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RECENT DEVELOPMENTS REGARDING LOCAL REGULATION OF SEXUALLY ORIENTED BUSINESSES

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The North Carolina General Assembly recently enacted major legislation to clarify the options available to local governments regarding regulation of sexually oriented businesses. There has also been significant on-going litigation on this topic, both within North Carolina and nationally. This bulletin summarizes these recent developments.[1]

N.C. Legislation

A variety of factors converged in the past several years to prompt legislative attention to the question of local regulation of sexually oriented businesses.

In most of the state's larger cities, controversies and litigation have arisen over the location and operation of adult businesses. A bookstore in Charlotte with a substantial amount of adult material contested the city's definition of adult businesses.[2] In Raleigh, a topless bar proposed to be located in a prominent location near the Raleigh-Durham International Airport challenged the city's denial of approval[3] and an adult cabaret downtown challenged application of adult business standards to a club featuring female impersonators.[4]

1. For more comprehensive background information and a discussion of earlier cases, see DAVID W. OWENS, REGULATING SEXUALLY ORIENTED BUSINESSES, Special Series No. 15, January 1997.

2. South Blvd. Video & News, Inc. v. Charlotte Zoning Bd. of Adjustment, ___ N.C. App. ___, 498 S.E.2d 623 (1998).

3. Steakhouse, Inc. v. City of Raleigh, No. 5:97-CV-177-BO(1), 1997 U.S. Dist. LEXIS 16065 (E.D. N.C. 1997).

4. Carolina Spirits, Inc. v. City of Raleigh, 127 N.C. App. 745, 493 S.E.2d 283 (1997), *review denied*, 347 N.C. 574, 498 S.E.2d 380 (1998).

A nonconforming topless bar in Greensboro challenged the city's limits on its expansion.[5] Durham's restriction of a topless bar adjacent to the Research Triangle Park was challenged. Other highly publicized controversies involved facilities that were heretofore "exotic" for North Carolina in more than one sense, including a sado-masochistic parlor in Raleigh and a nude juice bar and erotic car wash in the Triad.

Significantly, adult business issues also have arisen in the state's smaller cities, rural areas, and resort communities. A federal court ordered that a topless bar be allowed to open in a restaurant in Roanoke Rapids. A widely publicized topless dance club opened adjacent to I-95 in rural Harnett County.[6] Onslow County's authority to adopt restrictions as a general police power ordinance was challenged by a topless bar and its dancers.[7] Topless bars were opened or proposed in a number of the state's low density, "family oriented" resort areas, ranging from Currituck County at the northern entrance to the Outer Banks to Calabash on the southern coast and to Maggie Valley in the mountains.

As these and similar uses were proposed, an increasing number of local governments enacted regulations of their location and operation. Not surprisingly, litigation often ensued. One result of the litigation was to identify the uncertainty regarding the exact scope of authority of local governments to regulate sexually oriented businesses. A federal district court held the state statute on adult establishments preempted any local separation requirements, a decision that was subsequently vacated by the Fourth Circuit Court of Appeals on the basis that this was an unsettled area of state law. The state court of appeals subsequently held this statute preempted local dispersion requirements for adult businesses.[8]

In November, 1996, Sen. Marc Basnight, the President Pro Tem of the Senate, organized a town meeting in Nags Head to discuss the authority of local governments to regulate sexually oriented businesses and the need for potential state legislation on the subject. The discussion at the meeting included reviews of current state laws, constitutional protections for free speech, and citizens' concerns about the impacts of adult businesses. Early in the 1997 session of the General Assembly, Sen. Basnight asked the chair of the Senate Judiciary Committee, Sen. Roy Cooper, to further review this question and to develop legislative proposals to address identified concerns. Sen. Cooper introduced Senate Bill 452 (S. 452) in March, 1997 to clarify state law on the question of the scope of local regulatory authority regarding sexually oriented business and to provide additional options for localities concerned with these issues. The bill was adopted by the state Senate in April 1997 and the state House of Representatives in July 1998.[9] It became effective upon signature by Governor Hunt on July 15, 1998.[10] The key provisions of the bill are summarized below.

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5. Fantasy World, Inc. v. Greensboro Bd. of Adjustment, ___ N.C. App. ___, 496 S.E.2d 825 (1998). The court ruled that expansion of the floor space devoted to a nonconforming sexually oriented business was a violation of the zoning ordinance. A portion of the structure at issue had been lawfully operated as a topless bar and the remainder operated as a restaurant. After adoption of separation requirements for adult businesses that rendered the use nonconforming, the restaurant closed. After a period of inactivity, the owner sought to use the former restaurant portion of the building for an adult bookstore and/or adult mini motion picture theater. The ordinance explicitly prohibited increasing the floor area devoted to nonconformities, which the court held prohibited the expansion

6. The facility installed a number of highly visible billboards along this heavily traveled segment of Interstate 95.

7. Maynor v. Onslow County, 127 N.C. App. 102, 488 S.E.2d 289, *appeal dismissed*, 347 N.C. 268, 493 S.E.2d 458, *review denied*, 347 N.C. 400 (1997). The ordinance was challenged by The Doll House, a nonconforming adult business. The court held this was a valid general police power regulation to protect the public health, safety, and welfare under G.S. 153A-121 and dismissed constitutional challenges that the ordinance was vague or overly broad. In Onslow County v. Moore, ___ N.C. App. ___, 499 S.E.2d 780 (1998) the court confirmed that minimum separation requirements for adult businesses could be adopted as either zoning requirements or as a general police power ordinance. These cases are the latest in a long-running series of cases from Onslow County on various aspects of regulating massage parlors, escort services, and adult businesses.

8. Onslow County v. Moore, ___ N.C. App. ___, 499 S.E.2d 780 (1998). *See also* Onslow County v. Moore, 127 N.C. App. 546, 491 S.E.2d 670 (1997), *vacated and remanded for consideration on the merits*, 347 N.C. 672 (1998).

9. The bill had broad legislative support. It was approved unanimously in the Senate and by a 111-1 margin in the House.

10. S.L. 1998-46. Other state legislatures have also recently enacted statutes to remove state preemption of local regulation of sexually oriented businesses. *See, e.g.*, 1998 Cal. Legis. Serv. Ch. 294, adopted in August, 1998, removing state preemption of local regulation of live nude entertainment. This California statute also explicitly provides that the local regulations must be consistent with the Constitution.

Preemption

One of the principal objectives of S. 452 was to remove any question on whether the legislature intended to allow local regulation of sexually oriented businesses. Local governments may do so even though the state government also continues to regulate certain aspects of adult businesses.

Several judicial opinions had concluded that state statutes preempted local regulation. The statute limiting adult establishments to one per structure had been held to preclude local separation requirements.[11] The statute on indecent exposure had been held to limit regulation of topless dancers.[12] Statutes regulating alcohol sales had been held to limit local regulation of bars.[13]

S. 452 amended several key statutes to provide expressly that these statutes do not preclude local regulation of sexually oriented businesses. These statutes include those prohibiting obscenity (G.S. 14-190.1), prohibiting indecent exposure (G.S. 14-190.9), limiting adult establishments to one per structure (G.S. 14-202.11), and regulating facilities with alcohol sales (G.S. 18B-904). Importantly, each of the amended statutes explicitly provides that local regulations must be consistent with constitutional protections afforded free speech.

Clarification that state laws do not prohibit local regulation clears the way for a variety of provisions that might otherwise have been invalid. Local governments can, for example, set specific hours of operation for adult facilities with alcohol licenses, rather than being limited to the uniform 2:00 a.m. time established by state ABC closing laws. There is no longer a question as to the validity of dispersal requirements between sexually oriented businesses.

Range of Regulatory Options

S. 452 creates G.S. 160A-181.1 to set out the range of regulatory options available to cities and counties in regulating sexually oriented businesses. These regulations are to be directed toward the reduction of adverse secondary impacts of these businesses. Regulations can include restrictions on location and operation of the facilities, licensing requirements, and reasonable fees. The regulations can be included in zoning regulations, licensing requirements, or other appropriate local ordinances.

Among the specific regulatory tools authorized by the law are:

1. Limits on location, including restrictions to specified zoning districts and minimum separation requirements;
2. Limits on operations, including restrictions on hours of operation, requirements that all viewing booths be open and visible to managers, limits on exterior advertising and noise, restrictions on ages of patrons and employees, requirements on separations between patrons and performers, and clothing requirements for masseuses, servers, and entertainers;
3. Licensing, disclosure, and registration requirements, including restricting ownership or employment of those who have criminal records for offenses reasonably related to the legal operation of a sexually oriented business;
4. Moratoria on new facilities or expansions while studies are conducted and ordinances debated;[14]
5. Amortization requirements for nonconforming sexually oriented businesses; and
6. Interlocal agreements whereby local governments within an interrelated geographic area can provide alternative sites for sexually oriented businesses without the necessity of each unit of government providing sites.[15]

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11. Onslow County v. Moore, ___ N.C. App. ___, 499 S.E.2d 780, 787-88 (1998). *See also* K. Hope, Inc. v. Onslow County, 911 F. Supp. 948, 952-54 (E.D. N.C. 1995), *vacated*, 107 F.3d 866 (4th Cir. 1997).

12. State v. Tenore, 280 N.C. 238, 185 S.E.2d 644 (1972). The statute prohibits exposure of one's "private parts" to members of the opposite sex in a public place (which includes a private club to which the public is invited). The court acknowledged that a city or county can adopt "a higher standard of conduct" in its jurisdiction. However, the case held that female breasts were not "private parts" and local governments could not make an offense of the identical conduct addressed by the state statute.

13. In re Melkonian, 85 N.C. App. 351, 355 S.E.2d 503, *review denied*, 320 N.C. 631, 360 S.E.2d 91 (1987).

14. In Phillips v. Borough of Keyport, 107 F.3d 164 (3rd Cir. 1997), *cert. denied*, 118 S.Ct. 336 (1997), the court held delays in permitting for a sexually oriented business based on an aversion to the content of the material could lead to recovery on a substantive due process basis, but a moratorium to allow time to study secondary impacts would not. See also Steam Heat, Inc. v. Silva, 646 N.Y.S.2d 537 (N.Y. App. Div. 1996), where the court upheld refusal to renew permits for an adult business during a one year moratorium.

15. In Schad v. Borough of Mount Emphaim, 452 U.S. 61, 75-77 (1981), the Supreme Court indicated this was a permissible option. One federal district court recently held

Local governments are also authorized to adopt their own detailed definitions of "sexually oriented businesses" to set precisely the scope of local regulations.

S. 452 also adds a new enforcement tool for local governments. It amends G.S. 19-1 to allow this public nuisance statute to be used against those businesses that repeatedly violate local ordinances on sexually oriented businesses in such a way as to create adverse secondary impacts. This is a powerful tool that can be used by private citizens as well as units of government.[16] It allows injunctions to prohibit continued misuse of the building[17] and allows attorney fees and other costs to be awarded to the prevailing party.[18]

Constitutional Foundation

S. 452 does not relieve local governments of the need to establish a strong constitutional foundation for any regulation of sexually oriented businesses. The U.S. Supreme Court has held that non-obscene but sexually explicit speech is entitled to First Amendment protection and any local regulation must be consistent with those constitutional limitations.

It is a political reality that sexually oriented businesses are unwelcome in many communities. Citizens and local elected officials alike may have strong opposition to the content of sexually explicit performances and materials. Such concern, however, can not be the basis of regulation. Sexually explicit but non-obscene material is protected by the First Amendment's free speech guarantees. Consistent with these cases,[19] S. 452 notes that the purpose of local regulation must be to prevent undue secondary impacts from the inappropriate location or operation of sexually oriented businesses. The regulations must be directed toward preventing negative impacts on neighboring property values and reducing the potential for increased crime, rather than toward suppression of protected speech.[20]

A local government should undertake the following steps to establish a proper constitutional foundation for its regulations of sexually oriented businesses. The courts have held that cities and counties have the burden of establishing that these steps have been undertaken.[21] The steps include:

1. Study the potential adverse secondary impacts to be prevented.[22] This does not require a

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that the availability of potential sites in an adjoining municipality does not provide adequate alternative avenues for expression. Wolfe v. Village of Brice, 997 F. Supp. 939, 944-45 (S.D. Ohio 1998).

16. G.S. 19-2.1.

17. G.S. 19-1.4 also provides that after notice, subsequent owners are liable for violations in the same manner as the one who first created the public nuisance. In State v. Mercer, 128 N.C. App. 371, 496 S.E.2d 585 (1998), the operators of sexually oriented businesses in Onslow County sought to have such a nuisance action brought by the state dismissed because cases involving the same defendants were pending alleging violations of the county's adult business ordinance. The court held that the nuisance action violation involved different subject matter, issues, and potential relief, and was thus not precluded by the pending litigation regarding ordinance violations. G.S. 153A-123(d) and 160A-175(e) also authorize use of injunctions to enforce county and city ordinances.

18. G.S. 19-8.

19. City of Renton v. Playtime Theatres, Inc, 475 U.S. 41 (1986); Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976).

20. Most courts continue to hold that regulations with a predominant concern of reducing adverse secondary impacts are deemed to be "content neutral" for First Amendment purposes. Several recent decisions have acknowledged that many regulations are indeed content based (imposing more stringent regulations solely on the basis of the types of books or videos sold or type of entertainment provided), but have concluded that sexually oriented businesses simply have a lower degree of protection than other protected speech. In Richland Bookmart, Inc. v. Nichols, the federal court of appeals for the Sixth Circuit termed content neutrality in these cases a "legal fiction," noting it would be more accurate to state that this terminology stood only for the conclusion that the challenged regulation was constitutionally valid. 137 F.3d 435, 438-41 (6th Cir. 1998). The Supreme Court, however, continues to emphasize the necessity of a secondary impacts rationale for these and similar regulations. *See, e.g.,* Reno v. American Civil Liberties Union, 117 S.Ct. 2329, 2342 (1997).

21. Phillips v. Borough of Keyport, 107 F.3d 164 (3rd Cir. 1997), *cert. denied*, 118 S.Ct. 336 (1997). The court held that the burden at trial is on the borough to specify the interests being advanced, the secondary effects being ameliorated, the evidence available to support a secondary impacts basis for the restrictions, and that adequate alternative avenues of expression are available. Adoption of legislative findings alone is insufficient to establish these. *See also* Nakatomi Investments, Inc. v. City of Schenectady, 949 F. Supp. 988 (N.D. N.Y. 1997) (burden is on the city to establish that the regulation furthers a substantial governmental interest).

22. Failure to document some consideration of a secondary impacts rationale for the regulation continues to lead to invalidation of regulations. *See* Books, Inc. v. Pottawattamie

formal technical study, but some thoughtful, explicit consideration of these impacts while the regulations are being framed is needed. This can include a review of studies conducted in other localities, reports from the planning, police, and other local staff on potential impacts, and testimony from concerned citizens at public meetings and hearings.

2. Conduct an analysis of the adequacy of sites available for location of sexually oriented businesses. The regulations can not have the practical effect of totally excluding constitutionally protected speech. The adopting unit of government needs to establish prior to adoption that the ordinance will leave reasonable alternative avenues for expression open. The sites available do not have to be those most desirable or profitable for the owners, nor do they have to be currently available for sale or rent. But they do need to be sites that could realistically be put to some commercial use and be of a sufficient number to meet anticipated demand.
3. Consider how each proposed regulation will advance the purpose of reducing adverse secondary impacts. Regulations need to be narrowly tailored to meet legitimate objectives.
4. Establish clear and definite standards for decisions and set adequate procedural safeguards to ensure prompt decisions and judicial review if permits or licenses are required prior to operation.

County, 978 F. Supp. 1247 (S.D. Iowa 1997) (where record is "totally devoid of any purported justification whatsoever" regarding secondary impacts, ordinance is invalid); Nakatomi Investments, Inc. v. City of Schenectady, 949 F. Supp. 988 (N.D. N.Y. 1997) (invalidating ban on topless dancing as based on moral concerns rather than amelioration of secondary impacts); Steverson v. City of Vicksburg, 900 F. Supp. 1 (S.D. Miss. 1994) (invalidating total ban on topless dancing in part due to lack of documentation of secondary impacts); Secret Desires Lingerie, Inc. v. City of Atlanta, 470 S.E.2d 879 (Ga. 1996) (invalidating ordinance where there was no documentation of consideration of secondary impacts); T&D Video, Inc. v. City of Revere, 670 N.E.2d 162 (Mass. 1996) (affirming preliminary injunction prohibiting enforcement of ordinance where there was no evidence of consideration of secondary impacts). Where some effort to examine secondary impacts is presented, the courts have not imposed particularly rigorous requirements for the scope of the studies. *See, e.g.*, Ben Rich Trading, Inc. v. City of Vineland, 126 F.3d 155 (3rd Cir. 1997) (holding consideration of testimony before state legislative committees and from other states considering similar restrictions was sufficient); Centerfold Club, Inc. v. City of St. Petersburg, 969 F. Supp. 1288 (M.D. Fla. 1997) (holding that consideration of studies from other cities, along with reports from city staff and citizens, established an adequate basis of studies); 1995 Venture I, Inc. v. Orange County, 947 F. Supp. 271 (E.D. Texas 1996) (holding testimony and letters from concerned citizens, along with a review of a nearby jurisdiction's experience, to be an adequate basis for establishing a secondary impacts rationale); Tee & Bee, Inc. v. City of West Allis, 936 F. Supp. 1479 (E.D. Wis. 1996) (consideration of studies elsewhere in the country adequate); Quetgles v. City of Columbus, 491 S.E.2d 778 (Ga. 1997) (consideration of other cities' studies on adverse secondary impacts was sufficient); Di Ma Corp. v. City of St. Cloud, 562 N.W.2d 312 (Minn. Ct. App. 1997), *review denied*, ___ N.W.2d ___ (1997) (accepting use of citizen comments, cases elsewhere, and state Attorney General's report to establish secondary impacts).

Recent Litigation Regarding Management Options

The courts in North Carolina and around the country have continued to review a variety of local government regulations of sexually oriented businesses. The overview below summarizes some of the more notable judicial developments over the past few years regarding management tools used by local governments to regulate sexually oriented businesses.

Adequacy of Alternative Sites Available

A local ordinance regulating sexually oriented businesses must provide reasonable alternatives for the dissemination of protected speech. It is not permissible to completely prohibit all sexually oriented businesses.

Courts examine the application of the all of the restrictions imposed and determine whether the regulations leave realistic sites available within the jurisdiction's commercial real estate market that could be used for protected adult speech.[23] There is no need to

23. *See, e.g.*, Lady J. Lingerie v. City of Jacksonville, 973 F. Supp. 1428 (M.D. Fla. 1997) (while two sites allowed by right would be inadequate, the availability of ninety-three additional sites available with a special use permit provide reasonable alternative avenues); Condor, Inc. v. Board of Zoning Appeals, 493 S.E.2d 342 (S.C. 1997) (twenty-one potential sites in industrial zoning districts adequate).

show that adult uses could be profitably operated at alternative sites, that the sites are currently being offered for sale or rent, or that owners are willing to make them available for adult uses.[24] However, a site cannot be considered to be "available" if the costs of improvements necessary to make the site suitable for any commercial use are so high as to be prohibitive.[25]

Courts increasingly examine the number of potential sites available as opposed to looking at a percentage of the city's land area.[26] Of particular importance is whether the potential supply of sites is proportional to estimated demand for sites.[27] Even a relatively small number of potentially available sites will be deemed adequate if that clearly exceeds past demand for sites in that locality. Some courts have also examined the ratio of the number of potential sites relative to the city's total population as an indicator of whether a "reasonable" number of alternatives are available.[28] This suggests that once a local government makes a "fair share" of its jurisdiction available, additional potential sites are not required.

Where there are no sites available when the totality of the jurisdiction's restrictions are applied, the regulation is invalid.[29] Also, an ordinance that sets

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24. If it can be established that site availability is in fact a sham, the ordinance would be invalid. The small town of Tynsborough, Mass., limited sexually oriented businesses to a zoning district that only included five lots in an industrial park and all five lots were owned by an outspoken opponent of sexually oriented businesses. While finding these lots to be facially "available," the court noted that if restrictive covenants were placed on the lots to prohibit their use for sexually oriented businesses, or if evidence were presented that genuine reasonable offers to purchase the lots had been rejected due to the nature of the business proposed, the sites would be deemed unavailable. D.H.L. Assocs., Inc. v. O'Gorman, 6 F. Supp.2d 70, 78 (D. Mass. 1998).

25. Centerfold Club, Inc. v. City of St. Petersburg, 969 F. Supp. 1288, 1302-04 (M.D. Fla. 1997).

26. Some courts still base the analysis on the proportion of the city available for location of sexually oriented businesses. *See, e.g.*, Z. J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683 (10th Cir. 1998) (upholding ordinance limiting sexually oriented businesses to industrial zoning districts that comprise almost eleven percent of the city's land area).

27. In Buzzetti v. City of New York, 140 F.3d 134 (2d Cir. 1998) the court noted that allowing for approximately 500 potential sites in a city where there were approximately 177 adult businesses currently operating (this constituting some eleven percent of the city land area) was sufficient. The New York courts reached the same conclusion. Stringfellow's of New York, Ltd. v. City of New York, 694 N.E.2d 407 (N.Y. 1998). A subsequent federal court challenge was dismissed as the issue had already been litigated in the state court action. Hickerson v. City of New York, 146 F.3d 99 (2d Cir. 1998). In North Avenue Novelties, Inc. v. City of Chicago, 88 F.3d 441 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 684 (1997), the court held the number of potential locations available relative to the number of existing facilities was a critical inquiry, ruling that adequate alternatives were available, given twenty-two to fifty-six potential sites identified, thirty-five uses currently operating, and only four or five new inquiries to the city each year. Similarly, in 3570 East Foothills Blvd. Inc. v. City of Pasadena, 912 F. Supp. 1257 (C.D. Cal. 1995), *aff'd*, 99 F.3d 1147 (9th Cir. 1996), the court held that in light of the predominantly residential character of the city and the fact that only one adult business was currently located in the city, a jury could find at that making at least eleven but not more than twenty-six individual sites available was an ample number of alternative sites. In a subsequent proceeding, the court held that even if only eleven to sixteen sites were available for simultaneous operation, this was adequate given there was historically only one adult business in the city and the plaintiff was the only person to have applied for an additional facility in ten years. 3570 East Foothills Blvd., Inc. v. City of Pasadena, 980 F. Supp. 329, 337-43 (C.D. Cal. 1997). However, in Young v. City of Simi Valley, 977 F. Supp. 1017 (C.D. Cal. 1997), the court found there were inadequate alternative sites available for adult uses when only four potential sites were available given the 1,000 feet separations required.

28. Centerfold Club, Inc. v. City of St. Petersburg, 969 F. Supp. 1288 (M.D. Fla. 1997) (potential availability of nineteen sites for adult businesses in a city of 238,726 is inadequate); BBI Enterprises, Inc. v. City of Chicago, 874 F. Supp. 890, 896 (N.D. Ill. 1995) (the preferred method of determining the reasonableness of alternative sites is an examination of the number of sites potentially available relative to the city's population).

29. In Wolfe v. Village of Brice, 997 F. Supp. 939 (S.D. Ohio 1998) the combination of a 1,000 feet separation from churches and schools and a 300 feet separation from residential zones left no sites available, so the court held the restrictions invalid. In C. R. of Rialto, Inc. v. City of Rialto, 964 F. Supp. 1401 (C.D. Cal. 1997), the city had two locational restrictions on adult business: (1) a requirement that they be 1,000 feet from a residential district; and (2) limiting their location to two specified zoning districts. There were no sites in the city that could meet both criteria, so the court invalidated the ordinance as not providing adequate alternative avenues of expression. The court rejected the city's request to sever the two requirements and invalidate only the separation requirement, leaving the district requirement in force. The court held that neither section was facially invalid (it being the combined effect of the two that left no sites available), so it would be inappropriate for the judiciary to

minimum setbacks from sensitive land uses (such as places of worship, schools, playgrounds, or residences) and allows a new sensitive land use to be established during the pendency of consideration of an adult use application, thereby "knocking out" the pending adult use, has been held invalid.[30]

Special/Conditional Use Permit Requirements

Many local governments allow adult uses by right in specified zoning districts provided the objective standards set in the ordinance are met. Other local governments require a special or conditional use permit for all adult businesses in order to provide a detailed case by case review for compliance with standards. Such an approach may be unconstitutional.

A special or conditional use permit (as well as adult business license requirements) can effectively serve as a prior restraint on speech protected by the First Amendment. Any prior restraint—a government regulation that restricts the speech before it is made—must have clear and definite standards for decisions and must have adequate procedural safeguards to ensure prompt decisions and judicial review.[31]

Some courts have held that a special or conditional use permit requirement that applies to all similar uses (for example, all bars or retail establishments, not just topless bars or adult bookstores) is a content neutral land use rule that is not subject to a prior restraint analysis.[32] As noted below, however, a number of other courts have applied a prior restraint analysis even to these requirements.

The principal problem with employing a special or conditional use process to regulate adult businesses is the discretionary nature of the standards to be used. If the standards to be applied are objective, there is no need to require a special or conditional use permit.[33] If the standards involve judgment and discretion, they may well be invalid if the special use permit requirement is considered a prior restraint. Standards that have been invalidated as too broad include:

- that the use be "essential or desirable" and not "detrimental";[34]
- that the use be consistent with the purpose of ordinance, its appearance not have an adverse effect on adjacent properties, and it be reasonably related to existing land uses;[35]
- that the site be adequate in size, not adversely affect a place of worship or park, be sufficiently buffered from residential uses, not have an exterior inconsistent with nearby commercial uses, be consistent with the comprehensive and other city

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choose one of the two to leave in effect. *See also* Town of Wayne v. Bishop, 565 N.W.2d 201 (Wis. Ct. App. 1997), *review denied*, 568 N.W.2d 297 (1997) (invalidating a zoning ordinance that limited sexually oriented businesses to a B-2 zoning district and the town had no B-2 districts mapped).

30. Young v. City of Simi Valley, 977 F. Supp. 1017 (C.D. Cal. 1997).

31. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) (invalidating ordinance regulating sexually oriented businesses due to failure to provide a time limitation within which a decision must be made); Freedman v. Maryland, 380 U.S. 51 (1965) (licensing schemes that are a prior restraint on protected speech must contain adequate procedural safeguards).

32. Marty's Adult World of Enfield, Inc. v. Town of Enfield, 20 F.3d 512, 515 (2nd Cir. 1994) (holding that special use permit review required for all business was valid as applied to adult bookstore and not subject to the strict scrutiny and procedural safeguards required by *Freedman*). Also, in denying a preliminary injunction relative to the application of Raleigh's adult use regulations to a proposed topless bar, the court noted that application of a special use permit requirement also applicable to other similar non-adult establishments may not constitute a prior restraint. Steakhouse, Inc. v. City of Raleigh, No. 5:97-CV-177-BO(1), 1997 U.S. Dist. LEXIS 16065 (E.D. N.C. 1997). *See also*, Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986) (upholding a New York statute that allowed closure of premises found to be used as a place of prostitution as applied to an adult book store, ruling that establishments that include protected First Amendment speech are not exempt from other legitimate police regulations). In his *Barnes* concurrence, Justice Scalia proposed such an approach, analogous to the judicial treatment of general laws affecting religious conduct. 501 U.S. at 579.

33. Mom N Pops, Inc. v. City of Charlotte, 979 F. Supp. 372 (W.D. N.C. 1997). Adult uses were permitted by right in several zoning districts provided specified minimum separation and objective operational standards were met. The court held this was not a prior restraint as neither the zoning administrator nor the privilege license issuer exercised any discretion in review of applications. *Accord*, Santa Fe Springs Realty Corp. v. City of Westminster, 906 F. Supp. 1341 (C.D. Cal. 1995).

34. C. R. of Rialto, Inc. v. City of Rialto, 975 F. Supp. 1254 (C.D. Cal. 1997).

35. Bukaka, Inc. v. County of Benton, 852 F. Supp. 807 (D. Minn. 1993). *See also* Franklin Equities, L.L.C. v. City of Evanston, 967 F. Supp. 1233 (D. Wyo. 1997) (requirement that use be compatible with surrounding uses invalid).

plans, and, be adequately served by highways of sufficient width and other public services;[36] and,

- that the council may impose "more restrictive requirements and conditions on applications than are provided in the Zoning Code."[37]

If a special or conditional use permit requirement is subject to a prior restraint analysis, many of the general standards commonly used in North Carolina zoning ordinances could not be employed. For example, standards that the use be compatible with the surrounding neighborhood or that it not cause a significant adverse impact on neighboring property values would likely involve too much discretion to survive prior restraint analysis.

In addition to definite standards, a regulation that is a prior restraint must provide for both prompt decisions and prompt judicial review, which often can not be assured with a special or conditional use process.[38]

An alternative that may hold some promise for local governments that propose to use a special or conditional use review would be to allow protected speech in some geographic areas or in certain circumstances by right and by special/conditional use in other situations. For example, New Haven, Connecticut, adopted an ordinance that required all adult cabarets to obtain a special exception permit, but allowed topless dancing as a use by right in other adult establishments that do not also provide food or drink. The court held that since the expressive speech involved (topless dancing) could be conducted without a special exception permit in part of the jurisdiction, requiring a special exception permit in other parts of the city is a content neutral time, place and manner regulation, and a prior restraint analysis would be inappropriate.[39]

Alcohol Prohibitions

An increasingly popular management tool used by local governments is a prohibition of alcohol sales at sexually oriented businesses. The validity of such restrictions was called into question by *44 Liquormart, Inc. v. Rhode Island*, [40] a 1996 Supreme Court case striking down restrictions on advertising retail prices of alcoholic beverages. The Court had previously implied[41] that additional restrictions on adult enter-

36. Santa Fe Springs Realty Corp. v. City of Westminster, 906 F. Supp. 1341 (C.D. Cal. 1995); Dease v. City of Anaheim, 826 F. Supp 336 (C.D. Cal. 1993).

37. Lady J. Lingerie, Inc. v. City of Jacksonville, 973 F. Supp. 1428 (M.D. Fla. 1997).

38. Books, Inc. v. Pottawattamie County, 978 F. Supp. 1247 (S.D. Iowa 1997) (licensing scheme for adult businesses is an invalid prior restraint when it has no time period for rendering a final decision); C. R. of Rialto, Inc. v. City of Rialto, 975 F. Supp.1254 (C.D. Cal. 1997) (conditional development permit is invalid prior restraint if no time limit for decision is imposed); Franklin Equities, L.L.C. v. City of Evanston, 967 F. Supp. 1233 (D. Wyo. 1997) (required decision within forty-five days of "closing of record" inadequate time limitation); Bukaka, Inc. v. County of Benton, 852 F. Supp. 807 (D. Minn. 1993) (no time period for decisions presents likely unlawful prior restraint). *See also* Ino Ino, Inc. v. City of Bellevue, 937 P.2d 154 (Wash. 1997) (provision allowing topless dancing only in the presence of a licensed manager invalid as an unlawful prior restraint due to lack of temporary licensing during the fourteen day license processing period). By contrast, in Florida Video Express, Inc. v. Orange County, 983 F. Supp. 1091 (M.D. Fla. 1997), the court upheld a licensing requirement for adult business as meeting the requirements imposed on prior restraints in that it mandated a decision on license applications within 30 days and provided for immediate judicial review by right. Also, in denying a preliminary injunction to stay enforcement of a Raleigh special use permit requirement for a topless bar, the court noted that if this were reviewed as a prior restraint, there were adequate provisions for a timely decision and prompt judicial review. Raleigh's rules provided for a decision on the special use permit at the next regularly scheduled board of adjustment meeting following submission of a complete application. The availability of superior court review in the nature of certiorari was deemed to satisfy the requirement of prompt judicial review. Steakhouse, Inc. v. City of Raleigh, No. 5:97-CV-177-BO(1), 1997 U.S. Dist. LEXIS 16065 (E.D. N.C. 1997). But in Franklin Equities, L.L.C. v. City of Evanston, 967 F. Supp. 1233 (D. Wyo. 1997), the court held prompt *access* to judicial review did not constitute adequate protection for prompt judicial *resolution* of challenges.

39. Crown Street Enterprises, Inc. v. City of New Haven, 989 F. Supp. 420 (D. Conn. 1997).

40. 517 U.S. 484 (1996).

41. California v. LaRue, 409 U.S. 109 (1972). A number of the cases upholding alcohol restrictions at sexually oriented businesses pre-date *44 Liquormart* and are based on the now mistaken assumption that *LaRue* authorized restrictions without the necessity of analysis of consistency with First Amendment protections. *See, e.g.*, Dodger's Bar and Grill, Inc. v. Johnson County Bd. of County Comm's, 32 F.3d 1436 (10th Cir. 1994) (upholding a Johnson County, Kansas ordinance prohibiting sexually oriented businesses inside or within 1,000 feet of facilities with alcohol licenses); Ranch House, Inc. v. City of Anniston, 678 So.2d 745 (Ala. 1996) (upholding ordinance prohibiting selling, distributing, or consuming alcohol in

tainment may be imposed on the authority of the Twenty-first Amendment's grant of authority to regulate alcohol sales. *44 Liquormart* disavowed that reasoning. The Court held that while the Twenty-first Amendment grants states authority to regulate commerce regarding the use of alcohol, it in no way reduces the protections afforded by the First Amendment.

Early cases decided subsequent to *44 Liquormart* indicate that alcohol restrictions for sexually oriented businesses will be upheld if the local government carefully establishes the proper constitutional foundation regarding secondary impacts. In 1994 Georgia amended its state constitution to authorize local governments to enact ordinances "regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages."[42] The Georgia supreme court upheld an ordinance banning alcohol sales at topless bars.[43] The court found the ordinance to be a content neutral regulation aimed at preventing adverse secondary impacts. A Mobile, Alabama ordinance prohibiting alcohol at adult establishments was upheld by a federal court under the same rationale.[44]

Also, it should be noted that a facility with a North Carolina ABC license that violates the terms of a local ordinance regulating sexually oriented businesses would be subject to state penalties[45] as well as local enforcement.

Clothing Requirements

Among the management tools specifically authorized by G.S. 160A-181.1 are clothing restrictions for masseuses, for servers of alcoholic beverages, and for entertainers. Regulation of clothing for the first two categories pose few legal issues. Providing massages and serving beverages involve conduct, not speech. Thus no First Amendment considerations limit local government clothing standards for these persons. Entertainment, however, usually involves protected expressive speech. Clothing requirements for entertainers such as exotic dancers must be consistent with First Amendment protections.

Local regulations can prohibit obscenity and indecent exposure. Thus exposure of the genitals—"totally nude" or "bottomless" dancing—can be prohibited.[46] This is the case regardless of whether alcohol is being sold on site or whether the entertainment is provided at a "private club" to which the public is invited. The more difficult question arises with proposals to prohibit topless dancing. In 1991 the Supreme Court in *Barnes v. Glen Theater, Inc.*,[47] upheld an Indiana

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business featuring nudity or partial nudity). *See also* State v. Larson, 653 So.2d 1158 (La. 1995); Proctor v. County of Penobscot, 651 A.2d 355 (Me. 1994); Robinson v. City of Longview, 936 S.W.2d 413 (Tex. Ct. App. 1996) (upholding under state law prohibition of alcohol sales at topless bars).

42. GA. CONST. Art. III, Sec. VI, Para. VII (Michie 1997). For background information on the controversies leading to legislative consideration of the act to authorize a vote on this amendment, see Leila A. G. Lawlor, Note, *Amendment to the Constitution of the State of Georgia*, 11 GA. ST. U. L. REV. 33 (1994).

43. Goldrush II v. City of Marietta, 482 S.E.2d 347 (Ga. 1997), *cert. denied*, 118 S.Ct. 70 (1997). The court also held the applicants did not have a vested right to the annual renewal of their liquor licenses.

44. Sammy's of Mobile, Ltd. V. City of Mobile, 140 F.3d 993 (11th Cir. 1998) (noting this was the least restrictive means of "controlling the combustible mixture of alcohol and nudity"). The court held no particularized findings regarding the adverse secondary impacts of combining alcohol sales and adult entertainment were required. The court found that since this entertainment was allowed in places without alcohol licenses, the regulation was a legitimate time, place, and manner restriction. *See also* DFW Vending, Inc. v. Jefferson County, 991 F. Supp. 578, 597-99 (E.D. Tex. 1998) (holding an alcohol prohibition at establishments with adult entertainment did not violate equal protection).

45. G.S. 18B-1005(a)(3) makes it unlawful to allow "any other unlawful acts" at a licensed facility. Violation of a local ordinance would be an unlawful act.

46. The North Carolina court recently addressed the question of what constitutes "private parts" that may not be exposed under the state indecent exposure statute. The court upheld a conviction for "mooning," but noted that exposure of the buttocks per se (as opposed to the external organs of sex and of excretion) is not a violation. The court specifically noted that appearing in public wearing a "thong" or "g-string bikini" was not indecent exposure. State v. Fly, ___ N.C. ___, 501 S.E.2d 205 (1998).

47. 501 U.S. 560 (1991) (upholding statute requiring dancers to wear "pasties" and a "g-string"). Chief Justice Renquist's plurality opinion, joined by Justices O'Connor and Kennedy, held that nude dancing was on the periphery of protected speech and that the requirement that dancers wear very minimal costumes was a narrowly tailored response to the important governmental interest of protection of public morals. Justice Scalia proposed that nudity in and of itself be declared conduct that could always be prohibited. The four dissenting justices—White, Marshall, Blackmun, and Stevens—would have held the statute invalid as a prohibition

statute that required dancers to wear minimal costumes. Justice Souter's narrowly drawn concurring opinion upheld the statute in the context of regulating secondary impacts. As the narrowest portion of the *Barnes* decision,[48] Justice Souter's opinion has been influential in subsequent decisions.

Courts have upheld several ordinances around the country that impose "bikini top" requirements.[49] Where the proper constitutional foundation has not been established, such requirements have been invalidated.[50] For communities to ban topless dancing altogether in a manner consistent with the *Barnes* decision, it is necessary to establish negative secondary impacts from establishments with topless dancing, as opposed to simply prohibiting topless dancing *per se*, and that the regulation is narrowly drawn to prevent those negative impacts. In this context, the exact amount of clothing that may be necessary to prevent adverse secondary impacts may differ in family resort areas such as Maggie Valley or Nags Head as compared with uptown Charlotte. A local government considering restrictions on topless dancing would be well advised to develop carefully a complete hearing record on two points—the adverse secondary impacts that are anticipated and that the clothing requirement imposed is the least restrictive measure needed to combat those impacts.

Definitions of Adult Businesses

To avoid constitutional problems of vagueness, local ordinances regulating sexually oriented businesses must carefully define which businesses are subject to the regulations. However, once a definition is set, attempts by business owners to circumvent the regulations by contending a particular business is not included within the definition are not uncommon.

A case in point arose in Charlotte. The Charlotte ordinance established separation requirements between adult establishments and other sensitive land uses. The question presented was whether the petitioner's facility was an adult establishment. The ordinance defined these to include bookstores where a "preponderance of its publications, books, magazines, and other periodicals" were devoted to adult materials. In *South Blvd. Video & News, Inc. v. Charlotte Zoning Board of Adjustment*,[51] the court held that "preponderance" did not require that more than fifty percent of the materials be devoted to adult material, but rather that adult materials were given a predominant and far greater emphasis in display within the store and in importance to the store's overall business. The court held that videotapes could be considered within the "publications" subject to this definition. The court also upheld a contempt citation based on the efforts to circumvent court orders regarding the business.

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of expressive conduct fully protected by the First Amendment and not narrowly drawn to accomplish a compelling governmental interest.

48. The court in Nakotomi Investments, Inc. v. City of Schenectady, 949 F. Supp. 988 (N.D. N.Y. 1997) concluded Justice Souter's concurrence was based on a different, not a narrower, rationale. However, most courts continue to view Justice Souter's view as the holding in *Barnes. See, e.g.,* Lounge Management, Ltd. v. Town of Trenton, 580 N.W.2d 156, 160 (Wis. 1998) (invalidating anti-nudity ordinance).

49. Cafe 207 Inc. v. St. Johns County, 856 F. Supp. 641 (M.D. Fla. 1994), *aff'd per curiam*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 1544 (1996) (upholding ordinance that required costumes not expose more than three-fourths of the breasts or more than two-thirds of the buttocks); Bright Lights, Inc. v. City of Newport, 830 F. Supp. 378 (E.D. Ky. 1993) (noting the unique nature of the city as a de facto adult entertainment "combat zone" for neighboring Cincinnati justified the requirement). Local ordinances similar to the Indiana statute in *Barnes* were upheld in Threesome Entertainment v. Strittmather, 4 F. Supp.2d 710 (N.D. Ohio 1998), SBC Enterprises, Inc. v. City of South Burlington, 892 F. Supp. 578 (D. Vt. 1995), and PAP's A.M. v. City of Erie, 674 A.2d 338 (Pa. Commw. Ct. 1996).

50. MD II Entertainment, Inc. v. City of Dallas, 935 F. Supp. 1394 (N.D. Tex. 1995). The city had amended its ordinance to require female dancers to wear bikini tops rather than pasties to avoid regulation as adult entertainment. The court found the regulation to be content-based since there was no evidence of consideration of secondary impacts as basis for regulation. Likewise, in Steverson v. City of Vicksburg, 900 F. Supp. 1 (S.D. Miss. 1994) the court invalidated an ordinance that completely prohibited topless dancing throughout the city. As there was a total ban of topless performers in adult establishments, the court found the *Renton* standard for adequate alternative avenues of expression to be violated. The court also found in respect to the ban that the city had not presented evidence of harmful secondary impacts nor that the ordinance was narrowly drawn.

51. ___ N.C. App. ___, 498 S.E.2d 623 (1998). In Fantasy World, Inc. v. Greensboro Bd. of Adjustment, ___ N.C. App. ___, 496 S.E.2d 825 (1998), the court also upheld use of a "preponderance" of matter being devoted to sexually explicit materials as sufficiently precise for defining the regulated businesses. *See also* Richland Bookmart, Inc. v. Nichols, 137 F.3d 435, 441 (6th Cir. 1998) (upholding use of having its "principal or predominate stock or trade" in sexually oriented materials, devices, or paraphernalia as a definition).

Others

Hours of operation. A Vineland, New Jersey, requirement limiting sexually oriented businesses' hours of operation to 8:00 a.m. to 10 p.m. Monday through Saturday and requiring open viewing booths was upheld.[52] A similar Tennessee statute that limited adult establishments to operation between 8:00 a.m. and midnight Monday through Saturday and required open viewing booths was also upheld.[53] Less restrictive ordinances setting closing times closer to the hours established by North Carolina ABC laws have also been upheld, including those in Jacksonville, Florida,[54] West Allis, Wisconsin,[55] and Newport, Kentucky.[56] On the other hand, a federal district court in Rhode Island invalidated a ban on the sale or rental of adult videos on Sundays and holidays.[57] While finding the ordinance was not preempted by state Sunday closing laws, the court held the regulation was content-based (no secondary impacts were established). A strict scrutiny analysis was applied and no compelling interest was presented for the restriction.

Advertising. A Minneapolis ordinance that limited on-site outdoor advertising for an adult bookstore to flat wall signs only, limited sign area to one square foot per foot of lot frontage, prohibited pictures or displays in window areas visible from the sidewalk, and limited opaque windows was upheld.[58]

Patron separations. Courts have continued to uphold reasonable requirements of separations between patrons and entertainers. Among the requirements upheld were a Chattanooga ordinance requiring a six foot minimum separation between dancers and patrons,[59] a Bellevue, Washington ordinance requiring a separation of eight feet for stage dancers and four feet for performers off the stage,[60] and an Arlington, Texas prohibiting any contact between dancers and patrons.[61]

Space limitation. The Third Circuit Court of Appeals invalidated a requirement that a video store

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52. Ben Rich Trading, Inc. v. City of Vineland, 126 F.3d 155 (3rd Cir. 1997).

53. Richland Bookmart, Inc. v. Nichols, 137 F.3d 435 (6th Cir. 1998). Live stage shows, adult cabaret, and dinner theaters are exempt from the closing hours requirements. See also Ino Ino, Inc. v. City of Bellevue, 937 P.2d 154 (Wash. 1997), where the court upheld a 2:00 a.m. to 10:00 a.m. closing period.

54. Lady J. Lingerie, Inc. v. City of Jacksonville, 973 F. Supp. 1428 (M.D. Fla. 1997) (upholding requirement that sexually oriented businesses close between 2:00 a.m. and noon).

55. Tee & Bee, Inc. v. City of West Allis, 936 F. Supp. 1479 (E.D. Wis. 1996). The ordinance required adult establishments to close between 2:00 a.m. and 8:00 a.m. on weekdays, between 3:00 a.m. and 8:00 a.m. on Saturdays, and between 3:00 a.m. and noon on Sundays.

56. Bright Lights, Inc. v. City of Newport, 830 F. Supp. 378 (E.D. Ky. 1993) (upholding a 2:30 a.m. to 6:00 a.m. closing requirement).

57. Faraone v. City of East Providence, 935 F. Supp. 82 (D. R.I. 1996).

58. Excalibar Group, Inc. v. City of Minneapolis, 116 F.3d 1216 (8th Cir. 1997). The court accepted a secondary impacts justification for the limits and found the ordinance was narrowly tailored, left adequate alternative avenues of advertising, and was not overly broad. See also Hamilton Amusement Center, Inc. v. Portiz, 689 A.2d 201 (N.J. Super. Ct. App. Div. 1997), where the court upheld a state statutory requirement that limited signs for sexually oriented businesses. The statute limited these businesses to two signs: (1) an identification sign of no more than forty square feet; and (2) a sign giving minors notice that they could not be admitted.

59. DLS, Inc. v. City of Chattanooga, 107 F.3d 403 (6th Cir. 1997). The court found the restriction furthered state interests in preventing crime and spread of disease. The court also upheld licensing standards that employees be eighteen years old and not have been convicted of crimes of a sexual nature nor have violated the ordinance within the past five years. Similar provisions in a Vermillion, Ohio, ordinance were upheld in Threesome Entertainment v. Strittmather, 4 F. Supp.2d 710 (N.D. Ohio 1998). While the court in *Threesome* upheld a six feet dancer-patron separation, a requirement that dancers perform only on a raised stage of at least forty-five inches height was invalidated (such a stage would make it impractical to offer dancing in most commercial buildings given a standard eight foot ceiling). A ten foot buffer was upheld in Calacurcio v. City of Kent, 944 F. Supp. 1470, 1477 (W.D. Wash. 1996).

60. Ino Ino, Inc. v. City of Bellevue, 937 P.2d 154 (Wash. 1997). The court also upheld other operational requirements, including requirements for disclosure of past criminal records, minimum lighting requirements.

61. Hang On. Inc. v. City of Arlington, 65 F.3d 1248 (5th Cir. 1995). The court noted touching is conduct that is not protected by the First Amendment. The court also held the ordinance was not overly broad in that incidental or unintentional touching would not be actionable given a lack of criminal intent inherent in such. *See also* State v. Bouye, 484 S.E.2d 461 (S.C. 1997), *cert. denied*, 118 S.Ct. 78 (1997) (holding the government may prohibit physical contact between topless dancers and patrons). Where the ordinance is not drafted to exclude unintentional or non-sexual touching, it may be invalid as overly broad. Threesome Entertainment v. Strittmather, 4 F. Supp.2d 710, 722-23 (N.D. Ohio 1998).

limit its adult material to ten percent of the structure's floor area.[62]

Access by minors. The Ninth Circuit Court of Appeals upheld a California statute prohibiting distribution of adult material (defined similarly to obscenity) in vending machines to which minors have access.[63] The court held this was a content-based regulation as the purpose was to prevent distribution of harmful materials to minors rather than addressing secondary impacts. The court therefore applied a strict scrutiny review, but held the restriction valid as it directly advanced a compelling governmental interest (preventing distribution of sexually explicit material to minors) and employed the least restrictive alternative available to do so. There are, however, limits to regulations limiting access to sexually oriented businesses on the basis of age. A Georgia statute raised the age requirement from eighteen to twenty-one for those attending performances featuring nudity by live performers. The Georgia Supreme Court invalidated the statute, holding it to be a content-based restriction subject to strict scrutiny and finding no compelling state interest in restricting access by adults who were eighteen, nineteen, and twenty years old.[64]

Amortization. Regulations that require existing sexually oriented businesses to come into compliance after a reasonable grace period continue to be upheld. In North Carolina, Onslow County's two year amortization provision was upheld.[65] A Jacksonville, Florida, provision requiring compliance in fifteen to nineteen months was upheld.[66] New York City's one year amortization provision was also upheld, even when the city's newly adopted locational standards required an estimated 84% of the city's 177 adult businesses to close or relocate.[67]

62. U. S. Sound & Services, Inc. v. Township of Brick, 126 F.3d 555 (3rd Cir. 1997). The town justified the regulation on the basis of preventing exposure of adult materials to minors. The court termed this a direct rather than a secondary impact and applied a strict scrutiny analysis. In Florida Video Express, Inc. v. Orange County, 983 F. Supp. 1091 (M.D. Fla., 1997), the court upheld application of a licensing requirement for sexually oriented businesses as applied to those businesses with more than 10% of gross income from adult materials, more than 25% of stock devoted to adult materials, or more than 10% of their floor area devoted to adult materials.

63. Crawford v. Lungren, 96 F.3d 380 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1249 (1997).

64. State v. Café Erotica, Inc., 500 S.E.2d 574 (Ga. 1998).

65. Maynor v. Onslow County, 127 N.C. App. 102, 488 S.E.2d 289, *appeal dismissed*, 347 N.C. 268, 493 S.E.2d 458, *review denied*, 347 N.C. 400 (1997).

66. Lady J. Lingerie, Inc. v. City of Jacksonville, 973 F. Supp. 1428 (M.D. Fla. 1997). The court noted that requiring immediate compliance would be unreasonable.

67. Stringfellow's of New York, Ltd. v. City of New York, 694 N.E.2d 407 (N.Y. 1998).

Conclusions

In adopting S. 452, the General Assembly has confirmed significant authority for North Carolina cities and counties to regulate sexually oriented businesses. State laws continue to prohibit obscenity, indecent exposure, and multiple adult businesses within a single building, as well as regulating alcohol sales. Local governments may, however, impose additional regulations in order to protect surrounding neighborhoods. Standards may be set on where and how these businesses may be operated.

Local regulatory power is not unlimited. Under the First Amendment, non-obscene but sexually explicit speech cannot be banned. All regulation of protected speech—which includes adult books, videos, movies, and exotic dancing—must be directed toward preventing adverse secondary impacts, not toward suppressing unpopular speech.

As part of its consideration of regulations, each local government must carefully establish a proper constitutional foundation for its action. The courts have not imposed a particularly onerous burden on local governments in this respect. Lengthy, detailed, and expensive studies are not required. Studies from other jurisdictions, citizen comments, and common experience and judgment can and should be considered. Yet some diligence in this area is necessary. Undue haste or caviler treatment of these constitutional requirements will result in invalidation of the regulations.

Therefore, the prudent local government will take several steps when devising regulations on sexually oriented businesses. It will engage in a focused discussion of what is to be accomplished by the regulations. What secondary impacts are being addressed? What types of businesses need to be regulated? How will the specific regulations proposed address these adverse impacts? The government also must document that adequate alternative avenues for expression will be provided. How many sites can meet the restrictions? Is this a reasonable number considering the number of current such businesses in operation, the number of applications received, the population and nature of the jurisdiction?

Some management tools are widely used and regularly approved by the courts provided this basic constitutional foundation has been set. These include: minimum separations from sensitive land uses and other sexually oriented businesses, usually in the 500 to 1,500 feet range; limitations to specified zoning districts; limitations on late night operation; limitations on physical contact between entertainers and patrons; and open booth and lighting requirements. Other regulations, such as prohibitions on sale or consumption of alcohol at sexually oriented businesses, requiring a special or conditional use permit for all sexually oriented businesses, and bikini top requirements for dancers, have a mixed record in the courts. Local governments proposing such additional restrictions need to take extra care to consider and document how such restrictions comply with First Amendment protections.

Application of these guidelines will not satisfy all citizens. Some will be upset that there is not a total prohibition of activity they find offensive, immoral, and demeaning. Others will feel their rights as adults to decide for themselves what to pay to see are being unduly impaired. The First Amendment and North Carolina's statutes require that local governments balance these concerns. Reasonable steps can be taken to prevent crime and harm to neighboring property values, but this must be done in a manner that respects others' rights to provide and see sexually explicit material.

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