

Chapter 3: Making the Legislative Record

Quick Guide to Chapter 3:

How does a community establish that its ordinance is content neutral?

The preamble, the testimony, the public statements of officials, all written support for the ordinance, and its very terms should demonstrate that it is intended to address the negative secondary effects of sex businesses, and is not motivated by animus toward sexually explicit speech. (3.1)

What if a citizen, or even worse, one of the elected council members, makes a statement about wanting to "shut these places down," -- is the ordinance now unconstitutional?

Not usually. Courts are looking mostly at the terms of the ordinance; also, if there is some evidence in the record of a content-neutral motivation being discussed it is usually enough to justify the ordinance. Bad motivation on the part of a few is usually not enough to overcome the text of the ordinance and the correct motivation of others. (3.1)

How do you prove that SOB's cause negative secondary effects? Do you have to have evidence specific to your community? What if the local SOB provides evidence that it causes no secondary effects?

A number of studies document the negative effects caused by SOB's, and the Supreme Court allows communities to rely on studies from other locations to support their own ordinance. You do not need specific evidence for your community; thus, you can enact an ordinance even if you have no SOB's currently in your town. A specific SOB's evidence about its lack of harmful effects is irrelevant because no specific SOB is being targeted; these ordinances are designed to apply to all SOB's and are justified by the experience and studies from other communities. (3.2)

Municipalities must establish two things through the legislative process:

- (1) that their intentions are pure; i.e. that they are not directing the regulations at the content of speech but at the negative secondary effects; and
- (2) that they have a valid and reasonable basis for enacting the various provisions contained in the ordinance.

In this chapter, we will discuss ways to establish the content neutrality of your ordinance, while avoiding or overcoming improper legislative motives.

3.1 – Establishing Content Neutrality

As previously discussed, an ordinance can pass muster as "content neutral" if it is "justified without reference to the content of the regulated speech." *Tollis, Inc., v. San Bernardino County*, 827 F.2d 1329, 1332 (9th Cir. 1987); *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others," *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1416 (8th Cir. 1994); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 122 (1991). "In determining whether a regulation is content based or content neutral, [the Court looks] to the purpose behind the regulation." *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001). Remember it must be "aimed to control secondary effects resulting from the protected expression" rather than inhibiting the protected expression itself. *Tollis, Inc.*, 827 F.2d at 1332; *Renton*, 475 U.S. at 48; *City of Erie v. Pap's A.M., TDA "Kandyland"* 529 U.S. 277, 296 (2000).

That intent, therefore, must be demonstrable from the legislative record and the ordinance itself. The legislative record is, of course, the recorded legislative history of the ordinance's enactment. This may include minutes of meetings of the local planning commission or subcommittee of city council when the ordinance was proposed, discussed and drafted. In fact, it includes all sessions of governmental meetings when the ordinance was discussed. It includes all recorded public hearings and especially all evidence received by the legislative body in support of the ordinance. Such evidence may take the form of anecdotal testimony, formal land use studies of the particular vicinity to be zoned, studies and reports from other communities on the effects of "adult" property uses, police reports on crime statistics near these uses, testimony of real estate appraisers, and testimony of nearby homeowners, business owners and churches on the effects such uses have on the quality of their activities and lives.

The local government must make clear that the purpose of the ordinance is not to eliminate pornography¹. Obscenity and child pornography laws are directed to that problem. The aim of

¹ When Richland County, South Carolina, adopted an ordinance, the county council specifically rejected a

this ordinance is to regulate the time, place and manner of operation of "sexually oriented businesses" because of their harmful secondary effects. This should be demonstrated by the transcripts and other evidence making up the legislative record. It would be entirely appropriate for the municipal attorney to brief his/her clients prior to consideration of the ordinance on the types of comments that would be harmful in establishing a record of content neutrality.

The experience of the Dallas City Council in enacting the ordinance upheld in *Dumas v. City of Dallas*, 648 F.Supp. 1061 (N.D. Tex. 1986), *aff'd sub nom FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988), *rev 'd on other grounds*, 493 U.S. 215 (1990), is a good example of the correct way to establish content neutrality. The Dallas city attorney presented the proposed ordinance regulating "sexually oriented businesses" to the Dallas City Planning Commission. The Commission considered studies carried out in other cities, but did not undertake a study of Dallas. The Commission did consider, however, a map of Dallas indicating *Protecting Communities From Sexually Oriented Businesses* areas in which "sexually oriented businesses" could locate under the proposed ordinance. The Commission also heard public testimony, both for and against the proposed ordinance. The Commission voted unanimously to recommend adoption of an ordinance regulating sexually oriented businesses. *Dumas*, 648 F.supp. at 1064.

The ordinance then went before the Dallas City Council. The Council considered the three studies that were before the Planning Commission. The Council also considered a Dallas study comparing crime rates in two commercial sections, one with "sexually oriented businesses" and one without (finding crime rates 90 percent higher in the "SOB" district). After hearing public comment in favor of the ordinance, the Council adopted it by unanimous vote. *Id.*

The intent of both the Planning Commission and the Council in adopting the ordinance was clear. Five of the 15 members of the Commission and four of the 11 members of the Council stated unequivocally -- to no dissent -- that the ordinance was concerned solely with controlling the secondary effects of "sexually oriented businesses" on surrounding neighborhoods. Both groups stated that they were concerned not with the content of the speech associated with "sexually oriented businesses", but with the crime, urban blight, and plummeting property values that inevitably infect the neighborhoods where such businesses locate. *Id.* at 1064-65. Hence the reviewing court concluded that the "intent of the City in passing the Ordinance was solely to control the secondary effects of sexually oriented speech on the neighborhoods its purveyors inhabit, rather than to eliminate the speech itself." *Dumas*, 538 F.Supp. at 1065-66. *See also* Albert Fredericks, *Adult Use Zoning: New York City's Journey on the WellTraveled Road From Suppression to Regulation of Sexually Oriented Expression*, 46 Buff. L. Rev. 433 (1998) (analyzing New York City's successful effort to establish content neutrality in their effort to regulate sexually oriented businesses).

motion to outlaw "adult" establishments in the county. In upholding the ordinance, the trial court, in its opinion, cited that vote to show that if the intent had been to eliminate these uses from the county, the council would have approved the "motion." As *Renton* stated, "[i]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location." *Renton*, 475 U.S. at 48.

In *Holmberg v. City of Ramsey*, 12 F.3d 140 (8th Cir. 1993), the court held an SOB zoning ordinance "content-neutral":

"[T]he ordinance's stated purpose is to lessen the undesirable secondary effects sexually oriented businesses have on surrounding neighborhoods, make these businesses less accessible to minors, prevent losses in property values, and reduce criminal activity. Like the district court, we find nothing in the ordinance that suggests the City Council passed the ordinance to suppress the message of Holmberg's sexual materials." 12 F.3d at 143.

Even less than stellar efforts to establish content neutrality have been upheld as sufficient by federal courts of appeal.

In *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994), the Sixth Circuit reversed the district court's conclusion that a public nudity ordinance failed the test of content neutrality. (The court ultimately ruled the ordinance overbroad on other grounds, which will be discussed in Chapter 8 - "The Problem of Nude Dancing"). "As the City's lawmakers claimed during trial that they were moved to enact the ordinance only by morality concerns and failed to dwell on an interest in combating secondary effects, the district court concluded that the ordinance is constitutionally deficient as applied to prohibit nude dancing ... ", *Triplett Grille*, 40 F.3d at 132. The district court was confident in this conclusion because "every Akron lawmaker testified concerning Council's deliberations..."

Nevertheless, the Sixth Circuit discovered sufficient support in the legislative record to reject the district court's conclusion, holding that "affirmative evidence of a secondary effects motivation imposes a burden on the City" not required by the Supreme Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). "Moreover, there is evidence in the record suggesting that a number of Akron City Councilmen actually supported the public indecency ordinance in part because they wished to prevent the occurrence of harmful secondary effects." In support, the court cited statements of two councilmen, one who testified that he supported the ordinance because "nude dancing brought a certain element to the neighborhood," and another who stated that constituents felt there were problems in the neighborhoods and they asked for help." 40 F.3d at 135. The evidence was not overwhelming, but it was sufficient for the Sixth Circuit to reject the notion that the ordinance was content based.

More recently courts have adopted different approaches to those situations where a locality presents little or no evidence of content neutrality. Some courts have held that such regulations unsupported by evidence are content based and subject to strict scrutiny analysis. *See, e.g., G.Q. Gentlemen's Quarters, Inc. v. City of Lake Ozark*, No. WD 60087, 2002 WL 1966521 (Mo. Ct. App. August 27, 2002) citing *Ranch House, Inc. v. Amerson*, 238 F.3d 1273 (11th Cir. 2001). Other courts have held that precedent requires a content neutral intermediate scrutiny analysis where the regulation in question is of a type ordinarily designed to minimize adverse secondary

effects. *See, e.g., Giovanni Carandola, Ltd. v. Bason*, No. 01-1726, 2002 WL 1997902 (4th Cir. August 30, 2002)

Even affirmative evidence of some improper legislative motive is not necessarily enough for a court to rule an ordinance to be content based. In *Renton*, the lower court had ruled that even if an ordinance's stated purpose was to deal with secondary effects, if restricting First Amendment rights was a "motivating factor" the ordinance was invalid. The Supreme Court disagreed, and cited *U.S. v. O'Brien*, 391 U.S. 367, 383-84, for the "familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive," and rejected the court of appeals' "view of the law." *See also City of Erie v. Pap's A.M.*, 529 U.S. 277, 292 (2000) (reaffirming that the Court will not to strike down a constitutional statute due to an "alleged illicit motive.")

In *Ambassador Books & Video v. City of Little Rock*, 20 F.3d 858 (8th Cir. 1994), the Eighth Circuit rejected an argument that an ordinance was motivated by an improper legislative purpose. The evidence supporting the district court's conclusion included a hand written statement by the city attorney instructing his staff to prepare a comprehensive ordinance because he wanted to "shut these places down! Somehow." The court ruled that this was the "personal objective of the city attorney, who was not a member of the body that adopted the ordinance," and that after reviewing case law the city attorney changed his approach to the problem. The court held that the evidence "that the city's true, but hidden, intent in enacting the ordinance was different from what the ordinance itself stated, falls far short of what would suffice to justify disregarding the plain and clear statement of the ordinance's purpose." 20 F.3d at 863.

Obviously, if the drafting city attorney's statement is not sufficient to create an improper legislative motive, statements by citizens who are proponents of these types of ordinances need not be a major concern unless the city council appears to be agreeing with requests that the council "zone these pornography businesses out of existence." Such testimony should not poison the content neutrality of the ordinance. *See Dumas*, 648 F.Supp. at 1065, n.11.

3.2 – Evidence of Negative Secondary Effects

Up until this point we've been discussing the purity of legislative motives needed to establish that your ordinance is content neutral. Now our focus shifts to establishing the need for a SOB ordinance. This section will explain how you prove that sex businesses cause negative secondary effects and therefore should be regulated more stringently than other types of businesses.

What type of evidence is permissible under existing caselaw, and what is constitutionally required to prove secondary effects? As we noted at the beginning of this chapter, there are a number of types of evidence that can be used to make the legislative record and to help prove negative secondary effects.

A municipality can conduct its own studies to support the contention that existing sexually oriented businesses create adverse effects on the community. In *Young*, the city of Detroit

conducted its own studies and employed experts to report on the effects such establishments had on their city. "In the opinion of urban planners and real estate experts who supported the ordinances, the location of several such businesses in the same neighborhood 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." 427 U.S. at 55.

In *Town of Islip v. Caviglia*, 540 N.E.2d 215, 219 (N.Y. 1989), the court recognized the importance of local government studies:

Studies relied on and prepared by the Town demonstrated that the location of adult businesses in certain areas heightened public apprehension about entering them, thus driving out traditional downtown businesses as customers avoided locations near adult bookstores, increased criminal activity, and lowered nearby residential property values. To be sure, planning studies, by their very nature, are not scientific nor their predictions certain but the town was entitled to credit the evidence in its study of past deterioration and the prediction that, unless remedied, the deterioration would continue; it was not required to wait before acting until its business areas became wastelands.

Numerous other communities have undertaken studies of the particular impact of sexually oriented businesses on the property values, crime rate and quality of life in communities. Summaries of some of these studies are in Appendix D at the back of this book.

Another form of direct evidence is to use testimony from health officials or counselors regarding the activities that occur in a typical sex business. In Kansas City, a licensed counselor described the compulsive sex addiction of many men who frequent "peep show" booth businesses. The counselor detailed the experience of his clients who had anonymous homosexual contact with up to 40 partners per day, were involved in drug dealing in the "bookstores" and who sometimes sought out children for "HIV-free" sexual gratification after becoming aroused at the "peep show" booth. In Tucson, Arizona, a doctor from Preventive Health Services commented on the likelihood of HIV transmission from the multiple anonymous sexual encounters occurring in "adult" bookstores, concluding that "regulating these establishments under the proposed Ordinance" would protect the health of the public by lowering the incidence of transmission of HIV and other sexual diseases.

Many communities do not have the resources to launch their own investigations into potential negative secondary effects on their community, particularly with respect to crime rates and property values. Nor would it make sense for courts to require communities to suffer the consequences of SOBs, and then to document those consequences before being able to regulate them. Many communities obviously desire to implement reasonable time, place and manner regulations before any sex business begins to cause problems.

Fortunately, the Supreme Court resolved that problem in favor of cities in the landmark *Renton*

decision. The U.S. Court of Appeals for the Ninth Circuit struck down a zoning ordinance enacted by the City of Renton, a 32,000-population suburb of Seattle, because it was enacted without the benefit of studies specifically relating to "the particular problems or needs of *Renton*." 475 U.S. at 50. However, there was a great deal of evidence before the Renton City Council regarding the problem of sex businesses generally, including expert testimony and studies from other communities. Requiring evidence of particular problems in Renton was an "unnecessarily rigid burden of proof," according to the Supreme Court, which held that Renton was entitled to rely on the experiences and studies of other cities:

We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's Northend Cinema opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here.

475 U.S. at 51-52. The Court went on to say that the fact that Renton chose a different form of regulation to respond to the problems created by SOBs than cities whose evidence it relied on was also not relevant to the issue of whether SOBs cause negative secondary effects from one community to another. Citing *Young*, the Court reiterated that cities "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." 475 U.S. at 52, citing *Young*, 427 U.S. at 71.

More recently, the Supreme Court has again affirmed that cities should have reasonable opportunity to experiment in regulation of sexually oriented businesses. In *City of Los Angeles v. Alameda Books, Inc*, 122 S. Ct. 1728 (2002) *rev'g* 222 F.3d 719 (9th Cir. 2000), sexually oriented businesses had been circumventing zoning laws by joining several stores under one roof. Los Angeles thus amended its SOB ordinance to prevent separate SOBs from forming these adult super-stores. In support of its amended ordinance, the city relied on a 1977 study it had completed that discussed concentrations of separate SOBs in an area, but not a concentration of SOBs under one roof. Overruling a Ninth Circuit decision to the contrary, the Supreme Court approved of the city's use of this study to justify the amended ordinance. As long as the study "fairly [supported] the municipality's rationale for its ordinance," the Court deemed it acceptable. 122 S. Ct. at 1736

The Fifth Circuit used similar reasoning to allow a rural county to use urban studies to justify the county's regulations. *LLEH, Inc. v. Wichita County*, Tex. 289 F.3d 358 (5th Cir. 2002). Wichita County, Texas had passed SOB regulations governing unincorporated areas of the county. The county had relied on urban secondary effects studies to justify the ordinance. The lower court held that this study was irrelevant since it dealt with urban, not rural, secondary effects. The Fifth Circuit reversed the lower court, allowing the county to rely on the study. Studies need not be specific to the area as long as they are reasonably related to the purpose of the ordinance. 289

F.3d at 367.

Because of the *Renton* decision and its progeny, today it is the rare community which actually conducts its own study of negative secondary effects. The method of choice for most communities is to rely on evidence of negative secondary effects shown by land use studies from other communities. Those studies should be obtained from the cities that produced them, or from Community Defense Counsel or organizations which have copies of original studies, and then introduced into the record at a council or planning commission hearing. Use of evidence from other communities is routinely upheld. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97 (2000) (“the city need not ‘conduct new studies or produce evidence independent of that already generated by other cities’ to demonstrate the problem of secondary effects, ‘so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.’”)

Similarly, the Eighth Circuit has written: "This court has rejected the argument that adult business ordinances must be founded upon local experience. *Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223, 226-27 (8th Cir. 1990) ('To insist that governmental interests justifying such legislation could only be found in specific local experiences and conditions would be unrealistically to require deliberate subjection to those experiences and conditions before attempting to avoid them.'" *Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858, 864 (8th Cir. 1994). Obviously, it makes no sense to require a community to prove it is suffering from harmful secondary effects before the community can protect itself from harmful effects. *See also Holmberg v. City of Ramsey*, 12 F.3d 140 (8th Cir. 1993) ("...Holmberg simply ignores the district court's findings that the City enacted the ordinance on the strength of thorough research, public hearings, documented studies, and considered deliberations, and stubbornly argues the City must document its substantial interest with localized studies and evidence showing that secondary effects actually exist. Under the First Amendment, the City was not required 'to conduct new studies or produce evidence independent of that already generated by other cities' before enacting an ordinance that lessens sexually oriented businesses' secondary effects. *Renton*, 475 U.S. at 51.")

In fact, because the Supreme Court recognized in *Renton* and again in *Barnes* the near-universal negative secondary effects associated with sex businesses, communities may be able to take "legislative notice" of those effects so that the barest minimum of a legislative record will be considered sufficient.

The Fifth Circuit in *Lakeland Lounge v. City of Jackson*, 973 F.2d 1255 (5th Cir. 1992), reversed a district court's ruling that there was no evidence the city council considered studies from other communities regarding negative secondary effects before enacting the ordinance. The court held that the city staff and planners had relied on such studies, that those staff members held a public meeting in which secondary effects were discussed, and that the ordinance itself made reference to those secondary effects studies from other cities.

In *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3d Cir. 1993),

the court upheld hours of operation restrictions imposed by the state of Delaware based on minimal pre-enactment evidence. The court acknowledged that when the expressive activity is "marginal ... some courts have attenuated the requirement of pre-enactment legislative evidence of the undesirable side effects of expressive activity and a reasonable likelihood that the proposed bill will reduce them by adopting a 'legislative notice' theory that is said to be analogous to the concept of judicial notice." *Id.* at 136.

One of the cases cited in *Mitchell* was *Wall Distributors, Inc. v. City of Newport News, Va.*, 782 F.2d 1165 (4th Cir. 1986). In a footnote, the court theorized:

In assessing the reasonableness of local legislative determinations of ends and means under this quite deferential standard of constitutional review, we may not confine the local legislature to only what it knows and can foresee from purely local conditions already experienced. Legislatures can no more be held bound not to know what the whole world knows than can courts; legislative notice of facts must be deemed to run at least as wide as does judicial notice.

In enacting local legislation of this sort, it therefore cannot be thought unreasonable (at least for constitutional review purposes) for local legislative bodies to assume that human nature --at least in respect of such basic matters as human sexuality and its commercial exploitation -- will not vary greatly between generally comparable metropolitan areas within even so heterogeneous a society as that of twentieth century America. We therefore assess the reasonableness of Newport News' determination not solely on the basis --concededly sparse -- of what had already demonstrably occurred within its geographical borders, but of what it might reasonably foresee in light of a sufficiently documented wider national experience properly reflected in matters of public record. It would defy common sense to suppose that the city fathers of Newport News are not made aware in this day and time of comparable conditions in other localities, and of the varied responses being made by other local governments to conditions already experienced. We therefore assume that a proper factor in this local legislative determination of governmental interests was what was demonstrably being generally experienced in comparable localities in, e.g., Arizona, *see Ellwestt*, 681 F.2d 1243, and North Carolina, *see Hart*, 612 F.2d 821.

To insist that governmental interests justifying such legislation could only be found in specific local experiences and conditions would be unrealistically to require deliberate subjection to those experiences and conditions before attempting to avoid them.

Relying on that case, the Eighth Circuit upheld legislation regulating SOBs on the legislative notice theory. *Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223, 226-27 (8th Cir. 1990). We should also take notice of Justice Souter's statement in *Barnes*:

In light of *Renton's* recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, ... I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every case.

501 U.S. at 584-85.

The Supreme Court also acknowledged the use of “legislative notice” in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). While *Erie* had findings of its own in the record, the city council members “would likely have had firsthand knowledge of what took place at and around nude dancing establishments.” 529 U.S. at 297. Thus, “an administrative agency may take official notice of such ‘legislative facts’ ... and is not confined to the evidence in the record...” 529 U.S. at 298.

While the legislative notice theory makes some sense considering *Renton*, *Barnes*, and *City of Erie*, it is of course safer to establish a strong legislative record.² However, these theories may be useful for municipalities who have already adopted an ordinance without much of a record, and now find their ordinance under attack.

3.3 – Using a Preamble to Show Legislative Purpose and Intent

One effective way to establish the legislative record regarding the negative secondary effects of sexually oriented businesses is to record those findings in the ordinance itself, usually in the form of a preamble. Detroit used such a statement of findings to bolster its argument in the *Young* case. The Supreme Court noted that “[o]n the basis of the reasons stated by the city for adopting the ordinances, the court concluded that they represented a rational attempt to preserve the city's neighborhoods.” 427 U.S. at 55-56. In a footnote, the Supreme Court quoted the district court: “[w]hen, as here, the City has stated a reason for adopting an ordinance which is a subject of legitimate concern, that statement of purpose is not subject to attack.” *Id.* at 56, n.11.

The Detroit ordinance stated:

In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulations of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a

²Occasionally a court will still strike down a valid ordinance because a city pays too little attention to documenting secondary effects. See *Chambers v. Peach County*, 467 S.E.2d 519 (Ga. 1996).

concentration of these uses in any one area (i.e., not more than two such uses within one thousand feet of each other which would create such adverse effects).

Young, 427 U.S. at 54, n.6.

A good example of a statement of legislative findings is taken from the Richland County, South Carolina, ordinance. The Richland County ordinance, including its statement of findings and its "purpose and intent", has been used as a model by many other communities:

WHEREAS, there are a substantial number of sexually oriented businesses in the unincorporated area of Richland County that require special supervision from the public safety agencies of the county in order to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the citizens of the County; and

WHEREAS, the County Council finds that sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature; and

WHEREAS, the concern over sexually transmitted diseases is a legitimate health concern of the County which demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens; and

WHEREAS, permitting and/or licensing is a legitimate and reasonable means of accountability to ensure that operators of sexually oriented businesses comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation; and

WHEREAS, there is convincing documented evidence that sexually oriented businesses, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values; and

WHEREAS, it is recognized that sexually oriented businesses, due to their nature, have serious objectionable operational characteristics, particularly when they are located in close proximity to each other, thereby contributing to urban blight and downgrading the quality of life in the adjacent area; and

WHEREAS, the County Council desires to minimize and control these adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from increased crime; preserve the quality of life; preserve the property values and character of surrounding

neighborhoods and deter the spread of urban blight; and

WHEREAS, it is not the intent of this ordinance to suppress any speech activities protected by the First Amendment, but to enact a content-neutral ordinance which addresses the secondary effects of sexually oriented businesses; and

WHEREAS, it is not the intent of the County Council to condone or legitimize the distribution of obscene material, and the Council recognizes that state law prohibits the distribution of obscene materials and expects and encourages state enforcement officials to enforce state obscenity statutes against any such illegal activities in Richland County.³

PURPOSE AND INTENT. It is the purpose of this ordinance to regulate sexually oriented businesses, to promote the health, safety, morals, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations to prevent the continued deleterious location and concentration of sexually oriented businesses within the County. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is neither the intent nor effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this ordinance to condone or legitimize the distribution of obscene material.

The Richland County ordinance is so effective and stringent that it has already been challenged and upheld twice. on three separate occasions. It was upheld twice, and a third lawsuit is pending. *See Centaur, Inc. v. Richland County*, 392 S.F. 2d 165 (S.C. 1990); *Rothschild v. Richland County Board of Adjustment*, 420 S.E. 2d 853 (S.C. 1992).

The drafters of the Dallas ordinance in *Dumas* did an excellent job of setting out the council's findings in the ordinance itself. The trial court observed that:

The Council ... found that a substantial number of sexually oriented businesses require regulation to protect the "health, safety, and welfare" of the establishments' patrons and citizens in general. Public safety authorities should regulate such businesses, the Council reasoned,

³ The enactment of an "adult" use zoning ordinance is not deemed an acceptance or legalization of obscene or unlawful pornography. *People v. Sequoia Books, Inc.*, 513 N.E.2d 1154, 1160 (Ill.App. 2 Dist. 1987) ("[O]rdinances... regulating zoning... for adult theaters, bookstores, and night clubs, were enacted to fulfill the municipalities' obligation to address the zoning problems raised by the existence of adult bookstores and were not adopted as an acknowledgement of the public's acceptance of materials deemed obscene"); *People v. Sequoia Books, Inc.*, 496 N.E.2d 740 (Ill.App. 2 Dist. 1986).

because the businesses "are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature" and because of the "concern over sexually transmitted disease." ...The Council next found that arrests for sex-related crimes near sexually oriented businesses have been "substantial," and that there is "convincing documented evidence" that sexually oriented businesses are associated with falling property values of surrounding business and residential areas. Then, the Council found that when such businesses are located in close proximity to one another, "urban blight" and a decrease of the quality of life in adjacent areas results. Finally, the Council stated that its intent was to minimize these adverse effects, thus preserving property values in surrounding neighborhoods, deterring the spread of urban blight, and decreasing crime. . . .The Council emphasized, however, that it did not intend to limit access by adults to sexually oriented material protected by the First Amendment.

Dumass, 648 F.Supp. at 1066.

For a comprehensive model of legislative findings as incorporated into a preamble, with a thorough purpose and intent statement, see Appendix A.

3.4 – Defending the Reasonableness of the Ordinance in Court

When an "adult" use ordinance is constitutionally challenged in a civil suit brought by a SOB, the plaintiff must prove the ordinance is constitutionally infirm. In a typical case, the SOB may contend the ordinance is unconstitutional because it is arbitrary, capricious, and unreasonable. In support of this contention, it may assert that there was insufficient evidence before the city council to support the purpose of the ordinance. The SOB may argue that the particular establishment in question does not cause blighting, increased crime, or diminution in property values. It may argue that there are no alternative locations available.

The burden is on the party attacking the ordinance to prove these allegations by a preponderance of the evidence. *Dolan v. City of Tigard*, 512 U.S. 374, 391 n.8 (1994) ("the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights"); *PA N.W. Distrib. v. Zoning Hearing Bd.*, 555 A.2d 1368 (Pa. Cmwlth. 1989) ("Appellant had the burden of proving that there were no locations within the Township from which it could do business") *rev'd other grounds* 584 A.2d 1372 (Pa. 1991). "There is a strong presumption in favor of the validity of municipal zoning ordinances." *Talbot v. Myrtle Beach Board of Adjustment*, 72 S.E.2d 66, 69-70 (S.C. 1952); *see also Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001); *APT Pittsburgh Ltd. Partnership v. Penn Tp. Butler County of Pennsylvania*, 196 F.3d 469, 475 (3rd Cir. 1999). "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Lehnhauser v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

The argument is frequently heard that a city must show that a particular "adult" establishment

causes the identified harmful secondary consequences. *See e.g. Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 138 (3d Cir. 1993)("It is thus on the basis of its own particular location that Adult Books argues the closing-hours amendment is not narrowly tailored because it regulates the closing hours of all adult bookstores, even those that can have none of the adverse effects on residential communities which justified the restriction in the first place.") This argument, of course, is foreclosed by *Renton*. There was no showing there that any particular use in *Renton* caused the secondary consequences -- indeed, there could not have been, since there were no such businesses when the ordinance was enacted. The Supreme Court addressed this issue:

The Court of Appeals rules, however, that because the Renton ordinance was enacted without the benefit of studies specifically relating to the "the particular problems or needs of *Renton*," the city's justifications for the ordinance were "conclusory and speculative." *City of Renton v. Playtime Theatres, Inc.*, 748 F.2d 527, 537 (9th Cir. 1984). We think the Court of Appeals imposed on the city an unnecessarily rigid burden of proof. The record in this case reveals that *Renton* relied heavily on the experience of, and studies produced by, the city of Seattle. In *Seattle*, as in *Renton*, the adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood. ... We hold that Renton was entitled to rely on the experiences of Seattle and other cities ... in enacting its adult theater zoning ordinance.

Renton, 475 U.S. at 52.

A city need not come forward and produce evidence at trial that a plaintiff's establishment, in particular, causes deleterious secondary consequences. Nor is the city council required to hear such evidence before enacting an "adult" use ordinance, as we've already discussed. "Adult" use zoning deals with a generic type of activity and there is no requirement that a local use be shown to cause blighting or crime.

While the city is free to produce expert and lay testimony at trial on the negative secondary effects of such uses, the reasonableness of the ordinance can be established by simply introducing the legislative record into evidence. The Court in *SDL, Inc. v. City of Houston*, 636 F.Supp. 1359, 1367 (S.D. Tex. 1986), *aff'd* 837 F.2d 1268 (5th Cir. 1988), squarely dealt with this issue. There the court rejected the argument that the city was required to independently prove, in court, its "findings that topless bars affect surrounding property values, affect residential neighborhoods, or affect minors." *Id.* The Court stated:

It is the legislature, and not the courts, which determines how much testimony is enough to require city action in redressing a perceived problem. The Court's role is to determine whether the evidence the City relies upon is reasonably believed to be relevant to the problem being addressed by the City. *Renton*, 106 S.Ct. at 931. This may include the

experiences of other cities with respect to sexually oriented businesses. *Id.* The Court finds that the City has met its burden of demonstrating a problem requiring the exercise of its police supervisory powers to provide for the welfare of its citizens.

Id. The Court also noted that whether the plaintiff can produce experts "hold[ing] conflicting opinions on the effects of sexually oriented businesses on property values is irrelevant." *Id.* The Court is to look to the legislative record, and, in light of *Renton*, determine if it is reasonable.

In *S & G News, Inc. v. City of Southgate*, 638 F.Supp. 1060, 1066 (E.D. Mich. 1986), *aff'd* 819 F.2d 1142 (6th Cir. 1987), the "adult" property use argued "that there must be an adequate factual basis to believe that the ordinance addresses the city's [particular] governmental interests." The court responded:

Renton has made clear that a city need not conduct its own independent study or gather its own evidence on the effect of adult uses on urban neighborhoods. It is entitled to rely on the experiences of other municipalities, and in the present case the City of Southgate relied on the experiences of Detroit through consultation with its urban renewal consultants, Parkins, Rogers and Associates. *Id.*

Similarly, the court in *Genusa v. City of Peoria*, 619 F.2d 1203, 1211(7th Cir. 1980), held that there was no need for the city to 'demonstrat[e] a past history of congregated adult uses causing neighborhood deterioration. *Id.* In rejecting the argument that the city must prove that plaintiffs establishment, in particular, causes blight, the court stated:

A legislative body is entitled to rely on the experience and findings of other legislative bodies as a basis for action. There is no reason to believe that the effect of congregated adult uses in Peoria is likely to be different than the effect of such congregations in Detroit. The Peoria City Council found, in the preamble to the ordinance, that congregated adult uses cause "deleterious effects," and the Supreme Court in *Young* found that such effects were sufficient to justify a zoning requirement that adult uses not be located in close proximity to one another. That ruling is controlling here. *Id.*

Similarly, *see International Food & Beverage Systems v. Ft. Lauderdale*, 794 F.2d 1520, 1526-27 (11th Cir. 1986), which reversed a district judge who "require[d] actual experience of the city with deleterious effects before it could regulate nude bars as the cause. *Id.* The court stated that this "is contrary to *Renton*, which city had no such experience." *Id.*

Following *Renton* in *T & A's, Inc. v. Town Bd. of Town of Ramapo*, 109 F. Supp.2d 161, 171 (S.D.N.Y. 2000), the Southern District of New York allowed the town to consider other cities' studies because "no municipality should be required to wait until the quality of life declines to attempt to protect and preserve its community." *See also, Voyeur Dorm, L.C. v. City of Tampa, Fla.*, 265 F.3d 1232, 1236 (11th Cir. 2001) (restrictions may be imposed to protect the quality of urban life and "to protect 'family values, youth values and the blessings of quiet seclusion");

Richland Bookmart, Inc. v. Nichols, 137 F.3d 435, 440 (6th Cir. 1998) (“Reducing crime ... and preserving the aesthetic and commercial character of the neighborhoods surrounding adult establishments is a ‘substantial government interest.’”).

In *Thames Entertainment, Inc. v. City of St. Louis*, 851 F.2d 199 (8th Cir. 1988), the court affirmed "that the city need not conduct new studies or produce independent evidence with regard to the impact of adult businesses in its city." *Id.* at 201. Moreover, the court even held that there need not be an "empirical basis for a finding that the presence of an adult bookstore within 500 yards of a residentially zoned district will have a deleterious effect upon the surrounding neighborhood." *Id.* It is sufficient for a legislator to rely on his "personal experience [that] adult establishments tended to attract transients and that their location in a neighborhood was not conducive to neighborhood revitalization.... Personal observations of a legislator ... certainly fall within the category of experiences that can be properly considered by a legislative body in enacting an ordinance [and] qualify as the evidence recognized in *Renton*." *Id.* at 201-202. *See also ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1416 (8th Cir. 1994).

More recently in *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728 (2002), the city used a study about crime in areas densely populated with SOBs to justify regulations for breaking up adult superstores where several SOBs were housed in one building. Reciting its past decisions, the Court held that the study “fairly supported the ... rationale for [the] ordinance” and that a more stringent, empirical study was unnecessary. 122 S. Ct. at 1736.

For an ordinance to pass constitutional muster, it must be reasonable, and not arbitrary and capricious. It is reasonable if the local council relies on its own experience or the relevant experiences of other cities. Whatever it relies on should be reflected in the legislative record of the council. So long as it rationally relies on some relevant evidence, it need not show at trial that a particular establishment causes blighting.