

ORDINANCE NO. \_\_\_\_\_

**AN ORDINANCE OF THE CITY OF NORTH BAY VILLAGE, FLORIDA, AMENDING CHAPTER 152, ZONING, SECTION 152.111, ADULT ENTERTAINMENT, OF THE CODE OF ORDINANCES; PROVIDING FOR CONFLICTS; PROVIDING FOR SEVERABILITY; PROVIDING FOR CODIFICATION; AND PROVIDING FOR AN EFFECTIVE DATE. (INTRODUCED BY CITY COMMISSIONER RICHARD CHERVONY, CITY MANAGER DENNIS KELLY, AND CITY ATTORNEYS SUSAN TREVARTHEN AND KATHRYN MEHAFFEY)**

**WHEREAS**, the City Commission of the City of North Bay Village (the "City") recognizes that changes to the adopted Code of Ordinances are periodically necessary in order to ensure that the City's regulations are current and consistent with the needs of the City and the requirements of Florida and federal Law; and

**WHEREAS**, the City Commission relies upon the evidence and testimony presented before the City Commission and on the findings incorporated in the following studies to support the modifications made by this Ordinance:

- (1) The "Survey of Texas Appraisers – Secondary Effects of Sexually-Oriented Businesses on Market Values" study by Connie B. Cooper, FAICP and Eric Damian Kelly, FAICP in association with David C. Keuhl, Ph.D. and Shawn Wilson, MAI (2008)(Texas);
- (2) The "Crime-Related Secondary Effects – Secondary Effects of "Off-Site" Sexually Oriented Businesses" study by Richard McCleary, Ph.D. in association with Alexi Alexander, J.D., Larry Bush, M.A., and Mark Vasquez, B.A. (2008)(Texas);
- (3) "Crime-Related Secondary Effects of Sexually-Oriented Businesses: Report To The City Attorney" by Richard McCleary, Ph.D. (2007)(Los Angeles, California);
- (4) "Survey of Findings and Recommendations of Sexually Oriented Businesses" by Eric Damian Kelly, PhD, FAICP and Connie B. Cooper, FAICP (August 2002) (Toledo, Ohio);

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- (5) "A Report on the Secondary Impacts of Adult Use Businesses in the City of Denver," by the Zoning Administration, Office of Planning and Development, Department of Public Safety, Department of Excise and Licenses, Assessor's Office, and in consultation with the City Attorney's Office, Denver, Colorado (January 1998);
- (6) "Sexually Oriented Business Ordinance Revision Committee Legislative Report, Houston, Texas (January 7, 1997);
- (7) "Adult Use Study," by the Newport News Department of Planning and Development, Newport News, Virginia (March 1996);
- (8) "Report to American Center for Law and Justice on the Secondary Impacts of Sex Oriented Businesses," by Peter R. Hecht, Ph.D. of the Environmental Research Group (March 31, 1996);
- (9) "Adult Entertainment Study" by Department of City Planning, City of New York (November 1994);
- (10) The "Adams County Nude Entertainment Study" by the Adam's County Sheriff's Department (1991)(Colorado);
- (11) "Effects of Adult Entertainment Businesses on Residential Neighborhoods," by the Department of Planning, Research and Development, City of El Paso, TX (Sept. 26, 1986); and
- (12) "NLC Summaries of "SOB Land Use" Studies, Crime Impact Studies by Municipal and State Governments on Harmful Secondary Effects of Sexually-oriented Businesses," National Law Center for Children and Families, 1991, 1994, 1996, 1997, 1999, 2000, 2001, 2002, 2005; and

**WHEREAS**, based on the evidence and testimony which has been presented to the City Commission, and based upon the findings provided in the studies above, the City Commission finds that there is convincing documented evidence that Adult Entertainment Establishments, because of their very nature, have deleterious effects on existing and future business establishments and residential areas, causing increased crime and the deterioration of property values; and

**WHEREAS**, the City Commission finds that Adult Entertainment Establishments, because of their very nature, have serious objectionable operational characteristics; and

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**WHEREAS**, the City Commission finds that the regulation of the location of Adult Entertainment Establishments is necessary to prevent undesirable adverse secondary impacts on surrounding areas; and

**WHEREAS**, the City Commission desires to minimize and control these adverse secondary impacts and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from increased crime; preserve the quality of life; preserve the property values and character of adjacent areas; and deter the spread of blight; and

**WHEREAS**, the City Commission, although concerned about these adverse secondary impacts, upholds constitutionally protected speech and expression and does not desire to infringe on or censor constitutionally protected speech and expression; and

**WHEREAS**, the City Commission desires to enact a content neutral ordinance that addresses only the adverse secondary impacts of Adult Entertainment Establishments; and

**WHEREAS**, the Planning and Zoning Board has reviewed this Ordinance at a duly advertised public hearing, and finds that this Ordinance is consistent with the City's Comprehensive Plan and recommended approval of the Ordinance; and

**WHEREAS**, the City Commission hereby finds and declares that adoption of this Ordinance is necessary, appropriate, and advances the public interest.

**NOW, THEREFORE, BE IT ENACTED BY THE CITY COMMISSION OF THE CITY OF NORTH BAY VILLAGE, FLORIDA, AS FOLLOWS:**

**Section 1. Recitals Adopted.** That each of the above stated recitals is true and correct and incorporated herein by this reference.

**Section 2. City Code Amended.** That Section 152.111 "Adult Entertainment", of Chapter 152 "Zoning", of the City of North Bay Village Code of Ordinances is hereby amended to read as follows<sup>1</sup>:

**SECTION 152.111 - ADULT ENTERTAINMENT**

**§ 152.111.01 – Purpose, Findings and Authority.**

(a) Purpose.

In the development and enforcement of this section, it is recognized that there are adult entertainment uses, which because of their very nature are recognized as having serious objectionable characteristics, particularly when several of them are concentrated in any given locations thereby having a deleterious effect upon the adjacent business and residential areas. It is desirable, therefore, to protect the well-being of the youth of the City from objectionable operational characteristics of these adult entertainment uses by to locating adult oriented activities away from residential areas and public facilities used frequently by minors such as schools, religious facilities, parks, libraries, playgrounds and day care centers. The City finds that, just as advertising is designed to stimulate one's appetite for desired goods and services, an overabundance or preoccupation with sexual displays or materials arouses the appetites of those so preoccupied, and encourages criminal sexual behavior.

In recognition of the protections afforded to the citizens of the United States under the First and Fourteenth Amendments to the Constitution of the United States, it is neither the intent nor the effect of this Section to:

- (a) inhibit freedom of speech or the press; or
- (b) impose a limitation or restriction on the content of any communicative materials, including sexually oriented materials; or
- (c) restrict or deny access by adults to sexually oriented materials protected by the First Amendment; or
- (d) deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market.

This Section balances the legitimate governmental purposes of the City against the above-described constitutional rights, by imposing incidental, content-neutral place, time, and manner regulations of adult entertainment establishments without limiting alternative avenues of communication. The special regulations deemed necessary to control the undesirable effects arising from these enterprises are set forth in this Section.

<sup>1</sup> Additions to existing city code text are shown by underline; deletions from existing city code text are shown by ~~striketrough~~. Additions subsequent to the Planning and Zoning Board meeting are shown in double underline and deletions are shown in ~~double striketrough~~.

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(b) Findings.

Based on the evidence and testimony presented before the City Commission and on the findings incorporated in (i) "Survey of Texas Appraisers – Secondary Effects of Sexually-Oriented Businesses on Market Values" study by Connie B. Cooper, FAICP and Eric Damian Kelly, FAICP in association with David C. Keuhl, Ph.D. and Shawn Wilson, MAI (2008)(Texas); (ii) "Crime-Related Secondary Effects – Secondary Effects of "Off-Site" Sexually Oriented Businesses" study by Richard McCleary, Ph.D. in association with Alexi Alexander, J.D., Larry Bush, M.A., and Mark Vasquez, B.A. (2008)(Texas); (iii) "Crime-Related Secondary Effects of Sexually-Oriented Businesses: Report To The City Attorney" by Richard McCleary, Ph.D. (2007)(Los Angeles, California); (iv) "Survey of Findings and Recommendations of Sexually Oriented Businesses" by Eric Damian Kelly, PhD, FAICP and Connie B. Cooper, FAICP (August 2002) (Toledo, Ohio); (v) "A Report on the Secondary Impacts of Adult Use Businesses in the City of Denver," by the Zoning Administration, Office of Planning and Development, Department of Public Safety, Department of Excise and Licenses, Assessor's Office, and in consultation with the City Attorney's Office, Denver, Colorado (January 1998); (vi) "Sexually Oriented Business Ordinance Revision Committee Legislative Report, Houston, Texas (January 7, 1997); (vii) "Adult Use Study," by the Newport News Department of Planning and Development, Newport News, Virginia (March 1996); (viii) "Report to American Center for Law and Justice on the Secondary Impacts of Sex Oriented Businesses," by Peter R. Hecht, Ph.D. of the Environmental Research Group (March 31, 1996); (ix) "Adult Entertainment Study" by Department of City Planning, City of New York (November 1994); (x) The "Adams County Nude Entertainment Study" by the Adam's County Sheriff's Department (1991)(Colorado); (xi) "Effects of Adult Entertainment Businesses on Residential Neighborhoods," by the Department of Planning, Research and Development, City of El Paso, TX (Sept. 26, 1986); (xii) "NLC Summaries of "SOB Land Use" Studies, Crime Impact Studies by Municipal and State Governments on Harmful Secondary Effects of Sexually-oriented Businesses," National Law Center for Children and Families, 1991, 1994, 1996, 1997, 1999, 2000, 2001, 2002, 2005; the City Commission finds as follows:

(1) Establishments exist or may exist within the city where books, magazines, motion pictures, videos, prints, photographs, periodicals, records, novelties, and devices that depict, illustrate, describe, or relate to specified sexual activities are possessed, displayed, exhibited, distributed, and sold.

(2) Establishments exist or may exist within the city where:

(a) The superficial tissues of one person are manipulated, rubbed, stroked, kneaded, or tapped by a second person, accompanied by the display or exposure of specified anatomical areas;

(b) Dancers, entertainers, performers, or other individuals, who, for forms of commercial gain, perform or are presented while displaying or exposing specified anatomical areas; or

(c) Lap dancing occurs.

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(3) The activities described in subsections (1) and (2) occur at establishments for the purpose of making a profit and, as such, are subject to regulation by the city in the interest of the health, safety, and general welfare of city residents.

(4) The competitive commercial exploitation of such nudity and seminudity is adverse to the public's interest, quality of life, tone of commerce, and total community environment.

(5) The commercial exploitation of nudity and seminudity consists of the use of nude and seminude entertainment in connection with or for the promotion of the sale of goods or services, and the receipt of money by the person engaging in nude or seminude entertainment in exchange for or as consideration for nude or seminude performance by such individuals.

(6) The commercial exploitation of nude and seminude acts, exhibitions, and nude entertainment occurs frequently at commercial establishments either selling or allowing consumption of alcoholic beverages on the premises.

(7) There is a direct relationship between the consumption of alcoholic beverages and the nude and seminude activities mentioned above, and an increase in criminal activities, disturbances of the peace and good order of the community. The occurrence of these activities is hazardous to the health and the safety of those persons in attendance and tends to depreciate the value of adjoining property and harm the economic welfare of the community as a whole.

(8) The combination of the sale and consumption of alcoholic beverages with the performance of nude and seminude acts, exhibitions and entertainment is adverse to the public's interest and the quality of life, tone of commerce, and total community environment in the city.

(9) To promote and preserve the public peace and good order and to safeguard the health, safety, and welfare of the community and its citizens, it is necessary and advisable for the city to prohibit nude and seminude acts, exhibitions, and entertainment establishments at which alcoholic beverages are, or are available to be, sold or consumed.

(10) There is a direct relationship between the display or depiction of specified anatomical areas as defined in this chapter and an increase in criminal activities and disturbances of the peace and good order of the community, and the occurrence of these activities is hazardous to the health and safety of those persons in attendance and tends to depreciate the value of adjoining property and harm the economic welfare of the community as a whole. These secondary effects are adverse to the public's interest and quality of life, tone of commerce, and total community environment in the city.

(11) When the activities described in subsections (1) and (2) take place in establishments within the city, other activities that are illegal or unhealthy tend to

accompany them, concentrate around them, and be aggravated by them. Such other activities include, but are not limited to, prostitution, solicitation for prostitution, lewd and lascivious behavior, possession, distribution and transportation of obscene materials, sale or possession of controlled substances, and violent crimes against persons and property.

(12) When the activities described in subsections (1) and (2) are present in establishments within the city, they tend to blight neighborhoods, adversely affect neighboring businesses, lower property values, foster an atmosphere that promotes crime, and ultimately lead residents and businesses to move to other locations.

(13) The establishments used for the activities described in subsections (1) and (2) are frequently used for unlawful and unhealthy sexual activities, including prostitution and sexual liaisons of a casual nature.

(14) To preserve and safeguard the health, safety, and general welfare of the people of the city, it is necessary and advisable for the city to obtain sufficient information regarding the owners of establishments where the activities described in subsections (1) and (2) occur in order to preclude the involvement of organized crime.

(c) Authority.

This Section is enacted pursuant to the City's home rule power to enact regulations to protect the public health, safety, and general welfare of the residents of the city; F.S. § Ch. 163 and Ch. 166; and the city's authority to regulate the sale and consumption of alcoholic beverages under the Twenty-First Amendment of the Constitution of the United States.

**§ 152.111.02 - Definitions.**

For the purpose of this Section, the following definitions shall apply unless the context clearly indicates or requires a different meaning. These definitions shall be in addition to the terms relevant to this Section provided in Chapter 119 of this Code.

~~*Adult Bookstore/Adult Video Store.* Shall mean an establishment which offers adult material for sale or rent for commercial gain, having as a substantial percentage or significant portion of its sale or stock in trade, books, magazines, films or video media for sale or rent, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas," or an establishment with a segment or section devoted to the sale or display of such material, or an establishment that holds itself out to the public as a purveyor of such materials based upon its signage, advertising, displays, actual sales.~~

~~*Adult Booth.* Shall mean a small enclosed or partitioned area inside an adult entertainment establishment which is:~~

- ~~(1) Designed or used for the viewing of adult material by one (1) or more persons; and~~
- ~~(2) Is accessible to any person, regardless of whether a fee is charged for access.~~

~~The term "adult booth" includes but is not limited to a "peep show" booth, or other booth used to~~

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view "adult material." The term "adult booth" does not include a foyer through which any person can enter or exit the establishment, or a restroom.

*Adult Entertainment Establishment.* Shall mean:

(1) Any adult arcade, adult theater, adult bookstore/adult video store, adult modeling establishment, adult motel, encounter studio, or adult dancing establishment as these uses are defined in Chapter 119 of this Code; or any other establishment or business operated for commercial gain where any employee, operator or owner exposes his or her specified anatomical area for viewing by patrons, including but not limited to massage establishments, whether or not licensed pursuant to Chapter 480, Florida Statutes, tanning salons, modeling studios, or lingerie studios.

(2) Any establishment where an action is taken which is intended to amuse and which is distinguished or characterized by an emphasis on material depicting, describing or relating to specified sexual activities or specified anatomical areas or which features topless dancers, exotic dancers, strippers, male or female impersonators, the modeling of clothing revealing, or less than completely and opaquely covering, specified anatomical areas, or similar activities.

(3) An adult entertainment establishment shall include the entire site ~~or premises~~ on which the adult entertainment establishment is located, including the exterior and interior of the establishment, or any portion thereof, upon which the activities or operations described in subsection (1) and (2) above are being conducted for commercial gain.

(4) Excluded from this definition are any educational institutions, as defined in Chapter 119, where the exposure of specified anatomical areas is associated with a curriculum or program.

(5) An establishment that possesses an adult entertainment license is presumed to be an adult entertainment establishment.

*Adult material.* Shall mean any one (1) or more of the following, regardless of whether it is new or used:

(1) Books, magazines, periodicals or other printed matter, photographs, films, motion pictures, video cassettes, slides, or other visual representations; recordings, other audio matter; and novelties or devices which have as their primary or dominant theme subject matter depicting, exhibiting, illustrating, describing or relating to specified sexual activities or specified anatomical areas; or

(2) Instruments, novelties, devices or paraphernalia that are designed for use in connection with specified sexual activities.

~~*Adult modeling establishments.* Shall mean any establishment offering nude or partially nude modeling sessions or lingerie, swimwear, or photography modeling sessions between two (2) or~~

~~more persons or private modeling sessions between two (2) or more persons requiring the exclusion of minors pursuant to Chapter 847, Florida Statutes.~~

~~*Adult theater.* Shall mean an enclosed building used for presenting for observation by patrons motion pictures, films, or video media, distinguished or characterized by an emphasis on matter depicting, describing or relating to sexual conduct or specified anatomical areas as defined in this section. An establishment which has adult booths is considered to be an adult theater.~~

~~*Encounter studio.* Shall mean all establishments offering nude or partially nude encounter sessions between two (2) or more persons, and requiring the exclusion of minors pursuant to Chapter 847, Florida Statutes.~~

*Massage establishment.* Shall mean:

- (1) Any shop, parlor, establishment or place of business wherein all of any one (1) or more of the following named subjects and methods of treatments are administered or practiced: body massage either by hand or by any mechanical or electrical apparatus or device (excluding fever therapy), apply such movements as stroking, friction, rolling, vibration, kneading, cupping, petrissage, rubbing, effleurage, or tapotement.
- (2) Provided, however, that, for the purpose of this section ~~division~~, the terms "massage establishment" shall not include any massage establishment wherein at least one (1) state licensed massage therapist is employed and on duty full time during the hours opened for business.
- (3) Nothing in this section ~~division~~ shall be construed as applying to state licensed massage therapist, barbers, cosmetologists, manicurists, pedicurists, physical therapists' assistants, midwives, practical nurses, agents, servants of employees in licensed hospitals or nursing home or other licensed medical institutions, licensed physicians, osteopaths, chiropractors, podiatrists, naturopathic physicians or other licensed medical practitioners, or their agents, or employee acting in the course of such agency, service or employment under the supervision of the licensee.

~~*Encounter studio.* Shall mean all establishments offering nude or partially nude encounter sessions between two (2) or more persons, and requiring the exclusion of minors pursuant to Chapter 847, Florida Statutes.~~

~~*Nude dancing establishment.* Shall mean an establishment operated for commercial gain wherein performers or employees of the establishment display or expose to others specified anatomical areas as defined in this section, regardless of whether the performer or employee so exposed is actually engaging in dancing.~~

~~*Sexual conduct.* Shall mean any sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, any sexual act, erotic touching, caressing or fondling of the breasts, buttocks, or any portion thereof, anus or genitals or the simulation thereof.~~

~~*Specified anatomical areas.* Shall mean as used in this division either of the following:~~

- ~~(1) Less than completely opaquely covered human genitals, pubic region, anal cleft, cleft of the buttocks, and all or any part of the areola of the female breast; and~~
- ~~(2) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.~~

**§ 152.111.03 - Permitted use schedule.**

Adult entertainment establishments ~~are shall~~ be permitted in the General Commercial (CG) Zoning district, subject to distance requirements set forth below, ~~as conditional uses upon approval by the City Commission, after public hearing.~~

**§ 152.111.04 - Regulations applicable to adult entertainment establishments.**

(a) Required Approval Conditions. ~~Prior to approving a conditional use, after public hearing,~~ An application for an adult entertainment establishment requires the approval of the City Commission after a public hearing. ~~shall find that such use meets the following conditional~~ No application for an adult entertainment establishment shall be presented to the City Commission unless it satisfies the following requirements:

(1) ~~No~~ The adult entertainment establishment must be located ~~shall be permitted~~ on a parcel of land located in ~~any district other than the CG zoning district, and if to be located within a CG zoning district it cannot be:~~

(2) The adult entertainment establishment must be located:

(i) ~~Within~~ At least five hundred (500) feet ~~offrom~~ any residentially zoned district as designated on the City's official zoning district map, ~~or within and at least five hundred (500) feet of from~~ any property on which over twenty-five (25) percent of the floor area is devoted to residential use; and

(ii) ~~Within~~ At least five hundred (500) feet ~~of from~~ any ~~area parcel~~ of land upon which a religious facility, public school, private school, public park, public playground, library, daycare center or nursery for children is located; ~~and/or~~

(iii) ~~Within~~ At least five hundred (500) feet ~~of from~~ any hotel or motel; ~~or; and~~

(iv) ~~Within~~ At least one thousand (1,000) feet ~~of from~~ any parcel of land upon which another adult entertainment establishment is located; and

(v) At least three hundred fifty (350) feet from a building that contains a business that sells or dispenses alcohol.

(3) No variance shall be granted to the spacing requirements of subsection (2) above.

(4) ~~The~~ minimum distance separation shall be measured by following a straight line from any portion of the building used for such purpose, or any building located on the property, of the adult entertainment establishment to:

(i) the nearest point of the property designated as residential on the City's official zoning district map; or

(ii) the nearest point of the residential area of any property on which over twenty-five (25) percent of the floor area is devoted to residential use; or

(iii) the nearest point of any area used for a religious facility, public school, private school, or public park, or playground, library, daycare center or nursery for children,

hotel or motel.

(5) In cases where a minimum distance is required between an adult entertainment establishment and another adult entertainment establishment, or an establishment licensed to sell or serve alcohol, the distance under this section ~~division~~ shall be measured from the building line of the existing licensee to the building line of the proposed licensee and shall be ~~from~~ the airline distance between the two (2) buildings.

~~(3) No application for a Business Tax Receipt for an adult entertainment establishment shall be approved for zoning compliance unless such application is accompanied by a certified survey from a registered land surveyor in the State of Florida showing that such use meets the distance requirements as set forth in this section. The applicant for such use shall furnish a certified survey from a registered surveyor. Such sketch shall indicate the distance between the place of business, and any existing use as defined by this division, any religious facility, public school, private school, public park, public library, playgrounds, day care center or nursery for children, hotel or motel, or residential zoning district or any property on which over twenty-five (25) percent of the floor area is devoted to residential use. Each sketch shall indicate all such distances and routes. In case of a dispute, the measurement sealed by the City shall govern.~~

~~(4) Will not adversely affect the health or safety of persons residing or working in the vicinity of the proposed use.~~

(65) The applicant must show a present possessory interest in the property (ownership, or leasehold, or contract to purchase/lease interest) by sufficient documentation.

~~(6) Will not be detrimental to the public welfare, properties or improvements in the neighborhood.~~

~~(7) Complies with all other applicable Code provisions.~~

~~(8) Additional conditions. The City Commission may designate such additional conditions in connection with the conditional use, which in the City Commission's opinion will assure that such use will conform to the foregoing requirements. The City Commission shall consider any of the information included in the application and presentation for public hearing.~~

(b) Expiration of conditional use approval. An ~~a~~Approved of an adult entertainment establishment conditional use shall lapse after twenty-four (24) ~~six (6)~~ months unless:

(1) a Business Tax Receipt or building permit has been issued for such use, or

(2) the next phase of development has been initiated, or

(3) unless the City Commission has specified a longer approval period, for good cause. Renewal of the Business Tax Receipt shall be subject to City Commission's approval in the same manner specified herein for an original approval of the conditional use.

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~~(c) Extension of conditional use approvals. Four (4) affirmative votes of the City Commission may grant an extension for a previously approved conditional use if a proper and timely request is made by the applicant prior to the expiration of the approval period.~~

~~(d) Conditional use reapplication. No reapplication for a conditional use shall be accepted by the City within twelve (12) months of the date of final disapproval by the City Commission of a previous application for a conditional use involving the same or substantially the same property, unless evidence is submitted to and accepted by the City Commission which justifies such reconsideration.~~

(ce) Application requirements. An application for approval of an adult entertainment establishment a conditional use shall, in addition to the requirements of Section 2.7.2 of the Land Development Regulations, include:

(1) A property survey by a registered surveyor;

~~(2) A letter of intent;~~

(3) Certified distance survey ~~complying with subsection (a)(1), above;~~ from a registered land surveyor in the State of Florida showing that such use meets the distance requirements as set forth in this section. Such sketch shall indicate the distance between the proposed adult entertainment establishment and:

(i) any other adult entertainment establishment, and

(ii) any establishment licensed to sell or serve alcohol; and

(iii) any area used for a religious facility, public school, private school, public park, public library, playgrounds, day care center or nursery for children, hotel or motel, and

(iv) any residential zoning district, and

(v) the residential area of any property on which over twenty-five (25) percent of the floor area is devoted to residential use.

Each sketch shall indicate all such distances and routes. In case of a dispute, the measurement scaled by the City shall govern.

(4) Where the use includes a vehicular use area or landscaped buffer, a proposed landscape plan and information regarding permanent maintenance arrangements;

(5) A neighborhood location map showing all surrounding zoning, ~~and usage~~ land use designations and existing uses located within 500 feet of the proposed site;

~~(6) All information required for any other type of application which is being processed simultaneously or for any other type of application, including but not limited to proposed signage;~~

~~(7) Any other information necessary to demonstrate that the proposed conditional use will conform fully with the requirements of this Division;~~

~~(8) Detailed security plan;~~

~~(9) Hours of operation; and,~~

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~~(10) Anticipated noise levels and methods to regulate same; and,~~

~~(6H) Documents establishing ownership of the property, or valid leasehold, or a contractual interest in a future ownership or leasehold.~~

(7) The proposed activities and specific type of adult entertainment establishment proposed.

(8) For adult entertainment establishments to be established in new construction, a sketch and description showing all new and existing structures on the property, interior layouts and proposed parking areas.

(9) For adult entertainment establishments to be established in redeveloped sites, a sketch and description or building plan that details all proposed interior and exterior changes to any existing building or structure.

~~The application process shall be consistent with existing regulations pertaining to public hearings.~~

(d) Review of applications. Applications shall be reviewed and be considered approved or denied by the City Commission within sixty (60) days of the applicant filing a complete application with the City, as follows:

(1) No application shall be accepted until it is deemed complete by the City Planner.

(2) The City Planner shall review all of the information submitted to determine conformity with this section.

(3) The submitted application will be reviewed for completeness within 20 business days, and any corrections, revisions or deficiencies provided to the applicant within that 20-day period.

(4) Upon each re-submittal of corrected plans, the City Planner shall have ten business days to review the application and provide any corrections, revisions or deficiencies to the applicant. This process shall continue until the applicant has submitted a complete application, or demands that the application be reviewed as is, without further revisions.

(5) If an applicant fails to provide additional information as requested by the City Planner within two (2) months of the request or respond to the City Planner with a time when the information will be submitted, the application shall be deemed to be withdrawn by the applicant. The applicant shall be entitled to one (1) sixty-day extension upon request, providing the request for extension is granted prior to the expiration of the two (2) month period.

(6) The City Commission shall approve or deny the ~~sign~~ permit within sixty days of the City's receipt of the complete application, or the applicant's demand for review as submitted, based on whether it complies with the requirements of this section. A written notice of the City Commission's decision shall be provided to the applicant, either in the form of an approved permit or written notice of denial. Such notice shall describe the applicant's appeal rights, and be provided to the applicant within ten (10) business days of the decision.

~~(f) *Revocation of conditional use.* Failure to comply with the conditional use requirements as established by the City Commission shall result in a revocation of the conditional use by the City Manager or his designee, after proper written notice sent by certified mail or overnight courier, and failure to cure within ten (10) calendar days of the date of the notice. The ten-day cure period may be extended by the City Manager or his designee for good cause.~~

(e) *Minimum space requirements.* An adult dancing establishment shall be subject to the Minimum Space Requirements (for parking) as provided for "Restaurants, Lounges and Nightclubs," in Section 152.044(b)(7) of this Code.

(f) *Regulation of obscenity subject to state law.* It is not the intent of the City Commission to legislate with respect to matters of obscenity. These matters are regulated and preempted by general law.

(g) *Regulation of massage establishments subject to state law.* It is not the intent of the City Commission to legislate, limit, or conflict with respect to matters pertaining to massage establishments that are regulated by state agency, the department of business and professional regulation, board of massage, and by general law, F.S. Chapter 480.

~~(hg) *Appeal.* The applicant may appeal the decision of the City Manager or his designee to revoke a conditional use to the City Commission by filing a timely notice of appeal with any court of competent jurisdiction in Miami-Dade County in accordance with applicable law and court rules. An administrative appeal must be filed within fifteen (15) days following receipt of the notice of the City Manager's decision. The City Commission shall hear appeals at a Public Hearing, and enter a decision on all appeals within ninety (90) days of the date of filing the appeal, and shall provide due notice of the appeal to the parties and the public. While the appeal is pending, the conditional use may not continue. The City Commission may reverse, affirm or modify any order, requirement, decision or determination appealed from and shall make any order, requirement, decision or determination that, in the City Commission's opinion, ought to be made in the circumstances.~~

**Section 3.     Repeal.** That all ordinances or parts of ordinances, resolutions or parts of resolutions in conflict herewith are repealed to the extent of such conflict.

**Section 4.     Severability.** That the provisions of this Ordinance are declared to be severable and if any section, sentence, clause or phrase of this Ordinance shall for any reason be held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining sections, sentences, clauses, and phrases of this Ordinance, and they shall remain in effect, it being the legislative intent that this Ordinance shall stand notwithstanding the invalidity of any part.

**Section 5. Inclusion in the Code.** That it is the intention of the City Commission, and it is hereby ordained that the provisions of this Ordinance shall become and be made a part of the Code of the City of North Bay Village; that the sections of this Ordinance may be renumbered or relettered to accomplish such intentions; and that the word "Ordinance" shall be changed to "Section" or other appropriate word.

**Section 6. Effective Date.** That this Ordinance shall be effective immediately upon adoption on second reading.

The motion to approve the foregoing Ordinance on first reading was made by \_\_\_\_\_, seconded by \_\_\_\_\_.

**THE VOTES WERE AS FOLLOWS:**

Mayor Connie Leon-Kreps \_\_\_\_\_  
Vice Mayor Eddie Lim \_\_\_\_\_  
Commissioner Stuart Blumberg \_\_\_\_\_  
Commissioner Richard Chervony \_\_\_\_\_

**APPROVED ON FIRST READING** during a regular session of the City Commission of North Bay Village this \_\_\_ day of \_\_\_\_\_ 2012.

The motion to adopt the foregoing Ordinance on final reading was offered by \_\_\_\_\_, seconded by \_\_\_\_\_.

**FINAL VOTE ON ADOPTION:**

Mayor Connie Leon-Kreps \_\_\_\_\_  
Vice Mayor Eddie Lim \_\_\_\_\_  
Commissioner Stuart Blumberg \_\_\_\_\_  
Commissioner Richard Chervony \_\_\_\_\_

**PASSED AND ENACTED BY THE CITY COMMISSION OF NORTH BAY VILLAGE, FLORIDA, THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2012.**

*Exh. A(15)*

\_\_\_\_\_  
Connie Leon-Kreps, Mayor

**ATTEST:**

\_\_\_\_\_  
Yvonne Hamilton, City Clerk

**APPROVED AS TO FORM FOR THE USE OF  
THE CITY OF NORTH BAY VILLAGE ONLY:**

\_\_\_\_\_  
City Attorney  
Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.

07/16/18

Weiss Serota Helfman Pastoriza  
Cole & Boniske, P.L.

# Memo

To: Planning and Zoning Board Members  
City Manager

From: Susan L. Trevarthen, Esq., AICP  
Kathryn M. Mehaffey, Esq.

Date: July 10, 2012

Subject: Summary of Adult Use Studies Regarding Zoning Regulations of Adult  
Entertainment Establishments of Land Development Regulations

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The following memorandum provides a summary of the municipal and state government summaries on the secondary effects of sexually-oriented businesses. The studies summarized below are listed in the proposed Ordinance.

1. **The “Survey of Texas Appraisers – Secondary Effects of Sexually-Oriented Businesses on Market Values” study by Connie B. Cooper, FAICP and Eric Damian Kelly, FAICP in association with David C. Keuhl, Ph.D. and Shawn Wilson, MAI (2008)(Texas)**

This study, commissioned as part of a two part study by the Texas City Attorneys Association was conducted by planning consultants, recognized as experts within the field of sexually oriented business regulations and impacts, in order to evaluate the impacts of retail-only adult businesses on the property values of surrounding properties. This study surveyed 195 Texas appraisers who were Members of the Appraisal Institute (MAI) and Senior Residential Appraisers (SRA). The survey questionnaire included a number of uses besides different types of sexually oriented businesses that appraisers often found concerning in relationship to market values in order to decrease the likelihood of targeted responses. The study found that both live and retail-only sexually oriented businesses had a large negative impact on market values of both single family homes and community shopping centers. Further, for single family homes, 86% of survey respondents felt those negative impacts would not diminish until at least a ¼ mile separation existed and 71% felt those negative impacts would not diminish until a ½ mile separation existed. For community shopping centers, 63% felt the negative effects did not diminish until at least ¼ mile away and 44% said the negative impacts did not diminish until ½ mile away. While the study focused on retail-only sexually oriented

Exh. B(1)

businesses, the survey results clearly showed the same significant impacts for sexually oriented businesses with live entertainment or video components.

**2. The "Crime-Related Secondary Effects – Secondary Effects of "Off-Site" Sexually Oriented Businesses" study by Richard McCleary, Ph.D. in association with Alexi Alexander, J.D., Larry Bush, M.A., and Mark Vasquez, B.A. (2008)(Texas)**

The second part of the study commissioned by the Texas City Attorneys Association is a statistical analysis which explains the criminological theory of secondary effects and applies that theory to sexually oriented businesses. The study provides analyses of other studies evaluating the crime rate impacts of sexually oriented businesses and concludes with a case study of crime data from a Texas jurisdiction. The study concludes that sexually oriented businesses pose significant public safety hazards related to prostitution, drugs, assault, robbery and vandalism. The study also analyzed a 2006 study supporting location of sexually oriented businesses. The 2008 analysis demonstrated with the 2006 study's own data the increased risks of crime and showed that the risk diminished exponentially with distance from the sexually oriented business. As such, the sexually oriented businesses were neighborhood point-sources creating significant risk for crime victimization.

**3. "Crime-Related Secondary Effects of Sexually-Oriented Businesses: Report To The City Attorney" by Richard McCleary, Ph.D. (2007)(Los Angeles, California)**

This study statistically evaluated the facts and materials in *Alameda Books v. City of Los Angeles*, U.S. District Court, Central District of California, Case No. CV 95-7771, and also evaluated 2006 data to consider the differences between retail only sexually oriented bookstores and sexually oriented businesses with retail and arcade/on-site viewing components. The study developed several conclusions:

- 1) There are three factors which produce large, significant crime-related secondary effects include: 1) sexually oriented businesses draw patrons from large geographical areas; 2) because patrons are disproportionately male, open to vice overtures, reluctant to report victimizations to the police, etc., these patrons are "soft" targets; and 3) the large number of "soft" targets concentrated at the site of a sexually oriented business attracts predatory criminals, including purveyors who dabble in crime and criminals who pose as vice purveyors in order to lure or lull potential victims.
- 2) Thirty years of empirical studies employing a wide range of designs have found that sexually oriented businesses have large, significant crime-related secondary impacts.

- 3) While all sexually oriented business subclasses pose significant public safety hazards, these hazards vary based on the opportunities for different types of crime created by the subclass of business.
- 4) Considering the two subclasses of stand-alone bookstores and combined bookstore-arcades, the combined bookstore-arcade poses higher risks for crime.
- 5) The risk of victimization at the site of a combined bookstore-arcade is more than double the risk at the site of a stand alone bookstore. These risks both diminish with distance, but the two types of businesses are not equal until approximately 900 feet from the business.

**4. "Survey of Findings and Recommendations of Sexually Oriented Businesses" by Eric Damian Kelly, PhD, FAICP and Connie B. Cooper, FAICP (August 2002) (Toledo, Ohio)**

This study evaluated the secondary effects of sexually oriented businesses and included an analysis of ordinances, police calls and field studies of the sexually oriented businesses in Toledo, and provided findings and recommendations for zoning, licensing and other regulatory changes. The Survey was conducted working with a steering committee which included the City's planning department, police force, building services, and legal department. Issues and concerns were additionally identified and analyzed through meetings with city council members, neighborhood groups and representatives of the sexually oriented businesses. One important issue highlighted in this report was the importance of the definitions, where the City regulated adult uses through zoning but the definitions failed to adequately identify the targets which resulted in the inability to regulate a sex toy shop with limited books and videos, as an adult entertainment establishment. The study analyzed the secondary effects of the external impacts of sexually oriented businesses on adjacent neighborhoods as well as the impacts of activities at these businesses that might not be protected by the First Amendment but that caused additional impacts in the community – often stemming from activities that started inside the business which were either unprotected activities or which often spilled out into the community.

The study found that clustering of two or more sexually oriented businesses resulted in a statistically significant increase in crime rates. There were also significant differences in criminal activity based on the type of sexually oriented business. Sexually oriented businesses with live entertainment were likely to have disproportionately higher criminal activity. For instance, in the analysis of Toledo's existing businesses, sexually oriented cabarets accounted for only 20% of the sexually oriented businesses but generated 44% of the total police calls. Adding an on-site entertainment component to any sexually oriented business, including a bookstore, lengthened the amount of time that patrons remained on the premises and increased the opportunity and likelihood for interaction with other patrons thereby increasing the negative impacts of the use above that of a simple retail establishment. In analyzing the data on a business by business type and ownership, the study concluded that the effects of Management on the secondary impacts of a business are also significant, thus supporting the need for an effective

licensing ordinance. Of the Adult Cabarets, one establishment had 102 incidents while one had 25, two had only 8 and one had no incidents reported. Of 26 calls to "encounter and touching" establishments, one establishment accounted for 69% of the calls. Of 37 calls to sexually oriented bookstores, 17 calls went to two stores which were under common ownership.

One of the major concerns identified in the study was location. A perfectly legitimate business located across from a school or in another location whereby residential neighbors, often including children, have a forced exposure to the business, will have significantly higher negative impacts on the neighborhood. The business becomes a "pig in the parlor" rather than a "pig in the barn."

The study recommended specific revisions to Toledo's ordinance including revisions to definitions, location criteria including distance criteria from sensitive uses and other sexually oriented businesses, inventory thresholds and access control, as well as extensive licensing requirements based on the type of sexually oriented business.

**5. "A Report on the Secondary Impacts of Adult Use Businesses in the City of Denver," by the Zoning Administration, Office of Planning and Development, Department of Public Safety, Department of Excise and Licenses, Assessor's Office, and in consultation with the City Attorney's Office, Denver, Colorado (January 1998)**

In 1996, an Adult Use Study Team was established to assess the secondary impacts caused by adult use businesses on nearby properties and neighborhoods, and to determine the availability of sites for adult businesses. This Team found that adult use businesses caused negative secondary impacts to nearby properties and neighborhoods, including criminal activity, litter, noise, traffic problems, and depreciation in residential property values. A survey of residents in areas where adult use businesses were located demonstrated that the litter generated by such businesses included printed material containing pornography, used condoms, sex paraphernalia, and used syringes. The criminal activity, which was significantly higher around adult use businesses compared with the city as a whole, included disturbing the peace, public indecency, prostitution, drug-related violations, loitering, robbery, larceny, theft from motor vehicle, and urinating in public.

**6. "Sexually Oriented Business Ordinance Revision Committee Legislative Report, Houston, Texas (January 7, 1997)**

This report was drafted by a committee tasked with updating prior research studies completed in 1983, 1986, and 1991 in order to determine and make recommendations on any needed reforms to the city's existing sexually oriented business ordinance. The committee found that criminal activities, anonymous sex, spreading of sexually transmitted diseases, and other such acts were occurring within sexually oriented

businesses. In order to try to regulate these secondary effects, the committee determined that it was necessary to license all of the entertainers and managers of sexually oriented businesses, provide for certain configurations and lighting requirements within the businesses to aid the police department in their investigations, provide distancing requirements from the city's family centers, parks, and neighborhoods, and provide for the elimination of "glory holes" to reduce the risk of anonymous sex.

**7. "Adult Use Study," by the Newport News Department of Planning and Development, Newport News, Virginia (March 1996)**

This study examined adult use studies from other cities around the country as well as the secondary effects of the adult uses currently operating in Newport News. The studies from other cities indicated that adult uses increase crime and decrease property values in the areas surrounding the uses. In Newport News, the police calls for service indicated that the adult uses experienced crime problems that impacted nearby neighborhoods or businesses. A survey of realtors in the city indicated that adult uses lessen nearby residential property values and may lessen nearby commercial property values depending on the type of adult use and the amount of concentration. The study determined that regulation of adult uses was warranted, and after evaluating the dispersal and concentration theories, recommended spatial separation of adult uses, and separation of these uses from residential areas.

**8. "Report to American Center for Law and Justice on the Secondary Impacts of Sex Oriented Businesses," by Peter R. Hecht, Ph.D. of the Environmental Research Group (March 31, 1996)**

This study compiled new data, examined municipal land use studies and historical data from the late eighteenth century through 1996, and drew conclusions based on statements and conclusions of previous land use studies. This study concluded that sexually oriented businesses provide a potential focus for illicit and undesirable activities by providing a place of contact for numerous potential customers for prostitution, pandering, and other activities. In addition, when alcohol is provided on site or nearby, or when there is a large concentration of sexually oriented businesses, the quantity of undesirable activities increases. This provides for a snowball effect of undesirable activities that feed upon and support each other. The research also revealed that sexually oriented businesses have more of an impact on smaller towns than they do on larger towns. This study also concluded that when these businesses are located near residential areas or educational and religious institutions, a number of children were exposed to inappropriate models of behavior, and were victims of opportunistic personal crimes.<sup>1</sup>

In addition, it was also concluded that sexually oriented businesses have a negative impact upon both residential and commercial property values located within three blocks of the adult use. The presence of sexually oriented businesses was

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<sup>1</sup> It should be noted that it was also determined that the elderly and women were also susceptible to opportunistic personal crimes when sexually oriented businesses were located in close proximity to residential areas, or religious and educational institutions.

considered by real estate appraisers and lenders to be evidence of community decline and decay. Also, other research indicated that areas with sexually oriented businesses experience lower rates of appreciation in property values and/or higher turnover in properties in comparison to comparable areas without sexually oriented businesses.

**9. "Adult Entertainment Study" by Department of City Planning, City of New York (November 1994)**

The City of New York commenced this study following a 35% increase in adult entertainment establishments over a 10 year period. At the time of the study, New York City had no adult use regulations – a triple XXX video store was subject to the same regulations as family video store. The study evaluated existing studies in other localities, studies and reports on adult entertainment establishments in New York City and an analysis and survey of the impacts adult entertainment establishments were having on the communities in New York City. In evaluating the impacts of these establishments, the City considered impacts identified by the City Planning Commission in a 1977 study, impacts identified by the Office of Midtown Enforcement and a Chelsea Business Survey, impacts identified through public hearing, a Times Square Business Improvement District Study and in newspaper reports and correspondence. The study also included an analysis of criminal complaint data and property assessed values.

The results of the Department's study of local impacts mimicked the findings of other studies. Specifically, the location of adult uses created "dead zones" in commercial areas that shoppers avoid, greater concentrations of crime in areas surrounding adult uses especially where multiple establishments were located. These issues resulted in additional perceived issues pressuring neighboring business to hire private security guards for parking lots and closing area businesses early. A survey of 100 business owners in one New York City community found that 61% felt the location of the adult video stores in their community had a negative impact on their businesses and a telling 88% thought the potential for doing business in the area had been negatively affected by the establishments. Additional concerns identified by the City in addition to the crime, deterioration of the business and residential climates, included quality of life impacts such as littering, noise, night-time operations, offensive signage and exposure of children to inappropriate materials. The City's survey of realtors found that 80% reported that an adult entertainment establishment decreased market values as at least 500 feet from the establishment. While the Planning Department's survey of assessed values did not clearly identify negative impacts resulting from the establishment of adult uses, the Department found that the diversity of the City and the limitation of available data would make create issues with due to the difficulty in isolating specific impacts attributable to any particular land use. However, the Department found that regardless of trackable deterioration in assessed values, the perceptions created by the establishment of the adult uses created a disincentive to invest resulting in a deterioration in the neighborhood surrounding the adult establishment.

**10. The "Adams County Nude Entertainment Study" by the Adam's County Sheriff's Department (1991)(Colorado)**

This study was an update to a 1988 study conducted by the Adams County Sheriff's Office in order to provide support for a proposed nude entertainment ordinance, which prohibited persons to appear in a "state of nudity"<sup>2</sup> for the purpose of entertaining patrons. The 1988 study consisted of two phases: first, an April 1988 study of six representative locations in Adams County was undertaken to determine the transiency of adult business customers. Second, crime statistics in two Adams County areas featuring adult businesses were gathered for the years of 1986 and 1987. The study concluded that there was a direct correlation between nude entertainment establishments and an increase in crime, alcohol related offenses, and transiency of patrons. After review of this study, the County Commissioners passed the nude entertainment ordinance which 1) restricted the hours of operation; 2) provided distance requirements; 3) provided a six-month amortization period reducing the number of adult businesses from 28 to 14; and 4) provided a public nuisance provisions for repeat or continuing violations. Subsequently, this ordinance was challenged and upheld by the Colorado Supreme Court. The court found that the ordinance did not violate constitutionally protected free speech because it did not ban nude dancing altogether and it did not unreasonably inhibit the presentation of nude dancing. The 1991 report re-evaluated the 1988 study based on 1990 statistics and found no significant changes with a few exceptions. One exception showed a block from the original study which had experienced a 900 percent increase in reported crimes including a 290% increase attributable to adult businesses offering nude entertainment and/or alcohol.

**11. "Effects of Adult Entertainment Businesses on Residential Neighborhoods," by the Department of Planning, Research and Development, City of El Paso, TX (Sept. 26, 1986)**

This study, done by the Department of Planning, Research and Development, the City Attorney's Office, the Police Department Data Processing Division, and New Mexico State University, involved one year of studying the impacts of sexually oriented businesses on the El Paso area. A separate report by New Mexico State University on perceived neighborhood problems was also included in this study. Three control areas and three study areas were used to evaluate the secondary effects of sexually oriented businesses. The study concluded that the following conditions existed within the study areas:

- (1) The housing base within the study area decreased substantially with a concentration of sexually oriented businesses
- (2) Property values decreased for properties located within a 1-block radius of sexually oriented businesses
- (3) There was an increase in listings on the real estate market for

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<sup>2</sup> A "state of nudity" occurs when such a person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.

- properties located near sexually oriented businesses
- (4) The presence of sexually oriented businesses resulted in a relative deterioration of the residential area of a neighborhood
  - (5) There was a significant increase in crime near sexually oriented businesses
  - (6) The average crime rate in the study areas was 72% higher than the rate in the control areas
  - (7) Sex-related crimes occurred more frequently in neighborhoods with even one sexually oriented business;
  - (8) Residents in the study areas perceived far greater neighborhood problems than residents in control areas; and
  - (9) Residents in study areas had a greater fear of deterioration and crime than residents in control areas.

The study of perceived neighborhood problems done by New Mexico State University revealed a strong, consistent pattern of higher neighborhood crime, resident fear and resident dissatisfaction in the neighborhoods containing sexually oriented businesses.

**12. "NLC Summaries of "SOB Land Use" Studies, Crime Impact Studies by Municipal and State Governments on Harmful Secondary Effects of Sexually-oriented Businesses," National Law Center for Children and Families, 1991, 1994, 1996, 1997, 1999, 2000, 2001, 2002, 2005.**

This is a collection of summaries of 43 municipal and state government studies on the secondary effects of sexually-oriented businesses conducted between 1977 and 1998. The summaries identify a historical trend of negative secondary effects from sexually oriented businesses, related to all types of criminal and economic/market behaviors.

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**SURVEY OF TEXAS APPRAISERS**  
**SECONDARY EFFECTS OF SEXUALLY-ORIENTED**  
**BUSINESSES ON MARKET VALUES**

**CONNIE B. COOPER, FAICP**  
**ERIC DAMIAN KELLY, PH.D., FAICP**

IN ASSOCIATION WITH  
DAVID C. KEUHL, PH.D.  
SHAWN WILSON, MAI

**CRIME-RELATED SECONDARY EFFECTS**  
**SECONDARY EFFECTS OF "OFF-SITE"**  
**SEXUALLY-ORIENTED BUSINESSES**

**RICHARD McCLEARY, PH.D.**

IN ASSOCIATION WITH  
ALEXI ALEXANDER, J.D.  
LARRY BUSH, M.A.  
MARK VASQUEZ, B.A.

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**TEXAS CITY ATTORNEYS ASSOCIATION**

**JUNE 2008**

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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 goal of the study is to determine the extent to which retail-only sexually oriented businesses with no on-premises entertainment cause harmful secondary effects on surrounding property values and ambient crime rates. The TCAA Adult Business Study Steering Committee, charged with coordinating the study, contracted with three nationally recognized experts to conduct the necessary research, Connie B. Cooper, FAICP, Eric Damian Kelly, Ph.D., FAICP and Richard McCleary, Ph.D.

### 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:

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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

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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 STUDY**

The study commissioned by TCAA is divided into two parts: Part I: “A Survey of Texas Appraisers – Secondary Effects of Sexually-Oriented Businesses on Market Values”, authored by Connie B. Cooper, FAICP and Eric Damian Kelly, Ph.D., FAICP; and Part II: “Crime-Related Secondary Effects – Secondary Effects of “Off-site” Sexually-Oriented Businesses”, authored by Richard McCleary, Ph.D.

**Part I, the Survey of Texas Appraisers**”, includes the results of an internet-assisted survey sent to Texas MAI and SRA appraisers who are Members of the Appraisal Institute. Of those sent surveys, 195 responded for a response rate of 25.5 percent and an overall margin of error of 6.06 percent. In the opinion of appraisers, the survey clearly documented that retail-only sexually oriented businesses had an impact on the market value of single family homes and community shopping centers. The survey also measured the opinions of appraisers as to the separation distances required before such retail-only businesses had no measurable impact on the market value of single family homes and community shopping centers. In each case, a large percentage of surveyed appraisers responded that a separation distance of more than a half mile (72 percent for single family homes and 45 percent for a community shopping centers) was required before there was no measurable impact on market values created by retail-only sexually-oriented businesses. Appraisers also responded that a concentration (two or more) of such sexually-oriented businesses also increased their negative impact as do late hours, and obtrusive signage and lighting.

The second section of Part I includes an examination of the sexually-oriented businesses and the courts; basic constitutional principles regulating First Amendment activity; the law of “secondary effects”; regulating signage and lighting; a review of Texas Statutes; and a concluding discussion of the treatment of other uses with negative secondary effects.

**Part II: “Crime-Related Secondary Effects**”, includes a documented description of the criminological theory of secondary effects; its application of this theory to the retail-only sexually-oriented business model; a synthesis of the evidence bearing on this theory; and a case study subjecting crime data from a Texas jurisdiction to null hypothesis tests.

This section of the study supports the finding that it is a *scientific fact* sexually-oriented businesses pose large, statistically significant ambient public safety hazards in terms of prostitution, drugs, assault, robbery, and vandalism. Strategies for mitigating the crime-related secondary effects are suggested such as increasing police presence, distancing sexually oriented businesses from sensitive land uses, limiting the hours of operation, and requiring such businesses to “harden” themselves against criminal activity by installing outdoor lighting, parking lot surveillance cameras, and anti-“cruising”

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structures. This study dispelled the myth that a large proportion of the patrons of retail-only businesses are female (it found only 20 – 25 percent were female), and that unlike male patrons, women tended to arrive in the company of others and visited the businesses at much early hours of the day. It also provides documentation that visits to retail-only sexually oriented businesses is not a run-in and run-out type visit. The report includes a review of three case studies of the criminological impact of “off-site” sexually-oriented businesses (Sioux City Iowa; Montrose, Illinois; and Los Angeles, CA).

Part II concluded with a discussion of the biases and weaknesses of 2006 secondary effects study conducted by Roger Enriquez, Jeffery Cancino and Sean Varano which was based on San Antonio data. McCleary found that compared to randomly selected control sites, off-site SOB sites pose large, statistically significant ambient crime victimization risks. The fact that ambient risk diminishes exponentially with distance from the site of a sexually-oriented business demonstrates the sites are neighborhood point-sources of crime victimization risk.

### **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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**Eric Damian Kelly, Ph.D., FAICP**, is a planner and a lawyer and for more than 30 years, has consulted with local government, primarily on plan implementation. He is a vice president of Duncan Associates, a planning consulting firm based in Austin, Texas. He also continues to serve as a faculty member in the Department of Urban Planning at Ball State University, where he is a former Dean and Department Chair. He is a member and past president of the American Planning Association, a member of the American Institute of Certified Planners and of the American Bar Association and a Fellow of the American Institute of Certified Planners. His license to practice law is on voluntary inactive status in Colorado. Since 1995, Kelly has served as General Editor of Matthew Bender’s 10-volume treatise, *Zoning and Land Use Controls*. He is the author or co-author of six reports in the American Planning Association’s Planning Advisory Service, including *Everything You Always Wanted to Know about Regulating Sex Businesses*, which he co-authored with Connie Cooper. He has worked with local governments in more than 30 states.

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**Richard McCleary, Ph.D.**, is a professor of criminology with extensive experience researching the crime-related effects of sexually oriented businesses. He is a professor at the University of California – Irvine with appointments in three departments: Criminology, Planning, and Environmental Health

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Sciences. He has studied the crime-related secondary effects of sexually oriented businesses for thirty years. His 1991 study of Garden Grove, CA, written with Professor James W. Meeker, is one of the most widely cited studies in the secondary effects literature. Dr. McCleary is a nationally-recognized expert in the crime-related effects of sex businesses and has testified extensively on behalf of governmental defendants in state and federal courts. His testimony has included his own analyses of crime-related secondary effects as well as critiques of analyses prepared by plaintiffs' experts. He is the author of five books and over 60 peer-reviewed articles. He is the recipient of awards and recognition by the National Institute of Justice, Criminal Justice Statistics Association, American Futurist Society and the Native American Rights Fund.

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# **PART I: SURVEY OF TEXAS APPRAISERS**

## **SECONDARY EFFECTS OF SEXUALLY-ORIENTED BUSINESSES ON MARKET VALUES**

**CONNIE B. COOPER, FAICP AND ERIC DAMIAN KELLY, PH.D., FAICP**  
IN ASSOCIATION WITH DAVID C. KEUHL, PH.D. & SHAWN WILSON, MAI

### **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<sup>1</sup> (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.

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<sup>1</sup> <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,<sup>2</sup> Austin, Texas;<sup>3</sup> Garden Grove, California;<sup>4</sup> and Rochester, New York.<sup>5</sup> 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.<sup>6</sup> 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

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<sup>2</sup> Indianapolis: “Adult Entertainment Businesses in Indianapolis, An Analysis,” 1984.

<sup>3</sup> Austin, Texas: “Report on Adult Oriented Businesses in Austin,” prepared by Office of Land Development Services, May 19, 1986.

<sup>4</sup> 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.

<sup>5</sup> 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.

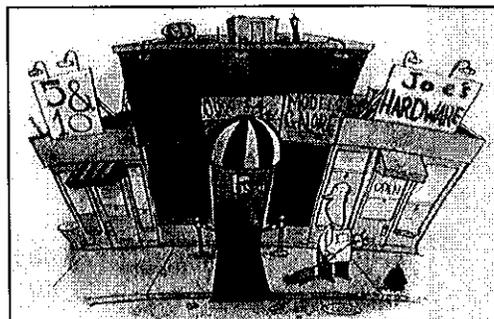
<sup>6</sup> The formal report is “Survey of Appraisers, Fort Worth and Dallas: Effects of Land Uses on Surrounding Property Values,” prepared for the City of Fort Worth; Duncan Associates, September 2004.

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,<sup>7</sup> 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.

<sup>7</sup> 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<br>¼ mile | ¼ mile to<br>½ mile | More than<br>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        |
| <b>Video Peep Booth Business</b>                         | <b>82.8</b> | <b>0.0</b> | <b>13.4</b> | <b>3.8</b> |
| Homeless Shelter   | 80.1        | 1.1        | 16.1        | 2.7        |
| <b>Gentleman's Club/Strip Club</b>                       | <b>79.6</b> | <b>0.0</b> | <b>16.7</b> | <b>3.8</b> |
| <b>Adult Media &amp; Video Store (retail sales only)</b> | <b>76.6</b> | <b>0.5</b> | <b>19.7</b> | <b>3.2</b> |
| <b>Lingerie &amp; Adult Novelties Store</b>              | <b>64.5</b> | <b>1.1</b> | <b>30.6</b> | <b>3.8</b> |
| 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 No Measurable Impact 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 no measurable impact," 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 quarter-mile or more (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 more than a half mile (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             | 10.8            | 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 |
|--------------------|--------|-----------|-------|------------|
| <b>Respondents</b> | 18     | 149       | 10    | 12         |
| <b>Percentage</b>  | 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 |
|--------------------|--------|-----------|-------|------------|
| <b>Respondents</b> | 84     | 92        | 2     | 9          |
| <b>Percentage</b>  | 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 |
|---|-----------|---------|
| Ablene- 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 |
|--------------------|-------------|---------------|---------------|-----------|
| <b>Respondents</b> | 1           | 14            | 96            | 81        |
| <b>Percentage</b>  | 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 untrammelled 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<sup>8</sup> 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

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<sup>8</sup> 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<sup>9</sup> associated with sexually oriented businesses and that are most susceptible to measurement and documentation<sup>10</sup> are increases in crime rates and decreases (or slowed rates of increase) in property values in areas around such businesses. Prof. Richard McCleary, of the University of California – Irvine, has conducted a related study of the effects of sex businesses on crime rates in Texas communities. This report focuses on secondary effects on property values.

### **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

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<sup>9</sup> 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.

<sup>10</sup> 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.

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, 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 preamble 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)<sup>11</sup>, *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

<sup>11</sup> Official citation for denial of rehearing not available.

establishing requirements to place dancers on a stage and to provide buffers between dancers and 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).<sup>12</sup> 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 preambulatory 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

<sup>12</sup> 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.

response to the city's citation of a number of studies from other jurisdictions, the clubs challenging the 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-weighting; 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 (5<sup>th</sup> 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 (who is part of the team performing studies for the Texas City Attorneys Association) 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.<sup>13</sup> 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

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<sup>13</sup> 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.

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 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 be 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.

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 underinclusive. 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).

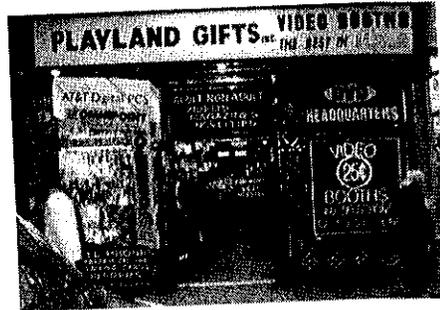
In *SDJ, Inc. v. Houston*, discussed extensively above, the Fifth Circuit rejected an underinclusiveness argument that was framed in part as an equal protection claim:

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 Cir. 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.

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)<sup>14</sup>, 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.

<sup>14</sup> 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.<sup>15</sup> 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

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<sup>15</sup> 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), *dismissed*, 1995 U.S. App. LEXIS 5085 (D.C. Cir. Feb. 3, 1995)<sup>16</sup>, (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)<sup>17</sup>; *perm. inj'n granted*, 2004 U.S. Dist. LEXIS 22185 (S.D.N.Y. Oct. 28, 2004)<sup>18</sup>; *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

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<sup>16</sup> Official reporter citation not available for dismissal.

<sup>17</sup> Official reporter citation not available for motion decision.

<sup>18</sup> 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.

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## PART II: CRIME-RELATED SECONDARY EFFECTS

### SECONDARY EFFECTS OF "OFF-SITE" SEXUALLY-ORIENTED BUSINESSES

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\* Figures and tables in this report are color-coded and must be reproduced in color.

#### 1. INTRODUCTION

Can a government, through its zoning and licensing codes, regulate sexually-oriented businesses (hereafter, "SOBs") that sell sexually explicit material strictly for off-site use? The answer to this question involves issues of law, social science theory, and empirical evidence. The Texas City Attorneys Association has retained us to collect and analyze data relevant to this question and then, relying on our expertise in criminology, planning, and statistics, to formulate an answer to the question. This report describes the research that we conducted to answer the question.

As a matter of law, expressive activities that occur inside SOBs enjoy a degree of First Amendment protection.<sup>19</sup> Nevertheless, the U.S. Supreme Court and the lower federal courts have ruled that governments may regulate SOBs so long as the regulation is aimed at mitigating potential adverse "secondary effects," such as ambient noise, blight, property values, and crime.<sup>20</sup>

To enact an SOB ordinance, a government must collect evidence to show that the businesses are associated with negative secondary effects. Studies conducted by governments over the last three decades find that SOBs do have significant secondary effects. Most of these studies assume that the distinct SOB subclasses – cabarets, bookstores, arcades, *etc.* – have identical secondary effects, however. Whether warranted or not, this assumption has become legally problematic.

To illustrate the problem, suppose that each distinct SOB subclass has a unique "average" secondary effect. This implies that one of the subclasses would have the lowest secondary effect of any subclass. The secondary effects of this subclass might conceivably be sufficiently *de minimus* as to fall below the Constitutional threshold where a government could regulate its operation. Alternatively, if the effect falls just above the threshold, the business model might be "tweaked" to force its secondary effects below the threshold.

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<sup>19</sup> See, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. 277, 319 (2000), where Justice O'Connor stated, "nude dancing still receives First Amendment protection, even if that protection lies only in the 'outer ambit' of that Amendment."

<sup>20</sup> See, e.g., *City of Renton v. Playtime Theaters, Inc.* 475 U.S. 41 (1986) where zoning to control the location of adult businesses was upheld.

What might this "bullet-proof" SOB subclass look like? Common sense suggests that it would be a store that sells adult merchandise for off-site use. Customers drive to the SOB; park; enter; purchase; exit; and drive away. Except for the merchandise purchased, this commercial activity is indistinguishable from the activities that occur at convenience stores, dry cleaners, and libraries. Common sense argues then, that the secondary effects associated with off-site SOBs are likely to be no larger than the analogous effects associated with convenience stores, dry cleaners, and libraries.

Adult book and video stores have made this common sense argument and some courts have found it persuasive. Like many common sense arguments, this one ignores theoretically relevant differences between SOBs and other businesses. In fact, the relevant criminological theory allows for qualitative differences among the subclasses. Controlling for these differences, however, the same criminological theory predicts that *all SOB subclasses will have large, significant secondary effects*. The empirical evidence corroborates the theoretical prediction.

This report begins with a discussion of the evolution of the secondary effects doctrine. We then describe the criminological theory of secondary effects, demonstrating the applicability of the theory to both on-site and off-site SOBs and, finally, report the growing body of empirical evidence that corroborates the theory. Readers who are familiar with the legal doctrine may skip to Section 2. Other readers will benefit from our introduction to the secondary effects doctrine.

## 2. EVOLUTION OF THE SECONDARY EFFECTS DOCTRINE<sup>21</sup>

Although the court decisions that motivate this report were published in 2002 and 2003, both rest on an evolving body of law that begins thirty years earlier. In the late 1960s, Boston's city planners proposed to concentrate the city's SOBs in a single small district. This proposal had two theoretical advantages. First, it would keep vice activity out of the city's other districts. Second, it would allow the police to focus resources on a small area, thereby reducing the risk of crimes associated with vice. By the early 1970s, the failure of Boston's "combat zone" experiment was obvious (Skogan, 1992; Garnett, 2005).

### 2.1 YOUNG V. AMERICAN MINI-THEATRES

At about this time, Detroit consulted with social scientists and real estate experts on the question of whether SOBs should be allowed to locate near other SOBs. The experts agreed that dispersing SOBs would mitigate their secondary effects. Relying on expert opinions, Detroit enacted an ordinance that set minimum distances between SOB sites.<sup>22</sup> Forced to relocate, several existing SOBs challenged the Constitutionality of the Detroit ordinance. Borrowing from the vocabulary of antitrust cases, the U.S. Supreme Court ruled in *Young v. American Mini-Theatres*<sup>23</sup> that governments could enact SOB ordinances so long as the ordinances were aimed at mitigating adverse secondary effects. By this test, the Court upheld the Detroit ordinance.

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<sup>21</sup> This section is based on a paper presented in Atlanta, GA on November, 14th, 2007 at the annual meeting of the American Society for Criminology: "Do 'off-site' adult businesses have secondary effects? Legal doctrine, social theory, and empirical evidence." Richard McCleary and Alan C. Weinstein

<sup>22</sup> *American Mini-Theatres, Inc. v. Gribbs*, 518 F.2d 1014 (1975) at 1018.

<sup>23</sup> *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976).

## 2.2 CITY OF RENTON V. PLAYTIME THEATRES, INC.

Although *Young* required that regulations be based on secondary effects evidence, it said nothing about the quantity or quality of the evidence. These questions were addressed ten years later in *City of Renton v. Playtime Theatres, Inc.*<sup>24</sup> In the early 1980s, Renton, WA enacted a zoning ordinance that in many respects resembled the ordinance challenged in *Young*. Since Renton had no SOBs, it could not base its ordinance on local studies and so looked to a Washington Supreme Court opinion reviewing studies from nearby Seattle.<sup>25</sup> A year later, two theaters located in a prohibited district began to show X-rated films. In the ensuing challenge, the Supreme Court ruled that the ordinance complied with the *Young* standard in that its sole purpose was the mitigation of secondary effects. On the evidentiary issue raised in the challenge, Justice Rehnquist wrote:

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.<sup>26</sup>

*Renton* legitimized the practice of basing a local ordinance on secondary effects studies from other communities. *Renton* also set a reliability threshold, albeit a low one, for the government's secondary effects evidence. The evidence must be "reasonably believed to be relevant."

## 2.3 CITY OF LOS ANGELES V. ALAMEDA BOOKS, INC.

The Supreme Court revisited this issue sixteen years later. In 1977, Los Angeles conducted a comprehensive secondary effects study. The study found, among other things, that concentrations of SOBs were associated with high ambient crime rates. Based on this finding, Los Angeles enacted an ordinance requiring SOBs to be separated by a minimum distance. The ordinance was amended in 1983 to prevent SOBs from evading the minimum distance rule by merging into a single entity. Instead of requiring minimum distances between adult *businesses*, the amended ordinance required minimum distances between distinct adult entertainment *activities*. SOBs that combined on-site coin-operated video viewing booths with sales of videos for off-site use were prohibited.<sup>27</sup> These multiple-activity SOBs were forced to segregate their on-site and off-site activities.

In 1995, two multiple-activity SOBs challenged the amended ordinance. Since the 1977 study said nothing about the secondary effects of combining multiple activities under one roof, they argued that Los Angeles had no evidence that multiple-activity SOBs were associated with secondary effects. The federal District Court agreed and the Ninth Circuit Court affirmed.<sup>28</sup> But the U.S. Supreme Court took a different view.

As often happens in First Amendment cases, the Supreme Court's decision in *City of Los Angeles v. Alameda Books, Inc.*<sup>29</sup> did not produce a clear majority holding. Because the 1977 Los

<sup>24</sup> *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

<sup>25</sup> See *Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978).

<sup>26</sup> *Id.* at 51-52.

<sup>27</sup> In *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), Justice Souter characterizes this model as "commercially natural, if not universal."

<sup>28</sup> *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000).

<sup>29</sup> *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

Angeles study had not investigated the effects of multiple-activities under one roof, the Ninth Circuit found that the evidence for the amended ordinance did not meet the *Renton* threshold.<sup>30</sup>

While acknowledging the limitations of the 1977 study, Justice O'Connor argued that Los Angeles could infer from its study that concentrations of adult *activities* would also be associated with secondary effects and, thus, that Los Angeles had complied with *Renton*'s evidentiary standard. Justice O'Connor's opinion criticized the Ninth Circuit for imposing too high a bar for cities that seek merely to address the secondary effects of SOBs. The Ninth Circuit found that the 1977 study did not provide reasonable support for the 1983 amendment because the study focused on the secondary effects associated with concentrations of SOBs rather than concentrations of activities within a single SOB. While acknowledging that the city's 1977 study did not assess whether multiple SOBs operating under one roof were associated with an increase in secondary effects, Justice O'Connor argued that the city could infer that a concentration of activities, no less than a concentration of SOBs, would be associated with an increase in negative secondary effects. She then criticized the Ninth Circuit for implicitly requiring that the city must not merely provide reasonable support for a theory that justifies its ordinance, but also prove that its theory is the only plausible one.<sup>31</sup>

Justice O'Connor then stated what evidentiary standard a city would need to meet. After noting that in *Renton* the Court "held that a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial independent government interest," Justice O'Connor wrote:

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.<sup>32</sup>

Applying this test to the case at hand, Justice O'Connor concluded that, given the early stage of the litigation, the city had complied with the evidentiary requirement of *Renton*.

Justice Kennedy wrote a lengthy concurring opinion to express concern that "the plurality's application of *Renton* might constitute a subtle expansion" of what is permitted under that case.<sup>33</sup> Justice Kennedy contended that this case raised two evidentiary questions for the Court. "First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition?"<sup>34</sup> He argued that the plurality answered only the second question, and while he believed that answer was correct, in his view more attention needed to be paid to the first. The critical inquiry that Justice Kennedy believes the plurality "skips" is "how speech will fare under the city's ordinance." In his view, shared by Justice Souter's dissenting opinion, a "city may not assert that it will reduce secondary effects by reducing speech in the same proportion." In short, "[t]he rationale of the

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<sup>30</sup> 222 F. 3rd at 727-728.

<sup>31</sup> 535 U.S. at 436-37.

<sup>32</sup> *Id.* at 438-39.

<sup>33</sup> *Id.* at 445.

<sup>34</sup> *Id.*

ordinance must be that it will suppress secondary effects and not by suppressing speech.”<sup>35</sup> Applying this first step to the ordinance in this case, Justice Kennedy argued that it would have one of two effects when applied to an SOB offering two adult activities under one roof: one of the activities must move. Since the latter of these effects cannot lawfully be the rationale for the ordinance – *i.e.*, the city cannot lawfully seek to reduce the amount of secondary effects merely by reducing the number of SOB’s – the city’s rationale must be that affected businesses will relocate rather than close and that the resulting dispersion of businesses will reduce secondary effects but not substantially diminish the number of businesses.<sup>36</sup>

Having identified the city’s “proposition,” Justice Kennedy next asked whether the city had presented sufficient evidence to support that proposition. In line with the plurality, Justice Kennedy argued for significant deference to local government fact-finding in making this inquiry. Citing *Renton* and *Young*, he contended that cities “must have latitude to experiment at least at the outset, and that very little evidence is required.” He also cautioned that “[a]s a general matter, courts should not be in the business of second-guessing the fact-bound empirical assessments of city planners,” noting: “The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge; and if its inference appears reasonable, we should not say there is no basis for that conclusion.”<sup>37</sup> Here, Justice Kennedy found that, for purposes of surviving a motion for summary judgment, the city’s proposition is supported by both its 1977 study and “common experience” and that the 1983 ordinance was reasonably likely to reduce secondary effects substantially while reducing the number of SOB’s very little.<sup>38</sup>

In a dissenting opinion, Justice Souter, joined in part by Justice Breyer, argued that imposing stricter evidentiary standards on governments would guard against potential abuses Justice Souter was concerned about what he viewed as the significant risk that courts will approve ordinances that are effectively regulating speech based on government’s distaste for the viewpoint being expressed.<sup>39</sup> “Adult speech refers not merely to sexually explicit content, but to speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts; a restriction on adult content is thus also a restriction turning on a particular viewpoint, of which the government may disapprove.”<sup>40</sup> For Justice Souter, the risk of viewpoint discrimination may be addressed by imposing on government a requirement that it demonstrate empirically “that the effects exist, that they are caused by the expressive activity subject to the zoning, and that the zoning can be expected either to ameliorate them or to enhance the capacity of the government to combat them (say, by concentrating them in one area), without suppressing the expressive activity itself.”<sup>41</sup>

Justice Souter claimed that his call for empirical evidence did not impose a Herculean task on government; rather, the harms allegedly caused by SOB’s “can be shown by police reports, crime statistics, and studies of market value, all of which are within a municipality’s capacity or available from the distilled experiences of comparable communities.”<sup>42</sup> He also noted that the need for “independent

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<sup>35</sup> *Id.* at 449-50.

<sup>36</sup> *Id.* at 450-51.

<sup>37</sup> *Id.* at 451-52.

<sup>38</sup> *Id.* at 452-53.

<sup>39</sup> *Id.* at 457.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

proof” can vary with the proposition that needs to be established and thus “zoning can be supported by common experience when there is no reason to question it.”<sup>43</sup> In the final section of his dissent, which Justice Breyer did not join, Justice Souter applied this standard to the case at hand and argued that the city offered neither a rationale nor evidence to support the proposition that an adult bookstore combined with video booths would produce the claimed secondary effects.<sup>44</sup>

Although *Alameda Books* reaffirmed *Renton* in crucial respects, thereby supporting governments, the plurality described exactly how an SOB could challenge government regulations:

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.<sup>45</sup>

In the wake of *Alameda Books*, SOB's use the approach spelled out by the plurality to challenge ordinances. Most challenges fail. If a regulation has a plausible rationale and if it is supported by at least some evidence, the courts continue to show substantial deference to legislatures.<sup>46</sup>

## 2.4 POST-ALAMEDA BOOKS CHALLENGES

Following *Alameda Books*, SOB's began to challenge the relevance of the secondary effects evidence relied upon by governments. These challenges fall into two categories. The first alleges that the large body of secondary effect studies relied upon by governments has ignored some idiosyncratic feature of the local environment. In 2004, for example, an off-site SOB in rural Kansas used criminological theory to argue that the sparsely-populated rural environment precluded the possibility of secondary effects. And since the local government had not studied this issue prior to enactment, the ordinance should be struck down.

Rejecting this argument, the trial court granted the defendant's summary judgment motion. On appeal, however, in *Abilene Retail #30 v. Dickinson County*, the Tenth Circuit agreed with the plaintiff's interpretation of criminological theory:

All of the studies relied upon by the Board examine the secondary effects of sexually oriented businesses located in urban environments; none examine businesses situated in an entirely rural

<sup>43</sup> *Id.* at 458-59.

<sup>44</sup> *Id.* at 461-64.

<sup>45</sup> *Id.* at 438-39.

<sup>46</sup> See, e.g., *G.M. Enterprises, Inc. v. Town of St. Joseph, WI*, 350 F.3d 631 (7th Cir. 2003), cert. denied, 125 S.Ct. 49 (2004); *Giovani Carandola, Ltd. v. Fox*, 396 F. Supp. 2d 630 (M.D.N.C. 2005); *Abilene Retail #30, Inc. v. Board of Commissioners of Dickinson Cty.*, 402 F.Supp.2d 1285 (D. Kan. 2005); but also see *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004) (finding it unreasonable for city officials to believe that secondary effects were associated with a business where dancers performed wearing fully opaque clothing over the pubic area, buttocks and breasts when the city had no evidence of secondary effects associated with such businesses and plaintiff's two experts testified no studies demonstrated adverse secondary effects from such businesses; nor did the experts believe such effects could be found).

area. To hold that legislators may reasonably rely on those studies to regulate a single adult bookstore, located on a highway pullout far from any business or residential area within the County would be to abdicate our "independent judgment" entirely. Such a holding would require complete deference to a local government's reliance on prepackaged secondary effects studies from other jurisdictions to regulate any single sexually oriented business of any type, located in any setting<sup>47</sup>

Because the SOB was located in an isolated rural area, and because the County had no evidence to suggest that rural SOBs would have secondary effects, the Tenth Circuit reversed the summary judgment and remanded the case for trial.

The second category of challenges alleges that the secondary effects studies relied upon by the government have ignored salient differences among distinct SOB subclasses. In *Encore Videos, Inc. v. City of San Antonio*,<sup>48</sup> an ordinance classified off-site book and video stores as SOBs if their inventories included 20 percent adult material. Citing *Alameda Books*, an off-site SOB challenged the ordinance's theoretical rationale and supporting evidence. Agreeing, the Fifth Circuit found that San Antonio had relied on studies that either excluded off-site SOBs or, otherwise, had not distinguished between the effects of the on-site and off-site subclasses. In the Court's view, moreover, the city's theoretical rationale for ignoring the differences between on-site and off-site SOBs was weak.

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 because of the fact that consumers of pornography are not as likely to linger in the area and engage in public alcohol consumption and other undesirable activities.<sup>49</sup>

Other factors influenced the decision, of course, and the recent Fifth Circuit decision in *H and A Land Corp. vs. City of Kennedale*<sup>50</sup> clarifies *Encore Videos*. For present purposes, however, we end with the Court's foray into criminological theory. Though compelling from a common sense perspective, this theory ignores the relevant criminological theory of secondary effects.

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<sup>47</sup> *Abilene Retail #30, Inc. v. Board of Commissions of Dickinson County, Kansas*, 492 F.3d 1164, 1175 (10th Cir. 2007).

<sup>48</sup> 330 F.3d 288 (5th Cir. 2003), *cert. denied*, 540 U.S. 982 (2003), and opinion clarified, 352 F.3d 938 (5th Cir. 2003).

<sup>49</sup> *Id.* at 294-95.

<sup>50</sup> *H and A Land Corp. v. City of Kennedale*, 480 F.3d 336 (5th Cir. 2007).

### 3. THE CRIMINOLOGICAL THEORY OF SECONDARY EFFECTS

It is a *scientific fact* that SOBs, as a class, pose large, statistically significant ambient public safety hazards. The public safety hazard is realized not only in terms of "victimless" crimes (prostitution, drugs, *etc.*) but, also, in terms of the "serious" crimes (assault, robbery, *etc.*) and "opportunistic" crimes (vandalism, trespass *etc.*) that are associated with vice.

**Table 3 - Secondary Effect Studies Relied on by Legislatures**

|                  |      |                       |      |
|------------------|------|-----------------------|------|
| Los Angeles, CA  | 1977 | Times Square, NY      | 1994 |
| Whittier, CA     | 1978 | Newport News, VA      | 1996 |
| St. Paul, MN     | 1978 | Dallas, TX            | 1997 |
| Phoenix, AZ      | 1979 | San Diego, CA         | 2002 |
| Minneapolis, MN  | 1980 | Greensboro, NC        | 2003 |
| Indianapolis, IN | 1984 | Centralia, WA         | 2003 |
| Austin, TX       | 1986 | Daytona Beach, FL     | 2004 |
| El Paso, TX      | 1986 | Montrose, IL          | 2005 |
| Garden Grove, CA | 1991 | Sioux City, IA        | 2006 |
| Manhattan, NY    | 1994 | Palm Beach County, FL | 2007 |

We call the SOB-crime relationship a "*scientific fact*" because, first, it is predicted by a strong scientific theory; and second, because the theoretical prediction has been corroborated empirically. On the second point, Table 3 lists 20 empirical studies whose findings corroborate the claim that SOBs pose large, significant ambient public safety hazards. The remarkable range of time-frames, locations, and circumstances represented by these studies suggests that the consensus finding is general and robust.

#### 3.1 THE ROUTINE ACTIVITY THEORY OF "HOTSPOTS"

The consensus finding of this literature becomes *scientific fact* when it is interpreted in the context of a scientific theory. In this instance, the SOB-crime relationship is predicted by the central "organizing theory" of modern scientific criminology. The so-called routine activity theory<sup>51</sup> answers the what-when-where questions of victimization risk. As applied to "hotspots of predatory crime," such as SOB sites, the theory holds that ambient crime risk, generally defined as the number of crimes within 500-1000 feet of a site, with the product of four risk factors. This can be written as:

<sup>51</sup> This theory is due to Cohen and Felson (1979; Felson and Cohen, 1980; Felson, 1998). The routine activity theory is one of the most validated theories in modern social science. In 2005 alone, according to the *Social Science Citation Index*, the 1979 Cohen-Felson article was cited 621 times. The "hotspot" application of the theory is due to Sherman, Gartin, and Buerger (1989) and to Brantingham and Brantingham (1981; 1993).

$$\text{Ambient Crime Risk} = \frac{N \text{ of Targets} \times \text{Average Value}}{\text{Police Presence}} \times \text{Offenders}$$

An increase (or decrease) in the number of targets at the site or in their average value yields an increase (or decrease) in ambient crime risk. An increase (or decrease) in police presence, on the other hand, yields a decrease (or increase) in ambient crime risk.

### 3.1.1 Targets

SOB sites are crime hotspots because they attract potential victims, or targets, from wide catchment areas. SOB sites are no different in that respect than tourist attractions (Dimanche and Lepetic, 1999; Danner, 2003) and sporting events (Corcoran, Wilson and Ware, 2003; Westcott, 2006). Compared to the targets found at these better known hotspots, however, the targets found at SOBs are exceptionally attractive to offenders. This reflects the presumed characteristics of SOB patrons. The patrons do not ordinarily live in the neighborhood but travel long distances to the site.<sup>52</sup> They are disproportionately male, open to vice overtures, and carry cash. Most important of all, when victimized, they are reluctant to involve the police. From the offender's perspective, they are "perfect" victims.

### 3.1.2 Offenders

The crime-vice connection has been a popular plot device for at least 250 years. John Gay's *Beggar's Opera* (1728), for example, describes the relationship between MacHeath, a predatory criminal, and the vice ring composed of Peachum, Lucy, and Jenny. This popular view is reinforced by the empirical literature on criminal lifestyles and thought processes. The earliest and best-known study (Shaw, 1930; Snodgrass, 1982) describes the life of "Stanley," a delinquent who lives with a prostitute and preys on her clients.

This routine activity theory of hotspots assumes a pool of rational offenders who move freely from site to site, choosing to work the most attractive site available. These offenders lack legitimate means of livelihood and devote substantial time to illegitimate activities; they are "professional thieves" by Sutherland's (1937) definition. Otherwise, they are a heterogeneous group. Some are vice purveyors who dabble in crime. Others are predatory criminals who promise vice to lure and lull their victims. Despite their heterogeneity, the offenders share a rational decision-making calculus that draws them to SOB sites.

### 3.1.3 Target value

Criminological thinking has changed little in the 75 years since Shaw's (1930) *Jack-Roller*. To document the rational choices of predatory criminals, Wright and Decker (1997) interviewed 86 active armed robbers. Asked to describe a perfect victim, all mentioned victims involved in vice, either as sellers or buyers. Three of the armed robbers worked as prostitutes:

<sup>52</sup> In 1990, as part of an investigation, Garden Grove, CA police officers ran registration checks on motor vehicles parked at SOBs. Virtually all of the vehicles were registered to addresses outside Garden Grove. The 1986 Austin, TX study arrived at the same finding. More recently, the Effingham County, IL Sheriff's Department ran registration checks on motor vehicles parked at an SOB in the Village of Montrose. Except for employees' vehicles, all were from outside the county.

From their perspective, the ideal robbery target was a married man in search of an illicit sexual adventure; he would be disinclined to make a police report for fear of exposing his own deviance (p. 69).

The rational calculus described by these prostitute-robbers echoes the descriptions of other predators (see Bennett and Wright, 1984; Feeney, 1986; Fleisher, 1995; Katz, 1988, 1991; Shover, 1996).

### **3.1.4 Police presence**

Controlling for the quantity and value of the targets at a site, rational offenders choose sites with the lowest level of visible police presence. In strictly physical terms, increasing (or decreasing) the number of police physically on or near a site reduces (or increases) ambient risk. However, police presence can also be virtual, through remote camera surveillance and similar processes.

Whether physical or virtual, the *effectiveness* of police presence can be affected – for better or worse – by broadly defined environmental factors. For example, due to the reduced effectiveness of conventional patrolling after dark, crime risk rises at night, peaking around the time that taverns close. Darkness has a lesser effect on other policing strategies, which raises the general principle of *optimizing* the effectiveness of police presence. One theoretical reason why SOB subclasses might have qualitatively different ambient risks is that they have different optimal policing strategies.

## **3.2 WHAT DOES CRIMINOLOGICAL THEORY SAY ABOUT SUBCLASSES?**

In lawsuits, SOB plaintiffs have argued that their narrowly-defined SOB subclass is exempt from criminological theory. But in fact, the relevant criminological theory applies to all subclasses. To the extent that two SOB subclasses draw similar patrons from similarly wide catchment areas, theory predicts similar ambient crime risks. Put simply, similar causes (the presence of many high-value targets and low levels of police presence) have similar effects (*i.e.*, high ambient crime risk). This theoretical expectation is consistent with the data. Although the theory applies identically to all SOB subclasses, at the same time, it allows for qualitative differences among the subclasses.

In some instances, subclass-specific risks arise because the defining property of the subclass implies (or creates) idiosyncratic opportunities (or risks) for particular types of crime. Compared to the complementary subclass, for example, SOBs that serve alcohol present idiosyncratic opportunities for non-instrumental crimes, especially simple assault, disorderly conduct, *etc.* SOBs that provide on-premise entertainment present idiosyncratic opportunities for vice crime, customer-employee assault, *etc.* Criminologists call this etiological crime category “opportunistic.” There are many obvious examples and SOB regulations often treat subclasses differently because their ambient opportunity structures are different.

Qualitative differences also arise when the defining property of the subclass compromises the effectiveness of common policing strategies. Policing SOBs that offer on-site entertainment (adult cabarets, peep shows, *etc.*) may require that police officers inspect the interior premises, for example. Because this places officers at risk of injury, policing on-site SOBs requires specially trained and equipped officers, prior intelligence, specialized backup manpower, and other resources. Because potential offenders can wait inside the premises without arousing suspicion, moreover, routine drive-by patrols to “show the flag” are less effective.

The optimal policing strategies for two subclasses are sometimes incompatible or even mutually exclusive. To illustrate, an optimal policing strategy for SOBs that do not offer on-site entertainment, such as adult video and book stores, often involves neighborhood patrols by uniformed officers in marked cars. Visibility is a key element of this strategy. For peep shows and adult cabarets, on the

other hand, the optimal policing strategy often involves boots-on-the-ground deployments of plainclothes officers and unmarked cars. Invisibility is a key element of this strategy. Obviously, neighborhood patrols by plainclothes officers driving unmarked cars would defeat a major purpose of drive-by patrols; likewise, sending uniformed officers into an adult cabaret would be an inefficient method of control and might pose a physical danger to the officers, patrons, and employees. As a general rule, distinct SOB subclasses may require distinct policing strategies to mitigate ambient crime risks.

To some extent, differences among the optimal policing strategies for SOB subclasses amount to differences in cost. In many (but certainly not all) instances, the least expensive policing strategy involves drive-by patrols by uniformed officers in marked cars. Beyond the deterrent value of visible drive-by patrols, patrol officers can keep watch for known offenders and suspicious activity. When potential problems are spotted, the patrol officers can forward the information to a specialized unit or, if necessary, handle it on the spot, requesting backup resources only as needed.<sup>53</sup> It is important to realize, nevertheless, that the implementation of a policing strategy is determined in large part by local exigencies.

### **3.3 THE THEORETICAL ROLE OF ALCOHOL**

Proximity to alcohol is a key component of the criminological theory of secondary effects. Alcohol aggravates an SOB's already-high ambient crime risk by lowering the inhibitions and clouding the judgments of the SOB's patrons. In effect, alcohol makes the soft targets found at the SOB site considerably softer. The available data corroborate this theoretical expectation in all respects. Predatory criminals prefer inebriated victims,<sup>54</sup> e.g., and SOBs that serve alcohol or that are located near liquor-serving businesses pose accordingly larger and qualitatively different ambient public safety hazards.<sup>55</sup> Governments rely on this consistent finding of crime-related secondary effect studies as a rationale for limiting nudity in liquor-serving businesses.

### **3.4 THE CRIMINOLOGICAL THEORY OF MITIGATION STRATEGIES**

The routine activity theory points to strategies for mitigating the crime-related secondary effects of SOBs. In principle, the effects of a mitigation strategy can be *direct* or *indirect*. *Direct* effects are typically realized through *direct* manipulation of the risk factors to reduce ambient risk. *Indirect* effects are realized by making the risk factors more efficient. In practice, of course, some of the strategies are expensive or otherwise impractical. We begin with one of the most expensive, least practical mitigation strategies.

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<sup>53</sup> See, e.g., National Research Council (2004).

<sup>54</sup> See, e.g., Wright and Decker (1997, p. 87): "[E]ach of (the armed robbers) expressed a preference for intoxicated victims, who were viewed as good targets because they were in no condition to fight back." (p. 70); "Several [armed robbers] said that they usually chose victims who appeared to be intoxicated because, as one put it, 'Drunks never know what hit them.'"

<sup>55</sup> A 1991 study of Garden Grove, California by McCleary and Meeker found a large, significant increase on ambient crime risk when an alcohol-serving establishment opened within 500 feet (ca. one city block) of an SOB. Secondary effect studies in Greensboro (2003) and Daytona Beach (2004) found that alcohol-serving SOBs had larger secondary effects than retail alcohol outlets. These studies are reviewed in Section 2.

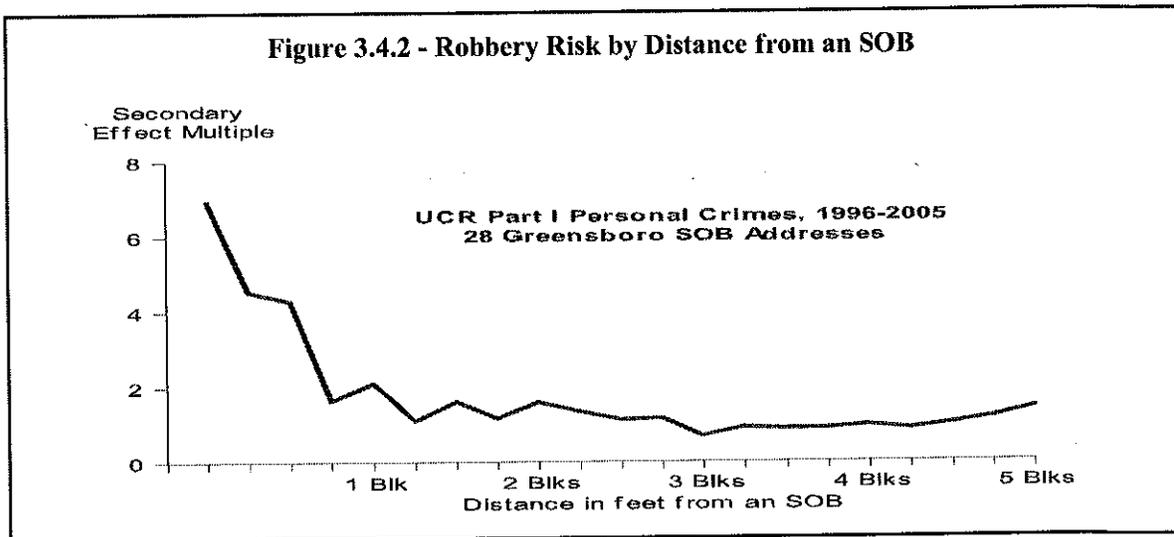
**3.4.1 Increasing the level of police presence**

The simplest, surest way to mitigate ambient crime risk is to assign more police to SOB neighborhoods. Although the relationship between police presence and ambient crime risk is complicated and complex, criminologists generally accept the aphorism: “more police, less crime.”<sup>56</sup> Unfortunately, this simplest, surest mitigation strategy is expensive and impractical. From the government’s perspective, increasing the number of police patrols in a neighborhood is prohibitively expensive. From the perspective of the SOB and its patrons, police presence can be highly intrusive, bordering on “harassment.”

In principle, fixed levels of police presence can be made more effective by fine-tuning *status quo* policing strategies. Police patrols can be made more visible, e.g., by using uniformed officers in marked vehicles instead of plain-clothes officers in unmarked vehicles. Most police departments have already optimized their strategies, however. Police effectiveness can also be enhanced by incorporating rational enforcement policies into SOB codes. Several examples are described in subsequent sections.

**3.4.2 Distancing SOB sites from sensitive uses**

Reducing the density of targets in an SOB neighborhood is a more economical, practical mitigation strategy. As a rule, the most problematic secondary effects are associated with dense concentrations of SOBs (e.g., Boston’s “combat zone” model). Accordingly, many governments require minimum distances between SOB sites (e.g., the Detroit model). In addition to reducing per-site target density, thereby reducing aggregate risk, this model minimizes many obstacles to routine policing.



<sup>56</sup> See, e.g., Levitt (1997, p. 270): “Increases in police are shown to substantially reduce violent crime but have a smaller impact on property crime. The null hypothesis that the marginal social benefit of reduced crime equals the costs of hiring additional police cannot be rejected.” Some “victimless” vice crimes are an exception to the rule, of course.

Figure 3.4.2 demonstrates the rationale for a related mitigation strategy.<sup>57</sup> The vertical axis of this “risk-distance function” is calibrated in units of Part I personal crime (homicide, aggravated assault, robbery, and rape) risk, relative to the neighborhood risk, for 28 Greensboro SOBs from 1996-2005. The horizontal axis is calibrated in distance from an SOB. The unit of distance is a city block which, in the Greensboro neighborhoods from which these data are taken, is approximately 400 feet.

Suppose that a person exits a building five city blocks (*i.e.*, 2,000 feet) from an SOB. As this person walks toward the SOB, his or her victimization risk rises. For the first few blocks, the risk increments are modest; thereafter, the risk increments grow large. At two blocks from the SOB, the person’s risk is double what it was at start of the five-block walk. At one-half block, the risk is six times higher. If the person walks away from the SOB site, his or her victimization risk falls until, at a distance of three blocks from the site, the risk decrements are imperceptible.

Governments can take advantage of the risk-distance relationship plotted in Figure 3.4.2 by setting minimum distances between SOBs and other sensitive land uses. SOB patrons have no choice but to “run the gauntlet.” The victims of some ambient crime incidents are not SOB patrons, however, but rather, are neighborhood residents and by-passers. By setting minimum distances between SOBs and the land uses frequented by these people, the government mitigates the SOB’s ambient crime risk secondary effect.<sup>58</sup>

### **3.4.3 Limiting the hours of operation**

Another economical and practical strategy for mitigating the ambient crime risk of SOBs is to limit the hours of operation. Criminological theory reduces to the aphorism, “more targets, more crime.” And in the overnight hours when businesses close and people go home, the crime rate drops. While the crime *rate* drops, however, the *per-target* risk rises. When a business stays open around-the-clock, its victimization risk rises steadily after sundown, peaking in the early morning. Darkness softens a target, increasing its appeal to predatory criminals.

Several mechanisms operate here but the most salient is that routine policing is more difficult and less effective in darkness. When bars and taverns close, police resources are stretched thinner yet, making soft targets even softer. Governments typically mitigate this risk by closing high-risk public places (playgrounds, beaches, parks, *etc.*) from dawn to dusk; by imposing curfews on high-risk persons (teen-agers, parolees, *etc.*); and by limiting the operation of high-risk businesses (bars, SOBs, *etc.*) during times of acute risk. Not surprisingly, this theoretical prediction is confirmed by the empirical evidence.

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<sup>57</sup> McPherson and Silloway (1980) used crude risk-distance functions, such as the one plotted in Figure 3.4.2, to demonstrate that Minneapolis SOBs were point sources of ambient crime victimization risk. Statistically adjusted risk-distance functions are used in Sections 4.3 and 5.2 below.

<sup>58</sup> We are often asked to specify a distance sufficient to fully mitigate an SOB’s ambient crime risk. The correct answer to this question – “As far as possible” – is not helpful. Although the risk-distance function plotted in Figure 3.4.2 seems to answer this question, remember that it is the *average* of 28 SOB sites. By definition, some sites are “better,” some “worse.” Planners must assume a worst case scenario but, then, must balance this assumption with practical (and legal) considerations.

#### **3.4.4 "Hardening" SOB sites<sup>59</sup>**

In principle, ordinances can mitigate ambient crime risk requiring SOBs to "harden" their properties. Mandating outdoor lighting, parking lot surveillance cameras, and anti-"cruising" structures illustrate strategies for hardening the site's exterior. This list of exterior hardening options is short, unfortunately; and although the effectiveness of exterior hardening strategies depends to some extent on local circumstances and conditions, there is little evidence that any of the typical options can mitigate ambient crime risk.

Regulating the interior configurations of SOBs, in contrast, has a stronger rationale in criminological theory. Interior hardening strategies are often less costly moreover, more practical, and in theory, more effective. Three widely used strategies illustrate the general principle:

- Ordinances that eliminate interior blind spots
- Ordinances that prohibit closed viewing booths
- Ordinances that restrict entertainers to raised stage areas

Each of these strategies reduces the risk of on-premise victimization of patrons and employees.<sup>60</sup> In some respects, the risk reduction mechanism is obvious. Removing blind spots and opening up closed booths obviously reduces the opportunity for lewd behavior, *e.g.* Though less obvious, to the extent that patron-on-patron, patron-on-employee, and employee-on-patron confrontations are precipitated by lewd behavior, these strategies also reduce the risk of assault.

The risk of patron-on-patron, patron-on-employee, and employee-on-patron crime is most acute inside SOBs that feature live entertainment; and of course, alcohol aggravates the risk. The risk can be mitigated by separating patrons and entertainers. Ideally, separation is achieved by mandated structures, such as raised stages. By creating a tangible "wall" between employees and patrons, raised stages reduce unintentional (or intentional) "touching," thereby reducing the risk of patron-on-employee and employee-on-patron crime.

#### **3.4.5 Police officer safety**

While assaults on police officers are rare, they are among the most serious crimes that occur inside SOBs. In theory, moreover, they are preventable. The risk of assault begins when officers enter the SOB and continues until they leave. Mitigation strategies aim at minimizing the number of times officers must enter SOBs and, having entered, the amount of time they must spend inside. Strategies that focus on the latter factor are more practical.

Police officers enter SOBs either in response to a reported crime incident or to inspect the premises as part of routine enforcement. By reducing the risk of the on-premise crime incidents, the interior target-hardening strategies described in the preceding section reduce the number of times that officers must enter SOBs to respond to reported incidents. Otherwise, there are few options for reducing the number of times that officers must enter SOBs. Notwithstanding the risk to officers, routine inspection can be an effective mitigation strategy. By focusing attention on SOB sites, routine

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<sup>59</sup> The classic statement on "hardening" is Newman (1973).

<sup>60</sup> The strategies also facilitate routine enforcement while minimizing the risk of injury to police officers. Those topics will be discussed separately in the next section.

inspection reduces ambient risk through a complex set of pathways referred to, collectively, as “broken windows.”<sup>61</sup>

Regardless of how officers come to be inside an SOB, any strategy that minimizes the amount of time spent inside reduces the risk of injury. Ordinances aimed at improving interior visibility illustrate these strategies. In many instances, officers can accomplish their purpose with a quick visual inspection. If the interior of the SOB is well lit and obstacle-free, the inspection can be completed by one officer in a minute or two. If the interior is dark and/or labyrinthine, the same inspection may require two (or more) officers for a longer period of time.

In SOBs that feature live entertainment, a raised stage reduces the risk of injury to police officers through the same mechanism. If an ordinance mandates, say, a six-foot distance between patrons and entertainers, absent a raised stage, enforcing (and/or detecting willful violations of) the ordinance may require that several plainclothes officers spend an hour or more inside. With a raised stage, on the other hand, a comparable level enforcement and detection of violations can be accomplished with shorter, more superficial inspections. Raised stages also facilitate self-enforcement. Ensuring that patrons and entertainers comply with a distance rule, absent a raised stage, demands constant attention and keen judgment by the SOB. A raised stage facilitates self-enforcement by the SOB, thereby reducing the risk of patron-patron and employee-patron confrontations.

#### **3.4.6 Tailoring regulations to fit local needs**

The ideal SOB ordinance marries low compliance costs for the SOB to low enforcement costs for the government. To some extent, compliance and enforcement costs depend on local circumstances and conditions and these often dictate differences in codes and/or enforcement strategies. A code or strategy that is optimal for one set of circumstances may be less than optimal for another. If a local variation is aimed at rationalizing regulation and optimizing mitigation, it should be encouraged.

By definition, local conditions are too numerous to list. Nevertheless, the principle is straightforward. Legislatures adapt and modify codes to take advantage of local idiosyncrasies. In most instances, modifications are designed to facilitate compliance and minimize enforcement costs. Toward that end, legislatures often consult local enforcement officers and, to the extent possible and appropriate, incorporate the views of experts into the regulations.

### **3.5 BUT DOES THE THEORY APPLY TO THE OFF-SITE SUBCLASS?**

The consensus finding of the secondary effects literature, represented by the studies listed in Table 3, rests on a strong criminological theory. The theory predicts that a diligent, informed search will find a secondary effect. Absent the theoretical prediction, no one would have thought to look for secondary effects around SOBs. If someone accidentally stumbled upon a secondary effect, moreover, absent the theoretical prediction, the isolated finding would be interpreted as a trivial curiosity. Conversely, given the theoretical prediction, a legitimate *null* finding would reject the theory or, at least, would require a modification of the theory.

When a theory has been corroborated over a sufficiently wide range of times, places, and circumstances, its predictions can be used in lieu of the facts. To illustrate, suppose that City X

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<sup>61</sup>The best known statement of this effect is Wilson and Kelling (1982). Wilson and Kelling argue persuasively that police visibility in a neighborhood can have a greater impact on victimization risk than police activities that target crime *per se*. Modern police methods are based on this theory.

conducts a study and finds that its SOBs pose a significant public safety hazard. City Y would like to conduct its own study but cannot because it has no SOBs. In lieu of conducting its own study, City Y can assume that it *would have found* the same facts that City X *found*. City Y's inductive inference is defensible because SOBs in both City X and City Y – or in any other city, for that matter – generate secondary effects through causal factors outlined in Section 2.1. In short, “similar causes have similar effects.”

Continuing this hypothetical exercise, suppose that an entrepreneur invents a *novel* SOB subclass. Since City X conducted its study prior to the invention, the entrepreneur might argue that the study's secondary effects finding is *irrelevant* to the novel subclass. If the causal factors outlined in Section 2.1 do not apply to the novel SOB subclass, the entrepreneur's argument is valid. *If the novel subclass attracts “soft-target” patrons to its site*, on the other hand, no matter how novel the SOB may be in other respects, it will have the same secondary effects that other subclasses have.<sup>62</sup> Since off-site SOBs attract “soft-target” patrons, of course, criminological theory leads us to expect secondary effects for the subclass.

The typical off-site SOB is a store that sells sexually explicit books and/or DVDs, along with miscellaneous adult merchandise, exclusively for off-site use. Off-site SOBs offer no on-site entertainment of any sort, and in particular, have no coin-operated DVD viewing booths. In 2002, Justice Souter speculated that DVD sales and DVD viewing booths were inseparable parts of the “commercially natural, if not universal” SOB model.<sup>63</sup> Five years later, pure off-site SOBs are found in most metropolitan areas and, more recently, along rural stretches of the interstate highway system. Justice Souter would be surprised.

Some off-site SOBs were created by removing booths from on-site SOBs. These SOBs tend to be older and smaller, sometimes with less than 1,000 square feet of floor space. Newer off-site SOBs were designed without booths. Some have over 5,000 square feet of floor space, stocked with every imaginable type of adult merchandise. Some sell non-adult merchandise, such as lingerie and erotic clothing, alongside the standard adult items. None offers on-site entertainment of any sort, of course.

Compared to the older “commercially natural” on-site SOBs, the newer off-site SOBs have a very different “look and feel.” This superficial difference might suggest that they are safer places than the older on-site subclass and, indeed, off-site SOBs have claimed exactly this. In light of the contrary predictions of criminological theory, off-site SOBs have challenged the theory. These challenges have made two claims. First, off-site SOBs attract a different sort of patron – women and couples. Second, lacking on-site entertainment, off-site patrons spend very little time in the SOB neighborhood.

### **3.5.1 Our patrons are *not* “disproportionately male”<sup>64</sup>**

SOB plaintiffs have argued that a significant proportion of their patrons are women and, thus, that the criminological theory outlined in this section does not apply to them. The predicate of this argument is implausible for on-site SOBs; data show that women constitute trivially small proportions

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<sup>62</sup> We are often asked whether businesses that sell sexually explicit merchandise over the internet would have secondary effects. Perhaps; but because these businesses would not attract patrons to a physical site, any secondary effects would not be caused by the factors described in the criminological theory described in this section.

<sup>63</sup> *City of Los Angeles v. Alameda Books, Inc.* 535 U.S. 425 (2002).

<sup>64</sup> This section is based on McCleary and Tewksbury (2008).

of the patrons of cabarets, theaters, and peepshows.<sup>65</sup> The predicate is more plausible for off-site SOBs. At present, women appear to constitute 20-25 percent of the patrons at off-site SOB. As gender roles evolve and as more off-site SOBs begin to advertise and sell merchandise nominally intended for women, this proportion may grow.<sup>66</sup> No matter how large the proportion, however, if the off-site SOB also attracts male patrons, the criminological theory of secondary effects will apply to this SOB subclass.

To investigate gender phenomena, researchers recorded 729 patron-entrances at sixteen off-site SOBs in southern California over a two-year period. These sixteen sites were selected from a list of sites in three southern California counties because they shared five properties: (1) each sold sexually-explicit DVDs, aimed primarily at heterosexual audiences; (2) each sold other adult-themed merchandise; (3) each was open 24 hours; (4) each had a relatively high traffic flow, suggesting a profitable business; and (5) none had on-site viewing booths. Sites that lacked any of these properties were excluded from the study sample.

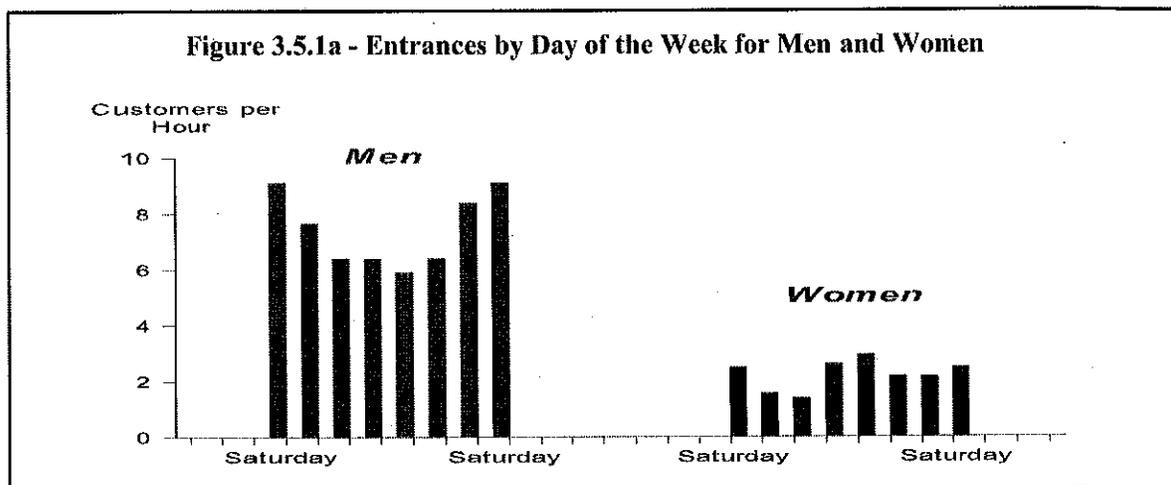
**Table 3.5.1 - Sixteen Off-Site SOBs: 729 Patrons in 85 Hours**

|                  | <i>Men</i> |        | <i>Women</i> |        | <i>Proportion Women</i> |
|------------------|------------|--------|--------------|--------|-------------------------|
| Alone            | 393        | 70.6 % | 28           | 16.3 % | 6.6 %                   |
| Same sex groups  | 116        | 20.8 % | 86           | 48.8 % | 42.6 %                  |
| Mixed sex groups | 16         | 2.9 %  | 26           | 15.1 % | 38.1 %                  |
| Couples          | 32         | 5.5 %  | 32           | 18.6 % | 50.0 %                  |

Table 3.5.1 reports one salient difference between male and female patrons. Of the 729 patrons who entered the SOBs, 172 (23.6 percent) were women. The proportion of women varies significantly by the manner of entry, however. Whereas most of the male patrons entered *alone* (70.6 percent), relatively few female patrons entered alone (16.3 percent). Nearly one-half (48.8 percent) of the women who entered were accompanied by other women. Another one-third entered in the company of a male partner (18.6 percent couples) or as part of a mixed male-female group (15.1 percent). This preferred method of entrance is consistent with the ethnographic literature on social deviance.

<sup>65</sup> Fisher, Hall and Hall (1998) report that less than three percent of the patrons of an adult cabaret are women. Ethnographic studies of adult theatres (Douglas and Tewksbury, 2008) and (Tewksbury, 1993) lead to similar estimates.

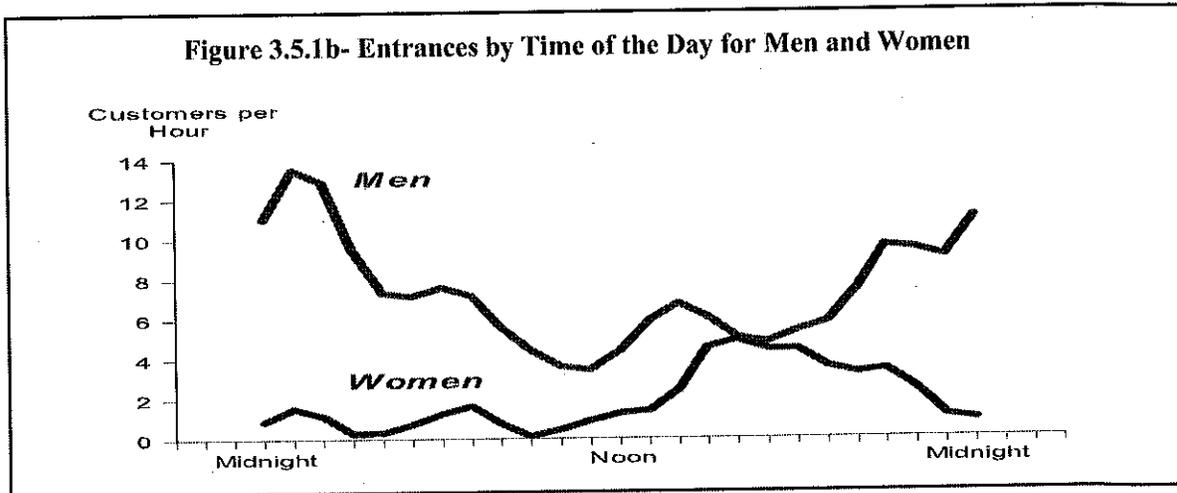
<sup>66</sup> See the case study of a "lingerie boutique" in Section 4.1.



Figures 3.5.1a-b reports another salient difference between male and female patrons. In addition to their aversion to entering the SOB alone, compared to men, women's entrances occur at distinctly different days of the week and hours of the day. The vertical axes in these figures are calibrated in *entrances per hour* for men and women. The horizontal axes are calibrated in *day-of-the-week* (Figure 3.5.1a) and *hour-of-the-day* (Figure 3.5.1b). To facilitate interpretation, the weekly and daily cycles for men (in red) and women (in blue) were "smoothed" by three-day and three-hour moving averages.

The weekly cycle for male patrons exhibits a single dramatic Friday-Saturday-Sunday peak that accounts for roughly one-half (53.3 percent) of the weekly entrances by men. The weekly cycle for female patrons, in contrast, exhibits a weekend peak on Friday and a midweek peak on Tuesday. Neither peak is as dramatic as the single weekend peak for men. Indeed, it might be more accurate to say that the weekly cycle for women is distinguished by a two-day lull on Sundays and Mondays.

The hourly cycles for men and women, plotted in Figure 3.5.1b, reveal analogous gender differences. Whereas entrances by men peak shortly after midnight, entrances by women peak at five in the afternoon. The "night owls," consisting largely of men, are a significant proportion of the total patronage. More than one-fifth (22.8 percent) of the male patrons enter between midnight and three in the morning. Women enter sporadically during this period; women make up only a small proportion of the "night owls." Women prefer the late afternoon and early evening hours. Nearly half (46.7 percent) of the entrances by women occur between four and seven in the evening. Between five and six P.M., women and men enter at the same hourly rate.



The gender differences plotted in Figures 3.5.1a-b can be interpreted to mean that men and women are very different sorts of patrons. Another interpretation, however, is that the nature of the off-site SOB changes, with respect to criminological theory, depending on the time of day. During late afternoon and evening hours, off-site SOBs are gender neutral that is; but after dark and continuing into the early morning, they are largely a male-dominated realm.

As a final note, the presence of a significant number of females at an SOB site can be a risk factor. If the SOB advertises the presence of unattached females at the site, e.g., male patrons are attracted to the site. To attract unattached female patrons, SOBs have offered lingerie gifts; and SOBs have claimed in their advertising that their patrons include unattached females, especially exotic or nude entertainers and dancers.

### **3.5.2 Stigma and anonymity at off-site SOBs**

Critics of the prevailing criminological theory argue that the “average” patron of an off-site SOB drives up, runs in, makes a purchase, runs out, and drives off. Although this “average” behavior may have common sense, it is inconsistent with the data. In an ethnographic study of an off-site SOB, Hefley (2007) reports that patrons spend significant periods of time in the immediate vicinity of the site. Some wait outside until the business is empty. Others “case” the business on multiple occasions before deciding to enter. Some patrons park their cars a block or more away and walk to the store. These “average” behaviors attract criminal predators to the site, creating the ambient public safety hazard predicted by the criminological theory of secondary effects.

When visiting SOBs it is common practice for patrons to enter the vicinity of the business and wait (sometimes significant periods of time) before entering the business. Donnelly’s (1981) ethnographic study of two “adult cinemas” demonstrated that patrons frequently park near the SOBs and wait to enter until either no others are in the vicinity to see them enter, or enter when several others are entering, in an effort to maintain their anonymity and not be seen/recognized by others in the vicinity. As Donnelly (1981) explains, “With the exception of the large “groups” ... all patrons engage, to a greater or lesser degree, in hiding behavior” (p. 260) as they enter and leave the establishment. Others, including Hefley (2007) who studied an off-site SOB, have shown that some patrons actively modify their appearances (or, use “disguises”) so as to manage the stigma they associate with being identified entering a SOB. In summary, Donnelly (1981), drawing on his own research and that of Karp (1973) and Sundholm (1973) concludes that “patrons prefer to main an extremely low-profile, and *do not wish to be seen at all.*” (pp. 241-242, emphasis in original).

The desire to remain anonymous and essentially invisible in the vicinity of SOBs is related to both a concern about stigmatization from observers, and concerns for safety. As made clear by Delph (1978, p. 29), for men who seek out sexual stimulation and encounters in any type of public location, their primary "concern is erotic fun without stigmatization." Avoiding notice and identification are key to such men. Concerns about safety, however, also include recognition that SOBs are hotspots for many forms of violent offenses. So too, however, are many SOBs locations of, or located very close to, sites of other forms of vice and criminal activity.

In a study of the pornography industry, Potter (1986) concluded that "Observations of the retail pornography trade make it abundantly clear that an overlap exists between porn and other forms of vice. Retail porn outlets in our sample also provide prostitution and gambling services, and in some cases drugs." Similarly, Stein's (1990, p. 78) 9.5 months working as a clerk in one adult bookstore revealed that "it was not uncommon for the bookstore to be used also as a referral agency" for a wide range of illicit services. As a result, patrons wishing to simply access sexually explicit merchandise or visual experiences may feel threatened by others in the environment who are perceived to be dangerous and purveyors of undesired goods and services.

Once they enter, patrons typically remain inside the SOB for short periods of time, almost always for less than one hour. When purchasing merchandise, patrons enter, browse, make a selection, pay, and then leave in short order. At peepshows, theaters, and other on-site SOBs, patrons stay inside the SOB for slightly longer periods of time, of course, but rarely for periods in excess of an hour.

The "hiding" activities that patrons demonstrate upon arrival and during entry to SOBs are continued once they are in the establishment. Patrons have consistently been shown to avoid eye contact, conversation, or being physically close to other patrons while in such establishments. This has been shown for off-site SOBs (Douglas and Tewksbury, 2008; Stein, 1990; Tewksbury, 1990, 1993), video arcades/peepshows (Douglas and Tewksbury, 2008; Stein, 1990; Sundholm, 1973; Tewksbury, 1990, 1993; Weatherford, 1986) and adult cinemas (Donnelly, 1981; Douglas and Tewksbury, 2008; Stein, 1990). Communications that occur between patrons in such locations are almost always brief, superficial/incidental and frequently nonverbal. Furthermore, for many patrons of SOBs, there is a sense of stigmatization perceived when the individual recognizes that they are being observed or "seen" in the establishment. Berkowitz (2006) documents that as a female patron in a retail SOB her observation of male patrons lead to men apparently feeling uncomfortable and that some "felt the need to escape the embarrassment of being labeled a pervert by exiting the establishment empty-handed" (p. 594).

Hiding and attempts to "manage and negotiate the shame that is associated with being a patron" (Berkowitz, 2006, p. 594) often includes efforts to keep others from knowing what a patron purchases. Berkowitz (2006, p. 595) explains that in her observations of one retail SOB, "many solo male patrons appeared timid and sometimes even uneasy. Many spoke in a low volume so that other patrons would not hear them when they were conversing with the store clerk. Finally, much of the time, the body language and nonverbal communication that these solo male patrons used hinted of awkwardness, in that their backs were hunched over, their eyes were wandering, and their arms were sometimes crossed directly in front of them."

Clearly, many patrons of SOBs demonstrate concerns about being identified and subsequently stigmatized if seen in or near SOBs. A recent anecdote illustrates this behavior, unfortunately in this instance, with dire consequences (Bourgeois, 2007). On the evening of March 1, 2007, a man parked his car in a dark lot several hundred feet away from *Dreamer's*, an off-site SOB in Kennedale, Texas.

Returning to his car, the man was confronted by a robber and was shot. Though seriously injured, the victim survived.

Although a legislature would not want to rely on anecdotal evidence alone, anecdotes of this sort constitute legitimate secondary effects evidence.<sup>67</sup> In addition to its corroborative value, however, this particular anecdote has some legal relevance. The off-site SOB in this incident, *Dreamer's*, was a plaintiff in *H and A Land Corp.*<sup>68</sup> One week prior to the shooting incident, a panel of the Fifth Circuit Court of Appeals clarified its earlier *Encore Videos* decision by concluding that a city's governing body had sufficient evidence to believe that off-site SOBs caused adverse secondary effects.<sup>69</sup>

### 3.6 CONCLUDING REMARKS: CRIMINOLOGICAL THEORY

The legal debate over crime-related secondary effects ignores the crucial role of criminological theory. *Without exception*, criminological theory predicts that SOBs will generate ambient public safety hazards. Plaintiffs' witnesses produce study after study to show that SOBs have *no* crime-related secondary effects or, sometimes, that SOBs have salutary public safety impacts on their neighborhoods. We will discuss the details of these studies at a later point. For present purposes, the criminological theory described in the preceding section is internally consistent and compelling – it makes sense in other words. As it turns out, the theory also agrees with the data.

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<sup>67</sup> See, e.g., *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F. 3d 1186, 1195-96 (9th Cir. 2004) (“Anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects ...”).

<sup>68</sup> *H and A Land Corp. v. City of Kennedale, TX*, 480 F.3d 336 No. 05-11474 (5th Cir. 2007).

<sup>69</sup> *Id.*

#### 4. OFF-SITE CASE STUDIES

The popular theories proposed by plaintiffs to explain why off-site SOBs might *not* have secondary effects are superficially plausible. Weighed against the formal criminological theory, however, the popular theories are found wanting. To the extent that off-site SOBs attract high-value, “soft-target” patrons to their neighborhoods, strong criminological theory predicts that off-site SOBs will generate the same crime-related secondary effect expected for on-site SOBs. The theory allows for qualitative differences, of course, but with respect to theoretical causes, there are no differences between the two complementary subclasses.

Nevertheless, until recently, the theoretical prediction was uncorroborated. Although off-site SOBs have been around since the advent of home video-tape players, researchers had not thought to question the relevance of criminological theory. Indeed, because the causes implicated by criminological theory were common to all SOB subclasses, researchers assumed that subclass distinctions were irrelevant. In line with this assumption, most of the secondary effect studies listed in Table 3 did not report separate effect estimates for each subclass. It was enough to report that *all* subclasses had adverse crime-related secondary effects.

The 1991 Garden Grove study is typical in that respect.<sup>70</sup> The SOBs studied in Garden Grove included at least one off-site SOB. Because the study found that *each* of the SOBs posed large ambient public safety hazards, one can infer by syllogism that off-site SOBs had adverse effects. The Fifth Circuit decision in *Encore Videos* noted explicitly, however, that the Garden Grove report did not report subclass-specific effects.

Following *Encore Videos*, government-sponsored studies have tried, where possible, to report specific effects for the off-site subclass. Given the relevant strong theory, the subclass-specific effects hold no surprises. The case studies reviewed in this section are typical in the sense that all corroborate the theoretical expectation. In addition, each illustrates an important aspect of the phenomenon.

- The subject of the first case study is an off-site SOB that characterized itself as a “lingerie boutique,” catering primarily to couples and women. The evidence suggests that this self-characterization was, at worst, an exaggeration. Nevertheless, the data demonstrate a large, significant secondary effect following the opening of the SOB.
- The subject of the second case study is an off-site SOB located in a rural village with a population of 250 people. The SOB drew cross-country travelers, including big-rig truckers, off the interstate highway with predictable consequences. The analysis of this case study is complicated by the idiosyncrasies of the terrain. For example, where does one find a “comparable” village for a control?
- The third case study compares risk-distance functions (See Figure 3.4.2) for multiple-activity on-site SOBs – video arcades that sell merchandise – and off-site SOBs in Los Angeles. The risk-distance functions demonstrate that, like SOBs generally, off-site SOBs are point-sources of neighborhood victimization risk.

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<sup>70</sup> McCleary and Meeker (1991).

#### 4.1 SIOUX CITY, 2006<sup>71</sup>

SOBs are nothing new to Sioux City, Iowa. Two had operated without incident in the city's older downtown area for decades. Although both sold sexually explicit DVDs, most of their revenue came from coin-operated viewing booths. Strictly speaking, both belonged to the on-site SOB subclass that Justice Souter characterized as the "commercially natural, if not universal" model. In terms of "look and feel," the two businesses were indistinguishable from on-site SOBs in larger cities.

In March, 2004, a third SOB opened in Sioux City. Unlike the two existing on-site SOBs, *Dr. John's* had no viewing booths. It was located in a newer area of the city and lacked the garish appearance associated with SOBs generally and, in particular, with Sioux City's two existing SOBs. During subsequent litigation, the trial judge commented on this fact:

[T]he first impression of the store is a far cry from the first image that most people would likely have of an "adult book store" or "sex shop." There is nothing seedy about the neighborhood, store building, or store front. In fact, from a quick drive-by, one would likely assume that the business was a rather upscale retail store for women's clothing and accessories. There are no "adult" signs or banners proclaiming "peep shows," "live entertainment booths," "XXX movies," "live models," "adult massage," or any of the other tasteless come-ons all too familiar from adult entertainment stores that exist in virtually every American city of any size and which one may find scattered along interstates and highways even in rural America.<sup>72</sup>

The trial judge's drive-by impression may overstate the point. Few passers-by would mistake *Dr. John's* for anything other than what it was.

Regardless of its look and feel *Dr. John's* was located in a prohibited zone. When Sioux City attempted to enforce its zoning code, *Dr. John's* sued, arguing that off-site SOBs lacked the typical crime-related secondary effects associated with SOBs. To counter this argument, Sioux City produced police reports of incidents occurring within 500 feet of *Dr. John's* during the four years between January 1st, 2002 and December 31st, 2005. For purposes of quasi-experimental control, reports of incidents occurring with 500 feet of a nearby motel were also retrieved.

To control plausible threats to internal and statistical conclusion validity, the City collected analogous police incident reports for an adjacent control area, a 500-foot circle centered on a non-SOB. Because the two circles are tangent to each other and face the same thoroughfare, they have similar traffic flows. And because they have similar mixes of businesses and similar incident rates, their underlying ambient crime risks are similar. Because the underlying risk factors are identical in the two circles, any effect found in one of the circles should be found in the other as well. But that was not the case.

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<sup>71</sup> This case study is based on McCleary and Weinstein (2007).

<sup>72</sup> *Doctor John's, Inc. v. City of Sioux City, IA.*, 389 F.Supp.2d 1096, 1103 (N.D. Iowa 2005), quoting from court's ruling on plaintiff's motion for preliminary injunction.

Table 4.1 - Total Crime Before and After the Opening of Dr. Johns

| Total Incidents       | Before |      | After |      | After/Before | Ratio |
|-----------------------|--------|------|-------|------|--------------|-------|
|                       | N      | Rate | N     | Rate |              |       |
| Dr. John's            | 17     | 7.8  | 41    | 22.4 | 2.86         | 2.31  |
| Control               | 44     | 20.3 | 46    | 25.1 | 1.24         |       |
| "Victimless" Excluded | Before |      | After |      | After/Before | Ratio |
|                       | N      | Rate | N     | Rate |              |       |
| Dr. John's            | 12     | 5.5  | 31    | 16.9 | 3.08         | 2.11  |
| Control               | 26     | 12.0 | 32    | 17.5 | 1.46         |       |

The first row of Table 4.1 breaks down total incidents for the 793 days before and 668 days after the SOB opened. In the *Dr. John's* circle, the annual crime rate rose from 7.8 to 22.4 incidents per year, an increase of approximately 190 percent. Crime in the control circle rose as well but the increase was more modest. The rise from 20.3 to 25.1 incidents per year amounts to a 25 percent increase. Based on a crude comparison of these rates, *Dr. John's* appears to pose an ambient victimization risk.

To test whether the effect might be a chance fluctuation, we take advantage of the fact that crime incidents in the two circles are not different than Poisson (Haight, 1967: 94-95). Under a Poisson hypothesis, the after/before odds for the *Dr. John's* and control circles, reported in Table 3, are distributed as unit-mean log-Normal variables. The ratio of the two odds, also distributed as unit-mean log-Normal, is the maximum-likelihood estimate of the secondary effect. Since the value of the odds ratio is 2.31, compared to the control circle, ambient crime rose by 131 percent after *Dr. John's* opened for business. Because an effect estimate of this magnitude or larger occurs by chance with probability smaller than 0.01, the null hypothesis is rejected.

The second set of rows in Table 4.1 reports the analogous breakdown with "victimless" crime incidents excluded. If the opening of *Dr. John's* lead to heightened police surveillance, it is possible that the before-after effect is a simple "instrumentation" artifact. Indeed, in a critique of the 1977 Los Angeles secondary effects study relied upon in *Alameda Books*, Paul, Linz and Shafer cite this possibility:

Although the findings of this study suggested high levels of criminal activity within these clusters, any implication that this is connected to the presence of adult businesses is invalidated by the fact that the researchers admitted to "stepped up" surveillance within these areas. Put simply, the police most likely found greater amounts of crime in the adult establishment areas because they were trying harder to find it.<sup>73</sup>

<sup>73</sup> P. 379, "Government regulation of 'adult' businesses through zoning and anti-nudity ordinances: de-bunking the legal myth of negative secondary effects." *Communication Law and Policy*, 2001, 6:355-391.

Whereas this explanation might be plausible for prostitution, drugs, and other “victimless” vice crimes, it is implausible for homicide, robbery, and the other “street” crimes reported in the 1977 Los Angeles study. On the contrary, heightened police surveillance will reduce the victimization risk of these crimes. So if the *instrumentation* hypothesis is plausible, the secondary effect should vanish when “victimless” crimes are excluded. As reported in Table 4.1, excluding “victimless” crimes from the estimate leads to the same conclusion.

**4.1.1 Is it a “lingerie boutique” or is it a SOB?**

The evidence suggests that, at worst, the self-characterization of *Dr. John’s* as a “lingerie boutique” is an exaggeration. When this case study began in early 2006, one quadrant of the SOB’s total floor space walled off with high display racks to create a separate room. The merchandise displayed in this room consists of DVDs and magazines and toys or devices, all of which was sexually explicit as that term was defined. The walls created a private room for patrons who wanted to browse and, at the same time, hid the sexually explicit merchandise from customers who might be offended. The merchandise displayed outside this room consisted of lingerie, swimwear, and other erotic (but not necessarily sexually explicit) items.

The walled-in room where sexually explicit merchandise was displayed was larger than 1,500 square feet.<sup>74</sup> The area outside this room, where no sexually explicit items were displayed, was about the same size. Although no door separated the two areas, and although patrons could move between the areas at will, the configuration gave the sense of two separated areas, only one of which met the City’s SOB definitions. The City defined an SOB either in terms of 40 percent of floor space devoted to sexually explicit merchandise; or 40 percent of the inventory devoted to sexually explicit merchandise.

The fluid nature of the floor space complicates this criterion. In terms of merchandise, on the other hand, *Dr. John’s* was clearly an SOB. Table 4.1.1 reports an inventory of *Dr. John’s* stock completed in the first week of January, 2006. The retail value of the sexually explicit merchandise displayed in the 1,500 square-foot room \$558,302.99, or approximately 50 percent of the total inventory. By the stock criterion, on the other hand, *Dr. John’s* is an SOB.

**Table 4.1.1 - Stock inventory for Dr. John’s**

|                                   | <i>Count</i>  |       | <i>Retail Value</i>   |       |
|-----------------------------------|---------------|-------|-----------------------|-------|
| <i>DVDs / Books</i>               | 10,630        | 19.3% | 395,809.39            | 35.0% |
| <i>Toys / Devices / Novelties</i> | 32,469        | 58.8% | 331,605.03            | 29.4% |
| <i>Lingerie, Swimwear, etc.</i>   | 12,109        | 21.9% | 403,469.99            | 35.4% |
| <b>Total</b>                      | <b>55,208</b> |       | <b>\$1,130,884.41</b> |       |

Even if *Dr. John’s* passed the display-space and stock criteria, it would have been judged an SOB by the fact that it promotes itself as an SOB through its signage and website. Both give the same prominent note to DVDs and toys that is given to lingerie, telling more or less the same story as the inventory mix reported in Table 4.1.1. While one can buy the same merchandise at *Dr. John’s* that is

<sup>74</sup> To put this in perspective, the combined floor space of Sioux City’s two on-site SOBs was less than 1,500 square feet, booths excluded.

found at, say, *Victoria's Secret*; one can also buy the sexually explicit merchandise found at Sioux City's two on-site SOBs.

**4.1.2 Dr. John's patrons**

To estimate the characteristics of *Dr. John's* clientele, an automatic surveillance camera was set up to take still-shots at three-second intervals of customers entering *Dr. John's*.<sup>75</sup> The cumulative record was reviewed by Irvine graduate students. Entrances by gender were recorded for 14.5 hours. Of the 180 customers who entered *Dr. John's*, 118 (65.6 percent) were males and 62 (34.4 percent) were females.

Table 4.1.2 reports a more instructive breakdown. Some customers entered *Dr. John's* in groups. Customers who entered singly were most likely to be male. Customers who entered in same-sex or different-sex groups, on the other hand, were as likely to be female as male. The male-female ratio was 50:50 for couples by definition. Excluding couples, the 132 customers who entered *Dr. John's* singly or in groups remains disproportionately and, roughly, by the same 2:1 male-female ratio.

**Table 4.1.2 - Customers by sex and group**

|                | Singles | Same-Sex Groups | Mixed-Sex Groups | Couples |     |
|----------------|---------|-----------------|------------------|---------|-----|
| <b>Males</b>   | 64      | 16              | 9                | 29      | 118 |
| <b>Females</b> | 11      | 13              | 9                | 29      | 62  |
|                | 75      | 29              | 18               | 58      | 180 |

Except for the smaller numbers, the distribution of entrances reported in Table 4.1.2 is consistent with the distributions plotted in Figures 3.5.1a-b. Although many off-site SOBs have some success at attracting women and couples, the SOBs remain a male-dominated realm.

**4.2 MONTROSE, 2003<sup>76</sup>**

The relevance of the government's secondary effects evidence can be challenged through either of two arguments. The first is predicated on the fact that the evidence has ignored some *relevant* difference among distinct SOB subclasses. Challenges by off-site SOBs illustrate this argument. The second is predicated on the fact that the evidence has ignored some idiosyncratic (but nevertheless *relevant*) local condition. In 2004, an SOB in rural Kansas used criminological theory to argue that the sparsely-populated rural environment precluded the possibility of secondary effects. And since the local government had not studied this issue prior to enactment, the ordinance should be struck down.

<sup>75</sup> The camera surveillance was conducted by Richard Matousek, a private investigator retained by the City.

<sup>76</sup> This case study is based on "Rural hotspots: the case of adult businesses." *Criminal Justice Policy Review*, 2008, 19:1-11.

Rejecting this argument, the trial court granted the defendant's summary judgment motion. On appeal, however, in *Abilene Retail*,<sup>77</sup> the Tenth Circuit agreed with the plaintiff's interpretation of criminological theory:

All of the studies relied upon by the Board examine the secondary effects of sexually oriented businesses located in urban environments; none examine businesses situated in an entirely rural area. To hold that legislators may reasonably rely on those studies to regulate a single adult bookstore, located on a highway pullout far from any business or residential area within the County would be to abdicate out "independent judgment" entirely. Such a holding would require complete deference to a local government's reliance on prepackaged secondary effects studies from other jurisdictions to regulate any single sexually oriented business of any type, located in any setting.<sup>78</sup>

Because the SOB was located in an isolated rural area, and because the County had no evidence to suggest that rural SOBs would have secondary effects, the Tenth Circuit reversed the summary judgment and remanded the case for trial.

Ignoring the question of *relevance*, the argument's predicate is correct. Because most criminological research is conducted in urban areas, criminological theories do not *necessarily* generalize to rural areas. In fact, it is entirely possible that some obscure criminological theory might not generalize to rural areas and populations. But the relevant routine activity theory of hotspots, outlined in Section 2 above, generalizes to any accessible area, urban, suburban, or rural. This is corroborated by a recent case study. When an SOB opens on an interstate highway off-ramp in a sparsely populated rural community, ambient crime risk rises precipitously, turning the community into a rural "hotspot of predatory crime."

An unincorporated village of 250 residents, Montrose, Illinois is located on I-70 midway between St. Louis and Indianapolis. I-70 separates Montrose's residential dwellings from its businesses: a convenience store-gas station, a motel, and for a short period, a tavern. Other than gas and lodging, cross-country travelers had no reason to exit I-70 at Montrose prior to February, 2003. In that month, the *Lion's Den* opened on a service road within 750 feet of the I-70 off-ramp. A large, elevated sign let I-70 travelers know that X-rated videos, books, and novelties could be purchased "24/7." The store was successful by all accounts.

The residents of Montrose did not welcome the new business. Unlike the village's other businesses, the *Lion's Den* was located on the residential side of I-70. Complaining that the store disrupted their idyllic life-style, villagers picketed the site on several occasions. Traffic was a chronic complaint. The narrow gravel access road connecting the site to I-70 could not support the weight of big-rig trucks; it soon fell into disrepair. The *Lion's Den* offered to build a new, larger access road from I-70 to its site. But fearing an even larger volume of traffic, the villagers declined the offer.

Like all Illinois villages, Montrose had no SOB ordinances. The *Lion's Den* was located within 1,000 feet of a public park, however, in violation of an Illinois statute. When the State moved to enforce its statute, the *Lion's Den* sued, arguing that "off-site" SOBs could not generate the public safety hazards associated with adult cabarets, video arcades and other on-site SOBs. The trial in *State v. The Lion's Den, et al.* lasted four days. The court upheld the statute and, in July, 2005, the Montrose *Lion's Den* closed its doors.

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<sup>77</sup> *Abilene Retail #30, Inc. v. Board of Commissions of Dickinson County, Kansas*, 492 F.3d 1164, 1175 (10th Cir. 2007).

<sup>78</sup> *Id.* at 1175.

Table 4.2 - Crime-Related Secondary Effects of a Rural Off-Site SOB

|                         | Open |       | Closed |       | Log Effect | $\beta$     | t      |
|-------------------------|------|-------|--------|-------|------------|-------------|--------|
| <i>Property Crimes</i>  | 23   | 9.54  | 15     | 7.20  |            |             |        |
| <i>Personal Crimes</i>  | 3    | 1.24  | 5      | 2.40  | Constant   | -3.267      | -17.60 |
| <i>All Other Crimes</i> | 28   | 11.61 | 9      | 4.32  | Open       | 0.475       | 2.06   |
| <i>Total Crimes</i>     | 54   | 22.39 | 29     | 13.92 |            | $e^{0.475}$ | 1.61   |

At the trial, the State presented evidence of the *Lion's Den's* adverse impact on the surrounding area: sexually explicit litter and decreased use of the nearby park. Neither party presented local crime data, however. Table 4.2 reports data bearing on this issue. During the 1,642-day period beginning January 1st, 2002, the Effingham County Sheriff's Office recorded 83 crime incidents in the Village. The most common incidents involved the theft or destruction of property. Incidents of disorder and indecency, traffic-related incidents, and alcohol-drug offenses were nearly as common. But incidents involving danger or harm to persons (robbery, assault, etc.) were rare.

The columns labeled "Open" and "Closed" in Table 4.2 break the incidents down into an 881-day segment in which the *Lion's Den* was open and a 761-day segment in which it was closed. Crime rates are 22.39 and 13.92 total incidents per year for the "Open" and "Closed" segments. From these raw rates, it appears that crime risk in Montrose rose when the *Lion's Den* opened and fell when the *Lion's Den* closed. The magnitude of the effect is proportional to the exponentiated effect estimate reported in Table 4.2 ( $e^{0.475} = 1.61$ ). The crime rate in Montrose was 61 percent higher while the *Lion's Den* was open.

Could the effect be due to chance? That is unlikely. The effect estimate reported in Table 4.2 is statistically significant at the conventional 95 percent confidence level. Could the effect be due a coincidental increase in the frequency of patrols the Effingham County Sheriff? That too is unlikely. Whereas heightened surveillance can exaggerate "victimless" crime rates, heightened surveillance would *not* produce higher rates of serious crime and, while the *Lion's Den* was open, crime in the Village grew more "serious," including two armed robberies, one committed by a gang of four men wearing ski masks and armed with shotguns. Both armed robberies were committed at site of the *Lion's Den*, moreover, and were the only robberies recorded in the Village's modern history.

The timing of the crime incidents reinforces this point. While the *Lion's Den* was closed, Montrose's modal crime incidents were "drive-off" thefts from the Village's gasoline station and vandalism at the Village's motel. Most of these incidents occurred in daylight and required no immediate response from the Sheriff's Office; and because the businesses were separated from residences by I-70, the modal incidents attracted little attention. While the *Lion's Den* was open, on the other hand, a majority of incidents occurred at night and demanded immediate response; as more incidents began to occur on the residential side of I-70, crime became more noticeable to Village residents.

The Tenth Circuit may not have found the Montrose results relevant to *Abilene Retail*. Every case study is unique in some respect, after all; and although the U.S. Census Bureau considers both Effingham County, Illinois and Dickinson County, Kansas to be "rural," the Tenth Circuit may have focused on idiosyncratic, legally relevant factors. Nevertheless, the case study results demonstrate that, whether urban, suburban, or rural, hotspots are hotspots. Whether the area is urban, suburban, or rural,

SOBs attract patrons from wide catchment areas. Because these patrons are disproportionately male, open to vice overtures, and reluctant to report victimizations, their presence attracts offenders, generating ambient victimization risk – a hotspot of predatory crime. This theoretical mechanism operates identically in rural, suburban, and urban areas but, because rural areas ordinarily have lower levels of visible police presence, rural hotspots may be riskier than their suburban and urban counterparts.

Solving the problem by allocating more police to rural areas is politically unfeasible. Governments allocate public safety resources across regions on utilitarian grounds. Per capita allocations have the greatest impact on per capita crime rates. This poses an obstacle to rural problem-oriented policing, of course, but it is a rational policy for a government. Because the targets attracted to the rural hotspot live outside the jurisdiction, and because victimizations are under-reported, ignoring the hotspot is a more realistic strategy.

The future is unclear. The relocation of adult businesses to rural areas parallels the post-war “flight” of inner-city families. From the perspective of adult business proprietors, the urban environment has become hostile. Zoning codes force adult businesses into “ghettos” where their operations are strictly regulated and where competition with other adult businesses is fierce. Rural areas have few regulations, on the other hand, and little competition; access to interstate highway traffic is a bonus. As urban environments become more hostile, more adult businesses will relocate to rural areas, forcing state and county governments into policy decisions.

#### 4.3 ALAMEDA BOOKS REDUX: LOS ANGELES, 2008

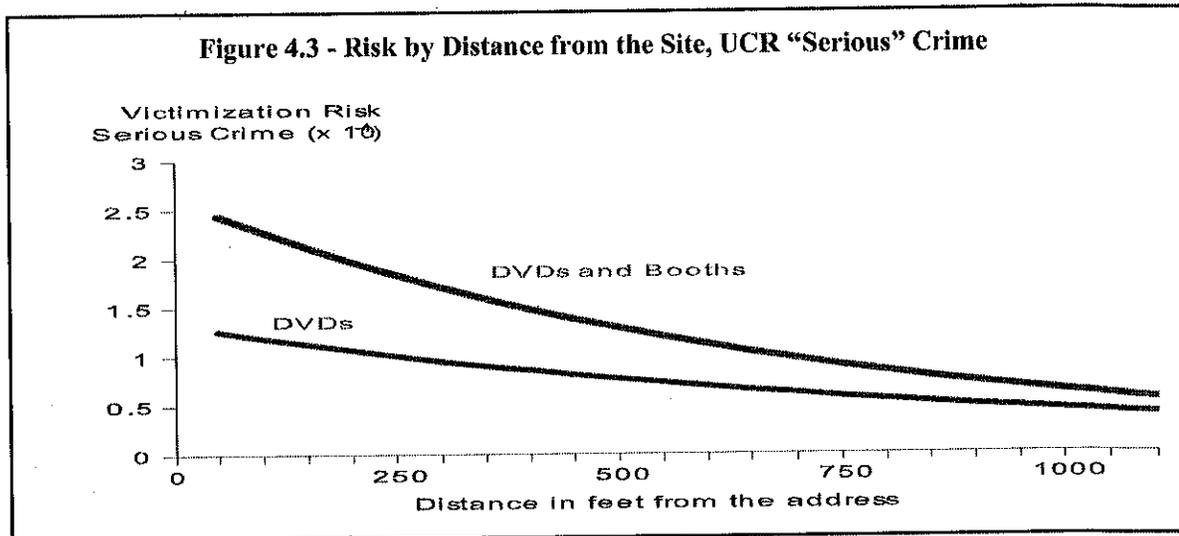
In 1977, the City of Los Angeles conducted a comprehensive secondary effects study<sup>79</sup> that found, among other things, an association between ambient crime and SOB concentrations. Based on this finding, Los Angeles required a minimum distance between SOB sites. When SOBs began to evade the minimum distance rule by merging, the City amended its ordinance to require minimum distances between distinct *activities*. The amendment forced “commercially natural if not universal” SOBs to segregate DVD sales from viewing booths.

In 1995, two affected SOBs challenged the amended ordinance. Because the 1977 study did not address the secondary effects of combining multiple activities under one roof, it was argued that Los Angeles had no evidence that multiple-activity businesses generated secondary effects. The trial court agreed and the Ninth Circuit affirmed. The U.S. Supreme Court reversed, reaffirming *Renton* and allowing that a government could infer, from the findings of the 1977 study, that concentrations of distinct *activities* – in particular, DVD sales and viewing booths on the same site – generated secondary effects. In a complicated split decision, the Court remanded the case for trial.

In 2006, the City of Los Angeles retained McCleary to examine the secondary effects rationale for the amended ordinance. Would dividing a multiple-activity SOB into single-activity SOBs, as required by the amended ordinance, yield a reduction in ambient crime risk? Ideally, this question could be addressed by finding a member of the “commercially natural if not universal” SOB subclass that had been divided into discrete units that sold DVDs (but had no booths) and that operated coin-operated viewing booths (but did not sell DVDs). If the amended ordinance had a legitimate rationale, one would expect the ambient risk for the multiple-activity SOB to be greater than the sum of the risks for its constituent single-activity SOBs.

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<sup>79</sup> City of Los Angeles Department of City Planning (1977), cited in *Alameda Books* at 429.



Unfortunately, there were no ideal "natural experiments" of this sort to be found in Los Angeles. Alternatively, using the same logical argument, one could compare the ambient crime risks for multiple-activity SOBs – which we will call "bookstore-arcades" – to the ambient risks for single-activity "bookstores" and "arcades." Since there were no *pure* arcades<sup>80</sup> in Los Angeles, however, only part of this alternative design could be implemented. Though less than the ideal – which is almost always true – the partial design tells us much about the phenomenon.

Figure 4.3 plots the risk-distance functions for twelve bookstore-arcades (in red) and seven bookstores (in blue). The vertical axis is calibrated in annual UCR Part I ("serious") crime incidents (homicide, aggravated assault, robbery, rape, burglary, theft, auto theft, and arson) per square mile. The horizontal axis is calibrated in distance from the site. As Figure 4.3 shows, both SOB subclasses are risky places. Since both risk-distance functions are statistically significant at the conventional 95 percent confidence level, both SOB subclasses have secondary effects. Compared to bookstores, however, bookstore-arcades are riskier at all distances and the difference between the two functions is significant.

#### 4.4 CONCLUDING REMARKS

Some subclass specific risks arise because the defining characteristic of the subclass creates idiosyncratic opportunities for particular types of crime. Other subclass-specific risks arise when the defining characteristic of the subclass compromises the effectiveness of common policing strategies. The relatively higher ambient risks of bookstore-arcades accrue from both sources. Nevertheless, the failure of economical policing strategies is the greater problem. The optimal policing strategy for SOBs with viewing booths requires that police inspect the interior, placing officers at risk of injury. Accordingly, policing this subclass requires special training and equipment, prior intelligence, backup manpower, and other resources.

<sup>80</sup> SOB arcades that sell *no* adult merchandise whatsoever are rare. But there are many that derive very little revenue from the same of adult merchandise.

Absent viewing booths, the optimal policing strategy rests heavily on routine drive-by patrols. Since the ambient risk function for this subclass can cover a several-block area (see Figure 4.3), drive-by patrols is an efficient way to provide a visible police presence to the neighborhood. Visibility is *per se* a deterrent. Routine patrols can keep watch for known offenders and suspicious activity. When problems are spotted, the routine patrol can forward the information to a specialized unit or, if necessary, handle it on the spot, requesting backup resources only as needed. Needless to say, neighborhood patrols by plainclothes officers in unmarked cars would be inefficient. Whereas visibility is central to policing SOB bookstores, the presence of viewing booths requires invisible (plainclothes) police presence inside the SOB. The optimal policing strategies of the two subclasses are incompatible.

Criminological theory is clear on the threshold question of whether off-site SOBs are exempt. They are not. As it turns out, moreover, the Fifth Circuit had not intended its *Encore Videos* decision to be interpreted as a comment on applicability of criminological theory. Four years later, the Fifth Circuit upheld a Kennedale, Texas ordinance aimed at off-site SOBs.<sup>81</sup> Unlike the San Antonio ordinance under challenge in *Encore Videos*, the Kennedale ordinance relied on studies of off-site SOBs. The Court took the opportunity, furthermore, to clarify the short note in *Encore Videos* that had been misinterpreted as questioning the applicability of criminological theory.<sup>82</sup>

On March 1st, 2007, exactly one week after the Fifth Circuit's *H and A Land Corp.* decision, a man parked his car in a dark lot near an off-site SOB in Kennedale, Texas. Returning to his car, the man was confronted by a robber and shot (Bourgeois, 2007). Though seriously injured, he survived. Governments would not want to rely on anecdotal evidence alone. Nevertheless, anecdotes of this sort constitute legitimate secondary effects evidence.<sup>83</sup> In addition to its corroborative value, this particular anecdote has some legal relevance because the off-site SOB was a plaintiff in *H and A Land Corp.*

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<sup>81</sup> *H and A Land Corp. v. City of Kennedale, TX.*, 480 F. 3d 336 (5th Cir. 2007).

<sup>82</sup> *Id.* at 340

<sup>83</sup> See, e.g., *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1195-96 (9th Cir. 2004) ("Anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects ...").

## 5. SAN ANTONIO

In early 2006, several Texas cities were evaluated as candidates for an intensive case study. Due to its historical role in the off-site/on-site controversy, San Antonio was the leading candidate. As information on the candidate cities accumulated, San Antonio's advantages grew more apparent. It had several off-site and on-site SOBs, for example; and although all of the candidate cities had reasonably reliable machine-readable crime incident data, San Antonio's city attorney was particularly supportive of the case study concept. In the final analysis, San Antonio offered the strongest mix of data, design, and resources.

Another factor arguing for San Antonio was the publication, in early 2006, of a secondary effects study based on San Antonio data. Using a cross-sectional quasi-experimental design that had been used in Greensboro (Linz and Yao, 2003) and Daytona Beach (Linz, Fisher, and Yao, 2004), Enriquez, Cancino and Varano (2006)<sup>84</sup> found that:

After controlling for socioeconomic and demographic community characteristics associated with social disorganization, ... the empirical evidence tempers the San Antonio City Council's contention that the presence of [SOBs] produces crime. Instead, the results point to weak institutions, namely alcohol outlets and community characteristics associated with social disorganization theory as causes and correlates of crime (p. 34).

Critics of the quasi-experimental design used by Enriquez, Cancino, and Varano note that it is strongly biased in favor of the null finding. This bias might explain why the design has become a favorite of SOB plaintiffs. We will expand on this issue in the following sections.

### 5.1 THE ENRIQUEZ-CANCINO-VARANO NULL FINDING

To test whether SOBs have any secondary effects whatsoever, Enriquez, Cancino, and Varano regress *per capita* crime rates for San Antonio "neighborhoods" (Census Block Groups) on nine "social disorganization" variables.<sup>85</sup> After statistically adjusting for the effects of these variables, Enriquez, Cancino, and Varano compare the crime rates in neighborhoods with and without "human display establishments" (SOBs). Because the  $R^2$  statistic associated with the difference was not significant at the conventional 95 percent confidence level, Enriquez, Cancino, and Varano concluded that the difference is *null* – that SOBs have no statistically significant crime-related secondary effects. To investigate the validity of this conclusion, we attempted to replicate their analysis. Although we could not reproduce their results exactly, the results of our reanalysis are consistent with their results in one important respect.<sup>86</sup> Nevertheless, our results support a very different conclusion.

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<sup>84</sup> Roger Enriquez is assistant professor of criminal justice, University of Texas, San Antonio; Jeffery M. Cancino is associate professor of criminal justice at Texas State University, San Marcos. Sean P. Varano is assistant professor of criminal justice at Northeastern University.

<sup>85</sup> As proposed by Shaw and McKay (1942), the theory of social disorganization holds that neighborhoods with low residential stability will have high rates of delinquency and *vice versa*. The theory draws heavily from grand sociological theory (e.g., Tönnies, 1963[1887]; Durkheim, 1964[1893]) and from the early Chicago school experience.

<sup>86</sup> At a minimum, replication would require the arithmetic means and variances of all variables as well as the covariances among variables. These "sufficient statistics" are ordinarily published along with results. Although

Table 5.1 - Effect Estimates, *Per Capita* Total Crime

|  | <i>Effect</i> | $\alpha < p$  | <i>Effect</i> | $\alpha < p$ |
|--|---------------|---------------|---------------|--------------|
| Constant                                   | 361.5         |               | -447.2        |              |
| Renter Occupied Housing                    | -81.3         | .05           | -181.9        | .54          |
| Latinos                                    | -134.9        | .0001         | 407.4         | .05          |
| Blacks                                     | -41.0         | .53           | 232.5         | .24          |
| Divorced                                   | -416.0        | .002          | 2778.4        | .00          |
| Median Household Income                    | -2.7          | —             | -4.0          | .15          |
| Vacant Housing                             | 86.5          | .37           | 3446.8        | .001         |
| 15-29 Year Old Males                       | -428.1        | .01           | -678.9        | .0001        |
| Female-Headed Households                   | 62.0          | .16           | 1339.3        | .14          |
| <b>Alcohol Establishments</b>              | <b>15.2</b>   | <b>.00001</b> | <b>189.7</b>  | <b>.12</b>   |
| <b>Adult Display Establishments (SOBs)</b> | <b>73.5</b>   | <b>.20</b>    | <b>1976.2</b> | <b>.0001</b> |

Table 5.1 reports a side-by-side comparison of the results reported by Enriquez, Cancino, and Varano (in red; taken from Table 7, pp. 33-4) and the results of our replication (in blue). The columns labeled “Effect” give the unstandardized effect estimates (*per capita* crime rates). The columns labeled “ $\alpha < p$ ” give the corresponding significance levels. By convention, any effect estimate with a probability smaller than  $\alpha < 0.05$  is statistically significant. The last row of Table 5.1, which reports effect estimates and significance levels for “alcohol establishment” and “adult display establishment (SOB) neighborhoods, tells the story.

- In terms of *per capita* total crime, Enriquez, Cancino, and Varano find that the effect of “adult display establishments” is nearly five times larger than the analogous effects of “alcohol establishments” ( $73.5/15.2 \approx 4.8$ ). But since the corresponding probability ( $\alpha=0.2$ ) is larger than 0.05, the five-fold effect is not statistically significant.
- The replication finds that the effect of “adult display establishments” is more than ten times larger than the analogous effect of “alcohol establishments” ( $1976.2/189.7 \approx 10.4$ ). Since the corresponding probability ( $\alpha=0.0001$ ) is smaller than 0.05, moreover, the ten-fold effect is not statistically significant.

In purely *substantive* terms, the original analysis and our replication produce consistent results. Neighborhoods with “adult display establishments (SOBs)” have higher *per capita* crime rates than “alcohol establishment” neighborhoods. Whether the effect ratio is five-fold or ten-fold, it is *substantively* large.

In purely *statistical* terms, on the other hand, the original analysis and our replication produce *discrepant* results. Whereas in the original analysis, the substantively large difference in *per capita* crime rates is *not* statistically significant ( $\alpha=0.2$ ), in our reanalysis, the difference is *highly* significant

Enriquez, Cancino, and Varano (2006) did not publish these data, they offered “Other tables and models are available on request” (fn. 80, p. 20). The authors have ignored two requests for their statistics.

( $\alpha=0.0001$ ). Which statistical result is more credible? Leaving this question unanswered for the present, Enriquez, Cancino, and Varano interpret the statistical size of their effect to mean that San Antonio SOBs have no crime-related secondary effects; and this has clear legal implications:

According to the plurality test in *Alameda*, the present study would certainly cast “direct doubt” on the rationale or evidence used to support the adoption of the San Antonio ordinance. This would then shift the burden back to the municipality. However, it is not clear what evidence a court would require from a municipality to justify the ordinance. (pp. 34-5)

But in fact, the fragile null finding reported by Enriquez, Cancino, and Varano is *not* sufficient to “cast direct” doubt on the factual predicate of San Antonio’s ordinance. Indeed, what Enriquez, Cancino, and Varano characterize as a null finding is, by the most widely accepted conventions of statistical hypothesis testing, an *inconclusive* finding. We will return to this point after reporting the results of our San Antonio analysis.

## **5.2 THE RESULTS OF OUR SAN ANTONIO CASE STUDY**

Table 5.2 lists the addresses of fourteen SOBs that were open for business in the City of San Antonio during the five-year period between January, 2002 and December, 2006. All fourteen SOBs sell videos and other adult merchandise for off-site use. The first three sites (in blue) also operate on-site viewing booths, however; they are “on-site” SOBs. The next eleven sites (in red) do not operate on-site viewing booths; they are “off-site” SOBs. The list of SOB sites (Table 5.2) was developed from searches of internet sources and licensing databases, and from consultations with City of San Antonio officials.

Each of the fourteen sites was visited at least once between January, 2006 and May, 2008. Many of the sites were visited on several occasions during that period. Each site visit included inspections of the surrounding neighborhoods, informal interviews with employees and patrons of the SOBs where possible, and sometimes, interviews with neighbors. Although we cannot be certain that the fourteen sites listed in Table 5.2 is exhaustive, the list is as complete as possible and representative of the SOBs in San Antonio.

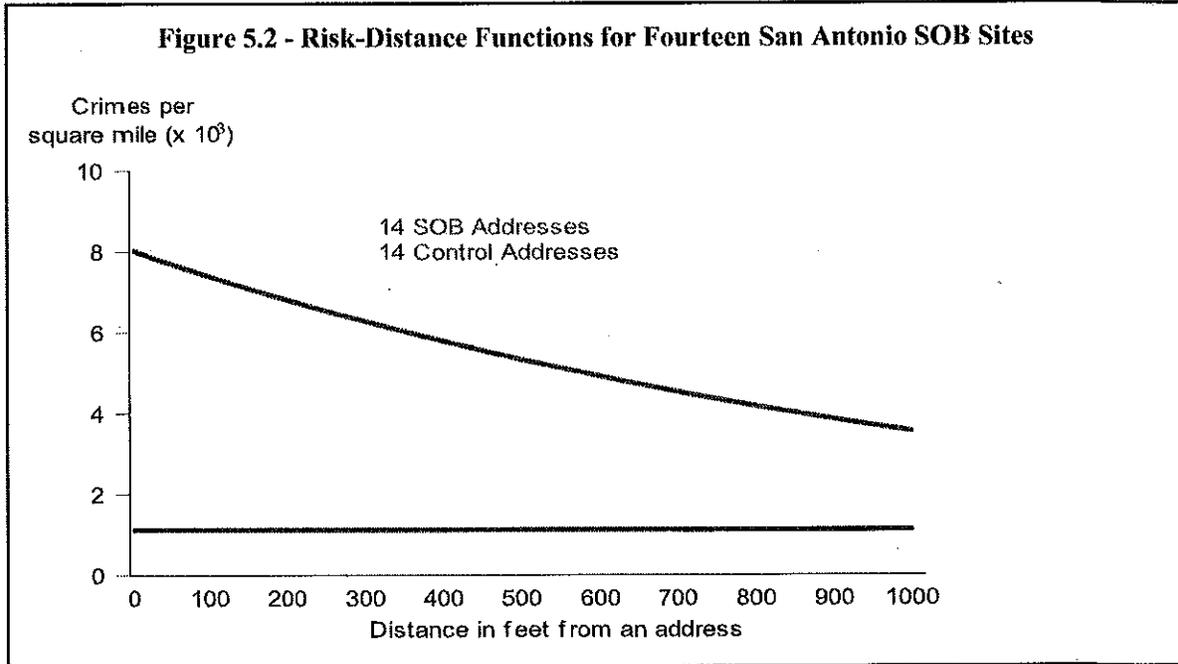
Table 5.2 - Fourteen San Antonio SOBs

|                                   | 2000 U.S. Census       |         |             |
|-----------------------------------|------------------------|---------|-------------|
|                                   | Address                | Tract   | Block Group |
| Adult Video MegaPlexx             | 9405 I 35 N            | 1212032 | 2           |
| Body Language                     | 8071 Culebra Rd        | 1719113 | 3           |
| Adult Video MegaPlexx             | 11827 San Pedro Ave    | 1913022 | 2           |
| Venus                             | 3848 Culebra Rd        | 1805043 | 3           |
| Texxxxas Nights                   | 6305 Wurzbach Rd       | 1807024 | 4           |
| Zebraz                            | 1608 N Main            | 1108005 | 5           |
| Broadway News                     | 2202 Broadway St       | 1110003 | 3           |
| Apollo News                       | 2376 Austin Hwy        | 1205025 | 5           |
| Encore Video - 1031 <sup>87</sup> | 1031 NE 410            | 1210001 | 1           |
| Leather and Lace Video            | 2525 NE 410            | 1212043 | 3           |
| Temptations                       | 8373 Culebra Rd        | 1719111 | 1           |
| Shades of Love                    | 300 West Bitters       | 1917002 | 2           |
| Pop-in-go Video Superstores       | 7121 90 W              | 1616002 | 2           |
| Pop-in-go Video Superstores       | 3655 Fredericksburg Rd | 1802013 | 3           |

To measure the hypothetical crime-related secondary effects of the fourteen SOBs, we collected official crime data from the San Antonio Police Department. The dataset that was released to us included all crime incidents recorded in the City of San Antonio between January, 2002 and December, 2006. During this five-year period, the San Antonio Police Department recorded the locations of 457,603 incidents. All but 2,866 of those were successfully matched to San Antonio addresses, for a match rate of 99.4 percent. A 70 percent match rate is the norm for geocoding. The extraordinarily high match rate in this study is due in part to the geocoding system used by the San Antonio Police Department. Although each crime incident was coded with a modified NIBRS descriptor (U.S. Department of Justice, 2000), for analytic purposes, the incidents were collapsed into three broad categories: personal crime incidents, property crime incidents, and all other crime incidents. We report the results for total crime only.

One shortcoming of the statistical model used by Enriquez, Cancino, and Varano (2006) is that the land area of their "neighborhoods" (*i.e.*, Census Block Groups) is too large to capture the secondary effects of SOBs. Whereas the ambient crime risk emanating from an SOB point-source is optimally detectable in a 500-foot circle around the site (see Figure 3.4.2) – an area of approximately 0.028 square miles – the median San Antonio Census Block Group covers an area of 0.24 square miles. This factor-of-nine disparity generates a profound bias in favor of the null finding. When smaller, more appropriate areal units are analyzed, however, large, significant crime-related secondary effects emerge.

<sup>87</sup> The plaintiff "Encore Videos" in the Fifth Circuit decision is "Zebraz."



To illustrate, Figure 5.2 plots total crime risk-distance functions for fourteen SOB sites (in red) and fourteen randomly selected control sites (in black). The fourteen control sites were drawn at random from the set of San Antonio addresses in the 2000 U.S. Census tracts where SOB sites are located. Although there are (literally) thousands of potential control addresses in the complete set, a random sample of fourteen addresses balances the design, thereby optimizing its interpretability.

The technical details of Figure 5.2, including the calculation and interpretation of the numbers (*i.e.*, "Crimes per square mile x 10<sup>3</sup>"), are described separately in Section 6 below. For present purposes, ignoring these technical details, several points emerge from the risk-distance functions.

- In terms of total crime, SOB sites are risky places. As one moves toward an average SOB, victimization risk (defined loosely, as the probability of becoming a crime victim) rises. As one moves away, victimization risk diminishes.
- The risk-distance function for control addresses (in black) is relatively flat. No matter how near or far one might be from the average control site, victimization risk remains constant.
- At any distance, ambient victimization risk is significantly lower for control addresses compared to SOB sites. This relationship holds for distances greater than 1,000 feet, approximately two long city blocks.

Although it is possible in principle to estimate distinct risk-distance functions for off-site and on-site SOB sites, the difference between the two risk-distance functions is not statistically significant at the conventional 95 percent confidence level. Our inability to estimate distinct functions is due in part to the relatively small number of on-site SOB sites (three *vs.* eleven off-site SOB sites) and to the proximity of one off-site SOB site to an on-site SOB site. Tests of statistical significance are a technical topic that will be covered in Section 6 below.

### 5.3 THE "DIRECT DOUBT" CONTROVERSY<sup>88</sup>

Finding that the difference in *per capita* crime rates between SOB and non-SOB control neighborhoods is *not* statistically significant, Enriquez, Cancino, and Varano argue that the null finding "casts 'direct doubt' on the rationale or evidence used to support the adoption of the San Antonio ordinance." Of course, any investigator who *wants* to produce a null finding can do so, quite simply, by using the "weakest" possible quasi-experimental design. To guard against the potential abuse, rigidly enforced methodological rules require the investigator to demonstrate that a design is sufficiently "powerful" to support the null finding. Otherwise, the finding is judged to be *inconclusive*.

The "statistical power" of a quasi-experimental design is best illustrated by the distinction between the *substantive* and *statistical* size of a secondary effect. In terms of *per capita* total crime, Enriquez, Cancino, and Varano found that the effect for San Antonio's "human display establishments" was 4.84 times larger than the analogous effect for "alcohol establishments." Most residents of San Antonio – including the City Council and Police Department – would call this effect *substantively* large. Nevertheless, the effect is *statistically* small – not significant at the conventional 95 percent confidence level. Ignoring the effect's substantive size, Enriquez, Cancino, and Varano argue that *statistically* small effects are "not different than zero." And if an effect is "not different than zero," then perhaps it "is zero." And if the effect "is zero," then it casts "direct doubt" on the evidentiary basis of the San Antonio ordinance.

Of course, this argument ignores the methodological rules of statistical hypothesis testing. Figure 5.3a summarizes these rules by analogy to a jury trial. Suppose that an SOB stands accused of posing an ambient crime risk. After hearing the evidence, the jury can convict, acquit, or hang. If the jury convicts, there is a small (but non-zero) probability that the jury convicted an innocent SOB; *i.e.*, a false-positive (or "Type I" or " $\alpha$ -type") error. If the jury acquits, on the other hand, there is a small (but non-zero) probability that the jury acquitted a guilty SOB; *i.e.*, a false negative (or "Type II" or " $\beta$ -type") error. Finally, if the jury hangs, there was no decision and, hence, no possibility of error.

**Figure 5.3a - Jury Trials and Hypothesis Tests**

|                   | But in Reality, the Defendant is ... |                    |
|-------------------|--------------------------------------|--------------------|
|                   | Guilty                               | Not Guilty         |
| The Jury Convicts | ?                                    | 5% False Positives |
| The Jury Hangs    | ?                                    | ?                  |
| The Jury Acquits  | 20% False Negatives                  | ?                  |

In real-world courtrooms, the probabilities of false-positive and false-negative verdicts are unknown. Courts enforce strict procedural rules to minimize these probabilities but we can only guess

<sup>88</sup> This section is based on McCleary and Meeker (2006).

at their values. In statistical hypothesis testing, on the other hand, rigid convention sets the values at five percent for false-positives and twenty percent for false negatives.<sup>89</sup> Adopting these same values, to convict, the jury must be 95 percent *certain* of the SOB's guilt. To acquit, the jury must be 80 percent *certain* of the SOB's innocence. To ground the 95 and 80 percent certainty levels, we could try each case in front of a large number of independent juries. To convict, 95 percent of the juries would have to return the same guilty verdict; in the case of an acquittal, 80 percent would return the same not guilty verdict.

Correct and incorrect decisions are painted blue and red respectively in Figure 5.3a. Five percent of all convictions are false-positives and 20 percent of all acquittals are false-negatives. When the levels of certainty are too low to support conviction *or* acquittal, of course, the jury hangs. Non-decisions, painted yellow in Figure 5.3, depend on factors such as the strength of evidence, credibility of witnesses, and so forth. So as not waste a jury's time, the prosecutor doesn't bring obviously weak cases to trial. Likewise, faced with strong evidence of guilt, the defense counsel seeks a plea bargain in order to avoid trial.

The analogy to statistical hypothesis testing is nearly perfect. The researcher considers two complementary hypotheses. The SOB either has secondary effects; or alternatively, the SOB does not have secondary effects. Based on the magnitude of the expected and estimated effects, the researcher then accepts one of the two hypotheses.

- If the false-positive rate for the estimated effect is smaller than five percent, the hypothetical secondary effect is accepted with 95 percent *confidence*. The SOB has a large, significant secondary effect.

If the false-positive rate is larger than five percent, researcher does not automatically accept the alternative hypothesis but, rather, conducts a second test.

- If the false-negative rate for the expected effect is smaller than twenty percent, the alternative hypothesis is accepted with 80 percent *power*. The SOB does not have a secondary effect.

But lacking *both* 95 percent confidence *and* 80 percent power, neither hypothesis is accepted; *the results are inconclusive*. Since inconclusive results invariably arise from weak research designs, and since the relative strength of a design is known *a priori*, inconclusive results should be rare. But in fact, many of the secondary effects studies sponsored by SOB plaintiffs – and in particular, the study by Enriquez, Cancino, and Varano – have inconclusive results.

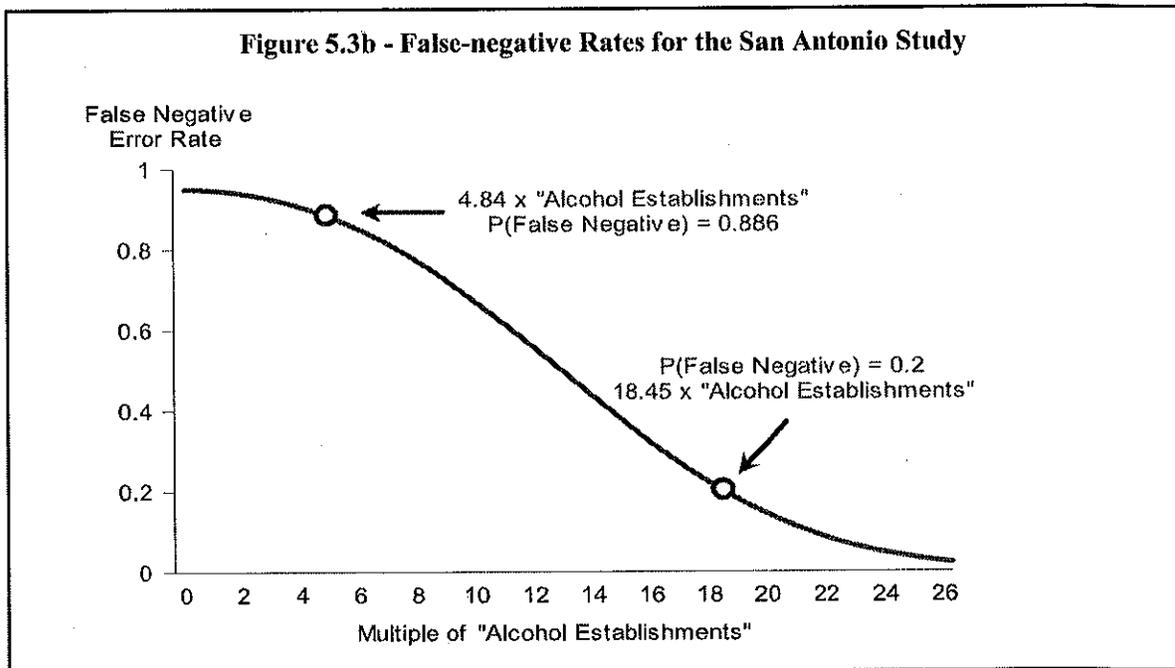
Finding a *substantively* large but *statistically* small effect, Enriquez, Cancino, and Varano argue that no secondary effect exists. A mundane analogy reveals the fallacy in this argument. If I cannot find my car keys, I might conclude that my car keys do not exist. But although this may be true, it may also be true – and it is certainly more likely – that I did not look hard enough for my car keys.<sup>90</sup>

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<sup>89</sup> The most comprehensive authority on this issue is Kendall and Stuart (1979, chapter 22). This authority requires a strong background in mathematics, however. Cohen (1988, pp. 3-4) and Lipsey (1990, pp. 38-40) set the conventional false-positive and false-negative rates at  $\alpha=.05$  and  $\beta=.2$ , respectively. These rates can be set lower, of course. The convention also sets the ratio of false-positives to false-negatives at 4:1, implying that false-positives are “four times worse than” false-negatives. The 4:1 convention dates back at least to Neyman and Pearson (1928). It reflects a view that science should be conservative. In this instance, for example, the 4:1 convention works in favor of the SOB. When actual decision error costs are known, the actual ratio is used.

<sup>90</sup> Newton made this point with his aphorism “*Negativa non Probanda*” which translates roughly as “Finding nothing proves nothing.”

As it turns out, Enriquez, Cancino, and Varano did not “look hard enough” for a secondary effect in San Antonio. The false-negative error rates plotted in Figure 5.3b were calculated from Table 7 (pp. 33-4) of Enriquez, Cancino, and Varano (2006). The horizontal and vertical axes are calibrated respectively in multiples of the “alcohol establishments” effect and the corresponding false-negative error rate. The false-negative rate for the 4.84 multiple reported by Enriquez, Cancino, and Varano is 0.886. What this means, put simply, is that the null finding is most likely (88.6 percent) an artifact of the study’s weak quasi-experimental design. Whereas Enriquez, Cancino, and Varano interpret their null finding as evidence that San Antonio SOBs do *not* have secondary effects, the low complementary probability (11.4 percent) raises grave doubts about the validity of this interpretation.



How substantively large would the secondary effect have to be before it could be detected with the conventional statistical power level of 80 percent? As shown, the secondary effect of “human display establishments” would have to be 18.45 times larger than the analogous effect of “alcohol establishments” before it could be detected with conventional statistical power. Given the unacceptably low power of their quasi-experimental design, it is not surprising that Enriquez, Cancino, and Varano were unable to find significant secondary effects. Given the low power of their design, that would have been a miracle.

Figure 5.3b has clear implications for challenging an ordinance under *Alameda Books*. “Quick and dirty” secondary effect studies – which is to say, studies with unacceptably low levels of statistical power – are biased in favor of the null finding. If investigators can circumvent the methodological rules, casting “direct doubt” on an evidentiary record is a simple, sure exercise. Anyone with a modest research background can design a study so as to guarantee a statistically insignificant result. Science guards against such abuses by requiring that investigators publish false-negative rates; or alternatively, as in this case, data sufficient for skeptics to calculate the false-negative rate.

#### 5.4 CONCLUDING REMARKS

The mathematics of statistical hypothesis testing is so demanding that few social scientists understand the concepts or their importance to research.<sup>91</sup> The conventional 80 percent power level was proposed and adopted in the 1920s when statistical hypothesis testing was in its infancy. The convention has survived for eighty years because it serves two useful, crucial functions.

- Anyone with a modest background in research methods can design a study in a way that favors – or even guarantees – a null finding. The convention minimizes abuses by malicious investigators.
- Haphazardly designed “quick and dirty” studies favor the null finding. The convention minimizes the impact of spurious findings generated by naive (but benign) investigators.

Lay audiences, who must rely on common sense, cannot always distinguish between weak and strong designs or between benign and malicious investigators. Scientific conventions guard against both abuses. In this particular instance, the 80 percent power convention allows the lay audience to trust the validity of a null finding.

Recognizing the conventions, crime-related secondary effect studies can be assigned to one of three categories: studies that report secondary effects with 95 percent *confidence*; studies that report null findings with 80 percent *power*; and studies that are *inconclusive*. All of studies listed in Table 3 above either report large, significant secondary effects or else are *inconclusive*. No studies report null findings with the conventional 80 percent power. This reinforces a statement made earlier: It is a *scientific fact* that SOBs pose large, significant ambient crime risks.

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<sup>91</sup> E.g., Cohen (1992, p. 155): “I attributed this disregard of power to the inaccessibility of a meager and mathematically difficult literature...”

## 6. THE STATISTICAL MODEL

The statistical results plotted in Figure 5.2 are derived from statistical analyses based on the Poisson family of models. Our development of the analytic models and results begins with a discussion of *crime risk*. To the individual, the notion of crime risk is associated with vague feelings about the probability of becoming a victim. From vicarious experience then, the individual knows to avoid exceptionally risky times (late night) and places (dark alleys). To translate vague feelings into precise numbers, we can equate crime *risk* with the annual crime *rates* reported in the news media.

**Table 6 - UCR Robberies for Two Texas Cities, Year 2000**

|                    | <i>Robberies</i> | <i>Population</i> | <i>Rate</i> | <i>Area</i> | <i>Rate</i> |
|--------------------|------------------|-------------------|-------------|-------------|-------------|
| <i>San Antonio</i> | 1,699            | 1,144,646         | 0.0015      | 407.6       | 4.2         |
| <i>Dallas</i>      | 7,046            | 1,121,152         | 0.0063      | 342.5       | 20.6        |

Table 6 reports robbery rates in 2000 for San Antonio and Dallas. The *per capita* robbery rates (in red) were 0.0015 and 0.0063. For purely aesthetic reasons, the news media report these rates as whole numbers per 1,000 residents. So the San Antonio and Dallas robbery rates could be expressed identically as 1.5 and 6.3 robberies per 1,000 residents per year. Because *per capita* rates have practical advantages, however, that metric is preferred.

In either the *per capita* or per 1,000 metric, compared to San Antonio, Dallas is more than four times *riskier*. The risk ratio statistic makes this point:

$$\text{Risk Ratio} = 0.0063 / 0.0015 \approx 4.2$$

To interpret this ratio, imagine a hypothetical tourist who spends a week in both cities. This tourist is four times likelier to be robbed in Dallas. The risk is exceeding low in either city, of course. This point is made clear by the waiting time statistic. In San Antonio, a hypothetical average tourist will spend more than 667 years waiting to be robbed:

$$\text{Waiting Time} = 1 / 0.0015 \approx 666.7 \text{ years}$$

In Dallas, on the other hand, the wait is "only" 159 years:

$$\text{Waiting Time} = 1 / 0.0063 \approx 158.7 \text{ years}$$

The waiting time statistic illustrates a practical advantage of *per capita* rates; mean (or average) waiting time is the inverse of the *per capita* rate.

This relationship depends on the two simple Poisson assumptions of *homogeneity* and *independence*. The homogeneity assumption requires that the individual's victimization risk be constant from time to time. However, in fact, risk varies by time of day, day of the week, and so forth. Because the hypothetical tourist cannot be in two counties at the same time, comparing risk across cities requires imagination.

Spatial heterogeneity is a more problematic assumption. The right-hand columns of Table 6 (in blue) report *ambient* crime risks for San Antonio and Dallas. These ambient crime rates are calculated as the ratio of robberies per year to land area. At the scale of the two cities – approximately 350-400

square miles – ambient crime risk is meaningless. Indeed, “bad” parts of low-risk cities are more dangerous to the hypothetical tourist than “good” parts of high-risk cities.

Fortunately, at the smaller geographical scales that are relevant to this secondary effect phenomenon, the consequences of heterogeneity vanish. Given a reasonably small area – say, a few city blocks – a simple ambient crime rate captures all of the essential features of crime risk. We will elaborate on this point shortly.

## 6.1 THE POISSON DENSITY FUNCTION

In the early 19th Century, French mathematician, S.D. Poisson developed an interest in the scattered distribution of crimes across Paris neighborhoods.<sup>92</sup> Poisson proposed the probability density function that bears his name to describe the spatial scatter of crime incidents. Briefly, if  $x$  is the number of crimes that occur in a neighborhood (or any other fixed area) during a year (or any other fixed period of time), the probability that exactly  $k$  crimes will occur in the neighborhood during the next year is given by the Poisson density function,

$$\text{Prob}(x = k) = \lambda^k e^{-\lambda} / k! \quad \text{where } \lambda \text{ is the crime rate}^{93}$$

To illustrate how this density function works, in 2000, the robbery rate in Dallas was

$$\lambda = .0063 \text{ per capita robberies}$$

Plugging this mean into the Poisson density function, the probability that a randomly selected Dallas resident will *not* be robbed in the next year is

$$\text{Prob}(x = 0) = (0.0063)^0 e^{-0.0063} / 0! \approx 0.99372$$

Or in other words, 99.372 percent of the resident population will *not* experience a robbery next year. The proportion who will experience  $k=1$  robbery is,

$$\text{Prob}(x = 1) = (0.0063)^1 e^{-0.0063} / 1! \approx 0.0063$$

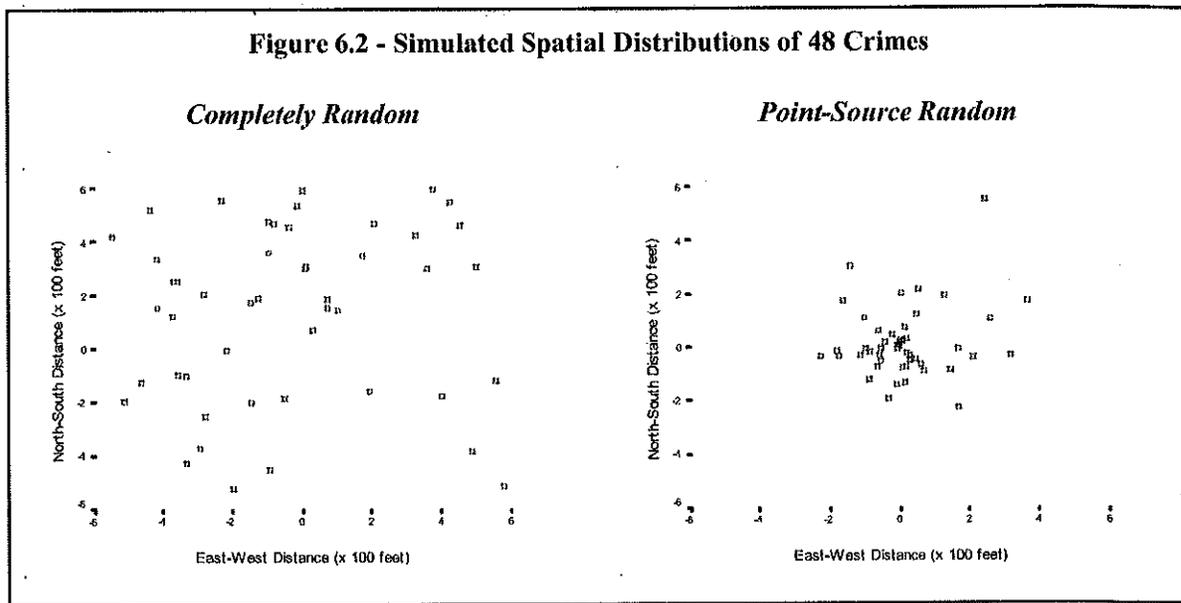
which, not surprisingly, is the *per capita* robbery rate. A very small (and unfortunate) proportion of these cases will experience a second robbery. For  $k=2$  robberies,

$$\text{Prob}(x = 2) = (0.0041)^2 e^{-0.0041} / 2! \approx 0.00002$$

and so forth. Using the same Poisson density function, one can calculate the proportion of individuals who experience  $k = 3, 4, \dots$  robberies. The proportions approach zero rapidly.

<sup>92</sup> Published in 1837 as *Recherches sur la probabilité des jugements en matière criminelle et matière civile*. Although one probably exists, no English translation is found on Amazon.com. In any event, the history and technical details are given in Haight (1967).

<sup>93</sup> The Poisson mean,  $\lambda$  (lambda), is estimated in the ordinary way. If there are  $\sum x$  crime incidents scattered over  $N$  city blocks in a given year, then  $\lambda = \sum x / N$  incidents per city block per year. To evaluate the Poisson density function for  $k=0$  crimes, remember that  $\lambda^0 = 0! = 1$ .



These probabilities apply to a randomly selected individual who spends a year wandering the streets of Dallas. This is inherently temporal or longitudinal way to think about crime rates. The same Poisson density function can be used to calculate the probabilities of inherently spatial phenomena, however. To illustrate, the simulated Poisson processes in Figure 6.2 have distributed or scattered 48 crime incidents across virtually identical 1,210,000 square-foot neighborhoods.<sup>94</sup> Although both Poisson distributions were generated with the same crime rate ( $\lambda=48$  crimes/area/year), in terms of their visual appearance, the two distributions are as different as night and day.

The left-hand distribution in Figure 6.2 is *completely random*.<sup>95</sup> Crime risk is distributed evenly across the blocks of this neighborhood. The right-hand distribution has the same crime rate but risk emanates from a point-source, hence the name *point-source random*.<sup>96</sup> As one moves away from the point-source, risk diminishes exponentially. Spatial distributions of this type rarely arise by chance alone: rather, they are typically generated by point-sources such as SOBs.

## 6.2 RISK VS. DISTANCE FROM THE POINT-SOURCE

Under simple Poisson assumptions, an area can be divided into a sample of parcels (i.e., “parcelated”) in any useful manner. If the sample is large, the division algorithm can be arbitrary or haphazard. The parcels can be a mix of trapezoids, squares, circles, or any irregular shape and no two parcels need have the same shape or area. The only requirement is that each parcel’s area be *calculable*.

<sup>94</sup> In this instance, since there are 48 crime incidents scattered over an area of 1,210,000 square feet,  $\lambda = 48/1,210,000 \approx 0.00004$  incidents per square foot.

<sup>95</sup> Diggle (2002) uses “complete spatial randomness” as a synonym for “Poisson.” The Cartesian ( $X_i, Y_i$ ) coordinates of the  $i^{\text{th}}$  *completely random* crime were drawn from a uniform distribution of the segment  $(-6,6)$ .

<sup>96</sup> The polar ( $\theta_i, \delta_i$ ) co-ordinates of the  $i^{\text{th}}$  *point-source random* crime were drawn from a uniform distribution of the segment  $(0,2\pi$  for  $\theta_i$ ) and an exponential distribution of the segment  $(0,6$  for  $\delta_i$ ). The polar co-ordinates ( $\theta_i, \delta_i$ ) translate into the Cartesian plane as  $X_i = \delta_i \cos(\theta_i)$  and  $Y_i = \delta_i \sin(\theta_i)$ .

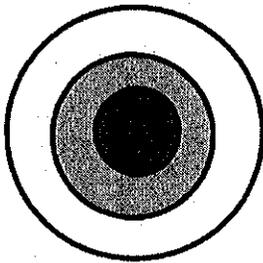
Given the sample of parcels, the ambient rates are calculated in the ordinary way. Wait a fixed period of time – say, one year. Count the number of crimes that occurred in each of the parcels and divide each parcel’s count by its area.

Formally, if  $CRIME_d$  denotes the number of crimes that occurred in the  $d^{th}$  parcel, then the ambient crime rate for the  $d^{th}$  parcel is

$$RATE_d = CRIME_d / AREA_d$$

where  $AREA_d$  is the surface area of the  $d^{th}$  parcel.  $RATE_d$  is a property of the  $d^{th}$  parcel. Unlike the *per capita* crime rates that we read about in newspapers, this ambient rate has no inevitable consequences for individuals. If  $RATE_d$  is particularly high, individuals can avoid the risk by avoiding the  $d^{th}$  parcel (and other “bad” neighborhoods).

**Figure 6.3 - Concentric Parcels Centered on a Point-Source**



$d = 1, 2, 3, \dots$  parcels

Radius of the  $d^{th}$  parcel =  $rd$  feet

Area of the  $d^{th}$  parcel =  $\pi (rd)^2 - \pi [r(d-1)]^2$  square feet

When ambient risk emanates from a point-source, a sensible division algorithm results in a set of concentric circular parcels as shown in Figure 6.3. Noise is a good model of ambient crime risk in many respects. Noise emanates from its point-source in all directions, for instance, and decays rapidly with distance. So does ambient crime risk when it emanates from a source such as, in this instance, an SOB. Like noise, ambient crime risk emanates in all directions and diminishes with distance from the point-source. In the real world, of course, an orderly emanation process will be distorted by buildings, walls, and other obstacles. If we have a reasonably large sample of point-sources, however, the effects of these obstacles will “average out,” revealing the expected ambient risk pattern.

To construct the risk-distance functions that were plotted in Figures 5.2, we first constructed concentric parcels around each of the fourteen SOB addresses and fourteen non-SOB control addresses. Each of the  $d=22$  concentric parcels were separated by radii of  $r=50$  feet. We then counted the number of crime incidents recorded in each the concentric parcels and, from these counts, estimated crude Poisson rates for the parcels. The final step consisted of regressing the rates on a set of explanatory variables. The regression results allow us to test the “best” risk-distance estimates for statistical significance.

### 6.3 THE POISSON REGRESSION MODEL

Our model is an application of a statistical model developed by Stiger and McCleary (1989) for a similar problem on an isolated site. To adapt the Stiger-McCleary model to the required multi-site case, we incorporated appropriate error terms for each of the sites. The resulting family of models are known, variously, as Poisson hierarchical (Bryk and Raudenbush, 2002), multi-level (Goldstein, 1995), or random co-efficient (Longford, 1993) models.

In its simplest form, the model equates the number of crime incidents in the  $i^{\text{th}}$  concentric parcel with the *area* of the parcel and the *distance* of the parcel from the SOB. That is, for any of our sites,

$$\lambda_i = \text{function}(\text{Area}_i, \text{Distance}_i) \quad i = 1, \dots, 22 \text{ concentric parcels}$$

To take advantage of maximum likelihood theory (McCullagh and Nelder, 1989.), we specify a conventional log-linear (“link”) function between  $\lambda_i$  and  $\text{Distance}_i$ . Thus,

$$\text{Log}(\lambda_i | \text{Area}_i) = \beta_0 + \beta_1 \text{Distance}_i + \tau_i \quad \text{where } \tau_i \sim N(\mu, \varphi)$$

The stochastic term  $\tau_i$  accounts for the effects of the many small measurement errors that accrue from various sources. Because there are 28 distinct sites, fourteen SOBs and fourteen non-SOB controls, we add another subscript to the simple model. Thus,

$$\text{Log}(\lambda_{ij} | \text{Area}_i) = \beta_0 + \beta_1 \text{Distance}_i + \tau_{ij} \quad j = 1, \dots, 28 \text{ sites}$$

Adding a second subscript allows for ( $i \times j = 22 \times 28 \Rightarrow$ ) 616 potentially distinct Poisson means. Hypothetically, the distinct Poisson means ( $\lambda_{ij}$ ) covary with the type of site (off-site SOB vs. on-site SOB vs. control), distance from the site, and interaction of distance and site-type. Finally, independent of all other considerations, to account for site-specific variance, each of the sites is allowed its own stochastic term. Conceptually, this can be written as

$$\beta_0 = \zeta_j \quad \text{where } \zeta_j \sim \Gamma(\beta_0, \psi)$$

The statistical significance of effect estimates is calculated from the ratio of the estimate to the error terms.

#### **6.4 ANALYTIC RESULTS**

Parameter estimates from XTPOISSON and XTNEGBIN in Stata Version 10 are reported in Table 6.4 for the rate of total crime per square mile. The column labeled “ $\beta$ ” in Table 6.4 reports unstandardized parameter estimates derived from the generalized estimating equation models (Zeger, Liang and Albert, 1988). Because these numbers are calibrated in the natural logarithm metric, they are difficult to interpret substantively. The exponentiated parameter estimates, reported in the column labeled “ $\exp(\beta)$ ,” address this problem. Whereas a  $\beta$ -value is difficult to interpret,  $\exp(\beta)$  is interpreted as the multiplicative effect of a variable on ambient crime risk. At any distance, e.g., ambient victimization risk at an SOB site is 7.13 times greater than at a control site.

The column labeled “ $s(\beta)$ ” in Table 6.4 reports the standard errors associated with a  $\beta$ -value. The column labeled “ $t(\beta)$ ” reports the ratio of a  $\beta$ -value to its  $s(\beta)$ . Under the null hypothesis, absolute values of  $t(\beta)$  larger than 2.0 are statistically significant at the conventional 95 percent confidence level. Thus, the parameter estimate for distance ( $\beta_1 = -0.000003$ ) is not significant ( $t(\beta_1) = -0.03$ ); while the parameter estimate for SOB sites ( $\beta_2 = 1.965$ ) is significant ( $t(\beta_2) = 10.37$ ). Multiple simultaneous hypotheses are tested with Wald statistics derived from the maximum likelihood algorithm.

Table 6.4 - Poisson Regression Parameter Estimates: Total Crime

|                                 | $\beta$   | $s(\beta)$ | $t(\beta)$ | $\exp(\beta)$ |
|---------------------------------|-----------|------------|------------|---------------|
| Constant ( $\beta_0$ )          | 7.0261    | 0.1351     | 52.01      | 1125.63       |
| Distance ( $\beta_1$ )          | -0.000003 | 0.0001     | -0.03      | .999997       |
| SOB ( $\beta_2$ )               | 1.9650    | 0.1894     | 10.37      | 7.13487       |
| SOB · Distance ( $\beta_3$ )    | -.0008    | 0.0002     | -4.73      | .999187       |
| Booths ( $\beta_4$ )            | -.9484    | 0.2992     | -3.17      | .387369       |
| Booths · Distance ( $\beta_5$ ) | .0002     | 0.0003     | 0.17       | 1.00019       |
| Constant ( $\beta_0$ )          | 7.0224    | 0.0879     | 79.88      | 1121.53       |
| SOB ( $\beta_2$ )               | 1.8208    | 0.1514     | 12.03      | 6.17712       |
| SOB · Distance ( $\beta_3$ )    | -.0008    | 0.0001     | -7.03      | .999209       |

Parameter estimates for distance ( $\beta_1$ ), viewing booths ( $\beta_4$ ), and the interaction of viewing booths with distance ( $\beta_5$ ) were tested for joint significance by assuming random effects. Under the null hypothesis,

$$H_0: \beta_1 = \beta_4 = \beta_5 = 0$$

the Wald statistic,

$$X^2 = 2.85$$

is distributed as  $\chi^2$  with three degrees of freedom. Since the probability associated with the value of  $X^2 > 2.85$  is 0.585,  $H_0$  cannot be rejected.

Parameter estimates for the more parsimonious model, reported in the bottom rows of Table 6.4, can be interpreted directly from the  $\exp(\beta)$  values. The value of  $\exp(\beta_0) = 1121.53$  total crimes per square mile is interpreted as the ambient victimization risk at control sites. The value of  $\exp(\beta_2) = 6.771$  is interpreted to mean that ambient victimization risk is 6.8 times higher at SOB sites. With each additional foot of distance from an SOB site, however, ambient risk diminishes by a factor of  $\exp(\beta_3) = .99921$ . Moving away from an SOB site, the magnitude of the secondary effect decays exponentially at the rate of  $\exp(\beta_3)$ . At a distance of  $Z$  feet, e.g., the magnitude of the secondary effect is  $\exp(Z\beta_3)$ .

## 6.5 CONCLUDING REMARKS: THE SAN ANTONIO RESULTS

The statistical analyses summarized in this section answer the threshold question of this report: Do off-site SOBs have crime-related secondary effects? Compared to randomly selected control sites, off-site SOB sites pose large, statistically significant ambient crime victimization risks. The fact that ambient risk diminishes exponentially with distance from the site of an SOB demonstrates the sites are neighborhood point-sources of crime victimization risk. Finally, although we reported statistical results for total crime, virtually identical effects are found for the three major crime categories.

As originally designed, our study anticipated contrasting the risk-distance functions of on-site and off-site SOBs. As it turns out, however, San Antonio has relatively few examples of the "commercially natural, if not universal" on-site SOB subclass. Furthermore, because one of the three

examples is located near an off-site SOB, its independent effect is lost. The dearth of on-site SOBs in San Antonio may be an unintended consequence of *Encore Videos*. Whatever the cause, it required a modification of our original design. This modification had no consequences for the threshold question.

## 7. SUMMARY AND CONCLUSIONS

When work on this study began in January, 2006, the authority of cities and counties to regulate off-site SOBs was under serious attack. Off-site SOBs had challenged the legitimacy of government regulations on two grounds. First, the extensive secondary effects literature that governments had relied upon did not report effects that could be attributed uniquely to the off-site subclass. Second, commonsense criminological theories suggested that off-site SOBs did not generate the same pernicious effects that had been associated with the broader SOB class.

When a Fifth Circuit panel seemed to buy both arguments in *Encore Videos*, some governments stopped enforcing regulations against off-site SOBs. Five years later, however, in *H and A Land Corp.*, another Fifth Circuit panel upheld a Kennedale ordinance whose secondary effects evidence included studies of off-site SOBs. At present, the most acute phase of the attack on the authority of governments to regulate off-site SOBs has passed.

*Encore Videos* had a profound impact on the way criminologists think about secondary effects. The first and most obvious impact is the addition to the literature of studies documenting the adverse secondary effects of off-site SOBs. Three such studies were reviewed in Section 4 of this report:

- When an “adult superstore” opened on an interstate highway off-ramp, total crime in a rural Illinois village rose by 60 percent. When the SOB closed two years later, total crime in the village dropped by 60 percent. A report of this case study has been published in a peer-reviewed journal (McCleary, 2006).
- Following the opening of a “lingerie boutique” in Sioux City, IA, total crime within 500 feet of site doubled. Total crime in a contiguous control circle was unchanged. A report of this case study was read at the national meeting of a scholarly association (McCleary and Weinstein, 2007) and is under review at a peer-reviewed journal.
- An updating of the 1977 Los Angeles secondary effects study found that both on-site and off-site SOBs posed large, significant public safety hazards. Risk-distance functions for both subclasses demonstrate the ambient victimization risk seeps out into the surrounding neighborhood for several blocks.

In addition to these three secondary effects studies

- An intensive case study of San Antonio SOBs, based on the risk-distance method developed for the 2007 Los Angeles study, found that ambient victimization risk extends for at least 1,000 feet in every direction of an off-site SOB.

In addition to extending the empirical secondary effects literature to the off-site SOB subclass, *Encore Videos* forced criminologists to rethink the fundamental mechanisms of their secondary effects theory. Relying on common sense, plaintiffs argued that the routine activity theory of hotspots did not apply to off-site SOBs because:

- The routine activities that occur at off-site SOBs are different than the routine activities that occur at on-site SOBs. Whereas on-site patrons linger inside, off-site patrons drive up; run in; purchase; run out; and drive off.
- Whereas virtually all on-site patrons are lone males, a significant proportion of off-site patrons are females and/or male-female couples.

But in fact, the routine activities at on-site and off-site are indistinguishable. On-site and off-site patrons spend similar amounts of time inside and outside the SOB; and like on-site patrons, off-site patrons engage in the same expected stigma management behaviors. The evidence suggests, furthermore, that there are few differences between on-site and off-site patrons. Although female

patrons are not uncommon at off-site SOBs, most off-site patrons are males. This is particularly true in the overnight hours when ambient victimization risk is at its highest.

*Encore Videos* challenged criminologists to re-examine the theory of secondary effects. The result of this re-examination is a stronger theory that applies equally to on-site and off-site SOBs; to rural, suburban, and urban settings; and to a range of business models. The theory is corroborated, finally, by empirical studies demonstrating that the typical off-site SOB – a store that sells sexually explicit media and miscellaneous adult merchandise exclusively for off-site use – attracts the same soft-target patrons, causing thereby the same crime-related secondary effects found for on-site SOBs.

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**APPENDICES**

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**APPENDIX A: TABLE OF AUTHORITIES – SURVEY OF APPRAISERS REPORT**

**Cases**

*Allstars v. City of San Antonio*, 2003 U.S. Dist. LEXIS 8517 (W.D. Tex. May 19, 2003).....28

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## **APPENDIX C: 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.

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- (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.