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PRACTICE FIRST AMENDMENT FREEDOMS



Regulating Sex Businesses

By Connie B. Cooper, FAICP, and Eric Damian Kelly, FAICP

Sex sells, but at the wrong time and place and in the wrong manner it causes communities across the country major headaches.

Almost a decade ago, we found out how “hot” a subject this was with the popularity of our Planning Advisory Service Report, *Everything You Always Wanted to Know About Regulating Sex Businesses*. But rather than summarize the information from that report, this issue of *Zoning Practice* will focus on the sex businesses issues that remain problematic for communities today. The article will offer our insights on the regulation of sex businesses from visiting more than 150 of them in cities as large as Memphis and Detroit and in small towns and counties in 10 states.

LEGAL CONCEPTS: THE BASICS

First Amendment Protection

“Non-obscene” adult media, movies, and performances, unlike many other land-use activities, enjoy a certain amount of protection under the First Amendment right to freedom of expression. When a local government regulates an activity protected by the First Amendment based on the “message,” the burden falls on the government to justify such action. The challenge is how to regulate sex businesses without reference to the very content of the media or performance that defines it as sex. In fact, discerning content is the major method in differentiating between an adult bookstore and a Barnes & Noble, for example. The Supreme Court has held that where the purpose of the regulations is to limit or mitigate the adverse secondary effects of a sex business, the regulation will be treated as content-neutral even though it defines the regulated businesses, in part, through reference to the content of media or performances conducted there (see *Playtime Theatres, Inc. v. City of Renton* (475 U.S. 41, 106 S. Ct. 925, 89 L. Ed 2d 29 (1986)).

What is Protected?

The First Amendment protects communication. Thus, non-obscene books, magazines, videos, CD-ROMS, and motion pictures are protected. The Supreme Court has had more difficulty with nude or topless dancing, holding in principle that acts are entitled to protection under the First Amendment, but has also upheld several restrictions on them. Other federal courts have looked to the general principles set out by the Supreme Court, rather than to the fact that in some instances the Court has

upheld community-wide bans on such performances. They have struck down many local attempts to ban adult-type dancing, while also upholding a number of restrictions on how and where performances can occur.

A number of goods and services offered in sex businesses are not protected by the First Amendment. For example, sex toys and novelties have no such protection, but communities should not ban them simply because it might be lawful to do so. Courts have generally held that there is no Constitutional right to a massage, upholding limits on sex massage parlors and other enterprises not operated by licensed or certified massage therapists. Escort services, bathhouses, “encounter” centers, lingerie modeling centers, and nude photography studios also fall well outside the scope of protection of the First Amendment.

Secondary Effects

There are two generally accepted types of secondary effects that provide a Constitutional basis for regulating sex businesses: increases in crime rates and adverse effects on property values.

Increases in crime rates occur 1) when activities in sex businesses (particularly on-premise entertainment) provide an opportunity for crime—for example, the arrangement of sex acts or selling drugs, either within or outside the establishment, and 2) when the business attracts what criminologists refer to as “soft targets”—persons impaired by a reaction to certain stimuli, making them vulnerable to crimes ranging from theft to assault. The impairment may come from drugs or alcohol or because their focus is on excitement rather than personal safety. Furthermore, the victim of the theft of a cell phone or wallet at a sex business is far less



Connie Cooper and Eric Damian Kelly

➡ Restricting the hours of operation is one way to control the potentially detrimental impacts of sex businesses.

ASK THE AUTHOR JOIN US ONLINE!

From November 20 to December 1, go online to participate in our “Ask the Author” forum, an interactive feature of Zoning Practice. Connie B. Cooper, FAICP, and Eric Damian Kelly, FAICP, will be available to answer questions about this article. Go to the APA website at www.planning.org and follow the links to the Ask the Author section. From there, just submit your questions about the article using an e-mail link. The authors will reply, and Zoning Practice will post the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of Zoning Practice at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA Zoning Practice web pages.

About the Authors

Connie B. Cooper, FAICP, is a nationally recognized planning consultant, former president of the American Planning Association, and coauthor of the PAS report *Everything You Always Wanted to Know About Regulating Sex Businesses*.

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likely to report the incident than someone who suffers a similar fate at a department store. Criminals may not understand the theory but they know where to find soft targets.

There is evidence to suggest that sex businesses have a negative effect on property values. The most credible evidence comes from appraisers and lenders who know the value of real estate because they determine loan values, which ultimately control market value. Several surveys of appraisers, lenders, and real estate professionals indicate that they believe sex businesses have a measurable negative effect on property values. Our recent survey of appraisers in Fort Worth, Texas, shows they see the negative effects of sex businesses on residential and commercial property values as extending out from the establishment as far as 3,000 feet. Respondents believed that all types of sex establishments, including media stores, cinemas, and cabarets, would have significant negative effects on property values, and that those effects would be much greater than the property value implications of bars, pawn shops, or salvage yards.

ADEQUATE ALTERNATIVE AVENUES

One of the fundamental principles of First Amendment law is that restrictions on First Amendment rights are permissible as long as the regulations allow adequate “alternative avenues” for the communication. For sex businesses in communities large and small, that requirement means allowing an adequate number of sites for such businesses to operate (see *Schad v. Borough of Mt. Ephraim*, (452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981))).

Courts around the country differ in their opinions of the number of sites considered “adequate,” the details of which are well beyond the scope of this article. At a minimum, communities must have sites available for new sex businesses, regardless of how many currently exist. Though not absolute, useful benchmarks are one percent of total land area, or five percent of nonresidential land, zoned to allow for sex businesses. A community falling

below these numbers should reexamine its ordinance in light of current law. And “available” means available by right. Rezoning processes or special use permits will not count. Large separation requirements from sensitive uses may eliminate many otherwise eligible sites.

Communities typically have to reduce the desired (and defensible) separation requirement simply to create enough available sites.

The failure of an ordinance to provide for adequate alternative sites may result in a court striking down the ordi-



➡ Same use type, different impacts. Although both sex businesses, the business in the top image is a retail use in a commercial area while the establishment in the image below offers live performance in a residential district.



Photos by Connie Cooper and Eric Damian Kelly

nance as unconstitutional, leaving the community with no regulations and allowing the plaintiff to locate a sex business in virtually any commercial zone.

BULLETPROOFING YOUR ORDINANCES

Court Challenges

Although some operators of sex businesses continue to challenge the regulations that govern them as content-based, the current litigation is about secondary effects. As recently as

cial” issues, such as the regulation of billboards or the sex industry, can have their own purpose statements. While these get the record started, we also recommend the following:

- At least one complete copy of all publications, reports, or studies cited in support of the adoption of the ordinance should be made available to officials at meetings and placed in the permanent record of the public hearing.

Addressing the Challenges

Attorneys for the sex industry argue that studies should be conducted in strict conformance with scientific methodology, reaching absolute conclusions. We disagree. The courts recognize that the local legislative process is not scientific and that local officials are often asked to evaluate and make policy judgments based on available information. In *Los Angeles v. Alameda Books* (152 L. Ed. 2d 670, at 683, 122 S. Ct. 1728, at



Photos by Connie Cooper and Eric Damian Kelly

10 years ago, sex business ordinances cited (with little discussion) early studies from Los Angeles, Austin, Oklahoma City, Indianapolis, and other cities to show the adverse secondary effects of sex businesses. Today, attorneys for the sex industry are challenging such ordinances on three grounds:

- Alleged deficiencies in the methods used in some or all of the studies;
- an apparent lack of relevance of some of the studies to the community relying on them; and
- the lack of clear connections between the secondary effects cited in the studies and the solutions incorporated in the adopted ordinance.

The arguments hold some merit. Indeed, in isolated cases there is merit to all of them. It is increasingly critical for communities to build a legislative record that can defend the ordinance. The legislative record may also deter costly, time-consuming litigation.

Building the Legislative Record

The legislative record provides the history of adopted legislation. Obviously, zoning ordinances include brief statements of purpose. But similarly, amendments for “spe-



- A staff memo highlighting major findings from the studies the staff used to create the ordinance should have citations of the studies and connect the findings to local issues and to the proposed ordinance (see discussion of “relevance” below).
- Document detailed “findings” on why the governing body is adopting the ordinance, with references back to the studies and staff memo and to local facts and conditions.
- Include a statement of purpose in the text of the ordinance.
- There should be a clear record in the minutes or transcripts showing that the studies, staff memo, and findings were thoroughly reviewed in a public meeting with the officials voting on the matter.

Ⓢ (Left): Sex businesses that offer live performance are highly regulated in many communities. The American flags in this image provide a powerful reminder of First Amendment freedoms. (Below): “G” is for “gift.” The letter has more than one meaning at this retail gift shop for the sex trade. (Clockwise on page 5): “La Chambre” co-exists with conventional uses in this strip mall. Distance requirements for sex businesses can put geography between them and “sensitive” uses such as schools and churches; The parking area for truckers behind one of the countless sex businesses located along isolated areas of interstate highway in America; Local regulations (zoning and sign controls) can permit sex businesses to market themselves freely to passersby. The bottom portion of the sign for this establishment advertises “exotic” dancers.

1736 (U.S. 2002)), the Supreme Court reiterated its 1986 position from *Playtime Theatres, Inc. v. City of 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.

Cities may use studies from other jurisdictions related to the secondary effects of sex businesses, but in *Alameda Books* the Court said the record must show that elected offi-

cials could “reasonably believe” that the cited evidence is relevant to the local situation. An ordinance regulating sex businesses is usually proposed because of community concerns. Planners can find local parallels with the information from the formal studies from other communities, including:

media reports about the sex business industry’s penetration of rural markets. Opposition petitions and general statements against sex businesses are not useful in the record. Concerned citizens should testify to facts and not opinions. To the detriment of adult use opponents in one Georgia county trying to build a

- If the evidence shows that other types of businesses have similar adverse effects, are there other laws or ordinances that address those effects, or will the proposed ordinance also address those?
- Are the major substantive provisions designed specifically to address one or more of the adverse secondary effects?



REGULATIONS: ZONING AND LICENSING

Planners should be concerned with two issues related to sex businesses:

- Location: a classic zoning issue, although many ordinances go beyond specifying the districts that should allow such businesses; and
- Operation: a difficult issue to address through zoning and better dealt with through a licensing ordinance.

The location of sex businesses is important because the potential for secondary impacts



Photos by Connie Cooper and Eric Damian Kelly

- testimony from law enforcement officers about incidents of crime associated with existing sex businesses;
- testimony from neighbors about illegal or suspicious activity (including sexual) outside the business—in cars, on nearby lawns, and elsewhere in the neighborhood but in the vicinity of the use; and
- testimony from landlords, property owners, or real estate agents about the difficulty of selling or renting property near an existing sex business.

A small town or rural county with few or no sex businesses should list other communities’ facts in the findings section of their ordinance and indicate that it must rely on these studies. Officials may also want to record

legislative record, a study by the sheriff’s department found no definitive relationship between crime and the sex business use. In such circumstances, communities must closely examine the data, including the location of the businesses. One conclusion may be that there is no problem with either the location or the management of the use.

The legislative record and findings should support the community’s proposed regulations. Ask the following:

- Is there evidence in the record of negative secondary effects of sex businesses?
- Does the evidence relate to the same types of businesses under the governance of the ordinance?

bears a direct relationship to proximity to the business. Similarly, crimes caused by a sex business extend beyond the property lines of the business but they do not extend indefinitely.

Licensing ordinances address business operations and not location. Indeed, many sex businesses are clean, well managed, and self-contained, with quiet environs and nicely illuminated parking lots. Others are unkempt, disorderly havens for prostitutes. Licensing ordinances require that the businesses operate in such a way that they minimize the negative secondary effects on the community.

Any community regulating sex businesses should establish basic zoning criteria. Without it, a permit application for a sex media store



➡ A multipurpose sex business with retail up front and a video arcade in the rear. Planners should review the community's accessory use provisions so that owners cannot sneak a mini-motion picture theater or a row of video booths (right) into a bookstore in a district zoning exclusively for retail.



Location

- Industrial zones are often large and have limited pedestrian activity, providing opportunities for an adequate number of sex business sites with little or no community impact.
- Local sex businesses offering live entertainment in auto-oriented zoning districts that have limited pedestrian traffic.
- Avoid siting sex businesses in neighborhood retail and commercial districts that are surrounded by residential areas. Such districts may ultimately yield few available sites because of separation requirements.
- Sex businesses that are exclusively retail may have less of an impact than businesses with on-site entertainment. Consider permitting these in more zoning districts and with shorter separation requirements than cabarets, cinemas, and stores with viewing booths.



must be treated the same as that for a popular bookstore. The section that follow offers suggestions for the content of sex business regulations.

ZONING

Zoning provisions for sex businesses should include the following:

- A purpose statement;
- use provisions indicating where sex businesses are permitted and prohibited;
- accessory use provisions that do not allow owners to sneak a mini-motion picture theater or a row of video booths into a bookstore in a district zoned exclusively for retail;
- distance requirements from sensitive uses and other sex businesses;
- criteria for measuring separation distances from the property line, building, or main entrances;

- standards for design and control of "back rooms" in mainstream video and media stores that sell sex material but that are clearly more than retail establishments;
- prohibition of public display of explicit materials and performances (this affects signs and window displays); and
- if no licensing ordinance exists, some basic design standards (discussed below).

Definitions

- Use the term "sexually oriented business" in referring to what is commonly called an "adult business," since it could be argued that a bar is also an adult business.
- Be precise in the definitions section of the ordinance. Take particular care in differentiating among the types of sex businesses. Avoid definitions that address sex activities related to forms of communication that may be protected speech.

tion requirements than cabarets, cinemas, and stores with viewing booths.

- If the gateway district to a community is zoned to allow sex businesses, consider an overlay district that prohibits them in highly visible areas of town.

Separation Requirements

- Establish separation requirements for sex businesses from all "sensitive" uses, including exclusively residential areas, schools, religious institutions, parks, playgrounds, and community centers.
- Establish separation requirements between sex businesses to avoid creating the equivalent of a Red Light District.
- After identifying proposed zoning districts and separation requirements conduct site visits to ensure that there are a reasonable number of sites still available. If not, add another zoning district or reduce the separation requirements.

LICENSING

Licensing ordinances regulate the activity within a business. For sex businesses with on-premise entertainment, this may be necessary. Licensing provisions for sex businesses are best adopted as a separate action of the governing body.

A checklist for sex business licensing should include purpose statements and definitions that match those in the zoning amendments, although some additional definitions will be necessary for a licensing ordinance. The licensing ordinance should also include language and standards for each of the following:

Applicability

- What types of businesses need licensing? Include at least those with on-premise entertainment.
- Which individuals will need a license? We recommend licensing performers and managers, but some jurisdictions require licenses for all employees.

Procedures

Consider procedures for the application process, appeals process, and procedures for suspension or revocation of license, and appeals from such a decision.

Criteria

Many communities will deny a request for a license if that person has had a similar license revoked or suspended or been convicted of a sex crime (as defined under state law) in the previous five years. Also consider criteria for the minimum age of operators, and for suspension or revocation of a license. A point system similar to that used for driver's licenses is a useful way to provide a record for suspension or revocation for repeat offenses.

Design Standards

If the community has just one or two sex businesses, or if the businesses sell only retail, the community may not want to deal with the complexity of a licensing ordinance. If so, consider adopting the design standards often contained in licensing provisions. For example:

- Consider prohibiting closed rooms or booths.
- For live entertainment, only permit stages higher than 24 to 36 inches.
- Establish minimum interior lighting standards so that management and police can see activity in the business.

- Prohibit window displays of sex material or performances.

Operational Standards

- Consider requiring that live entertainment be limited to stage performance; not in the audience.
- Consider requiring a separation of two to six feet between the stage and the nearest area accessible to patrons.
- Require that a licensed or responsible manager be on duty at all times.
- Require that law enforcement personnel be given access to all public areas of the establishment at all times.
- Limit contact between persons on the premises and prohibit actual or simulated sexual activity.
- Require management diligence in preventing customers, employees, or performers from violating the ordinance.
- Establish reasonable operating hours. At a minimum, require that sex businesses close when bars close.
- Establish clear management responsibility to exercise reasonable diligence in controlling the behavior of customers and performers.
- Consider requiring that management use security and video monitoring to control activity in the parking lot and on sidewalks and streets adjacent to the building.

CONCLUSION

The goal of regulating sex businesses that are protected by the First Amendment is to reduce or mitigate the potential negative effects of the businesses while respecting the Constitution. If in doubt about how to interpret the suggestions given in this article or elsewhere, simply come back to this principle and consider whether the existing or proposed ordinance meets that test.

CORRECTION

The author of the September 2006 News Brief, *Inclusionary Zoning in San Diego: Secure at Last?* is Max Eisenburger, not David Morley.

We apologize for this oversight.

Eds.



ZONING REPORTS

**TOO MANY HOMES ON THE RANGE:
THE IMPACT OF URBAN SPRAWL ON RANCHING
AND HABITAT**

1000 Friends of Oregon, 534 S.W. Third Ave., Suite 300, Portland, Or., 97204. 2006. 24 pages. Available online at www.friends.org/rangeland/index.html.

Funded by the Hewlett Foundation, 1000 Friends set out to interview ranchers and gather data on ranchland conversion to housing and other purposes in Oregon. Despite the use of Exclusive Farm Use (EFU) zoning, it found that acres in ranchland continue to decline, but not primarily to urban development, which is largely contained by Oregon's urban growth boundaries. The primary culprit is the division of the land into small hobby farms and rural residential developments, which upset the delicate balance of ecological and economic factors that make ranching sustainable. This study, though brief, is a good warning to other states to preserve what they value in rural areas.

Cover photo by Connie Cooper and Eric Damian Kelly.

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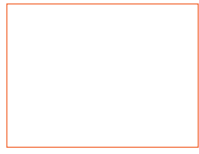
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WILL A SEX BUSINESS
LOWER YOUR PROPERTY
VALUES?

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