

Appendix B: Community Defense Counsel Memorandum of Law **Supporting Sample Comprehensive SOB Ordinance**

1. The purpose of this memorandum is to provide the legal basis for the provisions found in the sample ordinance. It is a brief outline of the law, not an exhaustive treatise. The ordinance is a "time, place, and manner regulation." As such, it is "content neutral" and focuses on the negative secondary consequences or harmful effects of the regulated activity, i.e., sexually oriented businesses.

2. There are two U.S. Supreme Court decisions which are the controlling authorities in this area of "time, place, and manner regulation": *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *see also*, *City of Los Angeles v. Alameda Books, Inc.*, 121 S.Ct. 1223 (2001).

3. In *Young*, the Supreme Court upheld the constitutionality of a Detroit zoning ordinance regulating the location of "adult" theaters by prohibiting them from locating within 1000 feet of any two other regulated uses or within 500 feet of a residential area. A plurality of the Court found that the Detroit ordinance did not violate the First Amendment as an impermissible prior restraint, and that the ordinance was based on a substantial governmental interest.

4. In *Renton*, the Supreme Court again upheld the constitutionality of a city's zoning ordinance against a First Amendment challenge. The challenged ordinance was designed to regulate "adult" uses by prohibiting them from locating within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park or school. Because the ordinance did not prohibit these uses altogether, the Court analyzed the city's ordinance as a form of time, place and manner regulation. "[C]ontent-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." 475 U.S. at 47. This ordinance, the Court stated, was aimed at the secondary effects of adult uses, and not at the content of the films shown, and was clearly based on a substantial interest in preventing crime, protecting retail trade and maintaining property values. The ordinance was also narrowly tailored to "affect only that category of theaters shown to produce the unwanted secondary effects." *Id.* at 52. Further, the Court found that the ordinance allowed for reasonable alternative avenues of communication because it left 520 acres or more than 5 percent of the entire land area of Renton available for "adult" uses. "In our view, the First Amendment requires that Renton refrain from effectively denying Respondents a reasonable opportunity to open and operate an adult theater within the city." *Id.* at 54.

5. The ordinance contains not only zoning regulations, but also licensing requirements, regulations dealing with "peep booths or arcades", hours of operation restrictions, and other miscellaneous regulations directed at neutralizing the negative secondary effects of sexually

oriented businesses. Subsequent cases to *Young* and *Renton* have analyzed these additional regulations, over and above zoning regulations, pursuant to the same time, place and manner analysis that is found in *Renton*. Using this analysis, these additional regulations have consistently been upheld against constitutional challenge.

6. The following is a review and discussion of important provisions found within the ordinance:

(a) Legislative Findings. The preamble and purpose sections of the ordinance are lengthy and detailed. Unlike other ordinances, courts frequently look at the purported purpose, legislative findings, and intent behind a sexually oriented business ordinance to determine whether it is indeed content neutral or if it is simply a pretext for attempting to eliminate or suppress "adult" uses. Therefore, the legislative body must make specific findings supporting the need for the ordinance and demonstrating that the ordinance is content neutral and directed at the negative secondary effects of adult businesses rather than the pornographic nature of the materials rented or sold within.

A city must establish that its SOB zoning and licensing ordinances are reasonable, i.e., that there is a need for them. It may conduct studies regarding its own experience with sexually oriented businesses. But not every city has the resources to conduct its own studies. After *Renton*, it is not necessary for a city to conduct its own studies. It may rely on the experiences and studies of other cities. *Young*, 475 U.S. at 50.

To determine whether an SOB ordinance is reasonable, a court must look to the legislative record. There must be evidence in the record to support the ordinance. Fortunately, as the ordinance demonstrates, there is significant and sufficient evidence on which a legislature may rely to prove the reasonableness of an SOB ordinance like this one. Thus, a city council may obtain studies or reports conducted by other cities and rely on them in enacting the ordinance. Many such studies are available and may be obtained from planning directors of those cities, or from Community Defense Counsel.

Renton held that a city need not show that a particular SOB causes the identified harmful secondary consequences. There was no showing that any particular use in *Renton* caused the secondary consequences sought to be prevented. Again, a city or legislature may rely on the experiences of other communities.

(b) Definitions. The definitions used in this ordinance are generally adopted from *Young*, *Renton*, and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). Rather than to arbitrarily attempt to set a percentage of use such as floor area, stock and trade, or gross revenues to define a sexually oriented business, a more flexible approach has been approved by the Supreme Court. Language upheld by the Supreme Court in *Young* was: "a substantial or significant portion of its stock in trade"; in *Renton*, "distinguished or characterized by an emphasis on matter depicting, describing, or relating to [sex]"; and in *Dumas v. City of Dallas*, 648 F.Supp. 1061 (N.D. Tex. 1986), *aff'd*, 837 F.2d 1298 (5th Cir. 1988), *reversed on other grounds*, *FW/PBS, Inc.*, "one of its principle business purposes." See also *People v. Superior Court*, 774 P.2d 769, 259 Cal.Rep.

740 (1989), "one of its principle business purposes."

Challenges to time, place and manner regulations are frequently made on grounds that the language in such laws is unconstitutionally vague. Such challenges are almost uniformly rejected. Because zoning must apply to property uses which by nature are dynamic and changeable, you cannot define regulated uses with absolutely scientific precision. The words or provisions used in this ordinance have been uniformly upheld against vagueness challenges.

(c) Licensing. This Ordinance provides for licensing of both the sexually oriented business and employees within. Licensing of the sexually oriented business is important to keep track of various adult uses regulated under the zoning provisions and also to help document the negative secondary effects of these uses. Licensing of both sexually oriented businesses and their employees is important to provide for accountability -- i.e., who is responsible for what takes place on the premises, who truly owns the establishment, and what is the background of workers and employees.

It is important to review the caselaw in a jurisdiction to ensure that any ordinance adopted complies with it. Some courts have limited the personal information that can be obtained in a license application. In some jurisdictions, courts have also restricted the identity of persons who may be required to sign an application where the applicant is not an individual. See, e.g., Community Defense Counsel, Alliance Defense Fund, Inc., *Protecting Communities From Sexually Oriented Businesses*, Ch. 7 (2d Ed. 2002).

The Supreme Court has stated that cities can have special licensing schemes for different kinds of speech activities: "Of course, the city may even have special licensing procedures for conduct commonly associated with expression." *City of Lakewood v. Plain Deals Publishing Co.*, 486 U.S. 750, 760 (1988) (in the context of newsrack regulation).

Licensing schemes are routinely challenged on prior restraint grounds. In *FW/PBS*, the Court found that a licensing requirement was a prior restraint and that certain safeguards were necessary to avoid constitutional problems: (1) "the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained," and (2) "there must be the possibility of prompt judicial review in the event that the license is erroneously denied." 493 U.S. at 228. Both of these requirements have been addressed in the ordinance. and there is no prior restraint problem. See §V(A) and (C), and X(D). Jurisdiction specific caselaw should also be reviewed here since *FW/PBS* left unsettled the question of whether ordinances must create access to prompt judicial review within a certain time period, or whether they must guarantee a judicial decision by a certain time period. See, Community Defense Counsel, Alliance Defense Fund, Inc., *Protecting Communities From Sexually Oriented Businesses*, Ch. 7 (2d Ed. 2002).

A licensing scheme must establish clear guidelines limiting the discretion of the issuer to ensure that protected speech is not suppressed. Further, those guidelines and the information required

from applicants must be reasonably related to the license's purpose. The information required by this ordinance has been approved by numerous courts. *See, e.g., Broadway Books, Inc. v. Roberts*, 642 F. Supp. 486 (E.D. Tenn. 1986); and *KEV, Inc. v. Kitsap, Co.*, 793 F.2d 1053 (9th Cir. 1986).

(d) Fees. Licensing fees to cover the cost of issuing and enforcing regulations are permissible, as long as the fee is "revenue neutral." *Cox v. New Hampshire*, 312 U.S. 569 (1941). As long as the fee only recoups the government's costs in providing a service and conducting any investigations and is not a tax imposed on the exercise of a constitutional right, it is constitutional.

The amount of the various fees is determined on a city-by-city basis and needs to be related to the expenses (i.e., administrative costs, inspection expenses, law enforcement resources, etc.) incurred. But a city need not show precisely its costs of administration, *World Wide Video, Inc. v. Tukwila*, 816 P.2d 18 (1991), and the burden is on the challenger to show that the fee is excessive. *Adult Ent. Ctr., Inc. v. Pierce Co.*, 788 P. 2d 1102, 1108 (1990).

(e) Zoning. Section XI regulates the location of sexually oriented businesses by dispersing them from each other and from other sensitive uses (residential area, parks, schools, churches, etc.) and limiting them to one or more specified zoning districts. Scatter zoning was specifically approved of in *Renton*, and *Young* employed both setbacks and dispersal features within commercial zones. *Young*, 427 U.S. at 62.

"Cities may regulate adult theatres by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. It is not our function to appraise the wisdom of [the city's] decision to require adult theatres 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'." *Renton*, 475 U.S. at 52.

The zone (or zones) that a sexually oriented business is to be limited to, and the amount of distance between SOBs and other SOBs or other sensitive uses, need to be determined by each individual community based on its size (both geographic and population), number of sexually oriented businesses presently existing, and the configuration of its present zoning scheme. The locational restrictions will be constitutional so long as they allow for "reasonable alternative avenues of communication." *Id.* at 47.

Since *Renton*, various courts have upheld percentages below Renton's 5 percent as reasonable. *See S & G News, Inc. v. City of Southgate*, 638 F. Supp. 1060 (E.D. Mich. 1986) (2.3 percent of the total land area of the County) and *Function Junction, Inc. v. City of Daytona Beach*, 507 F. Supp. 544, 552 (M.D. Fla. 1987) ("12 locations in Daytona Beach ... potentially could accommodate plaintiffs' [adult use] lounges.") The Fifth Circuit in *Lakeland Lounge v. City of Jackson, Michigan*, 973 F. 2d 1255 (1992), found reasonable a City of Jackson ordinance which provided for four areas with 8 to 10 locations which were "available and suitable" -- approximately 1.2 percent of the City's land mass.

(f) Amortization. One of the most important elements of "adult" use zoning ordinances is a requirement that all nonconforming uses come into compliance within a specified period of time. A majority of the states, and the U.S. Constitution, permit an ordinance to terminate pre-existing "adult" uses which conflict with the locational or other provisions of an adult use zoning ordinance. Over a relatively brief period of time, all nonconforming sexually oriented businesses are eliminated under such a requirement. Pre-existing adult use status does not guarantee a permanent right to continue such property use when it contravenes the requirements of an ordinance.

Amortization clauses are almost uniformly upheld. See *Hart Bookstores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979) (upheld ordinance providing a six-month amortization period for pre-existing, nonconforming adult uses); *Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153 (1978) (upheld ordinance providing a 90-day amortization period for pre-existing, nonconforming sex theaters); *Castner v. City of Oakland*, 180 Cal. Rptr. 682 (1982) (upheld ordinance regulating adult entertainment activity providing a one-year amortization period under which owner can apply for up to a two-year extension); *City of Vallejo v. Adult Books*, 219 Cal. Rptr. 143 (1985) (upheld ordinance regulating adult bookstores and theaters providing a one-year amortization period under which owners could apply for an extra year if they could show extreme hardship); *Cook County v. Renaissance Arcade*, 522 N.E. 2d 73 (Ill. 1988) (upheld ordinance providing a six-month amortization period under which an additional six months is given to any business which applies), and *SDJ, Inc. v. City of Houston*, 636 F. Supp. 1359 (S.D. Tex. 1986), *aff'd*, 841 F.2d 107 (5th Cir. 1988) (upheld six-month amortization of sexually oriented businesses).

The amortization period provided for in the ordinance is one year. This one-year period can be shortened or lengthened depending on the caselaw in your jurisdiction and the factual situation existing in your community, i.e., how many nonconforming sex uses already exist, how much do they have invested in their present location, etc. A similar approach may be taken as mentioned earlier in the case summaries, such as setting forth a specific period with the option of an additional period if a hardship is demonstrated.

Amortization provisions contained in sexually oriented business zoning ordinances are constitutionally permissible so long as they are content neutral and satisfy the requirements of *Renton* and *Young*, that being, they must be "reasonable" and not "arbitrary and capricious." Also the state constitution must allow for amortization generally.

(g) Arcade Areas. Section XIV deals with additional regulations pertaining to so-called "peep show" booths. Ordinances regulating the interior configuration of sexually oriented businesses, more particularly "peep show" booths, are routinely upheld against constitutional attack. However, it is essential that a city council have before it some evidence (not necessarily as to its own experience, but in "peep show" booths generally based on others' experiences) of the sexual activities occurring within the "peep show" booths. These reports should set forth information about sexual activity, such as anonymous sex between patrons using "glory holes", solo or group

masturbation, and other illicit activities. The Supreme Court described the activity which occurred within "peep show" booths in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 699 (1986): "The court reported evidence that such a booth was used for 'masturbation, fondling, and fellatio by patrons on the premises of the store ...'." With such evidence or documentation, the ordinance will rest upon a reasonable basis, and not be considered arbitrary or capricious.

The following cases have upheld interior configuration requirements substantially identical or similar to the model language contained herein, which provides for open booths with direct line of sight from a manager's station: *Wall Distributors, Inc. v. City of Newport News, Virginia*, 782 F. 2d 1165 (4th Cir. 1986); *Ellwest Stereo Theatres, Inc. v. Weiner*, 681 F. 2d 1243 (9th Cir. 1982); *Broadway Books; SDJ, Inc.*; and *Dumas*.

(h) Public Nudity. In 1991, the Supreme Court settled the question of whether communities can ban public nude dancing in establishments not licensed to sell liquor, and without the added regulatory power of the 21st Amendment. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 115 L.Ed. 2d 504, the Supreme Court upheld the use of Indiana's public indecency law to prohibit nudity in a public place, including an "adults only" sexually oriented business.

The *Barnes* Court emphasized that the Indiana law was not aimed at the suppression of free expression, but was a content-neutral prohibition of certain conduct: "The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity." *Id.* at 514. The Court found that Indiana's statute was not directed at nude dancing or its potential expressive elements; rather, the State sought to prohibit public nudity across the board.

Section XVII prohibits total nudity in a sexually oriented business, pursuant to *Barnes*. Also, in Subsection B, the ordinance requires that individuals appearing in a "semi-nude condition" must be at least 10 feet from any patron or customer and on a stage at least two feet from the floor, and that a semi-nude employee may not solicit or be paid a gratuity, or touch a patron. These regulations were approved in *KEV, Inc. v. Kitsap County*, 793 F. 2d 1053 (9th Cir. 1986), and *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995).

The U.S. Supreme Court reaffirmed *Barnes* in *City of Erie v. Pap's A.M., TDA "Kandyland"*, 529 U.S. 277 (2000) which upheld an ordinance almost identical to *Barnes*.

(i) Hours of Operation. The zoning provisions are "place" regulations. The licensing and interior configuration requirements are "manner" regulations. The Supreme Court in *Renton* approved of "time, place, and manner" regulations. Section XIX is a "time" regulation. Numerous courts have upheld hours of operation restrictions on sexually oriented businesses., the latest being in *See, e.g., Mitchell v. Commission on Adult Entertainment*, 10 F. 3d 123 (3d Cir. 1993). *See also Broadway Books; Star Satellite, Inc. v. Biloxi*, 779 F.2d 1074 (5th Cir. 1986); and *7250 Corp. v. Board of County Commissioners*, 799 P. 2d 917 (Colo. 1990).

Conclusion

This memorandum of law is not an exhaustive treatment of sexually oriented business and First Amendment law, but rather an overview to demonstrate support for the various provisions found within the sample ordinance. Because state and local laws vary, please consult with a local attorney before implementing this ordinance. For further details and assistance, please contact Community Defense Counsel c/o of the Alliance Defense Fund, Inc. at 480-444-0020.