

## **Chapter 4: Defining An "Adult" Use**

### **Quick Guide to Chapter 4:**

#### **If a theater on rare occasions shows an X-rated film, can it be defined as an "adult" use?**

Probably not. No business can be regulated as a sex business unless it falls into the category of those that create "negative secondary effects." It is unlikely that a rare or single showing of a sex film would lead to neighborhood blighting effects, crime or prostitution. (4.1)

#### **How much "adult" material must a business maintain to be defined as an "adult" use?**

There is no specific percentage of stock, floor space or revenue that should trigger regulation as an "adult" use. Courts have upheld language that defines sex businesses as those which have the distribution of sexually explicit material as "a principal business purpose" or the material itself as "a substantial or significant portion of its stock." We advise sticking to the language upheld by courts, and applying it to local businesses on a case by case basis. (4.2)

#### **What about video stores with "adult" sections or back rooms with "adult" material?**

In some cases, courts have rejected application of SOB regulation to video stores with "adult" sections or "adult" back rooms. However, under language upheld by the Supreme Court, it is possible to regulate these establishments as sex businesses if the "adult" material is a "significant" part of the business. Again, case by case analysis is required. (4.2)

One of the recurring problems in drafting a successful ordinance directed at sexually oriented businesses is in defining the type of establishment regulated by the ordinance. Given the diversity of views regarding pornography and related activity, it is not surprising that there is no uniform agreement on a definition for the types of sexual exploitation outlets which negatively impact residential and commercial neighbors.

This threshold question must be answered before we can proceed further: What is an "adult" property use subject to regulation under a content-neutral time, place and manner ordinance? Is it a theater which shows a single pornographic movie? Must it be a commercial establishment which deals exclusively in "adult" materials? Is it somewhere in between? What about an "adult" novelty shop that mixes the sale of legitimate lingerie with some sexually explicit videos and magazines?

In today's commercial environment, we have many video stores which stock only an occasional pornographic movie; others have 50 percent or more of their inventory in hard-core pornography. We have convenience stores which sell food and other necessities along with Penthouse and Playboy; other "bookstores" carry nothing but pornographic publications. Some "adult boutiques" carry lingerie, perfumes, and soft-core and hard-core pornography in magazines and videos. Some video stores carry exclusively pornographic videos, and have "private viewing rooms" that are often used for public sexual activity; other supposedly family oriented video stores have "adults only" back rooms which contain extensive selections of the same hard-core videos available in "adult bookstores."

This variety of types of businesses dealing in the commercial exploitation of sex makes it necessary to define "adult uses" with a precision that protects the free speech interests of businesses while not running afoul of the constitutional requirements set forth in *Young and Renton*. However, because zoning must apply to property uses which by nature are dynamic and changeable, it cannot define regulated uses with absolute scientific precision. This, however, is not grounds for invalidation. The "prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." *Rose v. Lock*, 423 U.S. 48, 49 (1975). See also *United States v. Powell*, 423 U.S. 87, 94 (1975) (The fact that Congress might ... have chosen ... more precise language ... does not mean that the statute ... is unconstitutionally vague); *United States v. Petrillo*, 332 U.S. 1, 7 (1947) (holding that a law providing "adequate warning" despite the availability of "clearer and more precise language" is not unconstitutionally vague. The Constitution doesn't have "impossible standards."); *Stansberry v. Holmes*, 613 F.2d 1285 (5<sup>th</sup> Cir. 1980) (upholding an SOB zoning law against vagueness challenge: "A provision need not ... be cast in terms that are mathematically precise; it need only give fair warning ...."). Indeed, "few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may

cross the line." *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952).<sup>1</sup>

#### 4.1 – No Secondary Effects From “Single Use”

Property uses which are regulated must be defined in a way that is consistent with and advances the purpose of the ordinance. Remember, the *Young* Court concluded that as long as such ordinances were enacted to protect neighborhoods from deterioration, increased crime and other harmful secondary effects, they did not offend the First Amendment. *Young*, 427 U.S. at 68-73; *see Developments in the Law -- Zoning*, 91 L. 1427, 1557-1559 (1978). Thus the ordinance must only apply to the kinds of property uses which tend to create blight, increase crime, and cause other negative secondary effects. There must be a demonstrable link between the use regulated and the problem to be addressed by the ordinance.

The ordinance must be "designed to serve a substantial governmental interest and not reasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 930. Clearly, local communities have a substantial interest in preventing the deleterious secondary effects associated with "adult" businesses. At a minimum, however, the courts require a logical relationship between the evil feared and the method selected to combat it. *Young*, 427 U.S. at 80. (Powell, J., concurring) (a regulation's "incidental restriction on First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest"). The governing body must be able to show that in enacting the particular limitations it placed on the property defined for regulation, it relied upon evidence permitting a reasonable inference that, absent such limitations, the defined "adult" property use would have harmful secondary effects. *See Renton*, 475 U.S. at 51; *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987); *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1335 (9th Cir. 1986); *Baby Dolls Topless Saloons, Inc. v. City of Dallas, Tex.*, 295 F.3d 471, 481 (5<sup>th</sup> Cir. 2002).

Thus, it is constitutionally impermissible to define for regulation a theater which comes within the ordinance after only a single showing of a pornographic movie. A "single use" standard cannot pass "constitutional muster as a content neutral time, place and manner regulation" because it cannot be justified as serving a substantial governmental interest in preserving the quality of urban life. *Tollis, Inc.*, 827 F.2d at 1332. It cannot be said that a one-time use of a property for an "adult" purpose causes harmful secondary consequences. *See People v. Superior Court*, 774 P.2d 769, 775 (Cal. 1989).

It is unlikely that a sufficient basis to support a "single use" definition will ever exist. Remember there must be some evidence in the legislative record to support the regulation. If an ordinance

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<sup>1</sup> "This Court, however, has consistently held that lack of precision is not itself offensive to the requirement of due process. ... [T]he Constitution does not require impossible standards; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices'. ... That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." *Roth v. United States*, 354 U.S. 476, 491-492 (1957). *And see Miller v. California*, 413 U.S. 15, 28 (1973) ("[T]he inability to define regulated materials with ultimate, God-like precision" does not cause invalidation).

defines an establishment as a regulated "adult" use after a single showing of an "adult" movie, it will likely be invalidated for failing to be "'narrowly tailored' to affect only that category of theatres shown to produce the unwanted secondary effects." *Renton*, 475 U.S. at 52. As the *Tollis*, court stated: "Nor do we see how the County could make such a showing, since it is difficult to imagine that only a single showing ever, or only one in a year, would have any meaningful secondary effects." 827 F.2d at 1333.

## 4.2 - How Much "Adult" Materials is Enough?

The question remains: How much pornographic material must an establishment sell or show before it can be defined for regulation in an "adult" use zoning ordinance? Clearly not all of the material must be pornographic or "adult" in nature. *Renton* permitted the city to regulate under its ordinance "any business ... which ... has as its primary purpose the selling, renting or showing of sexually explicit materials." 475 U.S. at 44 (emphasis added). Thus if the "primary purpose" -- but not the only purpose -- of an establishment was the distribution of sexually explicit material, then there was a sufficient nexus to the intent of the ordinance. The intent was to prevent harmful secondary effects and there was sufficient evidence before the city council to support its finding that such businesses contributed to blighting. *Renton*, 475 U.S. at 51-52. This finding was not affected by the fact that such a regulated business might also sell other material, or show other movies, which were not sexually explicit in nature.

In *Young*, the Court permitted the regulation of "an[y] establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas' [as defined]" 427 U.S. at 53 (emphasis added).<sup>2</sup> Once again, the Court permitted the regulation under a restrictive zoning ordinance of a business which could have a wide variety of non-pornographic merchandise. For instance, a suburban video store renting a broad range of general fare video cassettes, which also rented as "a substantial or significant portion of its stock in trade" sexually explicit videos, would have come within the Detroit ordinance upheld in *Young*.<sup>3</sup>

A variety of definitions of regulated uses have passed constitutional muster. The *California Supreme Court in People v. Superior Court*, 774 P2d 769 (Cal. 1989), held that an ordinance which simply regulated "adult" uses was sufficient where "use" was defined as "a regular and substantial course of conduct." The court stated that "under this standard, zoning restrictions

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<sup>2</sup> Those terms must also be defined. In *Central Avenue Enterprises v. City of Las Cruces*, 845 F.Supp 1499 (D.N.M. 1994), an ordinance that failed to define "specified sexual activities" and "specified anatomical areas" was ruled unconstitutionally vague. Please see our sample ordinance, Appendix A, for definitions for those terms.

<sup>3</sup> However, the Delaware Supreme Court rejected an interpretation of a state law that would have identified any video store offering "x-rated videos" as an "adult entertainment establishment," holding that "only those businesses which are likely to promote the crimes of obscenity and prostitution ... should be licensed as 'adult entertainment establishments ...'," thus avoiding unconstitutional overbreadth. *Richardson v. Town of Ocean View*, 535 A.2d 1346, 1351 (Del. 1988).

such as contained in the ordinance at issue here would apply to all adult entertainment theatres offering adult fare as a substantial part of their regular business, but would not apply to theatres showing only occasional or incidental adult movies." 774 P.2d at 777. See also *Alexander v. Minneapolis*, 928 F.2d 278, 282 (8th Cir. 1991) (Video store with 30 percent of its inventory in "adult" material lacked standing to challenge ordinance which defined "adult" uses as those having "a substantial or significant portion of [their] stock in trade" in sexually explicit material.)

Other courts have upheld the zoning regulation of establishments when a "preponderance" of material sold or shown is sexually explicit. *Pringle v. City of Covina*, 115 Cal.App.3d 151, 171 Cal.Rptr. 251(1981). And see *Town of Islip v. Caviglia*, 540 N.E.2d 215, 225 (N.Y. 1989) ("substantial or significant portion of its stock-in-trade"); *PA N.W. Distrib. v. Zoning Hearing Bd.*, 555 A.2d 1368, 1369 (Pa. Cmwlth. 1989) ("The 'adult' businesses regulated by the Ordinance included any establishment offering for sale any book, publication, film, or medium depicting nudity or sexual conduct or any movie theatre which on a regular continuing basis showed 'X' rated films") *rev'd on other grounds* 584 A.2d (Pa. 1991); *Christy v. Servitto*, 699 F.Supp. 618, 625 (E.D. Mich. 1988); ("substantial or significant portion of its stock in trade"); *Stansberry v. Holmes*, 613 F.2d 1285, 1287 (5th Cir. 1980) (regulated "sexually oriented commercial enterprise" defined as a "commercial enterprise whose major business is ... "); *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1210 (5th Cir. 1982) ("regularly" features); *SDL Inc. v. City of Houston*, 636 F. Supp. 1359, 1376 (S.D. Tex. 1986) ("major business"); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994) ("substantial or significant portion" held not vague); *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 993 (7<sup>th</sup> Cir. 2002) ("significant or substantial portion of its stock-in-trade" or "significant or substantial portion of its revenues" or "significant or substantial portion of its interior business or advertising..."); *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377, 388 (6<sup>th</sup> Cir. 2001) ("Any commercial establishment which for a fee..., regularly presents material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas'" and which fits into one of four adult business categories); *Z.J. Gifts D4, L.L.C. v. City of Littleton*, No. 01-1220, 2002 WL 31546925 (10<sup>th</sup> Cir. Nov. 18, 2002)("significant" or "substantial percentage" of inventory, floor space or advertising upheld).

The City of Dallas has adopted a definition in its "adult" use zoning ordinance which has proven quite effective. The ordinance regulates "sexually oriented businesses" defined as "a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following... [sexually explicit materials]" (emphasis added). *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1079 (N.D. Tex. 1986), *aff'd* 837 F.2d 1298 (5th Cir. 1988), *rev'd on other grounds*, *FW/PBS Inc. v. City of Dallas*, 493 U.S. 215 (1990). This language would apply the ordinance to video stores which offer a wide variety of movies, including family movies, if "one of its principal business purposes" is the rental of sexually explicit video cassettes.

Other definitions used in "adult" use ordinances are almost uniformly upheld against vagueness challenges. For instance, the court in *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 833 (4th

Cir. 1979), rejected a vagueness challenge to the words "adult bookstores," "adult movie theaters," "adult theater," "preponderance," and finally the words "distinguished or characterized by their emphasis" on erotic content. It held these words "reasonably specific and precise, bearing in mind that unavoidable imprecision is not fatal and celestial precision is not necessary." *Id* at 833 [citing *Miller v. California*, 413 U.S. 15, 27-28 n. 10 (1973)].

*See also Artistic Entertainment, Inc. v. City of Warner Robins*, 223 F.3d 1306, 1310 (11<sup>th</sup> Cir. 2000) (upholding "mainstream theater" exemption to "adult entertainment business"); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1255 (5<sup>th</sup> Cir. 1995) (upholding "no touch" provision); *Berg v. Health and Hosp. Corp. of Marion County, Ind.*, 865 F.2d 797, 805 (7<sup>th</sup> Cir. 1989) (rejected a vagueness challenge to an ordinance's use of the word "entertainment"); *Stansberry v. Holmes*, 613 F.2d 1285, 1290 (5<sup>th</sup> Cir. 1980) (held terms "sexually oriented commercial enterprise" and "major business" were not unconstitutionally vague); *Alexis, Inc. v. Pinellas County, Florida*, 194 F.Supp.2d 1336, 1353 (M.D. Fla. 2002) (upholding use of the term "erotic"); *J.L. Spoons, Inc. v. City of Brunswick*, 49 F.Supp.2d 1032, 1044 (N.D. Ohio 1999) (upholding prohibition against appearing in a "state of nudity"); *Mom N Pops, Inc. v. City of Charlotte*, 979 F.Supp. 372, 391-392 (W.D.N.C. 1997) (upholding "principal business purposes" and "substantial or significant portion of its stock or trade"); *Geaneas v. Willets*, 715 F.Supp.334, 337-338 (M.D. Fla. 1989) (held that the term "buttocks" was not unconstitutionally vague); *SDL Inc. v. City of Houston*, 636 F.Supp. 1359, 1367-1368 (S.D. Tex. 1986), *reh. denied*, 841 F.2d 107 (5<sup>th</sup> Cir.1988) (upheld words "sexually oriented business" stating that "fair notice is given to the establishments that they are subject to regulation"); *15192 Thirteen Mile Road, Inc. v. City of Warren*, 626 F.Supp. 803, 808 (E.D. Mich. 1985) ("escort services"); *People V. Superior Court*, 774 P.2d 769, 777 (Cal. 1989) (upheld the terms "distinguished or characterized by an emphasis" and "used" against vagueness attack); *Fantasy World, Inc. v. Greensboro Bd. of Adjustment*, 496 S.E.2d 825, 828 (N.C. Ct. App. 1998.) (the term "preponderance" is be "reasonably specific and sufficiently precise."); *Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153, 1157 (Wash. 1978), *cert. denied sub. nom. Apple Theater, Inc. v. City of Seattle*, 441 U.S. 945 (1979) ("adult theater").

### 4.3 - Percentages

Some ordinances regulate only those establishments which derive more than a certain percentage of their revenue from the distribution or showing of sexually explicit matter. *See Strand Property Corp. v. Municipal Court*, 148 Cal.App.3d 882, 889, 200 Cal. Rptr. 47 (1983) ("over 50 percent" of revenue); *Christy v. City of Ann Arbor*, 625 F.Supp. 960 (F.D. Mich. 1986) (20 percent of stock in trade). Other ordinances attempt to define an "adult use" as one where more than a certain percentage of floor space is devoted to sexually explicit material.

There are two problems with any definitions that use percentages, whether of display space, stock in trade, or revenues. First, they are easily subject to abuse by the SOB owners who are very comfortable skirting the law or violating its spirit while complying with the letter of the law. For example, with a percentage of revenue requirement, SOBs can easily alter or hide certain receipts in order to appear to comply with the ordinance's terms. Keep in mind that the

typical SOB has ties to organized crime, and often is used to launder money or at least skim money to avoid paying taxes. Numerous SOB owners have been convicted for income tax evasion because of this practice. If they are willing to cheat the I.R.S., they won't hesitate to cheat in reporting to your city the percentage of income derived from selling pornographic material.

To avoid regulation under ordinances that define "adult use" by percentage of stock in trade or display space devoted to sexual material, stores have been known to fill whatever percentage is needed -- say 51 percent -- with benign, cheap old paperback books. No one is buying them or even looking at them -- but they are an inexpensive way to avoid regulation as an SOB. One SOB in California rented an empty store next door and filled it with shelves full of old paperbacks purchased at a flea market in order to avoid regulation as an SOB by keeping the percentage of stock in sexual material below 25 percent. *See also, Taylor v. State*, No. 01-01-00505, 2002 WL 1722154 (Texas App. July 25, 2002)(unpublished)(employee convicted of working without a license argued percentages of non-adult materials in an attempt to prove that his employer was not a sexually oriented business).

Second, there is an issue of arbitrariness. If 50 percent of sales are sexual material and that leads to negative secondary effects, why would there be no effects if 49 percent of the material sold were sexual? What evidence can a city provide that 50 percent or 25 percent of sexual material is the magic number, after which a business creates negative secondary effects? Courts do not look kindly on arbitrary line-drawing, especially in the First Amendment context. We encourage communities to stick with standard language already approved by the U.S. Supreme Court and other courts, such as "principal business purpose" or "significant portion of its stock in trade." This is one area where the pursuit of precision is misplaced, and more general terms are appropriate. However, some jurisdictions have upheld these ordinances. *See Maloy v. City of Lewisville*, 848 S.W. 2d 380 (Tex. App. 1993) (20 percent).

#### **4.4 - Definitional "Trouble Spots"**

Several recent court rulings identify potential trouble-spots in some "adult use" definitions. In *Wolff v. City of Monticello*, 803 F.Supp. 1568 (D.Minn. 1992), the court held that a city could not sustain regulation of businesses that offered some sexual material, but not as part of their primary activity. Monticello attempted unsuccessfully to distinguish between "adult use/accessory businesses" and "adult use/principal businesses." The court ruled that there was no evidence of negative secondary effects associated with establishments where "adult" material was only available in a limited fashion.

In *City of Findley v. The Fantasy House, Inc.*, No. C5-91-8733 (10th Minn. Jud. Dist. August 17, 1993), a state judge enjoined Findley from enforcing a provision defining adult novelty businesses as SOBs. (That provision was severed; the remainder of the ordinance was unaffected.) The court held that there was no evidence of secondary effects related to novelty businesses which sold "devices which either simulate human genitals, or devices which are designed for sexual stimulation." [However, since obscene devices raise no First Amendment

issues and can be totally banned, there should not be a problem regulating SOBs that only have devices, but don't deal in videos or magazines. *See Sewell v. State*, 233 S.E. 2d 187 (Ga. 1977), appeal dismissed for want of a substantial federal question, 435 U.S. 982 (1978).]

Recently, the 11<sup>th</sup> Circuit held in *Williams v. Pryor*, 240 F.3d 944 (11<sup>th</sup> Cir. 2001), that an Alabama statute that prohibited commercial distribution of sexual devices did not violate the Constitution on its face, although the case was remanded for an as-applied analysis. The court held that the statute promoted a state interest in upholding "public morality." 240 F.3d at 949. On remand, the district court found the statute unconstitutional as applied. *Williams v. Pryor*, 220 F.Supp.2d 1257 (N.D. Ala. Oct. 10, 2002).

In *This That and Other Gift and Tobacco, Inc. v. Cobb County, Ga.*, 285 F.3d 1319 (11<sup>th</sup> Cir. 2002), the court upheld a statute forbidding the distribution of sexual devices but held unconstitutional those portions prohibiting any advertisements for sexual devices. The court found that sexual devices could be prescribed by doctors or psychological professionals. Banning advertisements for those uses went too far. 285 F.3d at 1324.

Louisiana's Supreme Court struck down a statute prohibiting the "promotion of obscene devices." *State v. Brennan*, 772 So.2d 64, 65 (La. 2000). In discussing the case, the court mentioned that seven states have prohibitions on sexual devices and that two other had prohibitions but had eliminated those statutes. 772 So.2d at 69. The court found that its state's statute had "no rational relationship to a legitimate state interest." 772 So. 2d at 76. While prohibitions on sexual devices did not violate the state constitution and did indeed promote governmental interests in public morality, the prohibition covered too much allowable material and was not rational. 772 So.2d at 73-76. *See also*, David C. Minneman, Annotation, *Constitutionality of State Statutes Banning Distribution of Sexual Devices*, 94 A.L.R.5th 497 (2001)(survey of the law on this issue).

The Supreme Court of Washington rejected a City of Tukwila ordinance that attempted to define as "adult" uses so-called "mainstream" video stores which had 10 percent or more of their "stock in trade" in sexually explicit material. *World Wide Video v. City of Tukwila*, 816 P.2d 18 (Wash. 1991). "Tukwila has not shown that adult businesses with predominantly 'take home' merchandise have the same harmful secondary effects traditionally associated with adult movie theaters and peep shows; thus the 'substantial governmental interest' portion of the test has not been met." 816 P.2d at 21. The court also concluded that no evidence supported the notion that a store with slightly more than 10 percent of its stock in trade in sexually explicit material creates negative secondary effects, so the ordinance also was not "narrowly tailored." *Id.*

However, the Eighth Circuit reached a different conclusion in *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994). That court reversed a district court ruling that reliance on other cities' studies was not relevant when applied to Rochester's ordinance, which dealt with "adult" bookstores "that offer both sexually explicit and non-sexually explicit materials and allow only off premises consumption of those materials." 25 F.3d at 1417. The court summarily rejected this claim:

That is simply not the law. "[T]he requirement of narrow tailoring is satisfied so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Under *City of Renton*, Rochester need not prove that Downtown Book and Video would likely have the exact same adverse effects on its surroundings as the adult businesses studied by Indianapolis, St. Paul, and Phoenix. So long as Ordinance No. 2590 affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects, Rochester "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Rochester relied upon studies that identified specific adverse secondary effects attributable to adult bookstores. The City reasonably believed that evidence was relevant to the problems addressed by Ordinance No.2590. Even if Downtown Book and Video is a new type of adult business, it may not avoid time, place, and manner regulation that has been justified by studies of the secondary effects of reasonably similar businesses.

25 F.3d at 1418 (citations omitted).

Another potential trouble spot is with ordinances that attempt to define SOBs as businesses that advertise themselves as promoting nudity, "X-rated" or "adult" entertainment. The Fifth Circuit held this to be an unconstitutional restriction on commercial speech, because there were no studies to support a connection between advertising and negative secondary effects. *MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492 (5th Cir. 1994). In other words, establishments must be classified as SOBs by virtue of what they are, not what they claim to be. *See also, Encore Videos, Inc. v. City of San Antonio*, No. 00-51119, 2002 WL 31421656 (5<sup>th</sup> Cir. Oct. 29, 2002) (Ordinance restricting the location of SOBs could not be applied to video studios offering off premises viewing only).

Another type of establishment which has not successfully been classified as an "adult" use is a hotel which offers pornographic in-room movies. That is because no studies connect mainstream hotels with negative secondary effects on the surrounding neighborhood. *Patel v. City of South San Francisco*, 606 F.Supp. 666 (N.D. Calif. 1985) However, such establishments may be subject to prosecution for violation of obscenity laws. *See, e.g., Phil Burress, Marriott Hotel In Cincinnati Suburb Pulls the Plug on Pornography: Warren County Prosecutor Warns "Adult Movies" May Violate Ohio Obscenity Law*, Citizens for Community Values Media News Release (July 31, 2002) (visited Aug. 20, 2002 <<http://www.ccv.org/ccv-red-Issues-Porn-MarriottPullsPorn.htm>>; Martha W. Kleder, *Kentucky Hotels Drop Porn After More 'Citizen Stings,' Concerned Women for America Culture & Family Report* (Sept. 4, 2002) (visited Sept. 12, 2002) <[http://cultureandfamily.org/report/2002-09-04/1\\_ky.shtml](http://cultureandfamily.org/report/2002-09-04/1_ky.shtml)>.

A "sham" hotel whose main purpose is to provide sexually explicit material in a bedroom setting, would likely be considered an SOB. This "sham" hotel closely approaches the generally held definition of "adult motels." *See, e.g., TK's Video, Inc. v. Denton County, Tex.*, 24 F.3d 705, 714

(5th Cir. 1994), (ordinance defined “adult motel” as one which provides patrons with [media] ... which are characterized by the depiction or description of [previously defined sexual activities or body parts]).

Additionally, many ordinances that have included restrictions on adult motels have been approved by the courts. In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990), motel owners challenged an ordinance requiring that motel owners rent rooms for a minimum duration of 10 hours. The Court accepted the city’s reasoning that short rental durations indicate a likelihood of prostitution and similar criminal activity. The city also had access to a Los Angeles study from 1977 showing the effects of such adult motels on surrounding areas. Thus, the Court held, the ordinance setting minimum rental durations had adequate support and did not violate the Due Process Clause. 493 U.S. at 237. See *City of Los Angeles v. Alameda Books, Inc.*, 122 S.Ct. 1728, 1732 (2002) (upholding an ordinance that included adult motels); *Baby Dolls Topless Saloons, Inc. v. City of Dallas, Tex.*, 295 F.3d 471 (5<sup>th</sup> Cir. June 20, 2002) (upholding an SOB zoning ordinance that included adult motels).

For specific language to use in a typical ordinance, please see "Section II, Definitions", of our sample ordinance, in Appendix A.