

CITY OF OLYMPIA
STUDY SESSION
MINUTES
February 11, 1997

COUNCIL	<input checked="" type="checkbox"/>
STUDY SESSION	<input type="checkbox"/>
COMMITTEE	<input type="checkbox"/>
DATE	2-18-97
AGENDA ITEM NO.	4C

The regular Study Session of the Olympia City Council convened at 7:30 p.m., Tuesday, February 11, 1997. Those in attendance were Mayor Bob Jacobs, Mayor Pro Tem Mark Foutch, Pat Cole, Laura Ware, Holly Gadbow, Margaret McPhee, and Jeanette Hawkins.

1. Zoning Regulations of Adult Oriented Businesses

City Manager Dick Cushing introduced the issue, advising that the Council had referred the adult oriented business zoning ordinance to the Planning Commission for review. The Planning Commission held a public hearing on the matter, completed its review, and referred its recommendations to the Council.

Mark Erickson, City Attorney, recited the issues before the Council: 1) Should adult oriented businesses be limited to the general commercial zone? 2) Are the separation requirements between adult oriented businesses and sensitive uses sufficient under current ordinance as amended by the Planning Commission proposal? 3) Do current definitions under the ordinance need to be changed? 4) Do the regulations allow reasonable access by adult oriented businesses into the Olympia commercial market? 5) Should libraries be given the same separation protection as schools, parks, and churches? 6) Should adult oriented businesses be allowed on Martin Way in the "peninsula" into the City of Lacey? 7) Should entries to and from Comprehensive Plan trails be given separation protection from adult oriented businesses? 8) Should measurements from sensitive uses on large lots be measured from the lot property line or from the perimeter of the property used in conjunction with the sensitive use?

Councilmembers discussed communication from the City of Lacey and the North Thurston School Board regarding adult oriented business sites in the Martin Way area. The Council was satisfied that the Olympia separation provisions of one-quarter mile from schools, churches, and parks provided adequate protection to schools and other uses in Lacey, given that the measurements under the Olympia ordinance extended across municipal boundaries.

On the other issues, the Council authorized preparation of an ordinance limiting adult oriented businesses to the general commercial zone but increasing the separation between adult oriented businesses and residences, child care facilities, nurseries, etc. from 250 feet to 330 feet. The Council also authorized an increase in the separation for libraries from 250 feet to 1,340 feet. The Council instructed that the ordinance include the definitions established for the adult oriented business licensing ordinance with the exception that the ten percent minimum rule for adult book stores be extended to adult motion picture theaters. Further, the word "features" would be replaced by the term "presents." The Council accepted the notion that measurements from sensitive uses on large lots should be from the perimeter of the area devoted to that use, provided that if the sensitive user owns the entire large lot and seeks to expand into the buffer between the sensitive use and an existing adult oriented business, he/she need not procure a waiver of distance requirements so long as the expansion does not involve the creation of new lots.

The Council heard comments from members of the North Thurston School Board expressing concern that a Montessori school along Martin Way be given protection. Council asked staff to make sure the school was addressed under the ordinance.

The Council then concluded that the regulations, as amended, provide a reasonable balance between the First Amendment rights of the adult oriented business operators/owners and protection needed for sensitive uses nearby. The Council acknowledged that protecting the public from the secondary effects described in the Minnesota Attorney General's study, the study by the City of Austin, Texas, the declaration of Detective J.P. Covey, and other materials in the record provided an adequate basis for the ordinance. The Council instructed staff to prepare an ordinance including the amended regulations for consideration at a subsequent consent calendar.

2. Grass Lake Refuge Master Plan

David Hanna gave a brief history and served as facilitator. Mr. Steve Shanewise of the Coot Company gave an overview of the significant habitat functions and values. Mr. Shanewise described the pristine nature of a large portion of the habitat area which has remained untouched by human development for hundreds of years. Ms. Julie McQuary gave a description of the plan process, vision, and implementation. She described a vision that was built from public workshops, technical advisory committees, and discussions with agency representation. Ms. Ware, Ms. Hawkins, and Mayor Jacobs had questions about location of trails in sensitive habitats, stormwater impacts from surrounding developments, and possible use of Grass Lake properties to serve the need for a neighborhood park. David advised the Council that the Plan is a draft that will come before Council for a public hearing and adoption, if possible, on March 4. Copies of the Plan are available to the public in libraries and at The Olympia Center.

3. Compensation Philosophy for Independent Employees

Cathy Raymond, Human Resources Director, presented the draft of the Compensation Philosophy Statement. This statement is used to provide the foundation on which decisions are made about how employees are compensated. There was considerable discussion about the absence of a statement indicating that we value employees' experience; about non-monetary rewards such as conference attendance; and about the need to not fall behind the market. There was consensus from the Council that the statement as drafted represents its perspective and that the items mentioned above would be considered in the development of the more detailed framework.

The framework will be brought back to the Budget Committee and Council for approval in April or May. Council can also expect to review the financial analysis during its budget deliberations. Implementation of the compensation system will be in the first six months of 1998.

The meeting recessed at 10:30 to Executive Session to discuss a possible litigation matter, and a real estate matter. The Executive Session is expected to take no longer than three hours, no action will be taken, and the Council will adjourn from the Executive Session.

CITY OF OLYMPIA
Olympia, Washington

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DATE	2-11-97
AGENDA ITEM NO.	2

CITY COUNCIL STUDY SESSION
February 11, 1997

SUBJECT: Zoning Regulations of Adult Oriented Businesses;
ORIGINATED BY: Olympia City Council, Olympia Planning Commission

ISSUE/ACTION: Should the current zoning regulations of adult oriented businesses, including definitions thereof, be amended in light of development patterns and evolution of the law.

STAFF CONTACT: Mark Erickson, City Attorney /753-8449 *ME*

BACKGROUND: In September 1996 the City Council referred to the Olympia Planning Commission the question of whether the current zoning regulations of adult oriented businesses should be changed. These regulations have been in place for about eight years and consist mainly of limiting adult oriented businesses to the general commercial zone and providing dimensional separations between these businesses and "sensitive" land uses.

Specifically, Section 18.06.060 of the Unified Development Code stipulates that no adult oriented businesses may be located closer than 250 feet from a residential use, public library, family child care home, child day care center, preschool facility, or nursery school. No adult oriented businesses may be located closer than 1,320 feet (one-quarter mile) of a public park, public or private primary or secondary school, college, or university, or church temple, synagogue, or other facility primarily devoted to the teaching or practice of religion. No adult oriented businesses may be located closer than 250 feet from the nearest point of the boundary of the general commercial district, except when separated from said boundary by an arterial of at least four travel lanes in width, nor may an adult oriented businesses be located closer than 1,000 feet of another such business.

These distances all to be measured by a straight line from the point of public entry into the adult oriented businesses, to the nearest point on a property line of a public park, or the nearest point of public entry or point on a property line, whichever is closer, of the remaining sensitive uses. The ordinance allows for a waiver of these dimensional requirements by conditional use

approved by the hearing examiner, based on other physical separation features, compatibility with adjacent land uses, the availability or lack of alternate locations, or the ability to avoid the adult facility by alternate vehicular and pedestrian routes. Lastly, current ordinance disallows sensitive uses from locating within the applicable distances from pre-existing adult oriented businesses unless a distance waiver is obtained from the hearing examiner.

Also, current ordinance (18.02.180 UDC) defines adult oriented businesses to include only adult bookstores, adult live entertainment centers, and adult motion picture theaters. This is a somewhat narrower definition than the Council approved in the adult oriented business licensing ordinance recently passed. (The UDC doesn't include adult arcades, adult motels, etc.)

The Planning Commission was not given specific directions for its inquiry except for a suggestion that the separation requirement relative to residential uses, public libraries, family child care homes, day care centers, preschool facilities, and nursery schools maybe should be raised from 250 feet to the one-quarter mile applicable to parks, schools, and churches.

The Planning Commission held work sessions on October 21, 1996 and November 4, 1996 and held a public hearing on November 18, 1996. In its deliberations, the commission sought to answer four questions: 1) Is the general commercial zone the appropriate zone for these businesses, as presently provided? 2) Are the current regulations in the zoning code requiring separation between adult oriented businesses and sensitive uses sufficient to protect communities of Olympia or should different separation requirements be established? 3) Are the proposed definitions of adult oriented businesses sufficiently clear to inform the public and potential applicants of the nature of the uses being regulated? and 4) Do the current or modified regulations give applicants for adult oriented businesses reasonable access to the Olympia commercial market to pass constitutional muster?

These questions go to the heart of the constitutional issue surrounding adult oriented businesses. As mentioned during our discussion of the licensing ordinance, some of what typically occurs in adult oriented businesses is considered protected expression under the U.S. and state constitutions. Thus, although the City can regulate the time, place, and manner in

which this expression occurs, it cannot ban it altogether. The current rule seems to be that a reasonable number of sites must be allowed for these uses which are part of the general commercial market of the City of Olympia. The "general commercial market" means the market for any commercial business, not necessarily adult oriented businesses. The fact that a site is currently built on and supporting another business does not disqualify it as counting toward reasonable access. If a site is defective, however, because of a lack of vehicular access, or because of extensive wetlands, steep slopes, or other infirmities, it does not count toward reasonable access. Basically stated, you can't relegate them all to areas behind the tracks. See my October 30, 1996 memo to the Planning Commission (copy attached).

On the other side of the issue is the need to protect our community from the secondary effects of these businesses. These effects such as increased crime, lowering of property values, and deprivation of neighborhoods were extensively discussed during our deliberations on the licensing ordinance. The same purpose must underlie this ordinance. In order to justify the curtailment on free expression, the City must identify the secondary effects. For that reason, I suggest the Council adopt as part of its record herein the documents submitted in conjunction with the licensing ordinance. These include the studies of the Minnesota Attorney General's office, studies of the City of Austin, Texas, the Declaration of Detective J. P. Covey. Those documents are also attached hereto.

The Planning Commission's approach was to restrict the location and number of adult oriented businesses as far as the constitution allowed. The commission asked staff for a specific number of sites that would, at a minimum, pass the constitutional test. That question is impossible to answer precisely but it was my opinion that if between five and ten nodules of sites remained after all regulations were imposed, the ordinance could probably be defended. At the conclusion of their deliberations, the Planning Commission recommended the following changes:

- 1) The separation dimensions between adult oriented businesses and residential uses, libraries, family day care homes, child day care centers, and preschool and nursery school facilities be increased from 250 feet to 330 feet (a traditional city block). This was a compromise since a separation much larger would virtually wipe out any

location for adult oriented businesses. On the other hand, it increased the protection over the current regulation.

2. The definitions be changed to coincide with those used in the adult licensing ordinance and that terms such as "sexual conduct" and "adult entertainment" be cross-referenced to that ordinance. The commission also recommended technical changes to the licensing ordinance definitions. These include changing the term "features adult entertainment" in the definition to "presents adult entertainment." Also, the current requirement for adult book stores that a minimum of ten percent of business volume be adult entertainment material before it qualifies as an adult oriented business should be extended to adult motion picture theaters.
3. The commission expressed concern that exits from or entrances to public trails within the adopted trail plan aren't protected by separation requirements. The commission didn't recommend any specifics here but suggested that the City Council consider such a requirement for trails designated in the Comprehensive urban trail plan.

The recommended regulations leave six or seven small nodes within the general commercial zones within which an adult oriented business could potentially be located. Although most nodes contain more than one lot, the 1,000-foot separation between adult oriented businesses limits each node to one such use. These nodes are located off Martin Way behind K-Mart and the Go-Cart Track along I-5, on the south side of Martin Way near the old Chehalis Western Rail Corridor (one lot), on Lilly Road just north of I-5, along Pacific Avenue near Fones Road, possibly along Pacific Avenue just west of the I-5 interchange, and on the west sides on Black Lake Blvd. on its east and west side near SR101. A map showing the precise locations will be provided at the study session.

Since the Planning Commission's report, a letter regarding this ordinance has been received from the City of Lacey's principal planner, David Burns. A copy of that letter is also attached. The gist of his letter is a request that Olympia not allow live adult entertainment facilities along that part of Martin Way which forms a peninsula into Lacey. He feels that the high density corridor concepts in the Comprehensive Plan dictate that adult

oriented businesses should not be located in this corridor so close to the City of Lacey.

ANALYSIS:

The City Council should answer the same questions that the Planning Commission looked at: 1) Is the general commercial zone the appropriate zone for these businesses? 2) Are the separation provisions recommended by the Planning Commission adequate to protect sensitive uses? 3) Are the proposed definitions and changes thereto acceptable? 4) Do the regulations allow reasonable access by adult oriented businesses into the Olympia commercial market to withstand a constitutional challenge? The Council should also deal with the issue raised by the City of Lacey along Martin Way, and address the status of public trails in these regulations.

- 1) The general commercial zone has been the allotted zone for these uses for the past eight years. Currently the City has no adult oriented businesses in existence. This zone makes sense in that it closely fits the legal requirement that these businesses have access to the commercial market of the City. A buildable lot in this zone would almost without question be counted under this test. Also, this zone contains less of the sensitive uses than do many other zones. The Planning Commission felt that this zone should continue to be used.

The City of Lacey planners suggest that Olympia should do as Lacey did, use its light or heavy industrial zones for these uses. Unlike Lacey, however, Olympia has a small amount of industrial zoning and that which it has lies close to residential areas. We don't believe that limiting adult oriented businesses only to industrial zones would meet the constitutional test.

- 2) The Planning Commission felt that its proposed separation provisions between adult oriented businesses and residential uses are reasonable and protect the public. Given the constraints of the general commercial zone and the fairly widespread location of sensitive uses, raising the separation requirements beyond 330 feet for residential, child care uses, etc. would virtually do away with all adult oriented business sites and render the ordinance unenforceable. The Planning Commission felt that 330 feet, a regular city block, was the best it could do.

It's true that the 330-foot separation for residential uses, libraries, child care facilities, etc. is significantly less than the separation for parks, churches, and schools. However, outside of the libraries, the intensity of use in the latter typically is greater than in the former. Thus, there is a rational basis for this distinction. However, the Council may want to consider whether libraries should be given the same separation dimension as is proposed for parks and schools. Its true the issue is somewhat academic as the current library and the proposed new library sites are already more than one-quarter mile from any allowed adult oriented business sites; still, the staff recommends that, because of their similarities in use, libraries should be given the larger separation protection given to schools and parks.

In reviewing the maps, staff realized another change that it believes should be made to the separation provisions of the ordinance. Currently separations are measured from the point of entry of the adult oriented business to the nearest point of a property line of a public park or to the nearest point of public entry or point on a property line, whichever is closer, of any of the other sensitive uses. In at least one case along Pacific Avenue, a church is located on a large undivided lot, much of which is not used for church purposes. Measuring the church separation from the closest point of that large lot almost removes the area along Pacific Avenue as a node for adult oriented businesses. We don't believe this is necessary. We believe the better rule for sensitive uses other than parks is to measure from the point of entry of the adult oriented business to the nearest point of entry or nearest point on the perimeter of property actually used for church, school, etc. purposes, whichever is closer. This would make the separation more meaningful, as it would not include portions of large lots not used for the sensitive use at issue.

- 3) The definitions recommended are those already adopted by the City Council in the licensing ordinance, with some suggested changes. Staff believes the changes are technical in nature and make sense. The ten percent minimum rule makes sense for motion picture theaters as much as it does for book stores, as it would include all "adult" theaters within the definition but still allow the

occasional (below ten percent) adult movie in other theaters.

- 4) In my opinion, the areas left for adult oriented businesses under the regulatory approach recommended by the Planning Commission would probably pass a legal challenge. It leaves six to seven nodes in commercially zoned areas within which an adult facility could be located. Although parcels within these nodes are in part currently being used for other purposes, these lots still count toward reasonable market access. I believe that given the size of Olympia and the fact that these uses have not historically been located in this community, the areas allowed reasonably accommodate any such demand for these uses, at least at present.

While staff respects the points expressed in the letter from the Lacey Planning Department, we don't believe that adult oriented businesses can or should be barred from the Martin Way corridor. First, the high density corridor policies of the Olympia Comprehensive Plan do not necessarily declare that adult oriented businesses would be incompatible in such corridors. The policies basically state that such corridors should be developed with a mixture of sufficient residential and commercial density to reenforce their respective roles and to prevent commercial "strip development." Only one of the proposed adult oriented business sites is located directly along Martin Way, that being one lot on the south side near the Chehalis Western Railroad vacated right-of-way. The other node in the peninsula is located off Martin Way behind K-Mart and the Go-Cart Track along I-5. Until residential uses appear in the corridor, Steve Friddle of Community Planning and Development does not believe these limited sites would be contrary to the policies of the high density corridor provisions of the Comprehensive Plan. Moreover, since the separation requirements apply to sensitive uses lying outside the city limits, distances from North Thurston High School and other sensitive uses in Lacey are already accounted for on the map.

Further, if the high density corridor policies prohibit adult oriented businesses along Martin Way, they would also prohibit them along other corridors, including Pacific Avenue and Black Lake Blvd. In that event, no sites at all would be left in the general commercial zones for adult oriented businesses.

Lastly, unlike in the City of Lacey, the City of Olympia's industrial zoning is very limited in size. As indicated above, we don't believe that the constitutional requirements can be met if adult oriented businesses are limited to the industrial zones of Olympia.

The Planning Commission asked the Council to consider protection for points of ingress and egress to public trails which are identified in the Comprehensive Plan. Three portions of these trails affect the proposed adult oriented business sites. One is the entrance to the Woodard Bay Trail on Martin Way. Another is the entrance to and exit from the trail along I-5 at Pacific Avenue near the Sizzler Restaurant. The third is the Fones Road intersection of the east-west greenway trail near the Crown Cork and Seal plant. Some members of the Planning Commission felt that these trails should be treated the same as parks, given their recreational purpose. Others felt that they weren't comparable to parks, as the recreational activities are transitory, like sidewalks, and the exposure is less obtrusive.

David Hanna's opinion is that urban trails wouldn't need the same level of protection as parks with stationary activities. The staff recommends that the Council consider a 330-foot separation between these ingress and exit points and an adult business site, except when separated from the adult oriented business by a four-lane or larger arterial. This would give these points comparable protection given to residential uses. Also, from the legally defensible perspective, it would not eliminate any proposed adult oriented businesses sites, although it would shrink the node on Fones and Pacific. It would also preserve the site across Martin Way from the Woodard Bay Trail.

OPTIONS:

- 1) Adopt Planning Commission's recommendations with additional staff recommendations.
- 2) Adopt Planning Commission's recommendations and modify staff recommendations, or visa versa.
- 3) Leave ordinance as is.

**PLANNING
COMMISSION**

RECOMMENDATION: Retain existing ordinances, except:

- 1) Extend separation requirement between adult oriented businesses and residential and similar uses from 250 to 330 feet.
- 2) Make changes in the definitions as indicated.
- 3) Consider trailhead separations.

**ADDITIONAL STAFF
RECOMMENDATIONS:**

- 1) Place libraries in same protection category as schools and parks, etc.
- 2) Require 330-foot separation for trail entrance points, except where 4-lane arterial intervenes.
- 3) Allow limited sites along Martin Way as proposed.
- 4) Change the point of measurement for sensitive uses in large lots to the entrance point or to the closest point on the perimeter of the area used in conjunction with that use, whichever is less.

**FINANCIAL IMPACT OF
RECOMMENDATION:**

Not significant.

**DOCUMENTS
ATTACHED:**

- 1) October 30, 1996 memo from Mark Erickson to Olympia Planning Commission
- 2) Studies from Minnesota Attorney General's office
- 3) Studies from City of Austin, Texas
- 4) Declaration of Detective J. P. Covey
- 5) Letter from David Burns, Planner/City of Lacey
- 6) Proposed amendatory ordinance.

**COUNCIL ACTION
REQUESTED:**

Adopt Planning Commission and staff recommendations and pass ordinance to second reading.

Ordinance No.

AN ORDINANCE amending sections of the Unified Development Code relating to adult oriented businesses and amending Ordinance No. 5663.

WHEREAS, adult oriented businesses, especially those involving live entertainment, have dramatic secondary effects on neighborhoods and communities in which they locate; and

WHEREAS, the secondary impacts have been studied by various cities and organizations around the country; and

WHEREAS, the City Council has reviewed the study by the City of Austin, Texas dated May 19, 1986 and the "Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses" from the State of Minnesota, dated June 6, 1989; and

WHEREAS, these studies provide conclusive evidence that adult oriented businesses generally create an atmosphere for increases in crimes, such as assault, theft, robbery, prostitution, drug use, and other serious offenses in the area in which those businesses are located; and

WHEREAS, these studies also conclude that surrounding property values tend to recede as a result of the appearance of adult oriented businesses and the activities they attract; and

WHEREAS, the City Council concludes that the findings of these studies more likely than not describe the impacts that Olympia neighborhoods and communities would experience if adult oriented businesses were to locate within the City of Olympia; and

WHEREAS, the City Council further concludes that the secondary impacts would have the most profound effects on young people and those citizens who do not seek out such businesses but who would be incidentally exposed to them while participating in school, recreation, church, library, day care, and other sensitive activities; and

WHEREAS, the City Council deems it in the public interest that such persons be given a measure of protection and insulation from adult oriented businesses and the activities incidental thereto, consistent with the City's constitutional authority; and

WHEREAS, the City Council finds that the current zoning policies of requiring distance separation between these businesses and various uses deemed sensitive, and the policy of dispersing such businesses rather than allowing groupings of them into ghetto-like pockets are reasonable ways to serve this public interest; and

WHEREAS, the current regulations are in need of review and update; and

WHEREAS, the current policies were reviewed by the Olympia Planning Commission, which held a public hearing thereon and submitted its recommendations; and

WHEREAS, the City Council acknowledges that such regulations and updates must be framed within the constraints of the First Amendment of the U.S. Constitution since the courts have recognized that some activities within adult oriented businesses contain protected expression under that amendment; and

WHEREAS, any regulation of these activities must fall within the purview of reasonable time, place, and manner regulations rather than outright prohibitions; and

WHEREAS, the City Council concludes that the current zoning regulations and policies governing adult oriented businesses as updated by the Olympia Planning Commission, taking into account the documented secondary impacts of these businesses, are reasonable time, place, and manner regulations.

THE OLYMPIA CITY COUNCIL ORDAINS AS FOLLOWS:

Section 1. Definitions Deleted. That Section 18.02.180 of the City of Olympia Unified Development Code and ordinances pertaining thereto are hereby amended by deleting the definition of "Adult Oriented Business," including Subsections 1, 2, and 3 thereof, and removing the definitions of "Specific Anatomical Areas" and "Specific Sexual Activities."

Section 2. Definitions Added. That Section 18.02.180 of the City of Olympia Unified Development Code and ordinances pertaining thereto are further amended by adding the following definitions thereto:

"Adult oriented business" shall mean the following businesses:

1. Adult arcade. An establishment containing any individual viewing areas or booths, where, for any form of consideration, including a membership fee, one or more still or motion picture projectors, slide projectors, or similar machines, or other image producing machines are used to show films, motion pictures, video cassettes, slides, or other photographic reproduction of sexual conduct, or adult entertainment.

2. Adult cabaret. A night club, bar, restaurant, theater, or auditorium, or similar commercial establishment, whether or not alcoholic beverages are served, which presents adult entertainment.

3. Adult motel. A hotel, motel, or similar commercial establishment which:

a. Offers sleeping accommodation to the public for any form of consideration and provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction of or description of sexual conduct or adult entertainment and are not rated G, PG, PG-13, NC-13, NC-17, or R by the Motion Picture Association of America; or

b. Offers a sleeping room for rent for a period of time that is less than ten (10) hours; or

c. Allows a tenant or occupant of a sleeping room to subrent the room for a period time that is less than ten (10) hours.

4. Adult motion picture theater. A commercial establishment or drive-in theater where at least ten percent of the films, motion pictures, video cassettes, slides, or similar photographic reproductions are characterized by the depiction or description of adult entertainment or sexual conduct and are not rated G, PG, PG-13, NC-13, NC-17, or R by the Motion Picture Association of America and are shown for any form of consideration.

5. Adult book store. A business having as at least ten percent of its volume of trade the display, barter, rental and/or sale of books, printed matter, video tapes, discs or cassettes, films, pictures or other material or paraphernalia distinguished or characterized by an emphasis on matters depicting, describing or relating to sexual conduct or adult entertainment, as defined herein. For purposes of this ordinance, "percent of its volume or trade" means that portion of the store's display space devoted to such material, or that portion of its gross receipts received from the sale of such material, whichever is greater.

6. Other adult entertainment facility. Any commercial establishment to which any patron is invited or admitted and where adult entertainment is presented as a substantial part of the premises' activity, including but not limited to escort agencies, seminude or nude modeling studios, or similar establishments.

"Adult entertainment."

1. Any exhibition, performance, or dance of any type conducted in a premises where such exhibition, performance, or dance involves a person who is unclothed or in such costume, attire, or clothing as to expose any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva, or genitals, or human male genitals in a discernibly turgid state, or wearing any device or covering exposed to view which simulates the appearance of any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva, or genitals, or human male genitals in a discernibly turgid state, even if completely opaquely covered; or

2. Any exhibition, performance, or dance of any type conducted in a premises where such exhibition, performance, or dance is distinguished or characterized by a predominant emphasis on the depiction, description, simulation of, or relation to, the following specified sexual activities:

- a. Human genitals in a state of sexual stimulation or arousal;
- b. Acts of human masturbation, sexual intercourse, or sodomy; or
- c. Fondling or other erotic touching of human genitals, pubic region, buttocks or female breast;

provided, adult entertainment and specifically the "depiction, description, simulation of, or relation to" sexual activities described above, shall not be construed to include any form of actual sexual conduct as defined in this section.

3. Any exhibition, performance, or dance intended to sexually stimulate any patron and conducted in a premises where such exhibition, performance, or dance is performed for, arranged with, or engaged in with fewer than all patrons on the premises at that time, with separate consideration paid, either directly or indirectly, for such performance exhibition or dance. For purposes of example and not limitation, such exhibitions, performances, or dances are commonly referred to as table dancing, couch dancing, taxi dancing, lap dancing, private dancing, or straddle dancing.

"Sexual conduct."

1. Sexual intercourse within its ordinary meaning, occurring upon any penetration, however slight; or
 2. Any penetration of the vagina or anus, however slight, by an object; or
 3. Any contact between persons involving the sex organs of one person and the mouth or anus of another; or
 4. Masturbation, manual or instrumental, of oneself or of one person by another;
- or
5. Direct touching of the sex organs or anus, whether clothed or unclothed, of oneself or of one person by another; or
 6. Flagellation or torture in the context of a sexual relationship; or
 7. Sodomy.

Section 3. Location regulations of adult oriented businesses. That Section 18.06.060 of the City of Olympia Unified Development Code and ordinances pertaining thereto are hereby amended to read as follows:

18.06.060 Commercial Districts' Use Standards.

A. Accessory Uses and Structures.

1. Arterial Commercial District (AC) Requirements. Only those accessory uses which complement or facilitate a permitted use shall be permitted, such as parking facilities, public plazas, enclosed or screened storage areas, car washes in conjunction with service stations, child day-care centers in conjunction with places of worship.

2. Downtown Business District (DB) Requirements. Private garages, accessory buildings or structures which are clearly incidental to a single-family townhouse or duplex use, are a permitted use, if structures do not exceed two (2) parking spaces per unit. (See also 18.06.060(S), Parking Facilities and Garages.)

B. Adult Oriented Businesses.

1. Location. Adult oriented businesses may be permitted, but only if the following separation and distance conditions are met:

a. No adult oriented businesses shall be located closer than one thousand (1,000) feet to another such business whether such other business is located within or outside the city limits. Said distance shall be measured by following a straight line from the nearest point of public entry into the structure which will house the proposed adult facility to the nearest point of public entry into the structure housing another adult facility.

b. No adult oriented businesses may be located closer than two hundred fifty (250) feet from the nearest point of the boundary of the General Commercial district; PROVIDED, this restriction shall not apply to a proposed business with respect to a particular zone boundary when the proposed site of the business is separated from said boundary by an arterial street of at least four (4) travel lanes in width.

c. No adult oriented businesses shall be located closer than ~~((two))~~ three hundred ~~((fifty))~~ thirty ~~((250))~~ 330 feet ~~((to))~~ of any of the following uses whether such use is located within or outside the city limits:

i. Any residential use;

~~((ii. Public library;))~~

~~((iii))~~ ii. Family child care home;

~~((iv))~~ iii. Child day care center;

~~((v))~~ iv. Preschool facility; ~~((and))~~

~~((vi))~~ v. Nursery school~~((:))~~ ; and

vi. The point of ingress to or egress from any public trail identified in the city's Comprehensive Plan, Urban Trails, except when such point is separated from the proposed business by a four-lane or wider street arterial.

d. No adult oriented businesses shall be located closer than one-thousand three hundred twenty (1,320) feet to any of the following uses whether such use is located within or outside the City limits:

i. Public park;

ii. Public or private primary or secondary schools, colleges and universities; and

iii. Places of worship (e.g., church, temple or synagogue or other facility primarily devoted to the teaching or practice of religious beliefs).

iv. Public library;

e. Such distances shall be measured by following a straight line distance between the point of public entry into the structure housing the adult facility and:

~~((iv))~~ i. The nearest point on a property line of a public park; or

~~((v))~~ ii. Whichever is closer, ((F))the nearest point of public entry to or the nearest point on ((a property line, whichever is closer, of)) the perimeter of the area actually used in conjunction with any residential use, public library, child day care home, child day care center, preschool, nursery school, public or private primary or secondary school, college, university, church, temple, or synagogue, or other facility primarily devoted to the teaching or practice of religious beliefs.

~~((In the case of any use utilizing leased area or facilities, "property line" shall refer only to such leased area and facility.))~~

For purposes of this ordinance, "actually used in conjunction with" means areas used for the primary and related structures, yards, parking lots, designated play areas and other areas used to determine site coverage under this code.

f. Waiver of Distance Requirements. The following procedures and criteria shall be adhered to with regard to a request for waiver of distance requirements:

i. Distance waiver required. Any party proposing to locate an adult facility within less than the required distances from uses or zones as specified in this ordinance may do so only after obtaining a waiver therefor from the Hearing Examiner through a conditional use permit.

ii. Waiver notice requirements. In addition to the notice requirements for conditional use permits, first class mailing notice shall be made to all parties within either distance set forth in subsections 18.06.060(B)(1)(c) and (d), depending upon the use in question. The applicant shall provide the names and addresses of all property owners and businesses within said distances from the proposed use.

iii. Criteria for decision. The final decision on the request for waiver of distance shall be made by the Hearing Examiner, based on consideration of the following:

(a) The extent to which physical features would result in an effective separation in terms of visibility and access.

(b) Compatibility with adjacent and surrounding land uses.

~~(c) The availability or lack of alternative locations for the proposed use.~~

(d) Ability to avoid the adult facility by alternative vehicular and pedestrian routes.

2. Intervening Uses. Uses and zones specified in Subsection 18.06.060(B)(1)(c) and (d) shall not be allowed to locate within the specified distances of an adult oriented business. Any party proposing to locate such a use or zone within the specified distances of an adult facility is considered an intervening use and may do so only after obtaining a distance waiver pursuant to the provisions of Subsection 18.06.060(B)(1)(f) of this code regarding waiver of distance requirements; provided, that notice requirements shall conform with the provisions of Section 18.78.020 of the Olympia Municipal Code.

3. Adult Oriented Businesses - Forbidden in Other Zones. The allowance of ~~((adult book stores, adult live entertainment centers and adult motion picture theaters))~~ adult

oriented businesses shall be limited to the General Commercial zone and such uses are forbidden in all other zones within the City of Olympia.

4. Adult Oriented Businesses - Conflict with State Law. The provisions of this ordinance shall not have the effect of authorizing any activities prohibited by State law or other ordinances of the City of Olympia.

C. Animals. All Commercial Districts:

1. Quantity. Not more than three (3) dogs, cats and untraditional pets such as potbelly pigs and rabbits (four (4) months of age or older) shall be permitted per dwelling unit. (Traditional pets/animals are defined as animals which can be house-broken, walked on a leash, are frequently, but not necessarily, housed within a residence and are neither obnoxious nor a public safety or health threat.)

2. Birds. Fowl, such as chickens, ducks and geese are prohibited. This does not apply to song birds or other traditional pet birds (e.g., parrots). [NOTE: The keeping of racing and performing pigeons is permitted as a conditional use.]

3. Farm Animals. Swine (other than potbelly pigs) and goats are prohibited.

4. Large Parcels. The keeping of other animals and pets, which are not specifically prohibited above, is permitted, provided that:

a. There shall be no more than one (1) animal per acre, in addition to those animals and pets permitted in 1 and 2 above, and

b. Such animals shall be confined within a suitably fenced area which shall be located no closer than fifty (50) feet from any property line, and

c. Their keeping does not constitute a nuisance or hazard to the peace, health and welfare of the community in general and neighbors in particular.

D. Banks.

1. Arterial Commercial District (AC) Requirements. Banks which offer only drive-through service (i.e., which serve customers exclusively in or on their vehicles) are not permitted.

2. Urban Waterfront (UW) and Downtown Business (DB) District Requirements. Drive-through banks may be permitted with a conditional use permit if the proposed project meets the Street Edge Development Standards of the Pedestrian Streets Overlay District, Chapter 18.16 OMC. The proposed project may be exempted from the Pedestrian-Oriented Street Wall Requirement under the "Pedestrian Streets Overlay District Requirements" if it is found that:

a. The proposed design meets the intent of the Pedestrian Streets Overlay District, "Pedestrian Streets Overlay District Requirements"; and

b. The building site presents unusual conditions which require an alternative design to accomplish the intent of the Pedestrian Streets Overlay District, "Pedestrian

Streets Overlay District Requirements."

E. Bed and Breakfast Houses. Professional Office/Residential Multifamily (PO/RM), General Commercial (GC), and Medical Services (MS) districts requirements: All Bed and Breakfast Houses are subject to the Bed and Breakfast House requirements in residential districts, Section 18.04.060(L)(3)(c).

F. Drive-Through and Drive-In Uses.

1. Arterial Commercial (AC) District Requirements. Businesses which serve customers exclusively in their vehicles are prohibited. This includes uses such as drive-through laundry pick-up agencies, drive-through-only banks, and drive-through photo processing services. This does not include car washes. Restaurants are not permitted to have drive-up or drive-through facilities.

2. Downtown Business and Urban Waterfront (UW) Requirements. Drive-through and drive-in uses are prohibited as a primary or accessory use (exception: drive-through banks are a conditional use). Existing drive-in and drive-through restaurants permitted before January 1, 1994, are conforming uses. Such uses shall be treated the same as other allowed uses, consistent with applicable regulations or conditional use requirements. Other uses made nonconforming by this zoning ordinance are subject to the requirements of Chapter 18.37, Nonconforming Buildings and Uses.

G. Public Facilities, Essential.

1. Regulations applicable to all commercial zoning districts. Essential public facilities are subject to the conditions listed in Section 18.04.060(W), as well as any other applicable provisions of this Title.

2. Neighborhood Retail District (NR) Regulations. State or regional transportation facilities shall be linear facilities only, such as roads or railroads.

3. Community Retail District (CMR) and Professional Office/Residential Multifamily District (PO/RM) Regulations. "Other facilities as designated by the Washington State Office of Financial Management, except prisons and solid waste handling facilities" (see Table 6.01 above) shall be limited to office uses.

4. General Commercial District (GC), Urban Waterfront (UW), and Downtown Business District (DB) Regulations. "Other facilities as designated by the Washington State Office of Financial Management, except prisons and solid waste handling facilities" (see Table 6.01 above) shall be limited to those office uses, industrial uses, recreation and culture uses otherwise allowed in these districts. In addition to the requirements for Essential Public Facilities, these uses shall meet all other applicable regulations of this Chapter and Title.

H. Food Stores. Professional Office/Residential Multifamily District (PO/RM) Requirements: Food stores are allowed up to a maximum size of five thousand (5,000) square

feet of gross floor area.

I. Fraternal Organizations. Fraternal organizations are permitted within the CSH zone district under the condition that if alcohol is served, the use shall be subject to all requirements governing nightclubs, taverns and lounges (see Section 18.06.060(P) Nightclubs and Taverns, below).

J. General Merchandise Stores. Professional Office/Residential Multifamily District (PO/RM) Requirements: General Merchandise stores shall have a maximum size of five thousand (5,000) square feet of gross floor area.

K. Group Homes.

1. General requirements for group homes are identified in subsection 18.04.060(L).

2. Downtown Business District (DB) Requirements. There is no minimum lot size for group homes with up to twenty (20) unrelated residents, exclusive of on-site operators.

3. General Commercial District (GC) and Medical Services District (MS) Requirements. The Hearing Examiner may relax the minimum lot size standard in paragraph 18.04.060(K)(3) where the characteristics of the home so warrant.

L. Health Fitness Centers and Dance Studios. Community Retail (CMR) and Professional Office/Residential Multifamily (PO/RM) District Requirements: These uses shall have a maximum size of five thousand (5,000) square feet of gross floor area.

M. Industry, Heavy. CW - 1 Zone District: Manufacturing, compounding, processing, treatment or assembly of products--except those which cause excessive danger or offense--is permitted within this district. Heavy industrial uses are not permitted south of Corky Street.

N. Industry, Light.

1. Arterial Commercial District (AC) Requirements.

a. Light industry is limited to production of consumer products offered for retail sale on site, including, but not limited to, coffee roasters; micro breweries; bakeries; bagel, pasta, or candy makers; and pottery or craft shops.

b. At least twenty (20) percent of the space on the first floor of the building (excluding hallways, employee facilities, or other areas not open to the public) shall be directly related to retail sales.

2. Urban Waterfront (UW) Requirements. Light industry is a permitted use east of Washington Street. It is a conditional use west of Washington Street.

O. Laundry and Laundry Pick-Up Agency. Arterial Commercial District (AC) Requirements: No drive-through facilities are allowed for drop-off or pick-up of laundry.

P. Nightclubs and Taverns. Commercial Services - High Density (CS-H) District Requirements: Night clubs, taverns and lounges are a conditional use, subject to the following conditions:

1. Setback. No building shall be located closer than sixty (60) feet from a property line abutting a residential use.
2. Noise Insulation. The building shall be of sound-reducing construction that will assure compliance with the sound emission requirements of Section 18.40.080, Property Protection Standards.
3. Loudspeakers. There shall be no outside loudspeakers.

Q. On-Site Treatment and Storage Facilities for Hazardous Waste Urban Waterfront (UW) District Requirements: These facilities are allowed only as an accessory use, subject to siting criteria pursuant to Chapter 70.105 RCW.

R. Operating Hours - Neighborhood Retail District (NR). Operating hours for businesses in the NR District shall be limited to the hours between 6:00 a.m. and 12:00 midnight. A later opening time and/or an earlier closing time may be required if necessary to assure compatibility with the adjacent residential neighborhood.

S. Parking Facilities and Garages.

1. Arterial Commercial District (AC) Requirements. Parking lots established as separate, primary uses are a conditional use. The proposed parking lot shall exclusively serve specifically identified uses in or adjacent to the district to accommodate shared employee or customer parking or off-site employee parking. The uses served by the lot may change over time.
2. Downtown Business District (DB) Requirements. Public plazas, or structured parking is permitted. Parking lots not associated with a permitted or conditional use are prohibited. All existing parking lots permitted before January 1, 1994, are conforming uses. Such lots shall be treated the same as other allowed uses, consistent with applicable regulations. Other uses made nonconforming by this zoning ordinance are subject to the requirements of Chapter 18.37, Nonconforming Buildings and Uses.

T. Residential Restrictions in the Medical Services District (MS). Residential uses may not be constructed within six hundred (600) feet of Lilly Road except above the ground floor in mixed use buildings.

U. Restaurants

1. Downtown Business (DB) District Requirements. New drive-in and drive-through restaurants are not permitted. All existing drive-in and drive-through restaurants permitted before January 1, 1994 are conforming uses. Such uses shall be treated the same as other allowed uses, consistent with applicable regulations. Other uses made nonconforming by this zoning ordinance are subject to the requirements of Chapter 18.37, Nonconforming Buildings and Uses.

2. Medical Services (MS) District Requirements. Restaurants may be allowed as

a conditional use where it can be demonstrated that the medical community or the consumers of medical services are clearly and primarily benefited by the convenience of the facilities.

V. Recycling Facilities. Only Type I Recycling Facilities are allowed in the following districts: Neighborhood Retail (NR), Community Retail (CMR), Professional Office/Residential Multifamily (PO/RM), Medical Services (MS), Urban Waterfront (UW), Arterial Commercial (AC), and Commercial Services-High Density (CS-H).

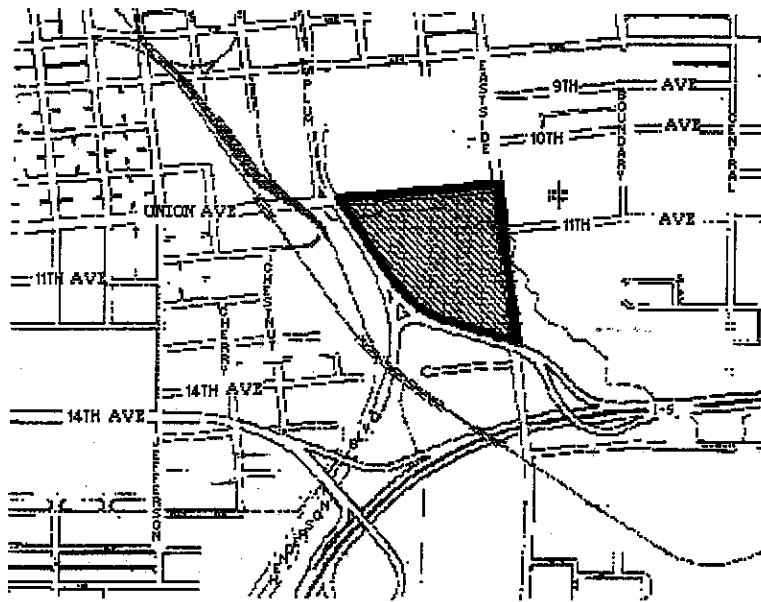
W. Service Stations and Car Washes

1. Arterial Commercial (AC) District Requirements. Car washes are permitted only in conjunction with a service station.

2. Downtown Business District (DB) Requirements.

a. Service stations, car washes and accessory uses are not permitted, except on those properties located south of Union Street and east of Plum/Henderson (see Figure 6-1). This also applies to gasoline dispensing facilities accessory to a permitted use.

b. All existing service stations permitted before January 1, 1994, are conforming uses. Such uses shall be treated the same as other allowed uses, consistent with applicable regulations.



 **SERVICE STATIONS ALLOWED**

FIGURE 6-1

Other uses made nonconforming by this zoning ordinance are subject to the requirements of Chapter 18.37, Nonconforming Buildings and Uses.

3. Urban Waterfront (UW) Requirements.

a. New service stations and car washes are not permitted. This also applies to gasoline dispensing facilities accessory to a permitted use. EXCEPTION: gasoline dispensing facilities accessory to a marina or boat club are permitted.

b. All existing service stations and car washes permitted before January 1, 1994, are conforming uses. Such uses shall be treated the same as other allowed uses, consistent with applicable regulations. Other uses made nonconforming by this zoning ordinance are subject to the requirements of Chapter 18.37, Nonconforming Buildings and Uses.

4. Neighborhood Retail District (NR) Requirements. Underground petroleum storage tanks are prohibited within the Allison Springs aquifer recharge area.

X. School - Colleges and Commercial, Business or Trade Schools. The following requirements apply to all colleges and commercial, business or trade schools requiring a Conditional Use Permit hereafter erected, established or relocated.

1. Lot Size. In addition to complying with the minimum lot size requirements of the zoning district in which located, the minimum lot area of a school in excess of four (4) students shall be based upon a determination made by the Hearing Examiner.

2. Setbacks. Setbacks and screening shall be sufficient to protect neighboring uses.

3. Traffic. The Hearing Examiner shall set such conditions as may be necessary to limit traffic impacts to levels that will be compatible with the neighborhood. If the traffic to be generated cannot be adequately mitigated without adverse impacts, the permit shall be denied.

Y. Specialty Stores.

1. Arterial Commercial (AC) District Requirements. No drive-through facilities are allowed for retail uses, such as a pick-up window for photo processing.

2. Medical Services (MS) District Requirements. Retail developments such as florists, gift shops and the like may be allowed as a conditional use where it can be demonstrated that the medical community or the consumers of medical services are clearly and primarily benefited by the convenience of such retail facilities.

3. Neighborhood Retail (NR) District Requirements. Specialty stores are limited to those selling such items as gifts, antiques, variety goods, light hardware, hobby supplies, garden supplies, reading materials and other small items used primarily in a private home.

4. Professional Office/Residential Multifamily District (PO/RM) Requirements. Specialty stores shall have a maximum gross floor area of five thousand (5,000) square feet.

Z. Temporary Uses

1. Intent. Certain uses, when active for a limited and temporary period of time and when property regulated, can be compatible, or otherwise limited in impact to neighboring properties and the general community. In accord with this intent, no temporary use shall be allowed unless a temporary use permit is approved by the City as prescribed by this section.

2. Permitted Temporary Uses. The following temporary uses are permitted in commercial districts, subject to the regulations in 18.04.060(EE)(2). Temporary uses are also allowed within PUD's.

a. Christmas tree sales, limited to not more than forty-five (45) days of site occupation and operation in any one (1) calendar year.

b. Circuses, carnivals and similar transient amusement enterprises, limited to not more than thirty (30) days of site occupation and operation in any one (1) calendar year.

c. Merchandise displays exterior to the building in which the business is located, limited to not more than thirty (30) days of site occupation during any one (1) year

period.

feet.

sidewalk and maintained in an attractive and trash-free manner.

business is located.

considered null and void.

face.

feet.

feet.

feet.

movable at any and all times.

of the sidewalk.

basis.

days. Business licenses shall not be automatically renewed and will require reapplication.

become null and void.

Agreement with the City of Olympia.

e. Parking lot and other outdoor sales, limited to no more than thirty (30) days of site occupation and operation in any one (1) year period. Merchandise displays may only occupy parking stalls which are in excess of parking requirements.

f. Temporary stands for the sale of retail products and food, limited to not more than thirty (30) days of site occupation and operation in any one (1) year period.

Temporary stands for the sale of fireworks shall be exempt from this section, but subject to rules and regulations administered by the Olympia Fire Department.

AA. Warehousing

a. Warehouses are prohibited except when part of a larger project and included within the proposed building.

b. All existing warehouses permitted before January 1, 1994, are conforming uses. Such warehouses shall be treated the same as other allowed uses, consistent with applicable regulations. Other uses made nonconforming by this zoning ordinance are

subject to the requirements of Chapter 18.37, Nonconforming Buildings and Uses.

BB. Wholesale Sales. The following Conditional Use Permit restrictions apply to wholesale uses:

1. Urban Waterfront (UW) District Requirements. Wholesale sales are a permitted use in those portions of the UW District which are not within the Pedestrian Streets Overlay District (see Chapter 18.16). In those portions of the UW District which are within the Pedestrian Streets Overlay District, wholesale sales may be allowed as a conditional use if the proposed project meets the Street Edge Development Standards of the Pedestrian Streets Overlay District. The proposed project may be exempted from the Pedestrian-Oriented Street Wall Requirement if:

a. The proposed design meets the intent of the Chapter; and
b. The building site presents unusual conditions which require an alternative design to accomplish the intent.

2. Commercial Services - High Density (CS-H) District Requirements. Permitted uses include those which offer specialized products at wholesale to other uses permitted in this district, including, but not limited to, office machine sales and repair services, and office supply sales.

3. Professional Office/Residential Multifamily (PO/RM) District Requirements. Wholesale sales and/or sales display rooms are allowed as a conditional use, with the exception of the following: motor vehicle sales, manufactured housing sales, boat sales or wholesale fuel distributors, and the like.

CC. Marinas. Urban Waterfront (UW) District Requirements: As an accessory use, marinas may provide sites for recreational vehicles for users of the marina, at a rate of up to 1.5 sites per 100 mooring slips. These sites shall be provided with hook-ups for water, sewer, and electricity. Users of these sites shall be limited to two (2) weeks' occupancy per year.

DD. Office Supplies and Equipment. Professional Office/Residential Multifamily District (PO/RM) Requirements. Office supplies and equipment stores shall have a maximum gross floor area of five thousand (5,000) square feet.

EE. Pharmacies and Medical Supply Stores. Professional Office/Residential Multifamily District (PO/RM) Requirements. Pharmacies and medical supply stores shall have a maximum gross floor area of five thousand (5,000) square feet.

Section 4. Definitions - Licensing of Adult Oriented Businesses Ordinance. That the following definitions of Ordinance No. 5663 are hereby amended to read as follows:

A. "Adult oriented business" shall mean the following businesses:

1. Adult arcade. An establishment containing any individual viewing areas or booths, where, for any form of consideration, including a membership fee, one or more still or motion picture projectors, slide projectors, or similar machines, or other image producing machines are used to show films, motion pictures, video cassettes, slides, or other photographic reproduction of sexual conduct, or adult entertainment.

2. Adult cabaret. A night club, bar, restaurant, theater, or auditorium, or similar commercial establishment, whether or not alcoholic beverages are served, which ~~((features))~~ presents adult entertainment.

3. Adult motel. A hotel, motel, or similar commercial establishment which:

- a. Offers sleeping accommodation to the public for any form of consideration and provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction of or description of sexual conduct or adult entertainment and are not rated G, PG, PG-13, NC-13, NC-17, or R by the Motion Picture Association of America; or
- b. Offers a sleeping room for rent for a period of time that is less than ten (10) hours; or
- c. Allows a tenant or occupant of a sleeping room to subrent the room for a period time that is less than ten (10) hours.

4. Adult motion picture theater. A commercial establishment or drive-in theater where at least ten percent of the films, motion pictures, video cassettes, slides, or similar photographic reproductions are characterized by the depiction or description of adult entertainment or sexual conduct and are not rated G, PG, PG-13, NC-13, NC-17, or R by the Motion Picture Association of America and are shown for any form of consideration.

5. Adult book store. A business having as at least ten percent of its volume of trade the display, barter, rental and/or sale of books, printed matter, video tapes, discs or cassettes, films, pictures or other material or paraphernalia distinguished or characterized by an emphasis on matters depicting, describing or relating to sexual conduct or adult entertainment, as defined herein. For purposes of this ordinance, "percent of its volume or trade" means that portion of the store's display space devoted to such material, or that portion of its gross receipts received from the sale of such material, whichever is greater.

6. Other adult entertainment facility. Any commercial establishment to which any patron is invited or admitted and where adult entertainment is ~~((provided on a regular basis and is))~~ presented as a substantial part of the premises activity, including but not limited to escort agencies, seminude or nude modeling studios, or similar establishments.

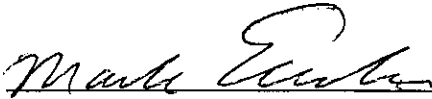
Section 5. If any provision of this ordinance or its application to any person or circumstance is held invalid, the remainder of this ordinance, or application of the provision to other persons or circumstances, shall be unaffected.

MAYOR

ATTEST:

CITY CLERK

APPROVED AS TO FORM:



CITY ATTORNEY

Passed:

Approved:

Published:



MEMORANDUM

TO: Olympia Planning Commission
FROM: Mark Erickson *ME*
DATE: October 30, 1996
SUBJECT: Adult Oriented Businesses

COUNCIL

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Mayor

Mark Foutch
Mayor Pro Tem

Pat Cole

Holly Gadbow

Jeanette Hawkins

Margaret McPhee

Laura Ware

CITY MANAGER

Richard C. Cushing

At the commission's October 21, 1996 meeting you asked that I provide more guidance on how many adult oriented business sites must be allowed under a zoning ordinance in order to pass constitutional muster. I advised you then that there doesn't appear to be a consistent, definitive-standard enunciated by the courts. Further research on this matter leaves me with the same opinion.

The major case in this area by the U.S. Supreme Court arose out the city of Renton, Washington. In City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) the court established the standard that adult oriented business operators are entitled to "reasonable access" to the real estate market of the community involved. A city cannot through restrictive zoning and excessive separation requirements effectively deny entry of adult oriented businesses into the community.

In Renton some 520 acres or 5% of the city's total land area had been set aside for adult oriented businesses under the zoning code. The court held that this set-aside provided reasonable access by Playtime Theaters and other such businesses to the Renton market. From this case, some authorities assumed that the court established 5% as the minimum set-aside in providing reasonable access for adult oriented businesses.

However, that percentage standard has been expressly rejected in other court opinions. In North Avenue Novelties, Inc. v. City of Chicago, 88 F.3d 941 (1996) the court was considering the City of Chicago's zoning ordinance which left 270 acres for adult oriented businesses, less than 1% of the land area of Chicago. The court held that the Constitution does not require that any minimum percentage of land be made available. Rather, the Constitution requires that the ordinance allow reasonable access to the market by operators of these businesses, and



reasonable access to the enterprises by those wishing to avail themselves of this entertainment. The court said that each community must be considered on a case-by-case basis to determine if both these "reasonableness" standards have been met. In Chicago, 35 adult uses were in existence at the time the case was decided, and between 22 and 56 additional adult use locations would be available under the ordinance. The court considered these current and potential sites as passing the reasonableness test. In addition, the court noted that only four or five inquiries a year for these businesses were received by the City of Chicago. Given these numbers, the court held that both the operators and the public were provided with reasonable opportunities.

Another approach was used by the Federal District Court in Illinois in the case of BBI Enterprises, Inc. v. City of Chicago, 874 F.Supp. 890 (1995). In BBI, the court developed a basis for comparison which was the relationship between 1) the number of city sites that are really available for adult uses, and 2) that city's population, a relationship that spoke more directly in supply and demand terms. The court went on to compare the number of adult uses in the cities of Los Angeles and New York to their population and then applied that to the City of Chicago's population. With that methodology the court approved the City of Chicago ordinance.

This decision, however, makes little sense for smaller communities. It first assumes that the ratio should be the same throughout the country and within all sizes of cities. Applying the ratio the court used in BBI, the City of Olympia would need barely one site for adult purposes. This would not be deemed reasonable for a city this size.

In short, there is no definitive standard upon which we can judge our ordinance to determine if sufficient sites are available for adult oriented businesses. The commission needs to consider the unique characteristics of Olympia and determine, as best it can, the number of establishments users and operators in this community could support. This obviously a very subjective exercise. The City of Bellevue's ordinance allows about 22 sites, which has been upheld. The City of Jackson, Mississippi allowed ten sites for six current operations, also found to be reasonable. In light of that and the fact that the City of Olympia gets about one inquiry per year about setting up these businesses, it has been my feeling that an ordinance allowing five to ten reasonable sites would likely be upheld. I am skeptical a court would uphold an ordinance that allowed much less than five sites, nor would it require, in my opinion, that the ordinance allow more than ten sites.

The above assumes that the sites are "constitutionally available" for use as adult facilities. Therefore, the quality of the sites must be considered. Sites may be physically made available under the zoning code but not be constitutionally available if they are physically

or practically unsuitable for that use. The standard here seems to be that sites must be within the actual business real estate market for it to be constitutionally available. The U.S. Court of Appeals in Topanga Press, Inc. v. City of Los Angeles found this to mean that it has to be reasonable to believe that a site will ever become available to any commercial enterprise. Additionally, the court stated as follows:

" . . . When a relocation site suits some generic commercial enterprise, although not every particular enterprise, it too may be said to be part of the real estate market. While it is constitutionally irrelevant whether relocation sites located in industrial or manufacturing zones suit the particular needs of an adult business, potential sites must be reasonable relocation sites for some commercial enterprise before they can be considered part of the relevant market. Consequently, whether one defines a warehouse, a swamp, or a sewage treatment plant as physically or economically unsuitable, it is not reasonable to define these sites as part of the real estate market that any business would choose."

The court in Topanga went on to say that generally commercially zoned sites are part of the market. It also stated that once a site is part of the market, it is not relevant whether it will result in lost profits, higher overhead costs, or even prove to be commercially infeasible for an adult business. The issue is whether any site is part of an actual market for commercial enterprises generally.

Thus, once we determine how many building sites shake out in the general commercial zone after the ordinance separation dimensions are applied, we must look at those sites to make sure they are part of the general commercial market of the City of Olympia. The fact that the site is currently built on and supporting another business does not disqualify it. However, if because of a lack of access, extensive wetlands, steep slopes, or other infirmities the site is not a part of the general commercial market, the site would not qualify as "constitutionally available."

I hope that this memorandum gives the commission some guidance in this area where definitive guidance is hard to come by. I would be happy to discuss this matter further at the November 4 meeting.

MOE:kap

City of Austin

AUSTIN CITY COUNCILMAYOR

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REPORT ON ADULT ORIENTED
BUSINESSES IN AUSTIN

Prepared By
Office of Land Development Services
May 19, 1986

EXHIBIT

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SUMMARY

Purpose

This report provides the basis for development of an amendment to the Austin zoning ordinance regulating adult businesses. Austin's current adult business zoning ordinance was permanently enjoined from being enforced in January, 1985 when Taurus Enterprises sued over a "Code Violation Notice", issued by the City. The violation occurred because a bookstore was located within 1000 feet of property zoned and used for residential purposes.

Existing Research and Legal Basis

The first portion of the study examines existing research concerning the impact of adult business on crime rates and property values. Results from these studies contain similar findings - crime rates are higher and property values lower near adult oriented businesses.

Despite the negative impacts, regulation of adult businesses must respect constitutional rights of owners and patrons. Therefore an overview of pertinent legal and constitutional issues is also provided.

Existing Adult Businesses in Austin

Austin has 49 adult oriented businesses, consisting primarily of bookstores, theaters, massage parlors, and topless bars. Generally, these businesses are located in an area between Lamar Boulevard and Interstate Highway 35.

Analysis of the Impacts of Adult Businesses in Austin

An analysis of crime rates was conducted by comparing areas with adult businesses (study areas) to areas without adult businesses (control areas). Both control and study areas are circular in shape with a 1,000 foot radius, contain similar land uses, and are in close proximity to one another. Four study areas were defined: two with single businesses and two with more than one business. Within the study areas, sex-related crimes were found to be from two to nearly five times the city-wide average. Also, sex-related crime rates were found to be 66% higher in study areas with two adult businesses compared to study areas with only one business.

In order to assess the impact of adult businesses on property values, questionnaires were mailed to 120 real estate appraisal and lending firms. Eighty-eight percent of those responding indicated a belief that an adult bookstore would decrease residential property values within one block, and 59% felt that residential property values would decrease within three blocks. Respondents based their opinions on several factors. They noted that adult businesses made homes less attractive to families, thus lowering demand and property values. Respondents stated that the existence of adult businesses leads mortgage lenders to believe that the neighborhood is in decline, thus making 95% financing difficult.

CHAPTER I INTRODUCTION

As is the case in many large American cities, Austin has witnessed a rapid rise in the number and type of adult entertainment businesses over the past decade. These businesses present a particular problem due, in part, to the moral implications associated with such enterprises in the minds of many members of the community. In addition, the proliferation and alleged detrimental effects of these businesses upon surrounding neighborhoods have been the focus of community attention for quite some time. This attention has resulted in numerous requests for the City to regulate adult businesses.

The regulation of adult entertainment businesses is a controversial matter. While legal and constitutional bases for municipalities to control the use of land within their jurisdictions in order to protect the "public health, safety, morals, and general welfare of their citizens" has been firmly established, the Supreme Court has upheld the right of adult entertainment businesses to operate in the community by virtue of the First and Fourteenth Amendments of the U.S. Constitution. Resolving conflicts between the legal rights of municipal governments and those of adult business operators and patrons has been a difficult task.

The City of Austin enacted a "Sexually Oriented Commercial Establishments Ordinance" on May 22, 1980. This ordinance prohibits adult businesses from being closer than 1,000 feet from a residential use. On October, 25, 1983, a lawsuit was filed attacking the validity of the Ordinance. The lawsuit was filed after the Building Inspection Department issued a "Code Violation Notice" for an adult bookstore located at 8004 Research Blvd. This violation notice was filed because the bookstore was located within 1,000 feet of property zoned and used for residential purposes. The suit disputed the city's assertion of harm to areas zoned and used for residential purposes.

On January 10, 1985, a trial was held. Because the court was unable to make a factual finding on the validity of the City's assertion, it permanently enjoined the City from enforcing the ordinance at that location. The court did not declare the ordinance unconstitutional. However, because of the precedent set by this action, Austin currently lacks an adult business ordinance that can be effectively enforced. Therefore, it is the purpose of this study to objectively evaluate the impacts of adult entertainment businesses on surrounding neighborhoods and to formulate appropriate regulations based on these findings.

The second portion of the study evaluated the impact of adult businesses on real estate values by surveying professional real estate appraisers. Two surveys were conducted. The first surveyed opinions of members of the American Institute of Real Estate Appraisers practicing in 22 metropolitan areas similar in size to Indianapolis. The second survey was a 20% random sample of AIREA members drawn at a national level. In the metropolitan area survey, 78% of those surveyed felt that residential property values would decrease if located within one block of an adult business. The national survey generated similar results - 80% of those surveyed felt residential property values would decrease if located within a block of an adult business.

Los Angeles, California

The Department of City Planning for Los Angeles published a report in June, 1977 entitled Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles. An evaluation of the impact of adult businesses on both crime rates and property values was conducted. Crime rates were evaluated by comparing the Hollywood area with the remainder of the city. Hollywood was selected as a study area because of its high concentration of adult businesses. The study focused on the years 1969 to 1975, during which the number of adult businesses increased from 11 to 88 establishments. The study indicated that prostitution acts in the Hollywood area were 15 times greater than the city average.

Like the Indianapolis report, the Los Angeles study surveyed real estate appraisers to assess the impact of adult businesses on property values. Over 90% of those surveyed felt that the concentration of adult businesses would decrease the market value of private residences located within 1000 feet of the adult business. Eighty-seven percent indicated that the concentration of adult businesses would decrease the market value of business property located in the vicinity of such establishments.

Los Angeles County, California

In April, 1978, the Department of Regional Planning of the County of Los Angeles published a study entitled Adult Entertainment Study and Proposed Zoning Ordinance Amendment. In the study, law enforcement officers were surveyed. Responses from the surveys indicated that areas with a concentration of adult businesses have a higher incidence of public intoxication, theft, assault, disturbing the peace, and sex-related vice. Respondents indicated that nude bars, modeling studios, and massage parlors caused the most individual problems.

The plurality opinion for this court case set out three First Amendment criteria that ordinances regulating adult entertainment businesses must satisfy in order to be Constitutionally upheld.

1. Regulations must be motivated not because of a distaste for the speech itself, but by a desire to eliminate its adverse effects.
2. Properly motivated legislation may be unconstitutional if it severely restricts First Amendment rights.
3. A properly motivated ordinance with only a limited impact on free expression may be unconstitutional if the municipality cannot demonstrate an adequate factual basis for its conclusion that the ordinance will accomplish its object of eliminating the adverse effect of adult businesses².

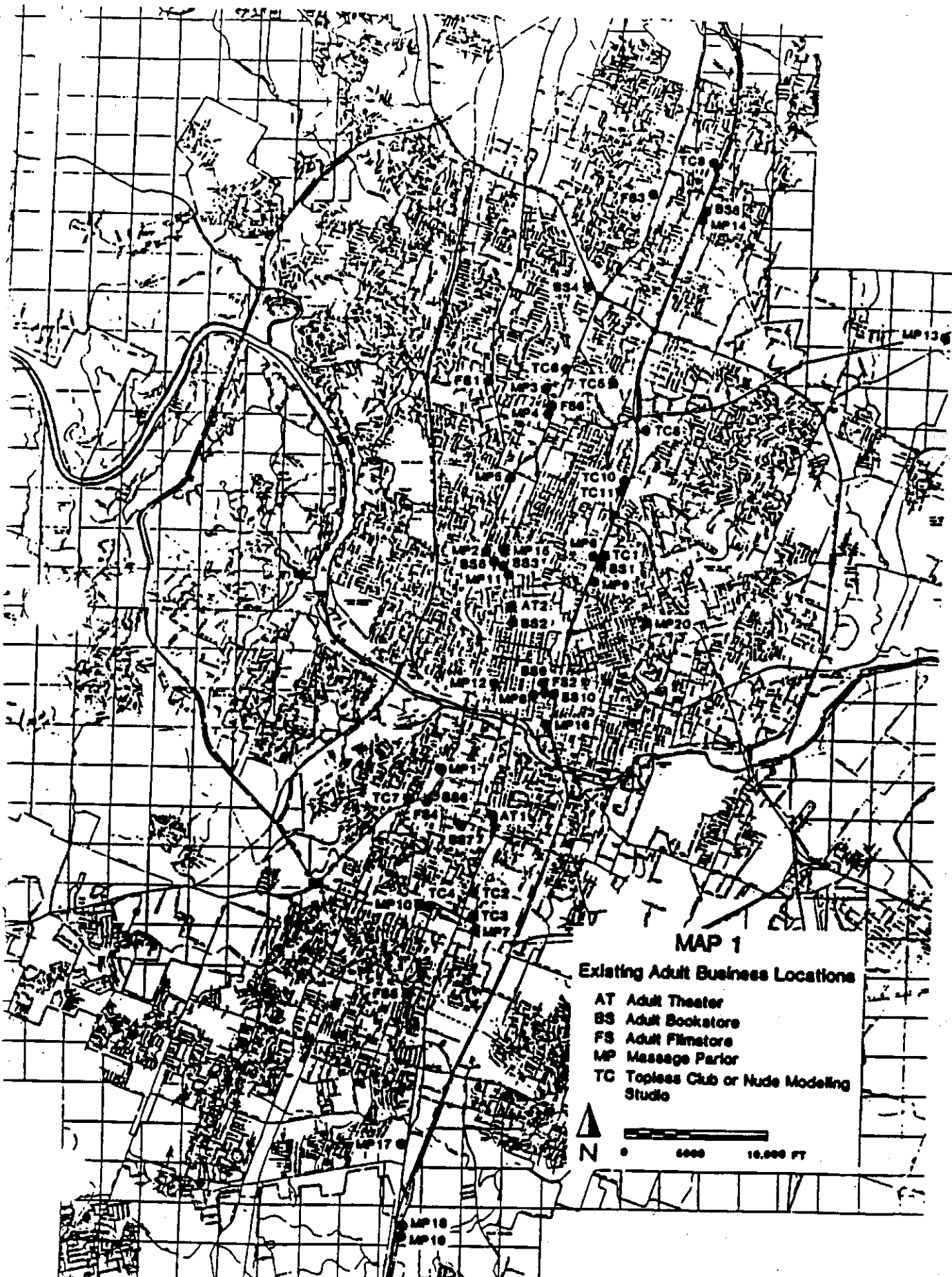
The limitations established by these criteria are best illustrated by analysis of the invalidation of Atlanta, Georgia's Adult Entertainment Ordinance³. This ordinance prohibited adult entertainment businesses from locating within 1,000 feet of any other such use, within 500 feet of any residential zoning district, or within 500 feet of any church or place used for religious worship. The ordinance also restricted all new adult entertainment businesses to three zoning districts. The Atlanta ordinance further required the amortization of certain existing businesses.

Though factual evidence was presented in support of Atlanta's ordinance, the U.S. Supreme Court found that the ordinance violated the first two criteria cited in Young. The Court first found evidence of an improper motive in enacting the ordinance. Minutes of a zoning review board meeting indicated that the board would help citizens opposed to the conduct of adult businesses to "zone them out of business". At the meeting an assistant city attorney indicated that the proposed ordinance was the "strongest vehicle toward elimination" of these businesses and the city was "hoping for complete eradication" of adult businesses. The court also found that the locational restrictions of the ordinance would significantly reduce and possibly eliminate public access to adult businesses. The court had ruled in Young that "pornography zoning" is constitutional only if "the market for this commodity is essentially unrestrained"⁴. The locational restrictions and amortization requirements in Atlanta were deemed too severe a restriction on the First Amendment rights of adult businesses.

2. Weinstein, Alan; Regulating Pornography: Recent Legal Trends; (Land Use Law; February, 1982;) p.4

3. *ibid.* p.4

4. *ibid.* p.4



- | | |
|------------------------------|---------------------|
| 5. Vickie's Massage | 3004 Guadalupe St. |
| 16. Silk Lady Massage | 92 East Ave. |
| 17. New Seoul Korean Massage | 8312 South Congress |
| 18. The Casbah | 9401-B South IH-35 |
| 19. The Chateau | 9401-B South IH-35 |
| 20. Singletons Massage | 1410 Ulit |

Topless Clubs and Nude Modeling Studios

- | | |
|-------------------------------|----------------------------|
| 1. The Crazy Lady | 3701 North IH35 |
| 2. The Doll House | 3615 South Congress |
| 3. The Red Rose | 336 East Ben White Blvd. |
| 4. Honey's | 629 West Ben White Blvd. |
| 5. Sugar's | 404 Highland Mall Blvd. |
| 6. The Yellow Rose | 6528 North Lamar Blvd. |
| 7. Ladies of the Eighties | 2304 South Lamar Blvd. |
| 8. Adams Nude Modeling Resort | 1023 Reinli St. |
| 9. French Quarter | 10600 Middle Fiskville Rd. |
| 10. Burlesque Modeling Studio | 4912 North IH35 |
| 11. Pearls Place | 4814 North IH35 |

B. EVALUATION OF ADULT BUSINESS IMPACTS

In order to develop appropriate recommendations for regulating adult businesses, it is essential to assess the impact of such businesses on the neighborhoods that surround them. Research conducted in other cities suggests that adult businesses have a detrimental effect on the incidence of crime and property value. This report will assess the impact of adult businesses in Austin by comparing the incidence of crime in areas surrounding adult businesses to similar areas having no adult businesses and by surveying the opinions of real estate professionals concerning the effect of adult businesses on property values. The methodology used in this research is similar to those used in the Indianapolis, Indiana and Los Angeles, California studies. For a more detailed discussion of the methodology and results of these studies, see Appendix A.

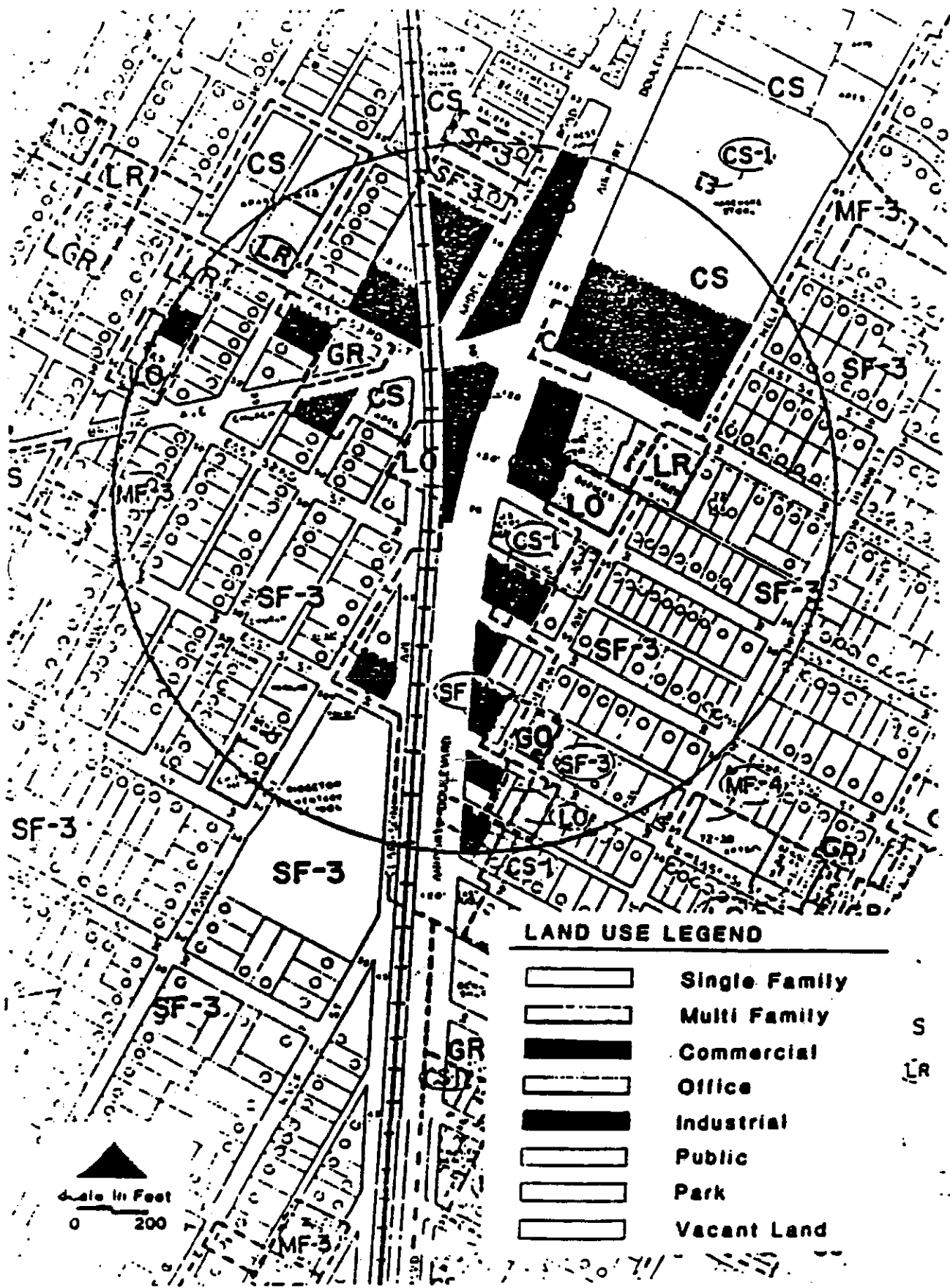
Incidence of Crime

Methodology. The effect of adult businesses on the incidence of crime was measured by collecting crime data for areas with adult businesses (Study Areas) and comparing them to similar areas having no adult businesses (Control Areas). This evaluation focuses on three questions. First, is the incidence of crime, particularly sexually related crime, higher in areas surrounding adult business sites than in similar areas without adult business sites? Second, is the incidence of crime, particularly sexually related crime, higher in areas having more than one adult business than in areas having a single adult business? Finally, how does the incidence of crime in these areas compare to crime rates for the City of Austin as a whole?

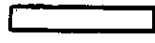






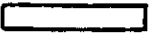
The highest concentration of adult businesses is located just west of the University of Texas campus along West 29th Street. This area was considered unsuitable because the transient population associated with the University of Texas might unduly influence the results of the evaluation. The concentration of adult businesses existing in the Central Business district was deemed unsuitable for study due to the lack of residential uses in the area. Three adult businesses are located along IH-35 near its intersection with East 38 1/2 Street. This area was not selected because a large portion of the Study Area is occupied by Concordia Lutheran College, and a suitable control area with similar land uses was difficult to define.

In order to draw valid comparisons, the Control Areas were selected according to their proximity and similarity to the Study Areas. Four Control Areas were selected for comparison to the four study areas.

MAP 3
CONTROL AREA 1

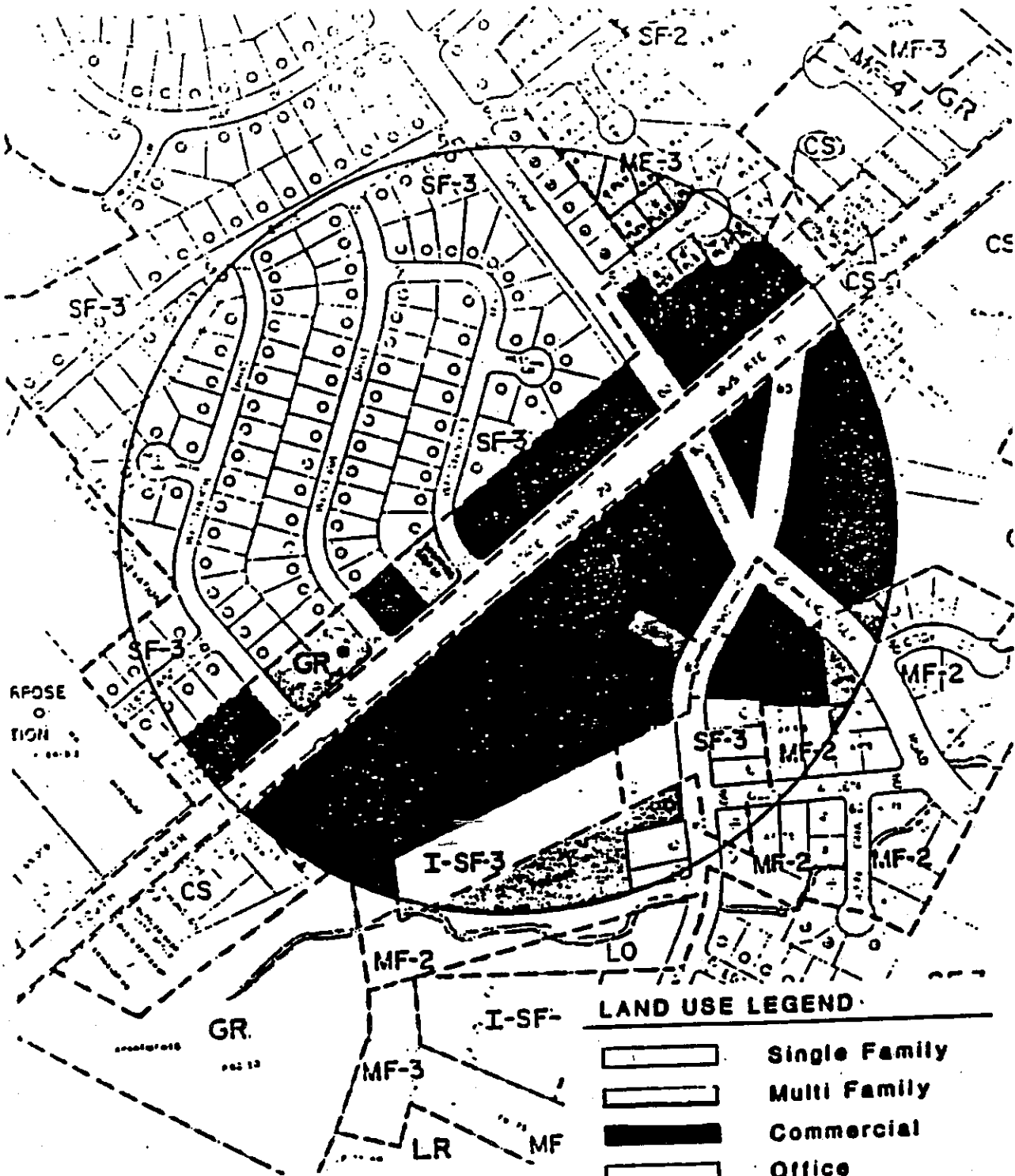


LAND USE LEGEND









-  Single Family
-  Multi Family
-  Commercial
-  Office
-  Industrial
-  Public
-  Park
-  Vacant Land

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MAP 5 CONTROL AREA 2

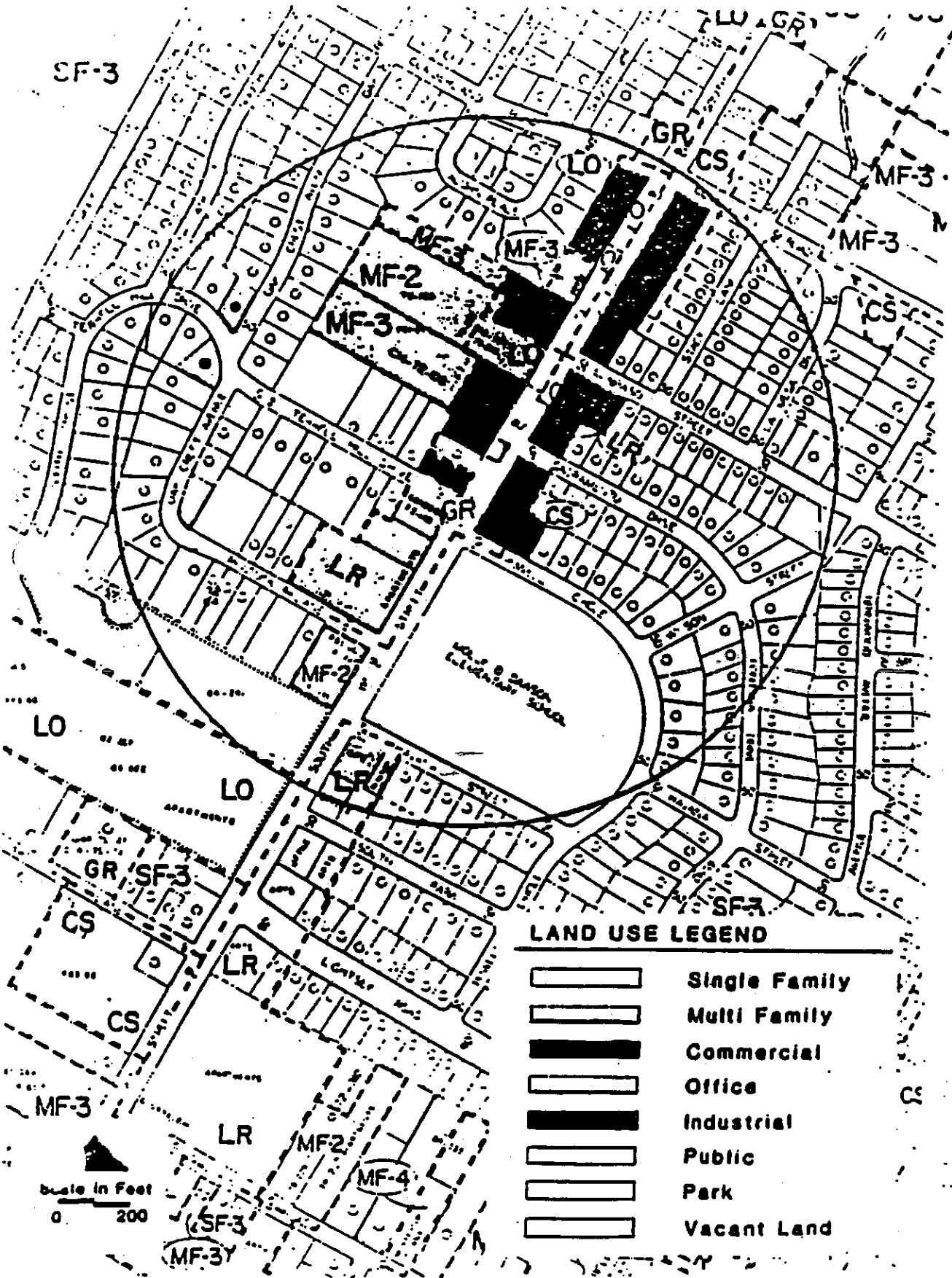


LAND USE LEGEND

-  Single Family
-  Multi Family
-  Commercial
-  Office
-  Industrial
-  Public
-  Park
-  Vacant Land



MAP 7
CONTROL AREA 3



LAND USE LEGEND

[Symbol]	Single Family
[Symbol]	Multi Family
[Symbol]	Commercial
[Symbol]	Office
[Symbol]	Industrial
[Symbol]	Public
[Symbol]	Park
[Symbol]	Vacant Land

MAP 9
CONTROL AREA 4

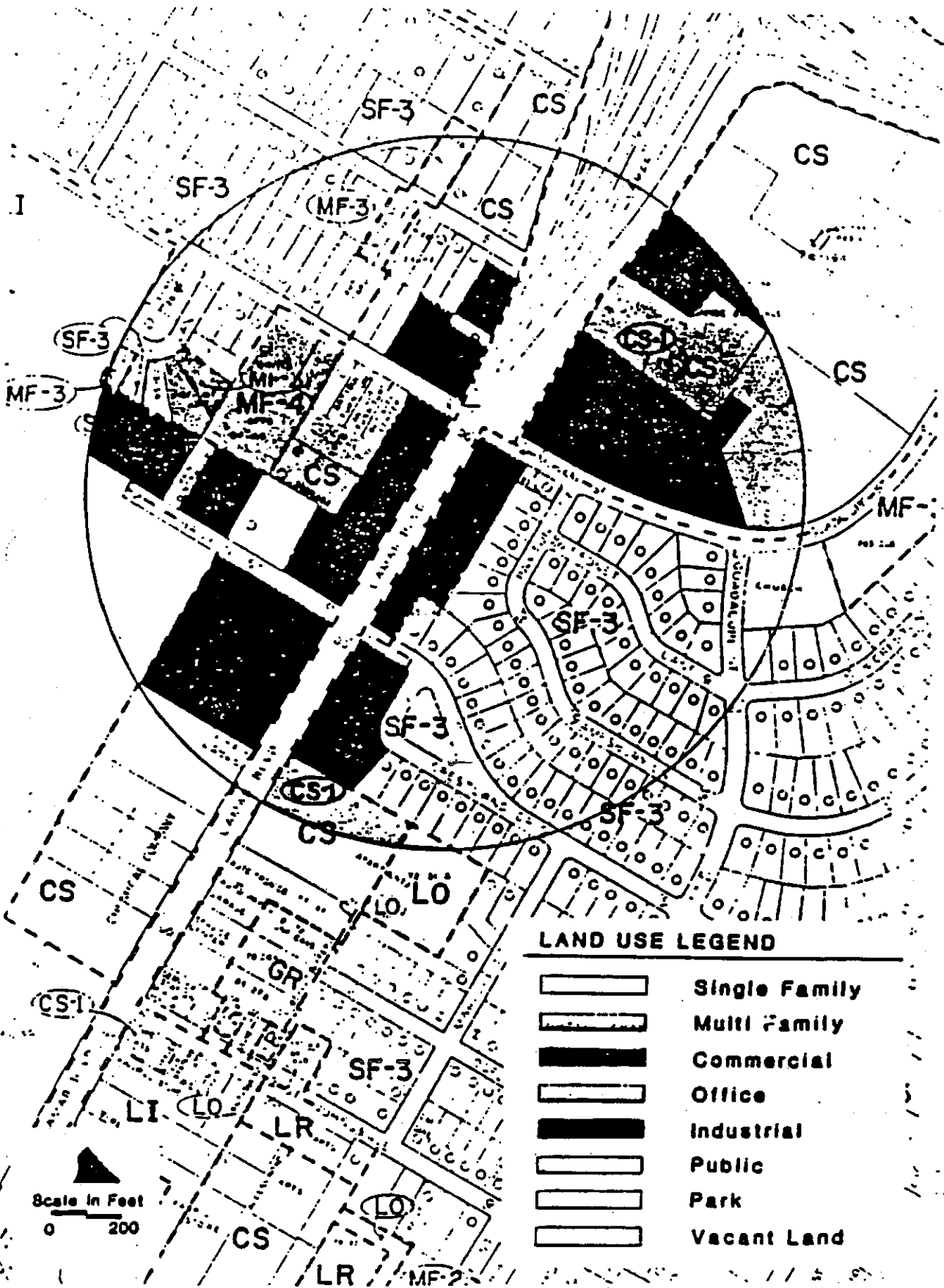


Table 5
Area 3
Population Characteristics

Ethnicity	Study	Control
% Anglo	17.7	54.8
% Black	12.1	2.4
% Hispanic	64.1	42.8
% Other	6.1	0
Age Composition		
% Under 18	40.1	25.1
% 18 to 64	51.6	69.6
% 65 and over	8.3	5.3
% Owner Occupancy	27.9	48.9

Table 6
Area 4
Population Characteristics

Ethnicity	Study	Control
% Anglo	84.4	72.8
% Black	2.5	2.5
% Hispanic	12.4	19.4
% Other	0.7	5.3
Age Composition		
% Under 18	16.1	21.8
% 18 to 64	69.4	0.5
% 65 and over	14.5	5.7
% Owner Occupancy	38.2	24.8

Table 7
Area 1
Existing Land Use
(in acres)

	Study	Control
Single Family	14.1	18.9
Multi-Family	3.0	1.5
Commercial	11.9	9.7
Office	0.3	2.2
Industrial	-	-
Public	3.9	4.4
Parkland	-	-
vacant	1.6	0.7
roads	37.3	34.7

Table 10
Areas 4
Existing Land Use
(in acres)

	Study	Control
Single Family	25.1	22.7
Multi-Family	2.3	4.9
Commercial	26.6	15.8
Office	1.1	5.1
Industrial	-	2.3
Public	-	0.4
Parkland	-	-
Vacant	1.6	3.7
Roads	15.4	17.2

Results

The crime rates calculated for each Study and Control Area and for the city at large are indicated in Table 11.

Table 11
Average Annual Crime Rates
(per 1000 population)

	Part 1 Crime Rate	Sex Related Crime Rate
Study Area 1	181.82	8.72
Control Area 1	320.65	2.17
Study Area 2	552.54	13.56
Control Area 2	96.69	2.48
Study Area 3	128.59	4.97
Control Area 3	69.60	2.37
Study Area 4	185.77	7.91
Control Area 4	133.41	1.84
City of Austin	83.14	2.81
Control Areas	132.23	2.21

Table 13
The Effect of Adult Businesses on
Property Values in Austin, Texas

	No Change	Decrease 1 to 10%	Decrease 10 to 20%	Decrease 20% or more
Residential Property One Block Radius	12%	31%	26%	31%
Commercial Property One Block Radius	31%	30%	33%	6%
Residential Property Three Block Radius	41%	28%	26%	5%
Commercial Property Three Block Radius	59%	30%	9%	2%

The tabulated responses in Table 13 indicate that a substantial majority (88%) those surveyed felt that an adult book store would have a negative effect residential property located within one block. Of these, 31 percent felt that value would decrease by more than 20 percent. A majority (69%) felt that the value of commercial property within one block of the bookstore site would be negatively affected. Only 6 percent felt, however, that the decline in value would be greater than 20 percent.

When the distance from the adult bookstore is increased, the negative impact on property values appears to be less severe. While a majority of respondents (59%) indicated that residential property located three blocks from the bookstore would decline in value, only 5 percent felt the decline would be greater than 20 percent and over 40 percent felt that there would be no change in value at this distance. The majority of respondents (59%) felt that there would be no change in value of commercial property located three blocks from the adult bookstore site.

Several respondents indicated that "pride of ownership" has an important influence on property values. When families are encouraged to leave a residential area or discouraged from locating in a particular area due to the existence of an adult business nearby, a transition from a family-oriented, owner-occupied neighborhood to a more transient, renter-occupied neighborhood may result. This trend is reinforced by the reluctance of real estate lenders to make 90 to 95% financing available for residential properties in the area.

With regard to the effect on commercial properties, respondents commented that commercial property values were negatively impacted but to a lesser degree than residential properties. It was also noted that the impact of a single adult entertainment business would be less severe than the impact resulting from a concentration of businesses. Other comments indicated a negative impact on the sales of businesses engaged in neighborhood trade. One respondent commented that adult entertainment businesses tend to drive out residential or commercial uses.

Those respondents who indicated little or no change in property values cited several reasons for their opinions. Several commented that adult businesses locate in areas where property values are already in decline. One comment noted that commercial properties would experience very little effect because most commercial properties are encumbered by long term leases. Another respondent stated that there is no market evidence that values will change.

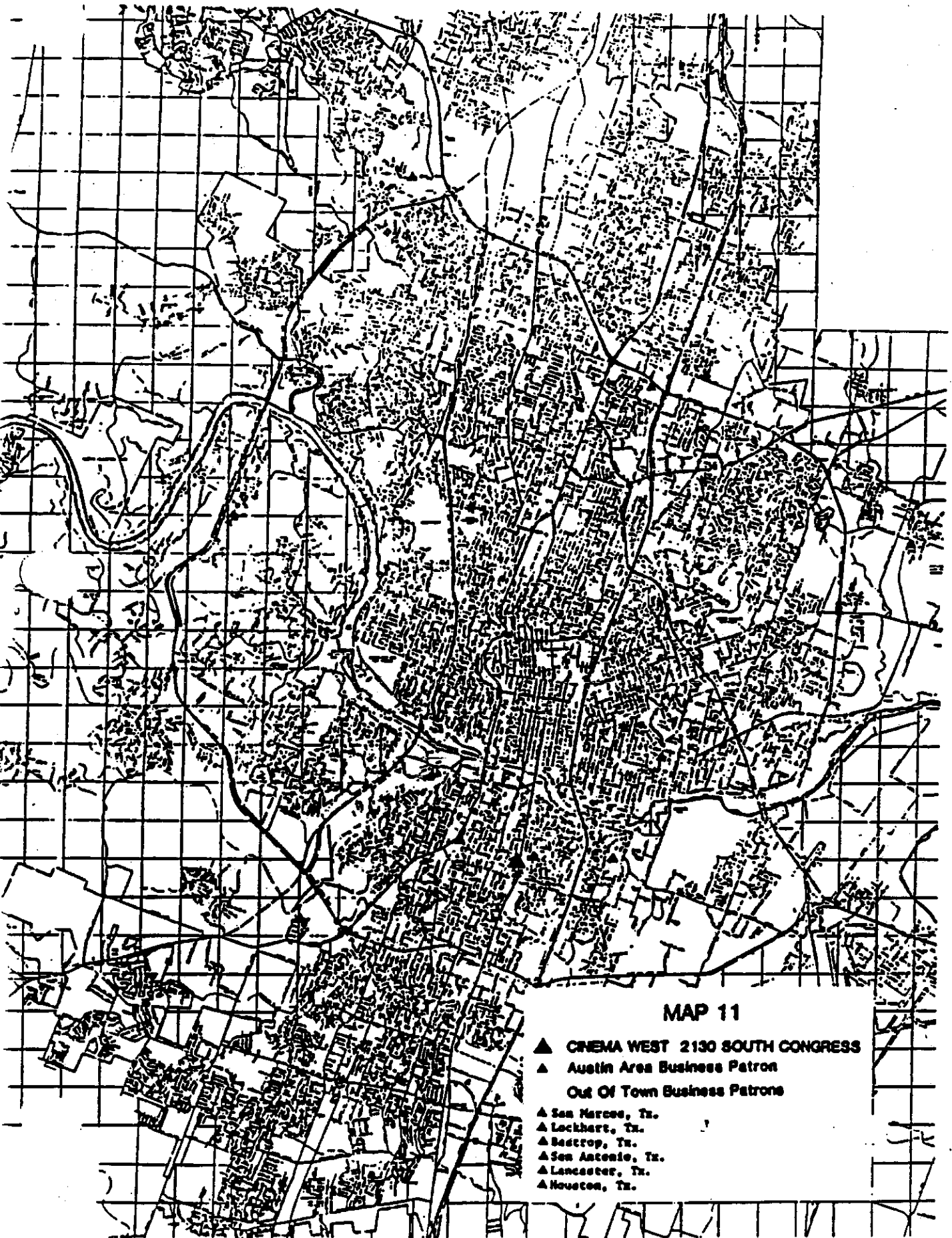
In summary, most appraisers and lenders believe that adult businesses will contribute to a decrease in surrounding property values, particularly residential properties within a one block radius. The appraisers' opinions will affect property values because their lending and appraisal policies will, to some extent, determine property value.

C. TRADE AREA CHARACTERISTICS

The use of zoning authority to regulate the locations of adult businesses implies that these businesses will be limited to certain zoning districts. In order to make appropriate recommendations for assignment of these businesses to specific zoning districts, an understanding of their trade area characteristics is important. Specifically, it is useful to know if a substantial portion of the adult businesses clientele is drawn from the immediate neighborhood or from a larger regional area.

Methodology

In order to establish the extent of an adult business trade area, a method of determining the location of customer residences must be employed. The method selected for this evaluation was the observation of vehicle license numbers. It was assumed that addresses listed on the vehicle registration reflected the location of the customers' residence.



Three adult business sites were examined; an adult theater, an adult bookstore, and a topless bar. Due to study constraints, observation of these sites was limited to a single weekend night. It is believed, however, that the results of this examination reflect a reasonably accurate representation of the trade area of each business.

Results

The general location of customer residences was plotted on a map along with the location of the observed adult business. Addresses located outside of the Austin area or not found on the map are listed on the map legend. Maps 10, 11, and 12 illustrate the residences of observed customers with respect to the adult business surveyed.

These maps indicate that the location of customers is fairly evenly distributed throughout the City, particularly in the case of the topless club, (Map 12). None of the three businesses observed appear to attract a significant number of customers from the immediate neighborhood. Of the 81 observations made only 3 were located within a one mile radius of the adult business. It should be noted that all of the adult businesses studied had single-family-residential neighborhoods in the immediate vicinity.

Almost half (44 percent) of the observed customers resided outside of the City of Austin. Table 15 summarizes this analysis for each of the adult businesses.

Table 15
Residence of Observed Customers

	Adult Theater	Adult Bookstore	Topless Bar
Within Austin	8	4	34
Outside of Austin	6	7	23
Total	14	11	57

The assignment of proper zone districts must also consider the type of adult business. Adult Entertainment Businesses, (including bookstores, theaters, and film stores) represent a form of free speech which is protected by the First Amendment. Regulation of these uses must not unduly restrict freedom of speech. Adult Service Businesses, such as massage parlors and modeling studios, are not as sensitive to First Amendment issues.

Adult Entertainment Businesses are recommended in the GR, L, CBD, DMU, CS, CS-1, CH, MI, and LI zone districts and Adult Service Business are recommended in the L, CBD, DMU, CS, CS-1, and CH zone districts.

Conditional Use Permits

The conditional use permit process offers a viable method of regulating adult businesses by providing an extra degree of review needed to address the potential impacts adult businesses generate to surrounding neighborhoods. Unlike traditional zone district regulations, conditional use permits require site plan review, thus affording additional analysis and control.

Austin's current zoning ordinance prohibits adult businesses from locating within 1000 feet of any property zoned or used as residential. This provision led to the invalidation of the ordinance in the suit initiated by Taurus Enterprises because it was found that almost all commercially zoned property is, in fact, located within 1000 feet of residential property. This is particularly true in older areas of the City where narrow strip commercial development is flanked by residential use. This restriction should be eliminated from the ordinance and the issue of neighborhood protection should be addressed via the conditional use permit.

Conditional use permits are recommended in the GR, L, DMU, MI, and LI zoning districts for Adult Entertainment businesses and for Adult Service businesses they are recommended in the L, DMU, CS and CS-1 zone districts. See Table 16 for a summary of these recommendations.

Table 16
Zoning Summary

	GR	L	CBD	DMU	CS	CS-1	CH	MI	LI
Adult Entertainment Businesses	C	C	P	C	P	P	P	C	C
Adult Service Businesses	-	C	P	C	C	C	P	-	-

C - Conditional Use
P - Permitted Use

Appendix A

Analysis of Adult Business Studies in Indianapolis, Indiana and Los Angeles, California.

A. INDIANAPOLIS, INDIANA

In February, 1984, the Division of Planning in Indianapolis published a report entitled Adult Entertainment Businesses in Indianapolis: An Analysis. This report contained the results of an evaluation of the impact of adult business upon the surrounding area in terms of crime rates and real estate values.

Incidence of Crime

Methodology. The Indianapolis study assessed the impact of adult entertainment businesses on crime rates by researching six areas containing adult businesses and six similar areas containing no adult businesses. The six Study Areas were selected from among the forty three adult business locations. The criteria used to select the Study Areas were their zoning mix, population size, and the relative age of their housing stock. The Control Areas (having no adult businesses) were chosen on the basis of their proximate location to the Study Areas and their similarity in terms of population size and zoning mix. Of the six Study Areas, two consisted primarily of residential zoning, two consisted primarily of commercial zoning, and two contained a mix of both residential and commercial zoning. All Study and Control Areas were circular in shape with a 1000 foot radius.

The Indianapolis study evaluated crimes in the Study and Control Areas for the years 1978 through 1982. The study compiled all reported incidents to which police were dispatched. These data were assembled into two groups: Major Crimes and Sex-Related Crimes. Major Crimes included Criminal Homicide, Rape, Robbery, Aggravated Assault, Residence and Non-Residence Burglary, Larceny, and Vehicle Theft. Sex-Related Crimes included Rape, Indecent Exposure, Obscene Conduct, Child Molestation, Adult Molestation, and Commercial Sex.

Results. The evaluation found that for both the Study and Control Areas, the rate of major crimes was higher than the corresponding rate for the Indianapolis Police District as a whole. The average annual rate for major crimes in the Study Areas was 23 percent higher than the corresponding rate in the Control Areas. Comparison of the rates for sex-related crimes indicated a considerably larger difference between the Study and Control Areas. The average annual rate for sex-related crimes in the Study Area was 77 percent higher than the corresponding rate in the Control Area. The study also found a strong correlation between the crime frequency and the residential character of the Study areas. Crime rates were 56 percent higher in predominantly residential areas than in predominantly commercial areas. The study found a more acute difference regarding sex-related crimes. Sex-related crimes occurred four times more frequently in predominantly residential areas than in areas that were substantially commercial in nature.

The majority felt that the negative impact was greater for residential properties than for commercial properties.

Table I
Effect of Adult Businesses on Property Values in Indianapolis, Indiana

	Decrease 20% or more	Decrease 10 to 20%	Decrease 1 to 10%	No change	Increase 1 to 10%	Increase 10 to 20%
Residential Property One Block Radius						
20% National Survey	21.3	24.5	34.1	20.1	0.0	0.0
100% MSA Survey	19.0	25.4	33.6	21.1	0.9	0.0
Commercial Property One Block Radius						
20% National Survey	10.0	19.3	42.6	28.1	0.0	0.0
100% MSA Survey	9.5	20.3	39.9	29.9	0.9	0.4
Residential Property Three Block Radius						
20% National Survey	1.6	9.3	25.4	63.3	0.4	0.0
100% MSA Survey	2.6	7.8	28.9	60.3	0.4	0.0
Commercial Property Three Block Radius						
20% National Survey	0.8	5.2	16.5	76.6	0.8	0.0
100% MSA Survey	2.2	3.9	16.8	75.9	1.3	0.0

Results. The City's study monitored trends in Part 1 crimes. Part 1 crimes include homicide, rape, aggravated assault, robbery, burglary, larceny, and vehicle theft. The number of reported incidents of Part 1 crimes in the Hollywood area increased 7.6 percent from 1969 to 1975. This was nearly double the citywide average increase of 4.2 percent for the same time period. This report also monitored Part I crimes committed against a person (as opposed to those committed against property) and found that they increased at a higher than average rate in the Hollywood Area. Street robberies and purse snatchings, where in the victims were directly accosted by their assailant, increased by 93.7 percent and 51.4 percent, respectively; compared to the city wide average increase of 25.6 percent and 36.8 percent.

The increase in arrests for Part II crimes indicated an alarming differential between the Hollywood area and the city as a whole. Arrests for these crimes increased 45.5 percent in the Hollywood area but only 3.4 percent city wide. Prostitution arrests in the Hollywood area increased at a rate 15 times greater than the city average. While the city showed a 24.5 percent increase, prostitution arrests in Hollywood increased 372.3 percent. In 1969, arrests for prostitution in the Hollywood area accounted for only 15 percent of the city total; however, by 1975 they accounted for over 57 percent of the total. In the Hollywood area pandering arrests increased by 475 percent, which was 3 1/2 times greater than the city wide average. In 1969 pandering arrests in the Hollywood area accounted for 19 percent of the city total. By 1975, the share had increased to 46.9 percent.

The Los Angeles Police Department increased their deployment of police personnel at a substantially higher rate in the Hollywood area in response to the surge in crime. The report emphasized that sexually-oriented business either contributed to or were directly responsible for the crime problems in the Hollywood area.

Real Estate Impacts

Methodology. The study prepared by the City of Los Angeles utilized a two point approach in evaluating the impact of adult businesses on surrounding property values. The primary approach sought to establish the impact on property values by monitoring changes in assessed value from 1970 to 1976 for selected areas having concentrations of adult businesses and for appropriate control areas. The report selected five study areas containing 4 to 12 adult entertainment businesses. Three study areas were in Hollywood and the other two were in the San Fernando Valley. Four control areas, having no adult businesses were selected. The study examined property assessment data, U.S. census data, and other pertinent information to determine the rate of appreciation over the six year study period. The rates for the Study Areas were compared to the rates for the Control Areas to gauge the impact of adult businesses on property values.

Respondents to the appraisers' survey commented that the adverse effects are related to the degree of concentration and the type of adult business. They indicated that one free standing adult business may have no effect. A few comments indicated that property values and business volume might increase for businesses that are compatible with adult entertainment businesses (e.g.: other adult businesses, bars). A high percentage of appraisers and realtors commented on the adverse effect of adult businesses on neighborhood appearance, litter, and graffiti.

The survey of property owners indicated that almost 85 percent felt that adult entertainment establishments had a negative effect on the sales and profits of businesses in the area. Over 80 percent felt that adult businesses had a negative affect on the value and appearance of homes in the area immediately adjacent to such businesses. Area property owners and businessmen cited the following adverse effects resulting from adult entertainment establishments.

1. Difficulty in renting office space.
2. Difficulty in keeping desirable tenants.
3. Difficulty in recruiting employees.
4. Limits hours of operation (evening hours).
5. Deters patronage from women and families.
6. Generally reduces business patronage.

Respondents emphasized their concerns about the high incidence of crime. A high percentage of respondents commented that the aesthetics of adult businesses are garish, sleazy, shabby, blighted, tasteless, and tend to increase the incidence of litter and graffiti.

Testimony received at the two public meeting on this subject revealed that there was serious public concern over the proliferation of adult entertainment businesses, particularly in the Hollywood area. Citizens testified that they are afraid to walk the streets, particularly at night. They expressed concern that children might be confronted by unsavory characters or exposed to sexually explicit material.

Theft

Attempted Auto Theft
Unauthorized use of a vehicle

Sex Related Crimes**Sexual Assault**

Attempted Sexual Assault
Aggravated Sexual Assault
Attempted Aggravated Sexual Assault
Rape of a Child
Attempted Rape of a Child

Prostitution

Promotion of Prostitution
Aggravated Promotion of Prostitution
Compelling Prostitution

Sexual Abuse

Aggravated Sexual Abuse
Attempted Aggravated Sexual Abuse
Public Lewdness
Indecent Exposure
Sexual Abuse of a Child
Attempted Sexual Abuse of a Child
Incest with a Child
Solicitation

Appendix D

QUESTIONNAIRE

Please complete this brief survey and return it to the Office of Land Development Services by December 4, 1985. Read the following information about a hypothetical neighborhood and respond to a few questions in terms of your professional experience and judgement.

A middle-income, single-family residential neighborhood borders a main street that contains various commercial activities that serve the neighborhood. There is a building that recently has become vacant and will open shortly as an adult bookstore. There are no other adult bookstores or similar activities in the area. There is no other vacant commercial space presently available in the area.

Please indicate your answers to questions 1 through 4 in the blanks provided using scale A through G.

- Scale:
- (A) Decrease 20% or more
 - (B) Decrease more than 10 % but less than 20%
 - (C) Decrease from 0 to 10%
 - (D) No change in value
 - (E) Increase from 0 to 10%
 - (F) Increase more than 10% but less than 20%
 - (G) Increase 20% or more

- 1) How would you expect the average values of the single-family residential property within one block of the bookstore to be affected? _____
- 2) How would you expect the average values of the commercial property within one block of the bookstore to be affected? _____
- 3) How would expect the average values of the single-family residential property within three blocks of the bookstore to be affected? _____
- 4) How would you expect the average values of commercial property within three blocks to affected? _____
- 5) Suppose the available commercial building is used for something other than an adult bookstore. For each of the following potential uses, would the average value of the residential property within one block of the new business be:

- (A) much higher;
- (B) somewhat higher;
- (C) about the same;
- (D) somewhat lower; or
- (E) much lower;

than if an adult bookstore occupied the site.

Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses

(June 6, 1989)

Introduction

Many communities in Minnesota have raised concerns about the impact of sexually oriented businesses on their quality of life. It has been suggested that sexually oriented businesses serve as a magnet to draw prostitution and other crimes into a vulnerable neighborhood. Community groups have also voiced the concern that sexually oriented businesses can have an adverse effect on property values and impede neighborhood revitalization. It has been suggested that spillover effects of the businesses can lead to sexual harassment of residents and scatter unwanted evidence of sexual liaisons in the paths of children and the yards of neighbors.

Although many communities have sought to regulate sexually oriented businesses, these efforts have often been con-

controversial and equally often unsuccessful. Much community sentiment against sexually oriented businesses is an outgrowth of hostility to sexually explicit forms of expression. Any successful strategy to combat sexually oriented businesses must take into account the constitutional rights to free speech which limit available remedies.

Only those pornographic materials which are determined to be "obscene" have no constitutional protection. As explained later in more detail, only that pornography which, according to community standards and taken as a whole, "appeals to the prurient interest" (as opposed to an interest in healthy sexuality), describes or depicts sexual conduct in a "patently offensive way" and "lacks serious literary, artistic, political or scientific value," can be prohibited or prosecuted. *Miller v. California*, 413 U.S. 15, 24 (1973).

Other pornography and the businesses which purvey it can only be regulated where a harm is demonstrated and the remedy is sufficiently tailored to prevent that harm without burdening First Amendment rights. In order to reduce or eliminate the impacts of sexually oriented businesses, each community must find the balance between the dangers of pornography and the constitutional rights to free speech. Each community must have evidence of harm. Each community must know the range of legal tools which can be used to combat the adverse impacts of pornography and sexually oriented businesses.

On June 21, 1988, Attorney General Hubert Humphrey III announced the formation of a Working Group on the Regulation of Sexually Oriented Businesses to assist public officials and private citizens in finding legal ways to reduce the impacts of sexually oriented businesses. Members of the Working Group were selected for their special expertise in the areas of zoning and law enforcement and included bipartisan representatives of the state Legislature as well as members of both the Minneapolis and St. Paul city councils who have played critical roles in developing city ordinances

regulating sexually oriented businesses.

The Working Group heard testimony and conducted briefings on the impacts of sexually oriented businesses on crime and communities and the methods available to reduce or eliminate these impacts. Extensive research was conducted to review regulation and prosecution strategies used in other states and to analyze the legal ramifications of these strategies.

As testimony was presented, the Working Group reached a consensus that a comprehensive approach is required to reduce or eliminate the impacts of sexually oriented businesses. Zoning and licensing regulations are needed to protect residents from the intrusion of "combat zone" sexual crime and harassment into their neighborhoods. Prosecution of obscenity has played an important role in each of the cities which have significantly reduced or eliminated pornography. The additional threat posed by the involvement of organized crime, if proven to exist, may justify the resources needed for prosecution of obscenity or require use of a forfeiture or racketeering statute.

The Working Group determined that it could neither advocate prohibition of all sexually explicit material nor the use of regulation as a pretext to eliminate all sexually oriented businesses. This conclusion is no endorsement of pornography or the businesses which profit from it. The Working Group believes much pornography conveys a message which is degrading to women and an affront to human dignity. Commercial pornography promotes the misuse of vulnerable people and can be used by either a perpetrator or a victim to rationalize sexual violence. Sexually oriented businesses have a deteriorating effect upon neighborhoods and draw involvement of organized crime.

Communities are not powerless to combat these problems. But to be most effective in defending itself from pornography each community must work from the evidence and within the law. The report of this Working Group is designed to

assist local communities in developing an appropriate and effective defense.

The first section of the report discusses evidence that sexually oriented businesses, and the materials from which they profit, have an adverse impact on the surrounding communities. It provides relevant evidence which local communities can use as part of their justification for reasonable regulation of sexually oriented businesses.

The Working Group also discussed the relationship between sexually oriented businesses and organized crime. Concerns about these broader effects of sexually oriented businesses underlie the Working Group's recommendations that obscenity should be prosecuted and the tools of obscenity seized when sexually oriented businesses break the law.

The second section of this report describes strategies for regulating sexually oriented businesses and prosecuting obscenity. The report presents the principal alternatives, the recommendations of the Working Group and some of the legal issues to consider when these strategies are adopted.

The goal of the Attorney General's Working Group in providing this report is to support and assist local communities who are struggling against the blight of pornography. When citizens, police officers and city officials are concerned about crime and the deterioration of neighborhoods, each of us lives next door. No community stands alone.

Summary

The Attorney General's Working Group on the Regulation of Sexually Oriented Businesses makes the following recommendations to assist communities in protecting themselves from the adverse effects of sexually oriented businesses. Some or all of these recommendations may be needed in any given community. Each community must decide for itself the nature of the problems it faces and the proposed solutions which would be most fitting.

- (1) City and county attorneys' offices in the Twin Cities metropolitan area should designate a prosecutor to pursue obscenity prosecutions and support that prosecutor with specialized training.
- (2) The Legislature should consider funding a pilot program to demonstrate the efficacy of obscenity prosecution and should encourage the pooling of resources between urban and suburban prosecutor offices by making such cooperation a condition for receiving any such grant funds.
- (3) The Attorney General should provide informational resources for city and county attorneys who prosecute obscenity crimes.
- (4) Obscenity prosecutions should begin with cases involving those materials which most flagrantly offend community standards.
- (5) The Legislature should amend the present forfeiture statute to include as grounds for forfeiture all felonies and gross misdemeanors pertaining to solicitation, inducement, promotion or receiving profit from prostitution and operation of a "disorderly house."
- (6) The Legislature should consider the potential for a RICO-like statute with an obscenity predicate.
- (7) Prosecutors should use the public nuisance statute to enjoin operations of sexually oriented businesses which repeatedly violate laws pertaining to prostitution, gambling or operating a disorderly house.
- (8) Communities should document findings of adverse secondary effects of sexually oriented businesses prior to enacting zoning regulations to control these uses so that such regulations can be upheld if challenged in court.
- (9) To reduce the adverse effects of sexually oriented busi-

nesses, communities should adopt zoning regulations which set distance requirements between sexually oriented businesses and sensitive uses, including but not limited to residential areas, schools, child care facilities, churches and parks.

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

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

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

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

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

Impacts of Sexually Oriented Businesses

The Working Group reviewed evidence from studies conducted in Minneapolis and St. Paul and in other cities throughout the country. These studies, taken together, provide compelling evidence that sexually oriented businesses are associated with high crime rates and depression of property values. In addition, the Working Group heard testimony that the character of a neighborhood can dramatically change when there is a concentration of sexually oriented businesses adjacent to residential property.

Minneapolis Study

In 1980, on direction from the Minneapolis City Council, the Minneapolis Crime Prevention Center examined the effects of sex-oriented and alcohol-oriented adult entertainment upon property values and crime rates. This study used both simple regression and multiple regression statistical analysis to evaluate whether there was a causal relationship between these businesses and neighborhood blight.

The study concluded that there was a close association between sexually oriented businesses, high crime rates and low housing values in a neighborhood. When the data was reexamined using control variables such as the mean income in the neighborhood to determine whether the association proved causation, it was unclear whether sexually oriented businesses caused a decline in property values. The Minneapolis study concluded that sexually oriented businesses concentrate in areas which are relatively deteriorated and, at most, they may weakly contribute to the continued depression of property values.

However, the Minneapolis study found a much stronger relationship between sexually oriented businesses and crime rates. A crime index was constructed including robbery, burglary, rape and assault. The rate of crime in areas near sexually oriented businesses was then compared to crime

rates in other areas. The study drew the following conclusions:

- (1) The effects of sexually oriented businesses on the crime rate index is positive and significant regardless of which control variable is used.
- (2) Sexually oriented businesses continue to be associated with higher crime rates, even when the control variables' impacts are considered simultaneously.

According to the statistical analysis conducted in the Minneapolis study, the addition of one sexually oriented business to a census tract area will cause an increase in the overall crime rate index in that area by 9.15 crimes per thousand people per year even if all other social factors remain unchanged.

St. Paul

In 1978, the St. Paul Division of Planning and the Minnesota Crime Control Planning board conducted a study of the relationship between sex-oriented and alcohol-oriented adult entertainment businesses and neighborhood blight. This study looked at crime rates per thousand and median housing values over time as indices of neighborhood deterioration. The study combined sex-oriented and alcohol-oriented businesses, so its conclusions are only suggestive of the effects of sexually oriented businesses alone. Nevertheless, the study reached the following important conclusions:

- (1) There is a statistically significant correlation between the location of adult businesses and neighborhood deterioration.
- (2) Adult entertainment establishments tend to locate in somewhat deteriorated areas.
- (3) Additional relative deterioration of an area follows

location of an adult business in the area.

- (4) There is a significantly higher crime rate associated with two such businesses in an area than is associated with only one adult business.
- (5) Housing values are also significantly lower in an area where there are three adult businesses than they are in an area with only one such business.

Similar conclusions about the adverse impact of sexually oriented businesses on the community were reached in studies conducted in cities across the nation.

Indianapolis

In 1983, the City of Indianapolis researched the relationship between sexually oriented businesses and property values. The study was based on data from a national random sample of 20 percent of the American Institute of Real Estate Appraisers.

The Study found the following:

- (1) The appraisers overwhelmingly (80%) felt that an adult bookstore located in a neighborhood would have a negative impact on residential property values within one block of the site.
- (2) The real estate experts also overwhelmingly (71%) believed that there would be a detrimental effect on commercial property values within the same one block radius.
- (3) This negative impact dissipates as the distance from the site increases, so that most appraisers believed that by three blocks away from an adult bookstore, its impact on property values would be minimal.

Indianapolis also studied the relationship between crime rates and sexually oriented bookstores, cabarets,aters,

arcades and massage parlors. A 1984 study entitled "Adult Entertainment Businesses in Indianapolis" found that areas with sexually oriented businesses had higher crime rates than similar areas with no sexually oriented businesses.

- (1) Major crimes, such as criminal homicide, rape, robbery, assault, burglary, and larceny, occurred at a rate that was 23 percent higher in those areas which had sexually oriented businesses.
- (2) The sex-related crime rate, including rape, indecent exposure, and child molestation, was found to be 77 percent higher in those areas with sexually oriented businesses.

Phoenix

The Planning Department of Phoenix, Arizona published a study in 1979 entitled "Relation of Criminal Activity and Adult Businesses." This study showed that arrests for sexual crimes and the location of sexually oriented businesses were directly related. The study compared three areas with sexually oriented businesses with three control areas which had similar demographic and land use characteristics, but no sexually oriented establishments. The study found that,

- (1) Property crimes were 43 percent higher in those areas which contained a sexually oriented business.
- (2) The sex crime rate was 500 percent higher in those areas with sexually oriented businesses.
- (3) The study area with the greatest concentration of sexually oriented businesses had a sex crimes rate over 11 times as large as a similar area having no sexually oriented businesses.

Los Angeles

A study released by the Los Angeles Police Department in 1984 supports a relationship between sexually oriented businesses and rising crime rates. This study is less definitive, since it was not designed to use similar areas as a control. The study indicated that there were 11 sexually oriented adult establishments in the Hollywood, California, area in 1969. By 1975, the number had grown to 88. During the same time period, reported incidents of "Part 1" crime (i.e., homicide, rape, aggravated assault, robbery, burglary, larceny and vehicle theft) increased 7.6 percent in the Hollywood area while the rest of Los Angeles had a 4.2 percent increase. "Part 11" arrests (i.e., forgery, prostitution, narcotics, liquor law violations, and gambling) increased 3.4 percent in the rest of Los Angeles, but 45.4 percent in the Hollywood area.

Concentration of Sexually Oriented Businesses Neighborhood Case Study

In St. Paul, there is one neighborhood which has an especially heavy concentration of sexually oriented businesses. The blocks adjacent to the intersection of University Avenue and Dale Street have more than 20 percent of the city's adult uses (4 out of 19), including all of St. Paul's sexually oriented bookstores and movie theaters.

The neighborhood, as a whole, shows signs of significant distress, including the highest unemployment rates in the city, the highest percentage of families below the poverty line in the city, the lowest median family income and the lowest percentage of high school and college graduates. (See *40-Acre Study on Adult Entertainment*, St. Paul Department of Planning and Economic Development, Division of Planning, 1987, at 19.) It would be difficult to attribute these problems in any simple way to sexually oriented businesses.

However, it is likely that there is a relationship between the concentration of sexually oriented businesses and eight-

borhood crime rates. The St. Paul Police Department has determined that St. Paul's street prostitution is concentrated in a "street prostitution zone" immediately adjacent to the intersection where the sexually oriented businesses are located. Police statistics for 1986 show that, of 279 prostitution arrests for which specific locations could be identified, 70 percent (195) were within the "street prostitution zone." Moreover, all of the locations with 10 or more arrests for prostitution were within this zone.

The location of sexually oriented businesses has also created a perception in the community that this is an unsafe and undesirable part of the city. In 1983, Western State Bank, which is currently located across the street from an adult bookstore, hired a research firm to survey area residents regarding their preferred location for a bank and their perceptions of different locations. A sample of 305 people were given a list of locations and asked, "Are there any of these locations where you would not feel safe conducting your banking business?"

No more than 4 percent of the respondents said they would feel unsafe banking at other locations in the city. But 36 percent said they would feel unsafe banking at Dale and University, the corner where the sexually oriented businesses are concentrated.

The Working Group reviewed the 1987 40-Acre Study on Adult Entertainment prepared by the Division of Planning in St. Paul's Department of Planning and Economic Development. This study summarized testimony presented to the Planning Commission regarding neighborhood problems:

Residents in the University/Dale area report frequent sex-related harassment by motorists and pedestrians in the neighborhood. Although it cannot be proved that the harassers are patrons of adult businesses, it is reasonable to suspect such a connection. Moreover, neighborhood residents submitted evidence to the Planning Commission in the form of discarded pornographic literature allegedly found in the streets, sidewalks, bushes

and alleys near adult businesses. Such literature is sexually very explicit, even on the cover, and under the present circumstances becomes available to minors even through its sale to minors is prohibited.

Testimony

The Working Group heard testimony that a concentration of sexually oriented businesses has serious impacts upon the surrounding neighborhood. The Working Group heard that pornographic materials are left in adjacent lots. One person reported to the police that he had found 50 pieces of pornographic material in a church parking lot near a sexually oriented business. Neighbors report finding used condoms on their lawns and sidewalks and that sex acts with prostitutes occur on streets and alleys in plain view of families and children. The Working Group heard testimony that arrest rates underestimate the level of crime associated with sexually oriented businesses. Many robberies and thefts from "johns" and many assaults upon prostitutes are never reported to the police.

Prostitution also results in harassment of neighborhood residents. Young girls on their way to school or young women on their way to work are often propositioned by johns. The Flick theater caters to homosexual trade, and male prostitution has been noted in the area. Neighborhood boys and men are also accosted on the street. A police officer testified that one resident had informed him that he found used condoms in his yard all the time. Both his teenage son and daughter had been solicited on their way to school and to work.

The Working Group heard testimony that in the Progtown neighborhood, immediately north of the University-Dale intersection in St. Paul, there has been a change over time in the quality of life since the sexually oriented businesses moved into the area. The Working Group heard that the neighborhood used to be primarily middle class, did not have a high crime rate and did not have prostitutes. Paul

police officers testified that they believed the sexually oriented businesses caused neighborhood problems, particularly the increase in prostitution and other crime rates. Property values were suffering, since the presence of high crime rates made the area less desirable to people who would have the ability and inclination to improve their homes.

The Working Group made some inquiry to determine to what extent smaller cities outside the Twin Cities Metropolitan area suffered adverse impacts of sexually oriented businesses. The Working Group was informed by the chiefs of police of Northfield and Owatonna that neither city had adult bookstores or similar sexually oriented businesses. Police chiefs in Rochester and Winona stated that sexually oriented businesses in their communities operate in nonresidential areas. In addition, there is no "concentration" problem. In Rochester, there are two facilities in a shopping mall and a single bookstore in a depressed commercial/business neighborhood. The Winona store is located in a downtown business area. The police chiefs stated that they had no evidence of increased crime rates in the area adjacent to these facilities. They had no information as to the effect which these businesses might have on local property values.

Information presented to the Working Group indicates that community impacts of sexually oriented businesses are primarily a function of two variables, proximity to residential areas and concentration. Property values are directly affected within a small radius of the location of a sexually oriented business. Concentration may compound depression of property values and may lead to an increase in crime sufficient to change the quality of life and perceived desirability of property in a neighborhood.

The evidence suggests that the impacts of sexually oriented businesses are exacerbated when they are located near each other. Police officers testified to the Working Group that "vice breeds vice." When sexually oriented businesses have multiple uses (i.e., theater, bookstore, nude dancing, peep

booths), one building can have the impact of several separate businesses. The Working Group heard testimony that concentration of sexually oriented businesses creates a "war zone" which serves as a magnet for people from other areas who "know" where to find prostitutes and sexual entertainment. The presence of bars in the immediate vicinity of sexually oriented businesses also compounds impacts upon the neighborhood.

The Attorney General's Working Group believes that regulatory strategies designed to reduce the concentration of sexually oriented businesses, insulate residential areas from them, and reduce the likelihood of associated criminal activity would constitute a rational response to evidence of the impacts which these businesses have upon local communities.

Sexually Oriented Businesses and Organized Crime

Infiltration of organized crime into sexually oriented businesses reinforces the need for prosecution of obscenity and requires specific regulatory or law enforcement tools. The Working Group attempted to assess both the present and potential relationship between organized crime and sexually oriented businesses.

The Working Group heard testimony from a witness who had been prosecuting obscenity cases for the past thirteen years that many sexually oriented businesses have out-of-town absentee owners. If the manager of a local business is prosecuted on an obscenity charge, his testimony may make it possible to pierce the corporate veil and identify the true owners.

The Working Group heard testimony that an organized crime entity may operate somewhat like a franchisor. In order to stay in business, the local manager of a sexually oriented business may have to pay fees to organized crime. The makers and wholesalers of pornographic materials are

also likely to be involved with organized crime.

The Working Group conducted additional research to assess the relationship between sexually oriented businesses and organized crime. The Working Group was informed by prosecutors of obscenity that there were many ways in which organized crime entities could derive a benefit from sexually oriented businesses. There is a large profit margin in pornography. The presence of coin-operated peep booths provides an opportunity to launder money. Cash obtained from illegal activities, such as prostitution or narcotics, can be explained as the income of peep booths. Cash income can also escape taxation, in violation of law.

Although it is clear that organized crime is involved to some degree in the pornography industry, various sources reach different conclusions as to the depth and extent of this involvement. Part of the difference in assessment is based on differences in the way the term "organized crime" is defined. Authorities who restrict their definition of organized crime to the highly organized ethnic hierarchy known as La Cosa Nostra (LCN) tend to find fewer links than those who define the term to include other organized criminal enterprises. Where there has been intensive law enforcement and prosecution, it is more likely that linkage between sexually oriented businesses and organized crime figures will be evident.

The Working Group has adopted the definition of organized crime contained in Minnesota's Report of the Legislative Commission on Organized Crime (1976). The Working Group is concerned about the relation between sexually oriented businesses and any "organized criminal conspiracy of two or more persons that is continuous in nature, involves activity generally crossing jurisdictional lines and results in third-party profit." The threat from organized crime includes, but is not limited to involvement of national crime enterprises such as LCN.

Recent federal indictments of James G. Hafiz in Indiana

for perjury¹ and of Harry V. Mohnhey in Michigan for tax evasion suggest a possible connection between organized crime and a Minnesota pornography business. Hafiz, a Minnesota resident who is an agent of Beverly Theater, Inc., the company which operated the Faust Theater in St. Paul,² has been linked to Mohnhey, a major pornographer based in Michigan. The indictments allege that Mohnhey caused the incorporation of the company which operated the Faust, that a corporation owned by Mohnhey paid for improvements to the Faust and that Mohnhey is, in fact, the owner of numerous sexually oriented businesses, including the Faust. (See *United States v. Hafiz*, Indictment, No. IP 88-102-CR (S.D. Ind., Sept. 15, 1988); *United States v. Mohnhey*, Indictment, No. 88-50062 (E.D. Mich. Sept. 9, 1988).)

Mohnhey, in turn, has been linked with national organized crime enterprises. A 1977 report of the United States Justice Department stated:

It is believed that Harry V. Mohnhey of Durand, Michigan, is one of the largest dealers in pornography in the United States . . . He is alleged to have a close association with the LCN Columbo and the LCN DeCavalcante, both of which are very influential in pornography in the eastern United States. In Michigan, Mohnhey is known to hire individuals with organized crime associations to manage his businesses. His businesses and corporations consist of 60 known adult bookstores, massage parlors, art theaters, adult drive-in movies, go-go type lounges and pornographic warehouses in Michigan, Indiana, Illinois, Kentucky, Tennessee, Wisconsin, Iowa, Ohio and California. He is involved in the financing and production of pornographic movies, magazines, books and newspapers. He also directs the importation and distribution of his own and other pornographic publica-

¹ Hafiz was acquitted of the perjury charges. St. Paul Pioneer Press, Jan. 11, 1989, at 10A.

² The City of St. Paul bought out the Faust for \$1.8 million, closing the entertainment complex on March 7, 1989.

tions to retail and wholesale outlets throughout the United States and Canada. . . . He has a working relationship with DeCavalcante's representative Robert DiBernardo and has met with Vito Giacalone and Joseph Zerilli of the LCN Detroit. He has to cater to both to operate in Michigan.

U.S. Justice Dep't, *Organized Crime Involvement in Pornography*, reprinted in the Attorney General's Comm'n on Pornography (hereinafter "Pornography Commission"), 2 *Final Report* at 1229-30 (1986).

Organized crime has the potential to infiltrate Minnesota's pornography industry. Evidence on a national level highlights the vulnerability of sexually oriented businesses to criminal control. A number of sources have reported that there is a connection between organized crime and the pornography industry.

The Pornography Commission reported that the Washington, D.C., Metropolitan Police Department "determined that traditional organized crime was substantially involved in and did essentially control much of the major pornography distribution in the United States during the years 1977 and 1978." 2 *Final Report* at 1044-45. The Washington, D.C., study "further concluded that the combination of the large amounts of money involved, the incredibly low priority obscenity enforcement had within police departments and prosecutors' offices in an area where manpower intensive investigations were essential for success, and the imposition of minimal fines and no jail time upon random convictions resulted in a low risk and high profit endeavor for organized crime figures who became involved in pornography." *Id.* at 1045.

The FBI concluded in 1978:

Information obtained . . . points out the vast control of the multi-million dollar pornography business in the United States by a few individuals with direct connections with what is commonly known as the organized crime establishment in the United States, specifically,

La Cosa Nostra. . . . Information received from sources of this bureau indicates that pornography is (a major) income maker for *La Cosa Nostra* in the United States behind gambling and narcotics. Although *La Cosa Nostra* does not physically oversee the day-to-day workings of the majority of pornography business in the United States, it is apparent that they have "agreements" with those involved in the pornography business in allowing these people to operate independently by paying off members of organized crime for the privilege of being allowed to operate in certain geographical areas.

Id. at 1046 (quoting *Federal Bureau of Investigation Report Regarding the Extent of Organized Crime Development in Pornography* 6 (1978)).

A brief survey of 59 FBI field offices conducted in 1985 found that about three-quarters of those offices could not verify that traditional organized crime families were involved in the manufacture or distribution of pornography. Several offices did, however, report some involvement by members and associates of organized crime. *Id.* at 1046-47. Stanley Ronquest, Jr., a supervisory FBI special agent for traditional organized crime at FBI headquarters in Washington, D.C., was interviewed by Attorney General staff. Ronquest stated that LCN has not been directly involved in the pornography industry in the last ten years. However, a former FBI agent told the Pornography Commission:

In my opinion, based upon twenty-three years of experience in pornography and obscenity investigations and study, it is practically impossible to be in the retail end of pornography industry (today) without dealing in some fashion with organized crime either the mafia or some other facet of non-mafia never-the-less [sic] highly organized crime.

Id. at 1047-48.

Thomas Bohling of the Chicago Police Department Organized Crime Division, Vice Control Section, told the Pornography Commission that "it is the belief of state, federal and local law enforcement that the pornography industry is

controlled by organized crime families. If they do not own the business outright, they most certainly extract street tax from independent smut peddlers." *Id.* at 1048 (emphasis in original).

The Pornography Commission stated that it had been advised by Los Angeles Police Chief Daryl F. Gates that "organized crime families from Chicago, New York, New Jersey and Florida are openly controlling and directing the major pornography operations in Los Angeles." *Id.*

The Pornography Commission was told by Jimmy Frattanno, described by the Commission as a member of LCN, "that large profits have kept organized crime heavily involved in the obscenity industry." *Id.* at 1052. Frattanno testified that "95% of the families are involved in one way or another in pornography. . . . It's too big. They just won't let it go." *Id.* at 1052-53.

The Pornography Commission concluded that "organized crime in its traditional LCN forms and other forms exerts substantial influence and control over the obscenity industry. Though a number of significant producers and distributors are not members of LCN families, all major producers and distributors of obscene material are highly organized and carry out illegal activities with a great deal of sophistication." *Id.* at 1053.

The Pornography Commission reported that Michael George Thevis, reportedly one of the largest pornographers in the United States during the 1970's was convicted in 1979 of RICO (Racketeer Influenced and Corrupt Organizations) violations including murder, arson and extortion. The Commission also reported examples of other crimes associated with the pornography industry, including prostitution and other sexual abuse, narcotics distribution, money laundering and tax violations, copyright violations and fraud. *Id.* at 1056-65.

Although the Pornography Commission report has been criticized for relying on the testimony of unreliable inform-

ants in drawing its conclusions finding links between pornography and organized crime (See Scott, *Book Reviews*, 78 J. Crim. L. & Criminology 1145, 1158-59 (1988)), its conclusions find additional support in recent state studies.

The California Department of Justice recently reported that:

California's primacy in the adult videotape industry is of law enforcement concern because the pornography business has been prone to organized crime involvement. Immense profits can be realized through pornography operations, and until recently, making and distributing pornography involved a relatively low risk of prosecution. But more aggressive law enforcement efforts and turmoil within the pornography business has destabilized the smooth flow of easy money for some of its major operations. . . .

As long as control over pornography distribution is contested, and organized crime figures continue their involvement in the business, the pornography industry will remain of interest to law enforcement officials statewide.

Bureau of Organized Crime and Criminal Intelligence, Department of Justice, State of California, *Organized Crime in California 1987. Annual Report to the California Legislature* at 59-62 (1988).

The Pennsylvania Crime Commission similarly determined in a 1980 report that most pornography stores examined were affiliated or owned by one of three men who had ties with "nationally known pornography figures who are members or associates of organized crime families." Pennsylvania Crime Commission, *A Decade of Organized Crime: 1980 Report* at 119.

For example, Reuben Sturman, a leading pornography industry figure based in Cleveland, was reported by the FBI in 1978 to have built his empire with the assistance of LCN member DiBernardo. *Federal Bureau of Investigation Report Regarding the Extent of Organized Crime Involvement in*

Pornography (1978). Sturman, who reportedly controls half of the \$8 billion United States pornography industry, was recently indicted by a federal grand jury in Las Vegas for racketeering violations and by a federal grand jury in Cleveland for income tax evasion and tax fraud. *Newsweek*, August 8, 1988, at 3.

Evidence of the vulnerability of sexually oriented businesses to organized crime involvement underscores the importance of criminal prosecution of these businesses when they engage in illegal activities, including distribution of obscenity and support of prostitution. Prosecution can increase the risk and reduce the profit margin of conducting illegal activities. It may also disclose organized crime association with local pornography businesses and increase the costs of criminal enterprise in Minnesota.

In addition to prosecution, forfeiture of property used in the illegal activities related to sexually oriented businesses can cut deeply into profits. Regulation to permit license revocation for conviction of subsequent crimes may also expose and increase control over criminal enterprises related to sexually oriented businesses.

Prosecutorial and Regulatory Alternatives

The regulation of many sexually oriented businesses, like other businesses dealing in activity with an expressive component, is circumscribed by the First Amendment of the United States Constitution.³ Nonetheless, the First

³ The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, or to petition the government for a redress of grievances." The constitutional guarantee of freedom of speech, often the basis for challenges to regulation of sexually oriented businesses, restricts state as well as federal actions. See, e.g., *Fiske v. Kansas*, 274 U.S. 380 (1927).

Amendment does not impose a barrier to the prosecution of obscenity, which is not protected by the First Amendment, or to reasonable regulation of sexually oriented businesses if the regulation is not designed to suppress the content of expressive activity and is sufficiently tailored to accomplish the regulatory purpose.

The Working Group believes that communities have more prosecutorial and regulatory opportunities than they may currently recognize. The purpose of this section of the Report is to identify and recommend enforcement and regulatory opportunities. Of course, each community must decide on its own how to balance its limited resources and the wide variety of competing demands for such resources.

1. Obscenity Prosecution

Obscene material is not protected by the First Amendment. *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973). The sale or distribution of obscene material in Minnesota is a criminal offense. The penalty was recently increased to up to one year in jail and a \$3,000 fine for a first offense, and up to two years in jail and a \$10,000 fine for a second or subsequent offense within five years. Minn. Stat. § 617.241, subd. 3 (1988).⁴

The Working Group believes that Minnesota's obscenity statutes are adequate to prosecute and penalize the sale and distribution of obscene materials. However, historically, widespread obscenity prosecution has not occurred. The Working Group believes this is not because the sale

⁴ The prior penalty was a fine only—up to \$10,000 for a first offense and up to \$20,000 for a second or subsequent offense. Minn. Stat. § 617.241, subd. 3 (1986). Obscenity arrests are so infrequent that incidents involving possible violations of section 617.241 are not separately compiled by the Minnesota Bureau of Criminal Apprehension. See Bureau of Criminal Apprehension, *1987 Minnesota Annual Report on Crime, Missing Children and Bureau of Criminal Apprehension Activities*.

or distribution of obscene publications in Minnesota is rare, but because prosecutors have been reluctant to bring obscenity charges, because of limited resources, difficulties faced when prosecuting obscenity, and because obscenity has historically been considered a victimless crime.

Obscenity, however, should no longer be viewed as a victimless crime.⁵ There is mounting evidence that sexually oriented businesses are, as described earlier in this report, often associated with increases in crime rates and a decline in the quality of life of neighborhoods in which they are located. Further, as discussed previously, when there is no prosecution of obscenity, large cash profits make pornographic operations very attractive to members of organized crime. The Working Group thus believes that prosecution of obscenity, particularly cases involving children, violence or bestiality, should assume a higher priority for law enforcement officials.

In addition, many of the difficulties faced when prosecuting obscenity can be addressed by adequate training and assistance. In order to prove that material is obscene, a prosecutor must prove:

- (i) that the average person, applying contemporary community standards[,] would find that the work, taken

⁵ Two blue ribbon commissions have reached different conclusions regarding the harmfulness of sexually explicit material to individuals. A presidential Commission on Obscenity and Pornography concluded in 1970 that there was no evidence of "social or individual harms" caused by sexually explicit materials and, therefore, "federal, state and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed." *The Report of the Comm'n on Obscenity and Pornography* at 57-8 (Bantam Paperback ed. 1970). However, in 1986, the Attorney General's Commission on Pornography concluded that "sexually violent materials . . . bear . . . a causal relationship to antisocial acts of sexual violence [and that] the evidence supports the conclusion that substantial exposure [and that] the evidence supports the conclusion that likelihood for an individual [to] commit an act of sexual violence or sexual coercion." Attorney General's Comm'n on Pornography, *1 Final Report* at 326, 333 (1986).

as a whole, appeals to the prurient interest in sex;

(ii) that the work depicts sexual conduct . . . in a patently offensive manner; and

(iii) that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Minn. Stat. § 617.241, subd. 1(a)(i-iii) (1988). This statutory standard was drawn to be consistent with constitutional standards set forth in *Miller, supra*.

To be sure, prosecutors face a number of hazards in prosecuting obscenity. They include inadequate training in this specialized area of law, attempts by defense attorneys to remove jurors who find pornography offensive, the offering into evidence of polls and surveys through expert testimony to prove tolerant community standards, efforts to guide jurors with jury instructions favorable to the defense, and discouragement with unsuccessful prosecutions.

But the hazards can be overcome. Alan E. Sears, former executive director of the U.S. Attorney General's Commission on Pornography, has stated:

Prosecutors can successfully obtain obscenity convictions in virtually any jurisdiction in the United States. In order to obtain a conviction, it is incumbent upon a prosecutor to prepare well, know the law, not fall into the "one case syndrome" trap, obtain a representative jury through proper voir dire, keep the focus of the trial on the unlawful conduct of the defendant, and obtain legally sound instructions.

Sears, "How To Lose A Pornography Case," *The CDL Reporter* (n.d.).

The Working Group heard testimony from prosecutors who have pursued obscenity cases nationally regarding effective ways to prosecute obscenity cases. Materials can be bought or rented, rather than seized under warrant. In the absence of survey data, community standards can be left to the wisdom of the jury. In that case, experts should be prepared to testify if the defense attempts to misstate statistics.

tical case that the material is not obscene. Prosecution of obscenity is also likely to be most effective if initial prosecutions focus on materials which are patently offensive to the community, such as those involving children, violence or bestiality.

The experience of other cities has demonstrated that vigorous and sustained enforcement of obscenity statutes can sharply reduce or virtually eliminate sexually oriented businesses. Cincinnati, Omaha, Atlanta, Charlotte, Indianapolis and Fort Lauderdale were cited to the Working Group as examples of cities which have successful programs of obscenity prosecution.⁶ The Working Group encourages prosecutors to take advantage of increasing training opportunities and other assistance for obscenity prosecutions and to reassess the desirability of increased enforcement. The Working Group is pleased to note that county attorneys and law enforcement groups in Minnesota have recently held forums and seminars on obscenity law enforcement and prosecution. The U.S. Justice Department's National Obscenity Enforcement Unit offers assistance to local prosecutors, including sample pleadings, indictments, search warrants, motions, responses and trial memoranda.⁷

⁶ Memorandum to Jim Bellus, executive assistant to St. Paul Mayor George Latimer (prepared by St. Paul Department of Planning and Economic Development) (July 5, 1988); see also Waters, "The Squeeze on Slezee," *Newsweek*, Feb. 1, 1988, at 45 ("After more than 10 years of levying heavy fines and making arrests, Atlanta has won national renown as the city that cleaned up pornography.");

⁷ The Address of the National Obscenity Enforcement Unit is U.S. Justice Department, 10th & Pennsylvania Ave. N.W., Room 2216, Washington, D.C. 20530. Its telephone number is 202-633-5780. Assistance is also available from Citizens for Decency through Law, Inc., 2845 E. Camelback Rd., Suite 740, Phoenix, AZ 85016. It is the publisher of "The Preparation and Trial of an Obscenity Case: A Guide for the Prosecuting Attorney." Its telephone number is 602-361-1322. The National Obscenity Law Center, another private organization, is located at 475 Riverside Drive, Suite 236, New York, N.Y. 10116. It publishes an *Obscenity Law Bulletin*. The "Handbook on the Prosecution of Obscenity Cases." Its

Recommendations

- (1) City and county attorneys' offices in the Twin Cities metropolitan area should designate a prosecutor to pursue obscenity prosecutions and support that prosecutor with specialized training.
- (2) The legislature should consider funding a pilot program to demonstrate the efficacy of obscenity prosecution and should encourage the pooling of resources between urban and suburban prosecuting offices by making such cooperation a condition of receiving any such grant funds.
- (3) The Attorney General should provide informational resources for city and county attorneys who prosecute obscenity crimes.
- (4) Obscenity prosecutions should concentrate on cases that most flagrantly offend community standards.

II. Other Legal Remedies

A. RICO/Forfeiture

In addition to traditional criminal prosecutions, use of RICO statutes and criminal and civil forfeiture actions may also prove to be successful against obscenity offenders. By attacking the criminal organization and the profits of illegal activity, such actions can provide a strong disincentive to the establishment and operation of sexually-oriented businesses. For example, the federal government and a number of the twenty-eight states which have enacted racketeer-influenced and corrupt organization (RICO) statutes include obscenity offenses as predicate crimes. Generally speaking, to violate a RICO statute, a person must acquire or maintain an interest in or control of an enterprise, or must conduct the

telephone number is 212-870-3216.

affairs of an enterprise through a "pattern of criminal activity." That pattern of criminal activity may include obscenity violations, which in turn can expose violators to increased fines and penalties as well as forfeiture of all property acquired or used in the course of a RICO violation. These statutes generally enable prosecutors to obtain either criminal or civil forfeiture orders to seize assets and may also be used to obtain injunctive relief to divest repeat offenders of financial interests in sexually oriented businesses. See 18 U.S.C. §§ 1961-68 (West Supp. 1988). RICO statutes may be particularly effective in dismantling businesses dominated by organized crime, but they may be applied against other targets as well.

The Working Group believes that Minnesota should enact a RICO-like statute that would encompass increased penalties for using a "pattern" of criminal obscenity acts to conduct the affairs of a business entity. Provisions authorizing the seizure of assets for obscenity violations should be considered, but the limitations imposed by the First Amendment must be taken into account.

It has been argued that a RICO or forfeiture statute based on obscenity crime violations threatens to "chill protected speech" because it would permit prosecutors to seize non-obscene materials from distributors convicted of violating the obscenity statute. American Civil Liberties Union, *Polluting The Censorship Debate: A Summary And Critique Of The Final Report Of The Attorney General's Commission On Pornography* at 116-117 (1986).

However, a narrow majority of the United States Supreme Court recently held that there is no constitutional bar to a state's inclusion of substantive obscenity violations among the predicate offenses for its RICO statute. *Sapperfeld v. Indiana*, 57 U.S.L.W. 4180, 4183-4184 (February 21, 1989). The Court recognized that "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the

dissemination of material not obscene." *Id.* at 4184. But the Court ruled that, "the mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedent." *Id.* The Court specifically upheld RICO provisions which increase penalties where there is a pattern of multiple violations of obscenity laws.

However, in a companion case, the Court also invalidated a pretrial seizure of a bookstore and its contents after only a preliminary finding of "probable cause" to believe that a RICO violation had occurred. *Fort Wayne Books, Inc. v. Indiana*, 57 U.S.L.W. 4180, 4184-4185 (February 21, 1989). The Court explained there is a rebuttable presumption that expressive materials are protected by the First Amendment. That presumption is not rebutted until the claimed justification for seizure of materials, the elements of a RICO violation, are proved in an adversary proceeding. *Id.* at 4185.

The Court did not specifically reach the fundamental question of whether seizure of the assets of a sexually oriented business such as a bookstore is constitutionally permissible once a RICO violation is proved. The Court explained:

[F]or the purposes of disposing of this case, we assume without deciding that bookstores and their contents are forfeitable (like other property such as a bank account or yacht) when it is proved that these items are property actually used in, or derived from, a pattern of violations of the state's obscenity laws.

Id. at 4185. The Working Group believes that a RICO statute which provided for seizure of the contents of a sexually oriented business upon proof of RICO violations would have the potential to significantly curtail the distribution of obscene materials.

Although Minnesota does not have a RICO statute, it does have a forfeiture statute permitting the seizure of money and property which are the proceeds of designated any of-

fenses. Minn. Stat. § 609.5312 (1988). But, this statute does not permit seizure of property related to commission of the offenses most likely to be associated with sexually oriented businesses. Obscenity crimes are not among the offenses which justify forfeiture. Although solicitation or inducement of a person under age 13 (Minn. Stat. § 609.322, subd. 1) or between the ages of 16 and 18 to practice prostitution (Minn. Stat. § 609.322, subd. 2) are included among the offenses which could justify seizure of property, many crimes involving prostitution are outside the reach of the present Minnesota forfeiture law.

The following crimes are not included among the crimes which can justify seizure of property and profits: solicitation, inducement, or promotion of a person between the ages of 13 and 16 to practice prostitution (Minn. Stat. § 609.322, subd. 1A); solicitation, inducement or promotion of a person 18 years of age or older to practice prostitution (Minn. Stat. § 609.322, subd. 3); receiving profit derived from prostitution (Minn. Stat. § 609.323); owning, operating or managing a "disorderly house," in which conduct habitually occurs in violation of laws pertaining to liquor, gambling, controlled substances or prostitution (Minn. Stat. § 609.33).

Although its reach would be much more limited, the legislature should also consider providing for forfeiture of property used to commit an obscenity offense or which represents the proceeds of obscenity offenses. Under the holding in *Fort Wayne Books, Inc. v. Indiana*, such forfeiture could not take place, if at all, until it was proved that the underlying obscenity crimes had been committed.

There are no comparable constitutional issues raised by enacting or enforcement of forfeiture statutes based on violations of prostitution, gambling, or liquor laws. The legislature may require sexually oriented businesses which violate these laws to forfeit their profits. The Working Group believes that such an expansion of forfeiture laws would give prosecutors greater leverage to control the operation of those

businesses which pose the greatest danger to the community.

Recommendations

- (1) The legislature should amend the present forfeiture statute to include as grounds for forfeiture all felonies and gross misdemeanors pertaining to solicitation, inducement, promotion or receiving profit from prostitution and operation of a "disorderly house."
- (2) The legislature should consider the potential for a RICO-like statute with an obscenity predicate.

B. Nuisance Injunctions

Minnesota law enforcement authorities may obtain an injunction and close down operations when a facility constitutes a public nuisance. A public nuisance exists when a business repeatedly violates laws pertaining to prostitution, gambling or keeping a "disorderly house." The Minnesota public nuisance law permits a court to order a building to be closed for one year. Minn. Stat. §§ 617.80-.87 (1988).

Nuisance injunctions to close down sexually oriented businesses which repeatedly violate laws pertaining to prostitution, gambling or disorderly conduct are potentially powerful regulatory devices. The fact that a building in which prostitution or other offenses occur houses a sexually oriented business does not shield the facility from application of nuisance law based on such offenses. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S. Ct. 3172 (1986) (First Amendment does not shield adult bookstore from application of New York State nuisance law designed in part to close places of prostitution).

Although the Working Group believes that nuisance injunctions with an obscenity predicate would be effective in controlling sexually oriented businesses, such provisions would probably be unconstitutional under current U.S. Su-

preme Court decisions. Six Supreme Court justices joined in the *Arcara* result, but two of them—Justices O'Connor and Stevens—concurred with these words of caution:

If, however, a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review. Because there is no suggestion in the record or opinion below of such pretextual use of the New York nuisance provision in this case, I concur in the Court's opinion and judgment.

Arcara, supra, 478 U.S. at 708, 106 S. Ct. at 3178.

In an earlier case, *Vance v. Universal Amusement*, 445 U.S. 308, 100 S. Ct. 1156 (1980), the Court ruled unconstitutional a Texas public nuisance statute authorizing the closing of a building for a year if the building is used "habitually" for the "commercial exhibition of obscene material." *Id.* at 310 n.2, 100 S. Ct. at 1158 n.2.

The Court's recent holdings in *Sappenzfeld* and *Fort Wayne Books, Inc.* give no indication that the Court would now look more favorably upon an injunction to close down a facility which sold obscene materials. The Court assumed without deciding that forfeiture of bookstore assets could be constitutional in a RICO case. But, in making this assumption, the Court distinguished forfeiture of assets under RICO from a general restraint on presumptively protected speech. The court approved the reasoning of the Indiana Supreme Court that, "The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity." *Fort Wayne Books, Inc.* at 4185. The Court assumed that RICO provisions could be upheld on the basis that "adding obscenity-law violations to the list of RICO predicate crimes was not a mere ruse to sidestep the First

Amendment." *Id.* Without the relationship to proceeds of crime, a remedy which closed a facility for obscenity violations would be far less likely to withstand constitutional scrutiny.

Recommendations

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

III. Zoning

Zoning ordinances can be adopted to regulate the location of sexually oriented businesses without violating the First Amendment. Such ordinances can be designed to disperse or concentrate sexually oriented businesses, to keep them at designated distances from specific buildings or areas, such as churches, schools and residential neighborhoods or to restrict buildings to a single sexually oriented usage. Because zoning is an important regulatory tool when properly enacted, the Working Group believes a careful explanation of the law and a review of potential problems in drafting zoning ordinances may be helpful to communities considering zoning to regulate sexually oriented businesses.

A. Supreme Court Decisions

The U.S. Supreme Court upheld the validity of municipal adult entertainment zoning regulations in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 96 S. Ct. 2440 (1976), and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S. Ct. 926 (1986).⁹

⁹ The only reported Minnesota court case reviewing an enter-

In *Young*, the Court upheld the validity of Detroit ordinances prohibiting the operation of theaters showing sexually explicit "adult movies" within 1,000 feet of any two other adult establishments.⁹ The ordinances authorized a waiver of the 1,000-foot restriction if a proposed use would not be contrary to the public interest and/or other factors were satisfied. *Young*, *supra*, 427 U.S. at 54 n.7, 96 S. Ct. at 2444 n.7. The ordinances were supported by urban planners and real estate experts who testified that concentration of adult-type establishments "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere." *Id.* at 55, 96 S. Ct. at 2445. A "myriad" of locations were left available for adult establishments outside the forbidden 1,000-foot distance zone, and no existing establishments were affected. *Id.* at 71 n.35, 96 S. Ct. at 2453 n.35.

Writing for a plurality of four, Justice Stevens upheld the zoning ordinance as a reasonable regulation of the place where adult films may be shown because (1) there was a factual basis for the city's conclusion that the ordinance would prevent blight; (2) the ordinance was directed at preventing "secondary effects" of adult-establishment concentration rather than protecting citizens from unwanted "offensive" speech; (3) the ordinance did not greatly restrict access to lawful speech, and (4) "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 63 n.18, 71 n.34, 35, 96 S. Ct. at 2448-49 n.18, 2452-53 nn.34, 35.

The ordinance is *City of St. Paul v. Carbone*, 419 N.W.2d 129 (Minn. App. 1989) (upholding facial constitutionality of St. Paul ordinance).

⁹ The ordinances also prohibited the location of an adult theater within 500 feet of a residential area, but this provision was invalidated by the district court, and that decision was not appealed. *Young v. American Mini Tr* *g.*, Inc., 427 U.S. 50, 52 n.2, 96 S.Ct. 2440, 2444 n.2 (1976).

Justice Stevens did not expressly describe the standard he had used, but it was clear that the plurality would afford non-obscene sexually explicit speech lesser First Amendment protection than other categories of speech. However, four dissenters and one concurring justice concluded that the degree of protection afforded speech by the First Amendment does not vary with the social value ascribed to that speech. In his concurring opinion, Justice Powell stated that the four-part test of *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968), should apply. Powell explained:

Under that test, a governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interests, "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedom is no greater than is essential to the furtherance of that interest."

427 U.S. at 79-80, 96 S. Ct. at 2457 (citation omitted) (Powell, J., concurring).

Perhaps because Justice Stevens' plurality opinion did not offer a clearly articulated standard of review, post-*Young* courts often applied the *O'Brien* test advocated by Justice Powell in his concurring opinion. Many ordinances regulating sexually oriented businesses were invalidated under the *O'Brien* test. See R.M. Stein, *Regulation of Adult Businesses through Zoning After Renton*, 18 Pac. L.J. 351, 360 (1987) ("consistently invalidated"); S.A. Bender, *Regulating Pornography Through Zoning: Can We "Clean Up" Honolulu?*, 8 U. Haw. L. Rev. 75, 105 (1986) (ordinances upheld in only about half the cases).

Applying *Young*, the Eighth Circuit Court of Appeals invalidated a zoning ordinance adopted by the city of Minneapolis. *Alexander v. City of Minneapolis*, 698 F.2d 936 (8th Cir. 1983). In *Alexander*, the challenged ordinance¹⁰ three

major restrictions on sexually oriented businesses: distancing from specified uses, prevention of concentration and amortization. It prohibited a sexually oriented business from operating within 500 feet of districts zoned for residential or office-residences, a church, state-licensed day care facility and certain public-schools. It forbade an adults-only facility from operating within 500 feet of any other adults-only facility. Finally, the ordinance required existing sexually oriented entertainment establishments to conform to its provisions by moving to a new location, if necessary, within four years.

The Eighth Circuit ruled that the Minneapolis ordinance created restrictions too severe to be upheld under the *Young* decision. It would have required all five of the city's sexually oriented theaters and between seven and nine of the city's ten sexually oriented bookstores to relocate and would have required these facilities to compete with another 18 adult-type establishments (saunas, massage parlors and "rap" parlors) for a maximum of 12 relocation sites. The effective result of enforcing the ordinance would be a substantial reduction in the number of adult bookstores and theaters, and no new adult bookstores or theaters would be able to open, the Court concluded. *Alexander, supra*, 698 F.2d at 938.

In *Renton, supra*, the United States Supreme Court adopted a clearer standard under which regulation of sexually oriented businesses could be tested and upheld. The Court upheld an ordinance prohibiting adult movie theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park or school.

Justice Rehnquist, writing for a Court majority that included Justices Stevens and Powell, stated that the *Renton* ordinance did not ban adult theaters altogether and that, therefore, it was "properly analyzed as a form of time, place and manner regulation." *Id.* at 46, 106 S. Ct. at 928. When time, place and manner regulations are "content-neutral" and not enacted "for the purpose of restricting speech on the

basis of its content," they are "acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication," Rehnquist stated. *Id.* He found the *Renton* ordinance to be content-neutral because it was not aimed at the content of films shown at adult theaters. Rather, the city's "predominant concerns" were with the secondary effects of the theaters. *Id.* at 47, 106 S. Ct. at 929 (emphasis in original). Once a time, place or manner regulation is determined to be content-neutral, "[t]he appropriate inquiry . . . is whether the . . . ordinance is designed to serve a substantial governmental interest and allows for reasonable avenues of communication," Rehnquist wrote for the Court. *Id.* at 50, 106 S. Ct. at 930.

The Supreme Court found that Renton's "interest in preserving the quality of urban life" is a "vital" governmental interest. The substantiality of that interest was in no way diminished by the fact that Renton "relied heavily" on studies of the secondary effects of adult entertainment establishments by Seattle and the experiences of other cities, Rehnquist added. *Id.* at 51, 106 S. Ct. at 930-31.

The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here. Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.

Id. at 51-52, 106 S. Ct. at 931.

Rehnquist's inquiry then addressed the means chosen to further Renton's substantial interest and inquired into

whether the Renton ordinance was sufficiently "narrowly tailored."

His comments on Renton's means to further its substantial interest suggest that municipalities have a wide latitude in enacting content-neutral ordinances aimed at the secondary effects of adult-entertainment establishments. He quoted the *Young* plurality for the proposition that:

It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

Id. at 52, 106 S. Ct. at 931 (quoting *Young, supra*, 427 U.S. at 71, 96 S.Ct. at 2453).

As to the "narrowly tailored" requirement, Rehnquist found that the Renton ordinance only affected theaters producing unwanted secondary effects and, therefore, was satisfactory. *Id.*

The second prong of Renton's "time place, manner" inquiry—the availability of alternative avenues of communication—was satisfied by the district court's finding that 520 acres of land, or more than five percent of Renton, were left available for adult-entertainment uses, even though some of that developed area was already occupied and the undeveloped land was not available for sale or lease. A majority of the Court found:

That [adult theater owners] must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and leasees, does not give rise to a First Amendment violation. . . . In our view, the First Amendment requires only that Renton refrain from effectively denying [adult theater owners] a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

Id. at 54, 106 S. Ct. at 932.

B. Standards and Need for Legal Zoning

Unlike *Young*, the Renton case spells out the standards by which zoning of sexually oriented businesses should be tested. Renton and several lower court decisions rendered in its wake suggest that the two most critical areas by which the ordinances will be judged are (1) whether there is evidence that ordinances were enacted to address secondary impacts on the community, and (2) whether there are enough locations still available for sexually oriented businesses so that zoning is not just a pretext to eliminate pornographic speech.¹⁰

This section first describes some of the legal considerations which communities must keep in mind in drafting zoning ordinances for sexually oriented businesses. Then,

¹⁰ Of 11 recent post-Renton adult-entertainment zoning decisions by federal courts, five invalidated ordinances, three upheld ordinances and three ordered a remand to district court for further proceedings. Zoning ordinances were struck in *Avolon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1987) (city council failed to offer evidence suggesting neighborhood decline would result); *Tollis Inc. v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987) (no evidence presented to legislative body of secondary harmful effects); *Ebel v. Corona*, 767 F.2d 635 (8th Cir. 1985) (lack of effective alternative locations); *11126 Baltimore Boulevard, Inc. v. Prince George's County of Maryland*, 684 F. Supp. 894 (D. Md. 1988) (insufficient evidence of secondary effects presented to legislative body; special exception provisions grant excessive discretionary authority to zoning officials); and *Peoples Tugs, Inc. v. Jackson County Legislature*, 636 F. Supp. 1345 (W.D. Mo. 1986) (improper legislative purpose to prevent continued operation of adult-entertainment establishment). Zoning ordinances were upheld in *SDV, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988); *PW/PBS, Inc. v. City of Dallas*, 837 F.2d 1268 (5th Cir. 1988); and *S & G News Inc. v. City of Southgate*, 638 F.Supp. 1060 (E.D. Mich. 1986), *aff'd without published opinion*, 819 F.2d 1142 (6th Cir. 1987). Remands were ordered in *Christy v. City of Ann Arbor*, 824 F.2d 489 (6th Cir. 1987), *cert. denied*, — U.S. —, 108 S. Ct. 1013 (1988) (remand for determination of excessive restrictions); *International Food & Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1530 (11th Cir. 1986) (remand for reconsideration in light of Renton, *supra*; nude bar ordinance); and *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1351 (9th Cir. 1986) (remand, in part, for determination of land availability).

some suggestions are provided, based on evidence reviewed by the Working Group, of types of zoning which can be enacted to reduce the secondary effects of sexually oriented businesses.

1. Documentation to Support Zoning Ordinances

Sexually oriented speech which is not obscene cannot be restricted on the basis of its content without running afoul of the First Amendment. The justification for regulating sexually oriented businesses is based on proof that the zoning is needed to reduce secondary effects of the businesses on the community.

Since *Renton*, a number of adult entertainment zoning ordinances have been invalidated for failure of the enacting body to document the need for zoning regulations. Thus, one court invalidated a zoning ordinance because there was "very little, if any, evidence of the secondary effects of adult bookstores . . . before the City Council." *11126 Baltimore Boulevard, supra*, 684 F. Supp. at 895; see also *Tollis Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987) (ordinance construed to prohibit single showing of adult movie in zoned area; invalidated for failure to present evidence of secondary effects of single showing); but see *Thames Enterprises v. City of St. Louis*, 851 F.2d 199, 201-02 (8th Cir. 1988) (observations by legislator of secondary effects sufficient).

On the other hand, it is not necessary for each municipality to conduct research independent of that already generated by other cities. The *Renton* court held that evidence of the need for zoning of sexually oriented businesses can be provided by studies from other cities "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51, 106 S. Ct. at 931. See also *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1274 (5th Cir. 1988) (public testimony from ex-

perts, supporters and opponents and consideration of studies by Detroit, Boston, Dallas and Los Angeles sufficient evidence of legitimate purpose).

The first section of this report summarizes evidence from various cities documenting the secondary effects of sexually oriented businesses. Following *Renton*, it is intended that local communities will make use of this evidence in the course of assembling support for reasonable regulation of sexually oriented businesses.

2. Availability of Locations for Sexually Oriented Businesses

Courts also evaluate whether zoning of sexually oriented businesses is merely a pretext for prohibition by reviewing the alternative locations which remain for a sexually oriented business to operate under the zoning scheme. A municipality must "refrain from effectively denying . . . a reasonable opportunity to open and operate" a sexually oriented business. *Renton, supra*, 475 U.S. at 54, 106 S. Ct. at 932.

Access may be regarded as unduly restricted if adult entertainment zones are unreasonably small in area or if the number of locations is unreasonably few. There is no set amount of land or number of locations constitutionally required. The *Renton* court found that 520 acres of "accessible real estate," including land "criss-crossed by freeways"—more than five percent of the entire land area in *Renton*—was sufficient. 475 U.S. at 53, 106 S. Ct. at 932. The *Young* court found the availability of "myriad" locations sufficient. 427 U.S. at 72 n.35, 96 S. Ct. at 2453 n.35.

Whether .058 square miles constituting .23 of 1 percent of the land area within the city's central business zone is sufficient is not clear. See *Alexander v. The City of Minneapolis (Alexander II)*, No. 3-88-808, slip op. at 22 (D. Minn. May 22, 1989) (less than 1% of land area could be valid if "ample actual opportunities" for relocation exist); *Christy v.*

City of Ann Arbor, 824 F.2d 489, 490, 493 (6th Cir. 1987) (remanding for a determination of excessive restriction). See also *11126 Baltimore Boulevard, Inc. v. Prince George's County of Maryland*, 684 F. Supp. 884 (D. Md. 1988) (20 alternative locations sufficient); *Alexander v. City of Minneapolis*, 698 F.2d 936, 939 n.7 (8th Cir. 1983) (pre-*Renton*; 12 relocation sites for at least 28 existing adult establishments not sufficient).

The sufficiency of sites available for adult entertainment uses may be measured in relation to a number of factors. See, e.g., *Alexander II*, *supra*, slip op. at 22-23 (insufficient if relocation site owners refuse to sell or lease); *International Food & Beverage Systems, Inc.*, 794 F.2d 1520, 1526 (11th Cir. 1986) (suggesting number of sites should be determined by reference to community needs, incidence of establishments in other cities, goals of city plan); *Basirddanes v. City of Galveston*, 682 F.2d 1203, 1209 (5th Cir. 1982) (pre-*Renton* case striking zoning regulation restricting adult theaters to industrial areas that were "largely a patchwork of swamps, warehouses, and railroad tracks . . . [lacking] access roads and retail establishments").

However, the fact that land zoned for adult establishments is already occupied or not currently for sale or lease will not invalidate a zoning ordinance. *Renton*, *supra*, 475 U.S. at 53-54, 106 S. Ct. at 932; but see *Alexander II*, *supra*, slip op. at 22-23 (reasonable relocation opportunity absent where owners refuse to sell or rent). There is no requirement that it be economically advantageous for a sexually oriented business to locate in the areas permitted by law.

3. Distance Requirements

Another factor that may be examined by some courts is the distance requirement established by an adult entertainment zoning ordinance. In *SDJ, Inc. v. Houston*, 837 F.2d 1268 (5th Cir. 1988), the Court was asked to invalidate a

750-foot distancing requirement on the ground that the city had not proved that 750 feet, as opposed to some other distance, was necessary to serve the city's interest.

The Court found that an adult entertainment zoning ordinance is "sufficiently well tailored if it effectively promotes the government's stated interest" and declined to "second-guess" the city council. *Houston*, *supra*, 837 F.2d at 1276.

Courts have sustained both requirements that sexually oriented businesses be located at specified distances from each other, see *Young*, *supra*, (upholding distance requirement of 1000 feet between sexually oriented businesses), and requirements that sexually oriented businesses be located at fixed distances from other sensitive uses, see *Renton*, *supra*, (upholding distance requirement of 1000 feet between sexually oriented businesses and residential zones, single-or-multiple family dwellings, churches, parks or schools).

The Working Group heard testimony that when an ordinance establishes distances between sexually oriented uses, an additional regulation may be needed to prevent operators of these businesses from defeating the intent of the regulation by concentrating sexually oriented businesses of various types under one roof, as in a sexually oriented mini-mall. The city of St. Paul has adopted an ordinance preventing more than one adult use (e.g., sexually oriented theater, bookstore, massage parlor) from locating within a single building. A similar ordinance was upheld in the North Carolina case of *Hart Book Stores, Inc. v. Edmister*, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980).

The experience with multiple-use sexually oriented businesses at the University-Dale intersection suggests that these businesses have a greater potential for causing neighborhood problems than do single-use sexually oriented businesses. Following *Renton*, it is suggested that lawmakers document the adverse effects which the community seeks to prevent by prohibiting multiple-use businesses before enacting this type of ordinance.

4. Requiring Existing Businesses to Comply with New Zoning

Zoning ordinances can require existing sexually-oriented businesses to close their operations provided they do not foreclose the operation of such businesses in new locations. Under such provisions, an existing business is allowed to remain at its present location, even though it is a non-conforming use, for a limited period.

The Minnesota Supreme Court has explained the theory this way:

The theory behind this legislative device is that the useful life of the nonconforming use corresponds roughly to the amortization period, so that the owner is not deprived of his property until the end of its useful life. In addition, the monopoly position granted during the amortization period theoretically provides the owner with compensation for the loss of some property interest, since the period specified rarely corresponds precisely to the useful life of any particular structure constituting the nonconforming use.

Naeaele Outdoor Advertising Co. v. Village of Minnetonka, 162 N.W.2d 206, 213 (Minn. 1968).

Such provisions applied to sexually oriented businesses have been said to be "uniformly upheld." *Dumas v. City of Dallas*, 648 F. Supp. 1061, 1071 (N.D. Tex. 1986), *aff'd*, *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988) (citing cases).

As detailed in the first section of this report, there are significant secondary impacts upon communities related to the location of sexually oriented businesses. These impacts are intensified when sexually oriented businesses are located in residential areas or near other sensitive uses and when sexually oriented businesses are concentrated near each other or near alcohol oriented businesses. The Working Group believes that evidence from studies such as those described in the first section of this report and anecdotal evidence in neighborhood residents and police officers

should be used to support the need for zoning ordinances which address these problems.

Recommendations

- (1) Communities should document findings of adverse secondary effects of sexually oriented businesses prior to enacting zoning regulations to control these uses so that such regulations can be upheld if challenged in court.
- (2) To reduce the adverse effects of sexually oriented businesses, communities should adopt zoning regulations to set distance requirements between sexually oriented businesses and sensitive uses, including but not limited to residential areas, schools, child care facilities, churches and parks.
- (3) To reduce adverse impacts from concentration of sexually oriented businesses, communities should adopt zoning ordinances which set distance requirements between liquor establishments and sexually oriented businesses and should consider restricting sexually oriented businesses to one use per building.
- (4) Communities should require existing businesses to comply with new zoning or other regulation pertaining to sexually oriented businesses within a reasonable time so that prior uses will conform to new laws.

IV. Licensing and Other Regulations

Licensing and other regulations may also be used to reduce the adverse effects of sexually oriented businesses. The critical requirements which communities must keep in mind are that regulations must be narrowly crafted to address adverse secondary effects, they must be reasonably related to reduction of these effects and they must be capable of objective application. If these standards can be

ing and other regulatory provisions may play an important role in preventing unwanted exposure to sexually oriented materials and in reducing the crime problems associated with sexually oriented businesses.

It is clear that failure to act upon a license application for a sexually oriented business cannot take the place of regulation. Without justification, denial or failure to grant a license is a prior restraint in violation of the First Amendment. *Paraguay Theater Corporation v. City of Minneapolis*, No. 716787, slip. op. (Henn. Co. Dist. Ct., Sept. 24, 1975).

An ordinance providing for license revocation of an adult motion picture theater if the licensee is convicted of an obscenity offense is also likely to be held unconstitutional as a prior restraint of free speech. *Alexander v. City of St. Paul*, 227 N.W.2d 370 (Minn. 1975). The Alexander court stated:

[W]hen the city licenses a motion picture theater, it is licensing an activity protected by the First Amendment, and as a result the power of the city is more limited than when the city licenses activities which do not have First Amendment protection, such as the business of selling liquor or running a massage parlor.

Id. at 373 (footnote omitted); see also *Cohen v. City of Daville*, 695 F. Supp. 1168, 1171 (M.D. Ala. 1988) (past sale of obscene material cannot justify revocation of license).

However, the courts have permitted communities to deny licenses to sexually oriented businesses if the person seeking a license has been convicted of other crimes which are closely related to the operation of sexually oriented businesses.

In *Dumas v. City of Dallas*, *supra*, the court reviewed a requirement that a license applicant not have been convicted of certain crimes within a specified period. Five of the enumerated crimes were held to be not sufficiently related to the purpose of the adult entertainment licensing ordinance because the city had made no findings on their justification. The invalid enumerated offenses were controlled substances act violations, bribery, robbery, kidnapping and organized

criminal activity. The court upheld requirements that the licensee not have been convicted of prostitution and sex-related offenses. *Id.* at 1074. If a community seeks to require that persons with a history of other crimes be denied licenses, clear findings must first be made which justify denial of licenses on that basis.

The *Dumas* court also invalidated portions of the licensing ordinance permitting the police chief to deny a license if he finds that the applicant "is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner" or is not "presently fit to operate a sexually oriented business." Neither provision satisfied the constitutional requirement that "any license requirement for an activity related to expression must contain narrow, objective, and definite standards to guide the licensing authority." *Id.* at 1072. See also *Alexander II*, *supra*, slip op. at 16 (unconstitutionally vague to define regulated bookstores as those selling "substantial or significant portion" of certain publications); *1126 Baltimore Boulevard*, *supra*, 684 F. Supp. at 898-99 (striking ordinance allowing zoning officials to deny permit if adult entertainment establishment is not "in harmony" with zoning plan, does not "substantially impair" master plan, does not "adversely affect" health, safety and welfare and is not "detrimental" to neighborhood because such standards are "subject to possible manipulation and arbitrary application").

A number of courts have upheld ordinances requiring that viewing booths in adult theaters be open to discourage illegal and unsanitary sexual activity. See, e.g., *Doe v. City of Minneapolis*, 693 F. Supp. 774 (D. Minn. 1988).

Licensing provisions and ordinances forbidding massage parlor employees from administering massages to persons of the opposite sex have withstood equal protection and privacy and associational right challenges. See *Clampitt v. City of Ft. Wayne*, 682 F. Supp. 401, 407-408 (N.D. Ind. 1988) (equal protection); *Wiggins, Inc. v. Fruchtman*, 482 F. Supp. 681,

689-90 (S.D. N.Y. 1979), *aff'd*, 628 F.2d 1346 (2d Cir. 1980), *cert. denied*, 449 U.S. 842, 101 S. Ct. 122. However, some courts have found same-sex massage regulations to be in violation of Title VII of the Civil Rights Act of 1964. See *Stratton v. Drumm*, 445 F. Supp. 1305, 1310-11 (D. Conn. 1978); *Gianciolo v. Members of City Council*, 376 F. Supp. 719, 722-24 (E.D. Tenn. 1974); *Joseph v. House*, 353 F. Supp. 367, 374-75 (E.D. Va.), *aff'd sub nom. Joseph v. Blair*, 482 F.2d 576 (4th Cir.), *cert. denied*, 416 U.S. 955, 94 S. Ct. 1968 (1974). *Contra, Aldred v. Duling*, 538 F.2d 637 (4th Cir. 1976).

Although the Working Group expressed strong concern about the operation of prostitution under the guise of massage parlors, this type of regulation is not advisable because legitimate therapeutic massage establishments could find their operations curtailed. Prostitution may be better controlled through prosecution and use of post-conviction actions such as forfeiture or enjoining a public nuisance.

In 1985, a court upheld an ordinance making it unlawful to display for commercial purposes material "harmful to minors" unless the material is in a sealed wrapper and, if the cover is harmful to minors, has an opaque cover. *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985). Last year, the legislature enacted a state law similarly prohibiting display of sexually explicit material which is harmful to minors unless items are kept in sealed wrappers and, where the cover itself would be harmful to minors, within opaque covers. Minn. Stat. § 617.293 (1988). This law has the potential to protect minors from exposure to sexually oriented materials. Communities also have considerable discretion to regulate signage so that the exterior of sexually oriented businesses does not expose unwitting observers to sexually explicit messages.

Recommendations

- (1) Prior to enacting licensing regulations, communities

should document findings of adverse secondary effects of sexually oriented businesses and the relationship between these effects and proposed regulations so that such regulations can be upheld if challenged in court.

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

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

Conclusion

There are many actions which communities may take within the law to protect themselves from the adverse secondary effects of sexually oriented businesses. Prosecution of obscenity crimes can play a vital role in decreasing the profitability of sexually oriented businesses and removing materials which violate community standards from local outlets. Forfeiture and injunction to prevent public nuisance should be available where sexually oriented businesses are the site of sex-related crimes and violations of laws pertaining to gambling, liquor or controlled substances. These actions will remove the most egregious establishments from communities.

Zoning can reduce the likelihood that sexually oriented businesses will lead to neighborhood blight. Licensing can sever the link between at least some crime factories and sexually oriented businesses. Regulation and cement

App. B / Adult Businesses

can protect minors from exposure to sexually explicit materials.

The Attorney General's Working Group on the Regulation of Sexually Oriented Businesses believes that prosecution, seizure of profits, zoning and regulation of sexually oriented businesses should only be done in keeping with the constitutional requirements of the First Amendment. Rational regulation can be fashioned to protect both our communities and our constitutional rights.

FILED _____ ENTERED _____
LOGGED _____ RECEIVED _____

★ SEP - 6 1995 ★

Honorable Thomas S. Zilly

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY _____ DEPUTY

RECEIVED

SEP - 6 1995

BURNS & HAMMERLY P.S.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEJA VU-EVERETT-FEDERAL WAY, INC.,)
a Washington corporation,)

Plaintiff,)

v.)

CITY OF FEDERAL WAY,)

Defendant.)

No. C95-1272 Z

DECLARATION OF J.P. COVEY IN
OPPOSITION TO PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION

JAMES P. COVEY does hereby declare, upon penalty of perjury under the laws of the state of Washington, that the following is true and correct:

1. I am a detective with the King County Police Department, and I make this declaration on my own personal knowledge.
2. After joining the King County Police Department in 1978, I served two years as a patrolman and two years as a detective. Commencing in 1982, I was assigned to work as a detective in Special Investigations for the Vice Control Unit. Except for a break of less than two years, I have worked continuously in that Unit through this date. Part of my responsibilities include investigations of adult entertainment establishments, including the Deja Vu club in Federal Way.

DECLARATION OF J.P. COVEY IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION - 1

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1 3. The City of Federal Way (the "City") contracts with the King County Police Department
2 for law enforcement services. I have been involved in several undercover investigations of the Deja
3 Vu club in Federal Way, notably in 1990 - 1992 and again in 1995. I have been inside the Deja Vu
4 club in Federal Way approximately 40 times, with about 10 of those visits occurring in 1995. I am
5 familiar with what constitutes "typical" table dance performances at that Deja Vu club.

6 4. Evidence of Secondary Effects. I testified at the August 1, 1995 Federal Way City Council
7 meeting concerning the proposed amendments to the City's adult entertainment ordinance, which
8 were enacted on August 15, 1995 as Ordinance 95-241. I testified that in the five years I have
9 observed activities in an undercover capacity at the Federal Way Deja Vu, there has been a criminal
10 violation occurring on every visit--either an act of prostitution or a violation of the City's adult
11 entertainment ordinance. Whether these violations occur inside or outside the club is irrelevant to me,
12 because they are all secondary to any lawful dance activity.

13 5. I provided the City Council with a summary of arrests at Deja Vu from 1990 through
14 1992, which is Exhibit B-2 to the legislative record of the City for Ordinance 95-241. I do not have
15 the conviction data, but convictions were obtained in the overwhelming majority of cases.

16 6. The 1995 investigation at the Federal Way Deja Vu was conducted in March through July
17 1995. Each time an undercover officer entered the Federal Way Deja Vu as part of the investigation,
18 one or more criminal or code violations was occurring. The City has filed 24 criminal complaints in
19 connection with that investigation. Copies of criminal complaints and investigative reports are
20 attached at Exhibit B-3 to the legislative record of the City for Ordinance 95-241.

21 7. King County officers conducted a 1993 undercover investigation at the Sugar's nightclub in
22 the Shoreline area. King County officers purchased 161 table dances, and 160 dances contained some
23 illegal conduct, including nine prostitution cases. The prosecution of these cases is ongoing; of the
24 three prostitution cases which have gone to trial to date, two have resulted in convictions and one in a
25 mistrial.
26

DECLARATION OF J.P. COVEY IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION - 2

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1 8. The number of charges which could be brought for violations of adult entertainment
2 ordinances in King County is limited only by the manpower available in law enforcement. Violations
3 of adult entertainment codes, illegal sexual conduct, and prostitution are rampant.

4 9. I testified, along with fellow King County detective Mike Gillis, in the March 1995 trial in
5 Deja Vu-Bellevue, Inc. v. City of Bellevue King County Superior Court No. 95-2-22796-3, in which
6 the City of Bellevue's four-foot table dancing and eight-foot stage dancing restrictions were upheld.
7 My testimony in that case is consistent with the statements in this declaration, except that the details
8 of the Federal Way investigation were not then available to me.

9 10. Federal Way Deja Vu Videotape and Specific Instances of Misconduct. The legislative
10 record for the City's Ordinance 95-241 also includes a videotape of table dances occurring at the
11 Federal Way Deja Vu on May 2, 1995. I was the customer in the videotape; the dancer is "Nikki." A
12 true and correct copy of the videotape is attached hereto as Exhibit A. The first ten pages of Exhibit
13 B-3 of the City's legislative history are documents describing the events portrayed in the videotape.
14 This videotape demonstrates the following sexual conduct:

<u>Time from Start:</u>	<u>Activity</u>
0:10	"Nikki" asks if I want a table dance
0:22	She bares her breasts and places them against my face
0:50	She rubs her genital area against my genitals
1:10	<u>S</u> he exposes her breast and puts it against my face
1:40	She exposes her vagina and massages my genitals
2:10	She rubs her genital area against my genitals
2:45	First dance ends; she asks if I want another; I tell her that I do not want to mess my pants; she goes to get a condom
6:30	She places a condom in my left hand; I go to the restroom
9:05	Second dance begins
9:15	She rubs her genital area against my genitals

1 9:50 She exposes her vagina and massages my genitals
2 10:12 She exposes her breasts
3 10:40 She exposes her vagina
4 11:15 She rubs her genital area up and down against my genitals
5 11:45 End of dance; I pay her \$30.

6 Based on my experience, these were two typical \$30 table dances at the Federal Way Deja
7 Vu. After the first dance, "Nikki" attempted to get me to purchase a more expensive dance in the
8 secluded V.I.P. section of the club. When I told her that it "costs more," she replied: "Yes, but you
9 get more contact." "Nikki" has been charged with prostitution and violation of the City's ordinance;
10 no trial has yet been held.

11 11. Other examples of criminal charges from the 1995 investigation at the Federal Way Deja
12 Vu, as well as the conduct that produced the charges, are set forth in Exhibit B-3 of the City's
13 legislative record for Ordinance 95-241. Some of the charges are prostitution--e.g., "Dana," CP
14 20097; "Athena," CP25070FW; "Hope," CP25053FW; "Sarena," CP 25067; "Barbi," CP 25181;
15 "Carmen," CP 25068; "Natasha," CP 25062; "Shelly," CP 25065; "Tasha," CP 20098; "Melissa," CP
16 25180. All of the performers were charged with at least violations of the entertainment code, for
17 conduct which included the exposure of breasts and the rubbing of genitals.

18 12. This conduct is typical of what is observed every time an undercover operation is
19 conducted at the Federal Way DeJa Vu.

20 13. The Need for Regulation of Distance. Federal Way's prior adult entertainment ordinance
21 (90-55) prohibited "touching" of specified body parts (e.g., genitals) between an entertainer and a
22 customer. That rule was difficult, if not impossible, to enforce on a regular basis. An officer simply
23 cannot observe violations occurring, due to the proximity of the bodies of the entertainer and
24 customer. Unless the officer is participating in a table dance in an undercover capacity, a violation is
25 extremely difficult to detect. The problems of detection are increased by the low lighting levels, as
26

DECLARATION OF J.P. COVEY IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION - 4

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1 well as the secluded areas of the V.I.P. lounge at Federal Way. If regulations kept dancers out of
2 reach of the patrons, it would be easy for an officer to detect sexual contact. The four-foot table
3 dance and eight-foot stage dance distance restrictions in the Federal Way ordinance do just that.

4 14. The City's ordinance will enhance substantially the City's ability to detect and prevent this
5 type of conduct. Absent the four-foot distance requirement, we cannot effectively stop this activity.
6 The City's eight-foot distance requirement for stage dances will ensure that there is no contact
7 between a stage performer and patron, no matter the height of the patron.

8 15. The Need for Licensing Information. I believe that the licensing information required in
9 Section 9-110 of the City's Adult Entertainment Code is reasonable and necessary for law
10 enforcement. The King County Police Vice Department consists of four detectives, covering Federal
11 Way, Sea Tac, Burien, Woodinville, Shoreline, and all of unincorporated King County. There are not
12 enough officers to perform ongoing undercover operations at any one adult entertainment facility.
13 For example, in 1993 and 1994, those officers were occupied in assisting the City of Federal Way in
14 enforcing its laws regarding massage businesses, and no undercover investigation was conducted at
15 Deja Vu.

16 16. Given the shortage of personnel and the rampant violations, it is necessary to assign
17 officers to the place(s) where the risk of violation is greatest. For that reason, the City's requirements
18 for licensing information are critical. We need personal data, including photographs and fingerprints,
19 to determine the true identity of the persons involved in these clubs. Many use aliases, and virtually
20 all dancers use "stage names." It is also critical to verify the age of the performers, because it is our
21 top priority to eliminate juveniles from this business. Similarly, we need information on corporations
22 to determine their true identity and ownership. We also need criminal histories to determine the
23 propensity for violation. If a club has 20 dancers with prior prostitution convictions, we will assign
24 more officers to that club than a club which has few performers with prior convictions.

25
26
DECLARATION OF J.P. COVEY IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION - 5

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Shaping
our community
together

CITY OF **LACEY**

POST OFFICE 3400 / 420 COLLEGE ST. SE
LACEY, WA 98509-3400

CITY COUNCIL

NANCY J. PETERSON
Mayor
HERB JONES
Deputy Mayor
ANN BURGMAN
WILLIAM A. BUSH
JON W. HALVORSON
EARLYSE A. SWIFT
JAMES J. WEBER

CITY MANAGER

GREG J. CUOIO

January 6, 1997



Mark Erickson
City of Olympia
P O Box 1967
Olympia, WA 98504-1967

Dear Mark:

I recently read an article in the paper about Olympia adopting new regulations to handle adult entertainment facilities. The article mentioned that property between Martin Way and Pacific near Sleater-Kinney was one of the areas that was currently allowed for adult entertainment. It was implied that this area would continue to be one area designated for such use. This is a concern to Lacey based on our new comprehensive land use plan and surrounding zoning designations.

Lacey recently adopted an adult entertainment ordinance which regulates which zones adult entertainment facilities may locate in. One of the areas considered was the Martin Way corridor, where we had adopted a mixed use high density corridor zone. This zone was patterned after Olympia's "Evolution of a Corridor" concept, and is intended to have a mixture of commercial and high density residential uses. In consideration of this corridor, the Lacey Planning Commission determined that the heavy emphasis on residential development was incompatible with the needs of adult entertainment uses. Therefore, the portion of the Martin Way corridor designated mixed use high density was eliminated from our consideration for location of adult entertainment facilities. It is my understanding that your Martin Way corridor has a similar emphasis and we urge you to consider the appropriateness of adult facilities in a zone that emphasizes residential uses.

Another concern with the Martin Way corridor between Sleater-Kinney and College St. where Olympia has a small peninsula of property which extends into the Lacey growth area is many people understandably identify this area with Lacey and believe it is under Lacey's jurisdiction. While it is not Lacey, we still have an interest in how the area develops, since it is often associated with Lacey. When our Planning Commission looked at the Lacey central business districts surrounding the peninsula, we found that the close proximity of sensitive properties precluded adult live entertainment facilities. I would assume that the peninsula of property Olympia has control over around Sleater-Kinney and College would



Mark Erickson
January 6, 1997
Page 2

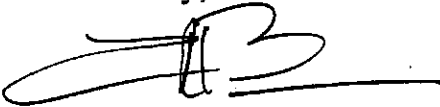
face similar limitations based on the proximity of existing and potential future residential uses and the North Thurston High School.

The Lacey Planning Commission and City Council did find that a couple zones within our Central Business District were viable for non-live adult entertainment, but these areas were very limited, were exclusively commercial zones, and were not in close proximity to any sensitive properties, including residential uses. The only areas we ended up designating for live entertainment are in our light industrial zones in the Hawks Prairie area where we have ample properties to buffer surrounding uses. We request Olympia take a similar approach.

In summary, the City urges you to consider Lacey's findings on the suitability of the Martin Way corridor for adult uses and to exclude adult uses from this particular area based on the intent of the zone and surrounding land uses.

Thank you for consideration of this important topic. If you have any questions regarding the above, please feel free to contact me in person at Lacey City Hall or by phoning 491-5642 between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday.

Sincerely,



David R. Burns, AICP
Principal Planner
241.ltr

cc: Greg Cuoio, City Manager—
Jerry Litt, Community Development Director