>
> * * * *
>
> It is of course true, as the State points out, that the evidentiary burden for a State attempting to justify a substantial governmental interest is very light. *Alameda Books* requires only that the State "demonstrate a connection between the speech regulated by the [statute] and the secondary effects that motivated the adoption of the ordinance." 535 U.S. at 441 (plurality opinion); see also id. at 451 (Kennedy, J., concurring in the judgment) ("[V]ery little evidence is required" to show that "speech will be substantially undiminished, and that total secondary effects will be significantly reduced."). And the Court's cases "require only that municipalities rely upon evidence that is 'reasonably believed to be relevant' to the secondary effects that they seek to address." Id. at 442 (plurality opinion) (quoting *Pap's A.M.*, 529 U.S. at 296)). It is also true, as the State suggests, that the notion that the alcohol/erotic dancing combination is a combustible one is supported by common sense.
>
> The State nonetheless "bears the burden of providing evidence that supports a link" between the combination of alcohol service and erotic dancing and negative secondary effects. Id. at 437 (plurality opinion); see also *J & B Entertainment*, 152 F.3d at 372-73. Here, the record is completely devoid of any evidence that a secondary effects problem exists or that § 32.03(k) furthers that interest. The only actual

[13] For the non-Texas reader, Texas allows local "dry" options prohibiting bars and similar establishments, but it allows the service of alcoholic beverages even in those jurisdictions in private "clubs." The sexually oriented businesses involved in this litigation were all operated as "clubs" in a dry jurisdiction.

> evidence the State proffered in support of its substantial governmental interest was in the form of land-use studies by other cities on the negative secondary effects caused by SOBs. But, as noted above, these studies were excluded, and the State has not challenged the exclusion on appeal. As such, there simply is no evidence, and the State has not met the minimal evidentiary burden placed upon it.

"Underinclusiveness" – Regulating/Not Regulating Other Uses with Negative Secondary Effects

The survey of appraisers that provides the substantive context for this report indicates that a significant majority of Texas appraisers believe that all of the sexually oriented businesses identified in the survey are likely to have negative effects on the market value of single-family residences and community shopping centers. These same appraisers also believe that certain other land uses may have similar adverse effects, particularly on the market value of single-family homes. One question that may arise in the drafting, adoption or defense of an ordinance regulating sexually oriented businesses is why the ordinance does not address all of the uses identified by the appraisers as having similar effects on the market value of property. The issue is important but not critical.

Courts in the Fifth Circuit and elsewhere have held that the "underinclusiveness" that results from regulating some but not all uses that may reasonably believed to have negative secondary effects does not make the adopted regulations unconstitutional. See, for example, this discussion from *Renton,* where the Supreme Court rejected an argument that the fact that the city chose to regulate only adult motion picture theaters and not other sexually oriented businesses should cause the ordinance to fall as unconstitutional:

> 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 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 this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters.
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> 475 U.S. 41, 52-53, 106 S. Ct. 925, 931-32, 89 L. Ed 2d 29, 41.

Several years later, in a case raising the same issue but not involving a sex business, the Supreme Court addressed the broader policy implications of this argument and this issue:

> [T]he First Amendment imposes not an "underinclusiveness" limitation but a "content discrimination" limitation upon a State's prohibition of proscribable speech. There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be "underinclusive," it would not discriminate on the basis of content. Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular secondary effects of the speech, so that the regulation is justified without reference to the content of the speech.
>
> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387–89, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), (citations and quotations omitted);

The Ninth Circuit applied this principle in a case involving the regulation of sex businesses. See *Center for Fair Pub. Policy v. Maricopa County,* 336 F.3d 1153 (9th Cir. Ariz. 2003), cert. den. 541 U.S. 973, 124 S. Ct. 1879, 158 L. Ed. 2d 468 (2004). There, the court dealt with an ordinance that established a 1:00 a.m. closing time for sexually oriented businesses but not for any other businesses:

> The State "may choose to treat adult businesses differently from other businesses . . . ." *Isbell v. Grand B Emporia, Inc.*, 258 F.3d 1108 at 1116 (9th Cir. 2001); see also Young, 427 U.S. at 70-71 ("[T]he State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."). If this is true as a general proposition, then it must also be true as to the specific proposition that a state may single out sexually-oriented businesses to regulate their hours of operation. See *Ben Rich Trading, Inc.*, 126 F.3d at 163 ("[A] municipality may regulate hours of adult businesses differently than other businesses without raising a strong inference of discrimination based on content.").
>
> 336 F.3d at 1171, citing *Isbell* [full citation in extract] and *Ben Rich Trading, Inc. v. City of Vineland*, 126 F.3d 155 (3d Cir. 1997)..

The Fifth Circuit dealt with a different aspect of the underinclusiveness argument in *J & B Entm't, Inc. v. City of Jackson, Miss*., 152 F.3d 362, 377 (5th Cir. 1998), where it rejected an argument that an ordinance limiting public nudity in sex businesses but not in all venues was not unconstitutional as undereinclusive. The public nudity cases are distinguishable from the issue here, because an ordinance banning all public nudity – even in legitimate theater productions, for example – might be held to be over-broad. See discussion at 152 F.3d at 377, citing *Barnes v. Glen Theatre, Inc*., 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991).

In *SDJ, Inc. v. Houston,* discussed extensively above, the Fifth Circuit rejected an underinclusiveness argument that was framed in part as an equal protection claim:

> First, the Ordinance does not deny plaintiffs equal protection because it regulates topless bars but does not regulate adult bookstores and theatres. This argument fails to recognize the fact that adult theatres and bookstores still are specifically exempted from the state enabling act, and thus the City has no authority to regulate these businesses. The argument also ignores that the Ordinance here was enacted as a companion to an earlier ordinance that specifically excluded topless bars due to preemption by state law. Furthermore, the Supreme Court dismissed a similar "under-inclusive" argument in *Renton*, stating, "That Renton chose first to address the potential problems caused by one particular kind of adult business in no way suggests that the city has 'singled out' adult theaters for discriminatory treatment."
>
> *SDJ, Inc. v. Houston*, 837 F.2d 1268, 1279 (5th Cir. 1988), *reh'g en banc den*. 841 F.2d 107 (5th Cir. 1988), *cert. den. sub. nom. M. E. F. Enterprises, Inc. v. Houston*, 489 U.S. 1052, 109 S. Ct. 1310, 103 L. Ed. 2d 579 (1989).

REGULATING SIGNAGE AND LIGHTING

In *SDJ, Inc. v. Houston,* the Houston ordinance "impose[d] restrictions on the exterior decor and signage of those businesses, limiting the number and verbiage of signs and requiring buildings to be painted achromatically." *SDJ, Inc. v. Houston*, 837 F.2d 1268, 1272 (5th Cir. 1988), *reh'g en banc den*. 841 F.2d 107 (5th Cir. 1988), *cert. den. sub. nom. M. E. F. Enterprises, Inc. v. Houston*, 489 U.S. 1052, 109 S. Ct. 1310, 103 L. Ed. 2d 579 (1989). The operators raised underinclusiveness and equal protection ordinance, challenging the signage limitations because they applied only to adult cabarets. The court ruled for the city on that issue, holding succinctly:

> Finally, plaintiffs claim that the Ordinance violates their equal protection rights because the signage restrictions imposed under the Ordinance far exceed the reasonable restrictions placed on other businesses and thus single out topless bars for different treatment. Because topless bars are not a "protected class," the City need only demonstrate that the signage restrictions are reasonably related to a legitimate government interest. The district court did not err in holding that the City had demonstrated that the signage restrictions were rationally related to the legitimate interest in preventing detrimental effects on minors. [footnote omitted]
>
> 837 F.2d at 1280.

There is relatively little law on this subject, so it is worth reviewing briefly some major cases from other jurisdictions. The Eighth Circuit has also upheld what it called "modest" restrictions on signage at adult businesses. In *Excalibur Group v. City of Minneapolis*, 116 F.3d 1216, 1221–22 (8th Cir. Minn. 1997), the ordinance in this case provided in part:

> Window areas may not be covered or made opaque, nor are signs permitted in the windows. Id. A one square-foot sign is allowed on the door, however. Id. Subsection (g)(4) works in conjunction with subsection (g)(1), which provides that all exterior signs must be flat wall signs, and subsection (g)(2), which allows one square foot of sign area per foot of lot frontage on a street.
>
> 116 F.3d at 1221–22, citing Minneapolis, Minn., Code of Ordinances § 540.410(g)(4).

The court held in material part:

> We hold that the restrictions in subsection (g)(4) are narrowly tailored to further the city's significant interest in alleviating the adverse impact of sexually oriented businesses on their neighborhoods. Having before it substantial evidence of the urban blight caused by the mere presence of these businesses, the city could reasonably conclude that controlling their outward appearance would lessen the effect they would have on surrounding commercial and residential neighborhoods. The city could also reasonably conclude that sign and window regulations would be an appropriate means by which to achieve this purpose. The sign and window restrictions do not reach substantially more speech than necessary, for they are directed only at the signs and window coverings that would affect the outward appearance of the businesses and impact the surrounding neighborhoods
>
> 116 F.3d at 1222. Internal citations omitted.

Similarly, an appellate court in New Jersey has found Constitutional a state law that restricted signs on sexually-oriented businesses:

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

Reversing the trial court on the issues of Constitutionality, the appellate court held:

> N.J.S.A. 2C:34-7(c) is not substantially broader than necessary. The two sign limitation is justified given the undesirable secondary effects that such signs attract, e.g., higher incidents of crime, child delinquency… .
>
> *Hamilton Amusements v. Poritz*, 298 N.J. Super. 230, 689 A.2d 201 (App. Div. 1997), *aff'd sub nom. Hamilton Amusement Ctr. v. Verniero*, 156 N.J. 254, 716 A.2d 1137 (1998), *cert. den.* 527 U.S. 1021, 119 S. Ct. 2365, 144 L. Ed. 2d 770 (1999).

Later in the opinion, the court added these comments:

> Not only does the statute allow two signs to be posted but it in no way proscribes other modes of advertisement. Additionally, the statute does not inhibit in any way the material that may be displayed within the store nor does it place any significant limitation on what may be advertised upon the business's two signs.
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> 689 A.2d at 206.

Courts have struck down broader restrictions on signage at or for sexually oriented businesses. The Eighth Circuit, which had upheld Minneapolis' "modest" sign regulations in *Excalibur Group v. City of Minneapolis*, discussed above, struck down as unconstitutional a Missouri state law that banned billboard advertising by sexually oriented businesses within one mile of a state highway. Mo. Rev. Stat. §226.531. Using the *Central Hudson* test, the court found that the statute was not narrowly tailored to serve the state's interest:

> It is clear that section 226.531 regulates the affected business's speech; it threatens criminal prosecution for the mere inclusion of the name or address of an affected business on billboards within one mile of a state highway. The Missouri statute ``sacrifices an intolerable amount of truthful speech about lawful conduct." … The prohibition is directed at speech beyond that which would lead to the stated secondary effects, and is not narrowly tailored to achieve Missouri's stated goal.
>
> *Passions Video, Inc. v. Nixon*, 458 F.3d 837, 843 (8th Cir. Mo. 2006), reh. en banc den. 2006 U.S. App. LEXIS 24092 (8th Cir. 2006)[14], reversing *Passions Video, Inc. v. Nixon*, 375 F.Supp.2d 866 (W.D.Mo. 2005).

The same state law allowed limited signage for sexually oriented businesses. It provided that a business located within a mile of a state highway could have signage, subject to these limitations:

> [I]f such business is located within one mile of a state highway then the business may display a maximum of two exterior signs on the premises of the business, consisting of one identification sign and one sign solely giving notice that the premises are off limits to minors. The identification sign shall be no more than forty square feet in size and shall include no more than the following information: name, street address, telephone number, and operating hours of the business.
>
> Mo. Rev. Stat. §226.531.2.

[14] Official reporter citation not available for denial of rehearing.

The Eighth Circuit also found that provision to be overbroad and failed the strict scrutiny test:

> In our view, this provision is not narrowly drawn to meet the state's asserted goals, and thus fails to meet the fourth step of the *Central Hudson* test. *Lorillard Tobacco*, 533 U.S. at 556. Should an affected business owner choose to post a sign with the price of gasoline, or a sign advertising a nationally-known soft drink on the exterior of the business, he or she would be subject to criminal prosecution. Thus, Missouri statute section 226.531, in its entirety, is unconstitutional because it fails to survive scrutiny under the *Central Hudson* test for regulations on commercial speech.
>
> 485 F.3d at 843-44.

In its decision striking down the state law, the Eighth Circuit relied in part on a decision of the Georgia Supreme Court, also striking down a ban on outdoor advertising by sexually oriented businesses. *State v. Cafe Erotica, Inc.*, 270 Ga. 97, 507 S.E.2d 732 (1998). In striking down the law, the court provided this policy discussion and holding:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end the free flow of commercial information is indispensable.
>
> Because the absolute proscription against any form of off-site advertising impedes the free flow of information and far exceeds the State's legitimate interest, O.C.G.A. § 32-6-75 (b) is an unconstitutional infringement on free speech as guaranteed by the First Amendment and the Georgia Bill of Rights.
>
> 270 Ga. at 100–01, 507 S.E.2d at 735.

The Seventh Circuit considered a local ordinance in Mishawaka, Indiana, upholding part of it and striking down another, appearing to find in one case a balance that the Eighth Circuit essentially adopted in two. In *Pleasureland Museum, Inc., v. Beutter*, 288 F.3d 988 (7th Cir., Ind. 2002), the Seventh Circuit upheld portions of the ordinance that prohibited the use of images and that required the use of only solid-color letters on signs at sex businesses. It went on, however, to hold that a provision allowing only the name of the business on the sign was unconstitutionally overbroad:

> Mishawaka fails to articulate a single reason why it is necessary to limit a sexually-oriented business' signage solely to displaying its name. Under Section 125.16(D)(1), a sexually-oriented business will not be allowed to notify the public about what type of store it operates or what its hours of operation are. Such a drastic restriction on signage cannot be sustained without some sort of evidentiary support.
>
> 288 F.3d at 1002-03.

Although a significant number of appraisers clearly believe that the addition of garish lighting to an already problematic business can increase the negative effect of that business on the market values of nearby property, the issue of adopting special sign regulations for sex businesses should be approached with caution. If local officials have observed particular problems with the types of signs at sex businesses, it is worth considering whether these are problems that might occur in other contexts or at other uses, providing a basis for a more general regulation that does not raise the issues of a potential content basis.

TEXAS STATUTES

Texas Enabling Statute to Permit Regulation of Sexually Oriented Businesses

The Texas Local Government Code includes specific enabling provisions to allow local governments to regulate certain sexually oriented businesses. Tex. Loc. Gov't. Code Ch. 243. The chapter includes this definition:

> In this chapter, "sexually oriented business" means a sex parlor, nude studio, modeling studio, love parlor, adult bookstore, adult movie theater, adult video arcade, adult movie arcade, adult video store, adult motel, or other commercial enterprise the primary business of which is the offering of a service or the selling, renting, or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to the customer.
>
> Tex. Loc. Gov't Code §243.002.

The statute expressly allows restrictions on the location of sexually oriented businesses (Tex. Loc. Gov't Code §243.006); this is a traditional zoning tool, readily available to most municipalities. In Texas, however, counties lack zoning authority, and several cities remain unzoned; this portion of the statute thus fills an important gap in authority for some local governments. The statute also expressly allows the creation of a local licensing ordinance for such businesses (Tex. Loc. Gov't Code §243.007).

Sexual Assault Prevention and Crisis Services Act

An odd section of a statute adopted by the legislature in 2007 as part of the Sexual Assault Prevention and Crisis Services Act (Tex. Gov't Code Ch. 420) provides, perhaps redundantly:

> The legislature may appropriate funds for a third-party assessment of the sexually oriented business industry in this state and provide recommendations to the legislature on how to further regulate the growth of the sexually oriented business industry in this state.
>
> Tex. Gov't Code §420.015.

Additional discussions with the Texas City Attorneys Association are needed to determine if this would be a source for funding further study of the impact sexually oriented businesses have on communities.

LESSONS LEARNED – WHEN ADOPTING SEXUALLY ORIENTED REGULATIONS

The purpose of this report is to provide a significant piece of evidence that elected officials and their advisors may "reasonably believe [] to be relevant" for demonstrating a connection between [sexually oriented businesses] and a substantial, independent government interest" – that is, protecting the market values of property. *Alameda Books,* 152 L. Ed. 2d at 683, 122 S. Ct. at 1736.

It is not material that can be adopted or used without thought. As the Supreme Court also reminded affected parties in the same paragraph quoted above, "The municipality's evidence must fairly support the municipality's rationale for its ordinance."

Based on the legal analysis provided here and on experience in assisting a number of communities to draft, adopt and implement regulations for sexually oriented businesses in this legal context, the following specific recommendations are offered to local governments relying on this and related reports:

- Attorneys, planners and other advisors to local officials should become fully familiar with any studies that they intend to use to show a "substantial governmental interest;"
- Copies of relevant studies should be provided to members of advisory bodies and elected officials who consider proposed regulations;
- If full copies of relevant studies are not distributed to all members of these bodies, it is desirable to provide them with a summary of the studies, relating the findings of the studies to local conditions to the maximum extent practicable (here it may be useful to cite testimony from hearings or other anecdotal information that provides local support or documentation for the empirical findings);
- Even when full copies of studies are provided to members of deliberative bodies, it is often useful to provide a written summary like the one recommended for officials who may not have received the full studies;
- It is useful to show that legislators relied on specific studies in deciding to adopt new regulations. Thus, it is useful to have a staff member or consultant provide an oral summary of the major findings of studies on which a deliberative body is expected to rely. If members of the body have been provided with a summary report, the record can be strengthened by having the person offering the summary recommend that members turn to particular pages as the presenter covers particular points;
- The proposed ordinance must be drafted with care, to ensure that it not only conforms with other constraints of Constitutional law and with state enabling legislation, but that it is clearly directed at solving problems identified in the studies placed in the record;
- The links between the various studies and the proposed ordinance should be set forth in detailed findings that accompany the ordinance, either as a preamble or as a separate document to be adopted before voting on the ordinance. Where it is not otherwise obvious, the findings should explain the relationship between the negative secondary effects identified in the studies and specific provisions of the ordinance; and,
- If the ordinance contains any unusual provisions, such as restrictions on signage or operating hours that may not be applied to other businesses, it is desirable to include in the findings specific explanations of the reasons for including those specific restrictions and for applying them only to sex businesses.

TREATMENT OF OTHER USES WITH NEGATIVE SECONDARY EFFECTS

OVERVIEW

The underlying purpose of this study was to determine whether sexually oriented businesses have measurable negative secondary effects that justify increased regulation for such businesses. Clearly the results of this study show substantial, measurable secondary effects which, in our opinion, justify special zoning regulation of such uses, including but not limited to separation distances from single-family residences.

These findings would appear similarly to support special regulation of the other high-impact uses, including bars and lounges, pawn shops, massage parlors, and homeless shelters, and to somewhat lesser extent high voltage power lines and landfills. Although somewhat beyond the scope of the report that we were retained to perform, we believe that it is both appropriate and necessary to offer some specific comments on these land uses.

Because the survey included a broad variety of uses often considered NIMBYs ("Not In My Back Yard") or LULUs ("Locally Unwanted Land Uses"), the results show that certain other uses have similar negative secondary effects on the market value of single-family homes and community shopping centers. In adopting regulations to address the negative secondary effects of sex businesses, it is important that local governments at least consider the extent to which other uses identified by the appraisers should be subject to similar regulations.

The legal and Constitutional considerations are not compelling; as the discussion of the "underinclusiveness" issue, beginning on page 33, indicates, the courts have generally recognized that local governments may identify a number of problems and may legitimately choose to address only some of those issues at any particular time. Nevertheless, interested citizens and potential litigants may pose questions about why a community decided to regulate one group of uses that has potential adverse effects on market values and not another. At a minimum, it is useful for local officials to be able to provide thoughtful responses to such questions. Ideally, the findings and agenda memos in support of new or amended ordinances regulating sex businesses will provide at least brief discussion of the issue of relating other uses with negative secondary effects.

OTHER USES WITH NEGATIVE SECONDARY IMPACTS

Bars and Lounges

Many Texas cities and counties have recognized the potential negative secondary impacts of bars and lounges. Not surprisingly, bars and lounges with live entertainment both turned up on the list of uses that appraisers believe may have an adverse effect on the market value of single-family homes. It is perhaps a little more surprising that over 40 percent of appraisers also believe that these uses may have an adverse effect on the market value of community shopping centers – one of the venues in which they are commonly found.

Bars and lounges can be considered "adult uses," a generic term often applied to sex businesses. Appraisers confirm that, at least as to market values of properties, they can have negative secondary effects that are somewhat similar to those of sex businesses. The state has a rigorous licensing law to address many operational problems of bars and lounges – types of operational issues that, for sex

businesses, are typically regulated through a local ordinance. However, the Texas Alcoholic Beverage Code exclusively governs the regulation of alcoholic beverages and preempts municipal ordinances that are not specifically authorized by that statute.[15] Therefore, although separation requirements between bars and lounges and single-family residences should be similar to that required for sex businesses, local governments lack the same authority to institute such separation requirements.

However, the Texas Alcoholic Beverage Code does contain some specific provisions related to the separation of establishments selling alcoholic beverages from specified other land uses:

> (a) The commissioners court of a county may enact regulations applicable in areas in the county outside an incorporated city or town, and the governing board of an incorporated city or town may enact regulations applicable in the city or town, prohibiting the sale of alcoholic beverages by a dealer whose place of business is within:
>
> (1) 300 feet of a church, public or private school, or public hospital;
>
> (2) 1,000 feet of a public school, if the commissioners court or the governing body receives a request from the board of trustees of a school district under Section 38.007, Education Code; or
>
> (3) 1,000 feet of a private school if the commissioners court or the governing body receives a request from the governing body of the private school.
>
> Tex. Alco. Bev. Code §109.33.

It is important to note that these provisions are not self-implementing – they must be adopted by a local governing body to be effective in that jurisdiction.

The Alcoholic Beverage Code contains one additional provision that appears to address locational conditions for which an alcohol permit may be denied:

> (a) The commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds that any of the following circumstances exists:
>
> * * * *
>
> (8) the **place** or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency; [emphasis added]
>
> * * *.
>
> Tex. Alco. Bev. Code §11.46(a)(8).

Recommendations: Because the regulation of alcoholic beverage establishments is a complex topic and one highly controlled by state statute, it is recommended that any ordinance concerning these businesses be separate from one dealing with sex businesses. The ordinance should also include a set of "findings" explaining the reasons for treating bars and lounges separately. Since this survey of appraisers indicates that bars and lounges are believed to have an adverse impact on the market values of single family homes and community shopping centers, the state legislature may want to

[15] Tex Alco. Bev. Code, Sec. 109.57; Dallas Merchants' and Concessionaire's Ass'n v. City of Dallas, 852 S.W. 2d 489 (Tex 1993).

consider amending the current Alcoholic Beverage Code to include separation distances from residential neighborhoods and, possibly, from certain types of commercial uses.

Pawn Shops

Also among the uses that Texas appraisers believe are likely to have negative secondary effects on the market value of single family homes and shopping centers are pawn shops. From a real estate perspective, pawn shops appear to have essentially the same negative characteristics as retail sex businesses. Like sex businesses, many pawn shops use lively signage, paint schemes and symbols to attract attention. The operations of pawn shops, however, are quite different from those of sex businesses. Pawn shops may attract criminal elements, but they are unlikely to attract people seeking illicit sex.

Pawn shops in Texas are regulated under Tex. Finance Code, Ch. 371. The state law, like other provisions of the Finance Code, focuses primarily on limiting interest and similar charges, protecting pawned property, and ensuring the integrity of the industry. Although pawn shop licenses are issued for a specific location, that appears to be a provision intended to facilitate inspections by giving the state an accurate list of where pawn brokers operate. Specific limitations on the locations of pawn shops are thus subject to control through local zoning. In theory, the state regulation of pawn shops should minimize the extent to which they attract criminal elements, thus distinguishing them to some extent from sex businesses. The state regulatory scheme, however, does not consider the potential impact of these operations on market values of nearby real property.

Recommendations. Under the "underinclusiveness" doctrine discussed within the legal section of this report, a local government is not required to regulate pawn shops at the same time or in the same way as it regulates sexually oriented businesses. It certainly should not attempt to impose a full range of sex business restrictions on pawn shops. Based on the findings of this survey of Texas appraisers, however, there is good reason to consider imposing the same sorts of separation requirements between pawn shops and single-family homes as are imposed between sex businesses and single-family homes. The separation between pawn shops and community shopping centers seems less relevant. Addressing this issue as part of the process of updating local zoning regulations to deal with the secondary effects of sex businesses not only addresses another public policy problem for the community (the secondary effects of pawn shops), but also provides an additional way to demonstrate that an ordinance is focused on secondary effects and not on protected communication.

Massage Parlors

Massage parlors were not included on the list of land uses about which appraisers were asked. The authors have, however, learned that some massage parlors serve as fronts for sexual activity of various types. There is no Constitutional right to a massage. See, for example, *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 139 (3d Cir. 1993), where the court included massage parlors in a list of possibly sexually related businesses that have "no Constitutional protection." See, also, *Babin v. City of Lancaster*, 89 Pa. Commw. 527, 493 A.2d 141 (1985)

There is thus no Constitutional protection afforded such businesses beyond general Constitutional rights such as the right to due process. There are, however, legitimate massage therapists who have professional training, abide by professional codes of ethics and offer non-sexual services that are beneficial to many people. Fortunately, the State of Texas has provided an easy means for distinguishing such establishments. It defines and licenses massage therapists. See Tex. Occup. Code, Chapter 455, Massage Therapy.

Recommendations: Through local zoning or other available ordinances, ban massage establishments except those operated by licensed massage therapists or as parts of clinics operated

and supervised by licensed medical professionals. No findings are necessary, but including this ban in a new or updated ordinance dealing with sexually oriented businesses is one way to demonstrate that the ordinance is not adopted with the intent of regulating protected speech.

Homeless Shelters

Many local zoning ordinances already address the issue of homeless shelters, in some cases requiring special or conditional use permits for them, to give local officials the opportunity to review a proposed site carefully and impose appropriate conditions to limit the secondary effects of the shelters. To the extent that a local government may consider new regulations for homeless shelters as a result of this study, it is important to remember that the issues involved with homeless shelters are much different than those involved with sexually oriented businesses. Homeless shelters typically try not to draw attention to themselves, using small signs and subdued paint jobs, in contrast to the sometimes garish lighting and signage used by sex businesses.

If considering updated regulations for homeless shelters and/or soup kitchens, a municipality should consider whether those are or should be accessory uses at churches or other houses of worship. Under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1(a)(1)-(2), some courts have ruled in favor of religious institutions that have argued – in the absence of express provisions in the local ordinance – that feeding or housing the homeless and destitute is an essential part of their religious practices and thus protected by the First Amendment to the Constitution and by RLUIPA. See, for example, *Western Presbyterian Church v. Board of Zoning Adjustment of District of Columbia*, 862 F. Supp. 538 (D.C. 1995), *dism*. 1995 U.S. App. LEXIS 5085 (D.C. Cir. Feb. 3, 1995)[16], (a pre-RLUIPA case that remains relevant); and *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. N.Y. 2002), *motion denied*, 2003 U.S. Dist. LEXIS 3898 (S.D.N.Y. 2003)[17]; *perm. inj'n granted*, 2004 U.S. Dist. LEXIS 22185 (S.D.N.Y. Oct. 28, 2004)[18]; *aff'd* 177 Fed. Appx. 198 (2d Cir., 2006) (opinion not published), *cert. den.* 127 S. Ct. 387, 166 L. Ed. 2d 271 (U.S. 2006).

High Voltage Power Lines

The Texas Public Utilities Commission must approve the siting of any electric transmission line with a capacity greater than 60 KV, under the Texas Public Utilities Regulatory Act, Tex. Utilities Code, Title II. Local control over this issue appears to be largely preempted by the state. To the extent that there may be some latitude for local control, that control should be exercised through a separate local ordinance designed to fit within the state regulatory structure for utilities.

Landfills

Siting and operation of new landfills is governed by a complex system of federal and state regulations, implemented in Texas through the Solid Waste Disposal Act, Texas Health & Safety Code, Ch. 361. Although landfills can affect market value of nearby properties for quite obvious reasons, there is no reason to think that they increase crime rates or cause other secondary effects similar to those of sexually oriented businesses. Counties play a role in landfill siting under the Health & Safety Code. The reasons for exercising and implementing those powers, however, include complex environmental, geological, transportation, market and other issues beyond the effects of such uses on the market value

[16] Official reporter citation not available for dismissal.

[17] Offical reporter citation not available for motion decision.

[18] Official reporter citation not available for order granting permanent injunction.

of other property. It is certainly an issue that should be addressed by any county in which the present or future siting of a landfill may occur, but it is not one that can reasonably be addressed through the same type of ordinance that regulates sex businesses.

APPENDICES

APPENDIX A: TABLE OF AUTHORITIES – SURVEY OF APPRAISERS REPORT

Cases

Statutes

APPENDIX B: STATE ENABLING ACT REGULATING SEXUALLY ORIENTED BUSINESSES

Texas Local Government Code, Chapter 243

Municipal and County Authority to Regulate Sexually Oriented Businesses

§ 243.001. Purpose; Effect on Other Regulatory Authority

(a) The legislature finds that the unrestricted operation of certain sexually oriented businesses may be detrimental to the public health, safety, and welfare by contributing to the decline of residential and business neighborhoods and the growth of criminal activity. The purpose of this chapter is to provide local governments a means of remedying this problem.

(b) This chapter does not diminish the authority of a local government to regulate sexually oriented businesses with regard to any matters.

§ 243.002. Definition

In this chapter, "sexually oriented business" means a sex parlor, nude studio, modeling studio, love parlor, adult bookstore, adult movie theater, adult video arcade, adult movie arcade, adult video store, adult motel, or other commercial enterprise the primary business of which is the offering of a service or the selling, renting, or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to the customer.

§ 243.003. Authority to Regulate

(a) A municipality by ordinance or a county by order of the commissioners court may adopt regulations regarding sexually oriented businesses as the municipality or county considers necessary to promote the public health, safety, or welfare.

(b) A regulation adopted by a municipality applies only inside the municipality's corporate limits.

(c) A regulation adopted by a county applies only to the parts of the county outside the corporate limits of a municipality.

(d) In adopting a regulation, a municipality that has in effect a comprehensive zoning ordinance adopted under Chapter 211 must comply with all applicable procedural requirements of that chapter if the regulation is within the scope of that chapter.

§ 243.004. Exempt Business

The following are exempt from regulation under this chapter:

(1) a bookstore, movie theater, or video store, unless that business is an adult bookstore, adult movie theater, or adult video store under Section 243.002;

(2) a business operated by or employing a licensed psychologist, licensed physical therapist, licensed athletic trainer, licensed cosmetologist, or licensed barber engaged in performing functions authorized under the license held; or

(3) a business operated by or employing a licensed physician or licensed chiropractor engaged in practicing the healing arts.

§ 243.006. Scope of Regulation

(a) The location of sexually oriented businesses may be:

(1) restricted to particular areas; or

(2) prohibited within a certain distance of a school, regular place of religious worship, residential neighborhood, or other specified land use the governing body of the municipality or county finds to be inconsistent with the operation of a sexually oriented business.

(b) A municipality or county may restrict the density of sexually oriented businesses.

§ 243.007. Licenses or Permits

(a) A municipality or county may require that an owner or operator of a sexually oriented business obtain a license or other permit or renew a license or other permit on a periodic basis for the operation of a sexually oriented business. An application for a license or other permit must be made in accordance with the regulations adopted by the municipality or county.

(b) The municipal or county regulations adopted under this chapter may provide for the denial, suspension, or revocation of a license or other permit by the municipality or county.

(c) A district court has jurisdiction of a suit that arises from the denial, suspension, or revocation of a license or other permit by a municipality or county.

§ 243.0075. Notice by Sign

(a) An applicant for a license or permit issued under Section 243.007 for a location not previously licensed or permitted shall, not later than the 60th day before the date the application is filed, prominently post an outdoor sign at the location stating that a sexually oriented business is intended to be located on the premises and providing the name and business address of the applicant.

(b) A person who intends to operate a sexually oriented business in the jurisdiction of a municipality or county that does not require the owner or operator of a sexually oriented business to obtain a license or permit shall, not later than the 60th day before the date the person intends to begin operation of the business, prominently post an outdoor sign at the location stating that a sexually oriented business is intended to be located on the premises and providing the name and business address of the owner and operator.

(c) The sign must be at least 24 by 36 inches in size and must be written in lettering at least two inches in size. The municipality or county in which the sexually oriented business is to be located may require the sign to be both in English and a language other than English if it is likely that a substantial number of the residents in the area speak a language other than English as their familiar language.

§ 243.008. Inspection

A municipality or county may inspect a sexually oriented business to determine compliance with this chapter and regulations adopted under this chapter by the municipality or county.

§ 243.009. Fees

A municipality or county may impose fees on applicants for a license or other permit issued under this chapter or for the renewal of the license or other permit. The fees must be based on the cost of processing the applications and investigating the applicants.

§ 243.010. Enforcement

(a) A municipality or county may sue in the district court for an injunction to prohibit the violation of a regulation adopted under this chapter.

(b) A person commits an offense if the person violates a municipal or county regulation adopted under this chapter. An offense under this subsection is a Class A misdemeanor.

§ 243.011. Effect on Other Laws

This chapter does not legalize anything prohibited under the Penal Code or other state law.

APPENDIX C: SEXUALLY ORIENTED BUSINESS DEFINITIONS

CABARET OR THEATER, SEXUALLY ORIENTED – a building or portion of a building which provides or allows the provision of sexually oriented entertainment to its customers or which holds itself out to the public as an establishment where sexually oriented entertainment is available. Signs, advertisements or an establishment name including verbal or pictorial allusions to sexual stimulation or gratification or by references to "adult entertainment," "strippers," "showgirls," "exotic dancers," "gentleman's club," "XXX" or similar terms, shall be considered evidence that an establishment holds itself out to the public as an establishment where sexually oriented entertainment is available.

ENCOUNTER CENTER, SEXUALLY ORIENTED – a business or enterprise that, as one of its principal purposes, offers: physical contact between two or more persons when one or more of the persons is in a state of nudity or semi-nudity.

ENTERTAINER, SEXUALLY ORIENTED – any person paid as an employee, contractor, subcontractor, or agent of the operator of a cabaret who frequently appears in a state of nudity or semi-nudity.

ENTERTAINMENT, SEXUALLY ORIENTED – any of the following activities, when performed by a sexually oriented entertainer at a sexually oriented business that is required to be licensed: dancing, singing, talking, modeling (including lingerie or photographic), gymnastics, acting, other forms of performing, or individual conversations with customers for which some type of remuneration is received.

EXPLICIT SEXUAL MATERIAL – any pictorial or three dimensional material depicting human masturbation, deviate sexual intercourse, sexual intercourse, direct physical stimulation of unclothed genitals, sadomasochistic abuse, or emphasizing the depiction of post-pubertal human genitals; provided, however, that works of art or material of anthropological significance shall not be deemed to fall within the foregoing definition.

MASSAGE – touching, stroking, kneading, stretching, friction, percussion, and vibration, and includes holding, positioning, causing movement of the soft tissues and applying manual touch and pressure to the body (excluding an osseous tissue manipulation or adjustment).

MASSAGE PARLOR – any business offering massages that is operated by a person who is not a state licensed "massage therapist" or that provides massages by persons who are not state licensed massage therapists.

MASSAGE THERAPY – the profession in which a certified massage therapist applies massage techniques with the intent of positively affecting the health and well being of the client.

MASSAGE THERAPIST –a person licensed as a massage therapist in accordance with the provisions of Texas State Statutes.

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

MEDIA, SEXUALLY ORIENTED – magazines, books, videotapes, movies, slides, CDs, DVDs or other devices used to record computer images, or other media which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas."

MEDIA STORE WITH SOME SEXUALLY ORIENTED MEDIA – a retail book, video or other media store that has sexually explicit media that constitutes more than 10 percent but not more than 40 percent

of its inventory or that occupies more than 10 percent but not more than 40 percent of its gross public floor area. [A different percentage may be used when adopting this definition for a specific jurisdiction.]

MEDIA STORE, SEXUALLY ORIENTED – an establishment that rents and/or sells sexually oriented media, and that meets any of the following three tests: [A different percentage may be used when adopting this definition for a specific jurisdiction.]

- More than forty percent (40%) of the gross public floor area is devoted to sexually oriented media; or
- More than forty percent (40%) of the stock in trade consists of sexually oriented media; or
- It advertises or holds itself out in any forum as a "XXX," "adult" or "sex" business, or otherwise as a sexually oriented business, other than sexually oriented media outlet, sexually oriented motion picture theater, or sexually oriented cabaret.

MODELING STUDIO, SEXUALLY ORIENTED – an establishment or business that provides the services of live models modeling lingerie, bathing suits, or similar wear to individuals, couples, or small groups in a space smaller than ___ feet.

MOTEL, SEXUALLY ORIENTED – a hotel, motel, or similar commercial establishment that meets any of the following criteria:

- Offers accommodations to the public for any form of consideration and provides patrons with sexually oriented entertainment or transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas;"
- Marketed as or offered as "adult," "XXX," "couples," or "sexually oriented."

MOTION PICTURE ARCADE, SEXUALLY ORIENTED – a building or portion of a building wherein coin-operated, slug-operated, or for any other form of consideration, electronically, electrically, or mechanically controlled still or motion picture machines, projectors, video or laser disc players, or other image-producing devices are maintained to show images of "specified sexual activities" or "specified anatomical areas."

MOTION PICTURE ARCADE BOOTH, SEXUALLY ORIENTED – any booth, cubicle, stall, or compartment that is designed, constructed, or used to hold or seat customers and is used for presenting motion pictures or viewing publications by any photographic, electronic, magnetic, digital, or other means or medium (including, but not limited to, film, video or magnetic tape, laser disc, CD-ROMs, books, DVDs, magazines or periodicals) to show images of "specified sexual activities" or "specified anatomical areas" for observation by customers therein. The term "booth," "arcade booth," "preview booth," and "video arcade booth" shall be synonymous with the term "motion picture arcade booth."

MOTION PICTURE THEATER, SEXUALLY ORIENTED – a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are frequently shown that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas" or that are marketed as or offered as "adult," "XXX," or sexually oriented. Frequently shown films, motion pictures, videocassettes, slides or other similar photographic reproductions as characterized herein do not include sexually oriented speech and expressions that take place inside the context of some larger form of expression.

NUDE MODELING STUDIO – any place where a person who appears in a state of nudity or semi-nudity and is to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration. "Nude model studio" shall not include a proprietary school licensed by the State of Texas or a college, junior college, or university supported

entirely or in part by public taxation; a private college or university that maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation.

NUDITY OR STATE OF NUDITY – the showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage 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 areola or nipple, or the showing of the covered male genitals in a discernibly turgid state. See, also, Semi-nude.

SADOMASOCHISTIC PRACTICES – flagellation or torture by or upon a person clothed or naked, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed or naked.

SEMI-NUDE OR IN A SEMI-NUDE CONDITION – the showing of the female breast below a horizontal line across the top of the areola at its highest point. This definition shall include the entire lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breast, exhibited by a dress, blouse, skirt, leotard, bathing suit, or other apparel, provided the areola is not exposed in whole or in part.

SEX SHOP – an establishment offering goods for sale or rent and that meets any of the following tests:

- It offers for sale items from any two (2) of the following categories: sexually oriented media; lingerie; leather goods marketed or presented in a context to suggest their use for sadomasochistic practices; sexually oriented novelties; and the combination of such items constitute more than ten percent (10%) of its stock in trade or occupies more than 10 percent (10%) of its floor area;
- More than five percent (5%) of its stock in trade consists of sexually-oriented toys or novelties; or
- More than five percent (5%) of its gross public floor area is devoted to the display of sexually oriented toys or novelties.

SEXUALLY ORIENTED BUSINESS – an inclusive term used to describe collectively the following businesses: sexually oriented cabaret or theater; sexually oriented entertainment; sexually oriented motion picture theater; sexually oriented motion picture arcade; sexually oriented encounter center; sexually oriented media store; sexually oriented escort bureau; bathhouse; massage parlor; sex shop; sexually oriented modeling studio; or any other such business establishment whose primary purpose is to offer sexually oriented entertainment or materials. This collective term does not describe a specific land use and shall not be considered a single use category for purposes of the County or any applicable municipal zoning code or other applicable ordinances.

SEXUALLY ORIENTED TOYS OR NOVELTIES – instruments, devices, or paraphernalia either designed as representations of human genital organs or female breasts or designed or marketed primarily for use to stimulate human genital organs.

SPECIFIED ANATOMICAL AREAS – include:

- Less than completely and opaquely covered human genitals, pubic region, or the areola or nipple of the female breast; and
- Human male genitals in a discernibly turgid state, even if completely and opaquely covered; and
- Areas of the human anatomy included in the definitions of "nude" or "nudity."

SPECIFIED SEXUAL ACTIVITIES – Acts of human masturbation, sexual intercourse, or sodomy. These activities include, but are not limited to the following: bestiality, erotic or sexual stimulation with objects or mechanical devices, acts of human analingus, cunnilingus, fellatio, flagellation, masturbation,

sadism, sadomasochism, sexual intercourse, sodomy, or any excretory functions as part of or in connection with any of the activities set forth above with any person on the premises. This definition shall include apparent sexual stimulation of another person's genitals whether clothed or unclothed.