

## **Chapter 7: Manner Regulation - Licensing**

### **Quick Guide to Chapter 7:**

**What can a community do to prevent unlawful sexual activity from occurring in "peep show" booths in "adult bookstores" or in nude dancing establishments?**

Ordinances are uniformly upheld that require doors to be removed from booths, visibility into the booths from an on-duty manager, and minimum lighting requirements. In addition, you can forbid sexual contact on the premises; in a nude dancing establishment, you can prohibit "couch dancing" or any other contact between dancers and patrons, and can require dancers to stay on stage and maintain a certain distance from patrons. (7.1)

**What type of business and personal licensing can you require of SOBs, their owners, and employees?**

While this is an area fraught with constitutional difficulties, you can clearly require SOBs to pay license fees that are revenue neutral so that background checks can be run on owners for relevant criminal conduct, and to determine compliance with health and safety codes along with other aspects of SOB regulation. To be constitutional the licensor must be without discretion, but merely following a set of rules and guidelines for issuing the license. The ordinance must contain specific time limits for responding to license applications, and prompt judicial review must be available when a license is denied. Employees may also be licensed so that the police can check for a criminal background. (7.2)

There are two primary methods of regulating the manner of operation for sexually oriented businesses. These are: regulating the interior configuration of SOBs; and licensing SOBs, their owners and employees.

## **7.1- Interior Configuration**

The problems associated with "peep show" booths were documented in graphic and repulsive detail in Chapter 2 of this book. To summarize, the typical "adult" bookstore has dim, smelly and private back rooms where for a quarter patrons can view brief sexually explicit videos. Functionally, however, these "peep show" booths exist as a meeting spot for men to engage in anonymous oral and anal intercourse, or for men to expose themselves and masturbate. Owners of sexually oriented businesses know this because they are aware of the holes in the walls, and they hire people to clean up the bodily fluids and used condoms from the booths.

In one California case, a former bookstore patron presented a lengthy declaration to the court:

My only purpose going to the bookstore was to pick up a sex partner. I would stay out cruising the parking lot, and then would stop and park. Only a few minutes would pass and I would have a male approach me and ask me what I would like. I would state I was just looking for action. The next question that was almost always asked, are you a cop. I would state no, and almost instantly he would start feeling his private area and state I will give you head for \$20. I stated I didn't do sex for money. I would then go inside the bookstore. I would say that there was usually four to five solicitors in the lot at one time. I constantly watched guys get into the cars (guys that approached me for money) and drive off and return 20 to 30 minutes later. I knew they were only driving a few blocks away or around the corner and having sex in the car. Most of the time it wouldn't take long and the same person would be back in another car, driving off with another person. Mostly it was younger guys picking up on older men. On a normal cruising night there could be 50 to 100 cars just cruising the area looking for sex. Most of the time, most just cruised flashing lights, parking in parking lots, getting out talking to each other. Then usually one guy would get into the other guy's car and drive off for a half hour and then return. Cars were always stopping in the middle of the road, driveways, and business parking lots. After the contact was made, sex usually occurred in the surrounding neighborhood. This is the way I usually conducted my activity. I would say that 65-70 percent was done this way. Then I would hit the bookstores. I would state from my personal experience that 90 percent of the bookstore's intention for business is to promote sexual activity. I looked for bookstores that had doors that locked so I could have sex. I never occupied another booth with another person because I was afraid of being caught. But, I was very seldom in one, when I didn't see two guys coming out of a stall. I looked for bookstores that had holes cut into the walls. These holes were big enough that oral sex could be conducted. One time I thought I was having oral sex through the hole and discovered it was anal. Many times

I would enter the booth and the guy would shove his penis through the hole without even saying a word, wanting head. Many times I was offered a rubber so I could have anal sex. Always the bookstore was dirty. I would see used condoms on the floor, dirty paper towel, semen on the floor and advertisements written on the walls for sex and phone numbers. People always watched who went into a certain booth, and if they were interested, they would go into the next one to have sex. Most of the time I would watch other sex acts from the hole. I got to know a lot of male prostitutes even though I wouldn't pay for their services. I [k]new one guy by the name of Tom who showed me \$200 he made in one night. Tom told me he also did heroin and had been in and out of jail for robbery and drugs. Several times I would give Tom a ride to Buena-Clinton area where I [k]new he bought drugs. I would never give him a ride back because I didn't want to get caught with him with drugs and I didn't do drugs. Tom always offered me some and I declined. Tom always told me how much money he made doing prostitution and drugs. He also told me how he would jack roll older clients because they couldn't defend themselves and they wouldn't report it to the police because of publicity. I observed Tom beat a guy up one night outside the bookstore for not paying him back for drugs. Then another night this male prostitute by the name of Carl stated he had this girl I could get with for \$30. I gave him the money and the girl wasn't there. I was going to beat Carl up for ripping me off. Carl was arrested for robbery before I got the chance.

I went to the bookstore mainly for sexual purposes. There was nowhere else I could go where I could find everything I was looking for. I [k]new the bookstore owners knew what was going on but was only looking for money. I look back on how these bookstores have ruined my life. They aren't there for personal enjoyment. They are there to promote sex, violence, prostitution and selling of drugs. When a[n] owner knows illegal activity is happening and does nothing to prevent it, he should be closed down for public safety. This is illustrated by holes in the wall for sex. If holes weren't there or doors weren't there, I can guarantee there would be none or little business.

Declaration of Herbert Hall in *People v. Welty*, Case No. X-605395, Superior Court of the State of California, County of Orange (November 8, 1989).

Because of the rights of communities to legislate in the interest of the public health and safety, and because these establishments so clearly are health and safety hazards, a number of regulations of "peep show" booths have been enacted, and they are almost uniformly upheld. All of these regulations have the expressed purpose of preventing dangerous and illegal public sexual activity from occurring. They do not interfere at all with the right of patrons to view sexually explicit videos; they simply regulate the *manner* in which those videos can be watched.

## **Open Booths**

One of the most effective methods of preventing dangerous public sexual activity in "peep show" booths is to require one side of every booth to be open so that the interior is visible by direct line of sight from the manager's station, or even from anywhere else in the main part of the store. *E.g., Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 1003 (7<sup>th</sup> Cir. 2002) (holding that open booth restrictions are content-neutral and aimed at secondary effects); *Matney v. County of Kenosha*, 86 F.3d 692, 698 (7<sup>th</sup> Cir. 1996) (“[W]e thus conclude ... that [open booth restrictions are] a constitutional time, place, and manner restriction.”). The ordinance may also require a manager to be on duty in the manager's station at all times the store is open, and hold him responsible for making sure the "peep show" booth rules are followed. The SOB can be required to submit detailed blueprints showing the layout of the store and demonstrating compliance with the open booth and manager's station requirements. *See, e.g., Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 994 (7<sup>th</sup> Cir. 2002) (“[T]he [permit] application shall [include] a diagram of the premises....”).

## **One Person Per Booth**

Another typical regulation that is normally upheld is a requirement that the private viewing rooms be used by only one person at a time, again to prevent unlawful sexual activity between patrons. The manager can also be held responsible for making certain no more than one person is in each booth. *E.g., Bamon Corp. v. City of Dayton*, 730 F.Supp. 80 (S.D. Ohio 1990) *aff'd* 923 F.2d 470 (6<sup>th</sup> Cir. 1991).

## **Minimum Lighting Requirements**

Obviously, it will do no good to have "peep show" booths open by direct line of sight to a manager's station if they are so dark that no one can see into them and observe whether more than one person is inside and whether illegal public sex acts are occurring. Thus, courts have upheld minimum lighting requirements, usually put in terms of footcandles measured at floor level. *See, e.g., N.W. Enterprises, Inc. v. City of Houston*, 27 F.Supp.2d 754, 826 (S.D. Tex 1998) (regulating minimum lighting requirement allowed as a content-neutral regulation aimed at secondary effects).

## **No "Glory Holes"**

"Glory holes" are small holes punched in the side of "peep show" booth walls so that patrons can engage in anonymous anal or oral intercourse. It is permissible to require that managers ensure that walls are continuous from floor to ceiling and without any holes or openings. *See Bamon Corp. v. City of Dayton*, 923 F.2d at 471 (upheld ordinance forbidding holes in peep booths).

## Cleaning Requirements

Again for reasons of public health, the manager can be required to maintain all booths in a clean manner, free from semen, urine, feces, needles and trash. E. g., *Scope Pictures, of Missouri, Inc. v. City of Kansas City*, 140 F.3d 1201, 1206 (8<sup>th</sup> Cir. 1998) (holding that a regulation requiring booths to be “clean and sanitary” is not vague).

The typical challenge to "peep show" booth regulations is grounded in the First Amendment right to view sexually explicit fare, along with the constitutional "right to privacy," which ostensibly can be found in either the Fourth or Ninth Amendment if you know where to look.

The U.S. Court of Appeals for the Sixth Circuit rejected both of those constitutional arguments in *Bamon Corporation v. City of Dayton*, 923 F.2d 470 (6th Cir. 1991). The court established that Dayton's open booth ordinance was a content-neutral regulation of the manner in which sexually explicit videos could be shown in a public place. It credited the government's legitimate purpose of preventing the spread of sexual diseases, and held that the ordinance burdened speech no more than necessary to further the government's interest:

[The ordinance] neither limits the number of viewing booths, nor attempts to regulate the material shown in the booths. The Dayton ordinance does not, in any real fashion, limit the availability of video booths as a means of viewing sexually explicit material. Thus, we find that the Dayton ordinance is a valid time, place and manner regulation.

923 F.2d at 474. The court went on to reject the right to privacy argument, holding that whatever constitutional rights belong to citizens to view sexually explicit films in their home, viewing them in places of public accommodation removed any privacy claim. *Id.*

Open booth ordinances have also been challenged on equal protection grounds because of the differing treatment of "peep show" booths showing sexually explicit fare, versus hotel rooms offering similar movies. A federal court in Wisconsin stated that a city could rationally conclude that unsanitary sexual behavior was more of a problem in small rooms devoted solely to private movie watching than in hotel rooms which served a variety of other functions. *Libra Books, Inc. v. City of Milwaukee*, 818 F.Supp. 263 (E.D.Wis. 1993).

The Eighth Circuit in *Doe v. City of Minneapolis*, 898 F.2d 612 (8th Cir. 1990), upheld a typical ordinance against the usual constitutional challenges, including an equal protection challenge, while also rejecting a claim that the owner's First Amendment rights were violated because the ordinance deprived him of the ability to survive economically and continue offering sexually explicit fare. The court was not persuaded: "[The owner] has a first amendment right to display his videos and dancers, but he does not have a guaranteed right to make a profit." 898 F.2d at 621.

Many other cases have upheld similar interior configuration requirements. See *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, (7<sup>th</sup> Cir. 2002); *Scope Pictures, of Missouri, Inc. v. City of Kansas City*, 140 F.3d 1201 (8<sup>th</sup> Cir. 1998); *Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663 (9<sup>th</sup> Cir. 1996); *Mitchell v. Commission on Adult Entertainment Establishments of State of Del.*, 10 F.3d 123 (3d Cir. 1993); *Berg v. Health and Hosp. Corp. of Marion County, Ind.*, 865 F.2d 797, 802-803 (7th Cir. 1989); *Wall Distributors, Inc. v. City of Newport News, Va.*, 782 F.2d 1165 (4th Cir. 1986); *Ellwest Stereo Theatres, Inc. v. Winner*, 681 F.2d 1243 (9th Cir. 1982); *Matney v. County of Kenosha*, 887 F.Supp. 1235 (E.D.Wis. 1995), *aff'd* 86 F.3d 692 (7<sup>th</sup> Cir. 1996); *Doe v. City of Minneapolis*, 693 F.Supp. 774 (D.Minn. 1988); *Postscript Enterprises v. City of Bridgeton*, 699 F.Supp. 1393 (E.D. Mo. 1988); *Broadway Books, Inc. v. Roberts*, 642 F.Supp. 486 (E.D. Tenn. 1986); *SDJ Inc. v. City of Houston*, 636 F.Supp. 1359 (S.D. Tex. 1986); *Dumas v. City of Dallas*, 648 F.Supp. 1061 (N.D. Tex. 1986), *aff'd* 837 F.2d 1298 (5th Cir. 1988); *Moody v. Board of County Commissioners*, 697 P.2d 1310 (Kan. 1985); *City of Ramsey v. Amusement Center, Inc.*, 498 N.W.2d 25 (Minn.App. 1993); *City of Cleveland v. Fisher*, 611 N.E.2d 1016 (Cle.Mun.Crt. 1992).

When a sexually oriented business knowingly allows sexual activities within "peep booths" or on the premises, it is constitutionally permissible to require the closure of the establishment. This is allowed despite First Amendment claims of an unconstitutional prior restraint. Thus, a city may constitutionally adopt an ordinance requiring closure of an entire premise as a public health nuisance if the establishment knowingly allows prostitution, lewdness or assignation on the premises.

The Supreme Court in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), squarely addressed this issue. In *Arcara*, an "adult" property use which sold sexually explicit magazines also contained "peep booths." The establishment routinely allowed "masturbation, fondling, and fellatio by patrons on the premises of the store, all within the observation of the proprietor." 478 U.S. at 699. The Court permitted the closure of the entire premises under a public health law as a valid, content-neutral time, place and manner regulation:

The legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activities. Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises. The legislature properly sought to protect the environment of the community by directing the sanctions at premises knowingly used for lawless purposes.

*Id.*, 478 U.S. at 707. Similarly, see *Commonwealth v. Croatan Books, Inc.*, 323 S.E.2d 86, 89 (Va. 1984), which upheld closure of a pornographic bookstore based on evidence that homosexuals congregated there to engage in sexual acts.<sup>1</sup>

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<sup>1</sup> And see *Ft. Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (permitting closure of sexually oriented business under RICO statute); *Art Theatre Guild, Inc. v. Ewing*, 421 U.S. 923 (1975), dismissing the appeal from *State ex rel. Ewing v. "Without a Stitch"*, 307 N.E.2d 911 (Oh. 1974) (upheld the Ohio Supreme Court ruling that a

Closing sexually oriented businesses as public nuisances will be explored in more detail in Chapter 9.

Another aspect of regulating the interior of sexually oriented businesses applies to public nude dancing establishments where "lap dancing" and other sexual contact occurs between dancers and patrons. *See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995). These regulations may include the required use of railings and stages to keep a distance between dancers and patrons. *See Jake's, Ltd., Inc. v. City of Coates*, 284 F.3d 884, 891 (8<sup>th</sup> Cir. 2002) (two feet above the floor, six feet required between patrons and dancers, and no tipping); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 411 (6<sup>th</sup> Cir. 1997) (requiring six-foot distance between dancer and people to help combat secondary effects); *KEV Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986) ; *Parker V. Whitfield County*, 463 S.E.2d 116 (Ga. 1995).

## 7.2 - Licensing

In order to keep track of the sexually oriented businesses and employees in a community, it is important to enact a license or permit requirement for SOBs.<sup>2</sup> However, under current caselaw there are significant constitutional problems in many jurisdictions with certain types of licensing regulations that have become almost standard in the typical sexually oriented business ordinance. Some types of licensing regulations are permissible in some jurisdictions and not in others. In this section we will survey licensing options for communities with the objective of pointing out those that have been successful and those that have met with significant constitutional difficulties.

The governmental interests involved in licensing SOBs and SOB employees are significant. They include the right of communities: to monitor businesses for violations of their building code, to zone and require interior configuration requirements; to monitor employees to make certain criminal laws against public sexual activity, prostitution, and obscenity are not violated; to make certain minors are not being employed in sexual contexts; to protect the public health by verifying that health code and other rules are followed; and to make certain organized crime figures are not involved in ownership and supervision of SOBs.

In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41(1986), the Supreme Court established the right of municipalities to treat SOBs differently than other kinds of businesses, based on the type of "speech" SOBs engage in which causes negative secondary effects on the community. We also know from other Supreme Court decisions that municipalities have the authority to

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one-year closure provision was a constitutionally permissible method of controlling obscenity.); *State ex rel. Kidwell v. U.S. Marketing, Inc.*, 631 F.2d 622, 25 ALR 4th 381 (9<sup>th</sup> Cir. 1980), *jurisdiction noted* 454 U.S. 1140 (1982), and appeal dismissed by *U.S. Marketing*, 455 U.S. 1009 (1982) (the Supreme Court of Idaho held that a one-year closure order under a nuisance abatement statute for leased bookstore property did not constitute an unlawful prior restraint).

<sup>2</sup> A conditional use permit -- which must be obtained before an SOB is allowed to operate -- raises the same constitutional principles as a license requirement because it conditions the exercise of presumably First Amendment protected speech rights on the approval of a governmental entity.

license conduct "commonly associated with expression," for example, in requiring parade permits or regulating the location of news racks. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760 (1988). This seems to establish that communities have the right to license SOB's, and many have done so successfully. *Seven Seventy Corp. v. County of Clark*, 911 P.2d 1187 (Nev. 1996) (SOB enjoined from operating without license).

However, because permits and licensing schemes generally require the prior approval of a governmental agency before First Amendment rights can be exercised, they are technically considered prior restraints on speech. As such, they are closely scrutinized by courts.

The general rule on prior restraints is that they are presumptively unconstitutional. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, at 558 (1975). The presumption can be overcome only by meeting the standards enunciated in *Freedman v. Maryland*, 380 U.S. 51 (1965): the licensing scheme must provide clear standards to guide the decision-making official; there must be prompt judicial review, prior to which the status quo must be maintained; the burden of initiating judicial review is on the government and the burden of proof is on the government to show the need for the restraint. 380 U.S. at 56-60.

For many years it was unclear whether these rules applied to SOB licensing schemes. The Fifth Circuit had rejected the use of prior restraint doctrine in approving a Dallas SOB licensing scheme and treated it as a content-neutral time, place and manner regulation because it was directed at the secondary effects of SOB's. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988). The Supreme Court reversed and struck down the law as facially unconstitutional. 493 U.S. 215 (1990).

The Court fractured into three separate camps: three justices agreed with the Fifth Circuit that prior restraint doctrine did not apply; three believed the full *Freedman* standards should be employed; and three in the middle created a modified *Freedman* and wrote the plurality opinion striking down the ordinance.

According to the plurality, two elements of *Freedman* were "essential" even if the regulations were content neutral (an issue the Court did not reach): first, the licensor must make the decision whether to issue a license within a brief, specified and reasonable period of time; and second, there must be the possibility of prompt judicial review in case the license is erroneously denied. 493 U.S. at 228. The Court held some elements of *Freedman* to be not "essential" and therefore the government does not have the burden of seeking judicial review, nor does the government have the burden of proof in court.

The Dallas ordinance did not sufficiently limit the discretion of the licensor, according to the Court, because, although the police were given 30 days to approve the issuance of the license, an inspection had to occur before the police could make a decision, and there were no time limits on the inspection. The Court held that the ordinance also failed to provide an avenue for prompt judicial review.

The fallout from *FW/PBS* on lower courts has been substantial. Indeed, this remains a developing area of law, with a great deal of on going litigation and new decisions being handed down with regularity. Some decisions on specific provisions of licensing schemes are in total conflict with decisions of other courts.

### **Discretion of Licensor**

The general principle here is that licensors must not be allowed to accept or reject licenses based on their own predilections or moral considerations, but must instead apply clear, specific guidelines in a robotic fashion -- in other words, if the business meets certain requirements, the license is essentially automatic.

Where an "adult" use zoning ordinance vests unbridled discretion in a public official regarding decision making activities, it is susceptible to constitutional attack. It is a settled constitutional principle that any license requirement for an activity related to expression must contain narrow, objective, and definite standards to guide the licensing authority. *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51(1969); *Saja v. New York*, 334 U.S. 558 (1948).

Any subjective judgments required by an ordinance should be controlled by standards "susceptible of objective measurement." *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967). The ordinance must avoid vesting overbroad discretion in the zoning administrator. However, where the findings of an official charged with decision-making authority are based on objectively determinable facts, they are permissible. *See Memet v. State*, 642 S.W.2d 518, 524 (Tex.App. 1982); *Schope v. State*, 647 S.W.2d 675, 680 (Tex.Civ.App. 1982).

*Dumas v. City of Dallas*, 648 F.Supp. 1061 (N.D. Tex. 1986), *aff'd* 837 F.2d 1298 (5th Cir. 1988), addressed an attack on the Dallas "adult" use ordinance on grounds of alleged overbroad discretion. The Fifth Circuit invalidated certain language because it vested an official with the authority to make purely subjective judgments on the "fitness of an applicant." 837 F.2d at 1072. Such "unfettered discretion... cannot survive constitutional scrutiny." *Id.* at 1073.

The *Dumas* court also rejected a similar challenge to other portions of the ordinance.

The findings the police chief must make in licensing sexually oriented businesses are based on objective determinable facts, and are thus permissible [cites]. Age restrictions are factually based ... as are determinations of past due fees and taxes ... and false statements on application forms. *see Schope*, 647 S.W.2d at 680 (upholding ordinance including such factors); *Bayside Enterprises v. Carson*, 470 F.Supp. 1140, 1148 M.D. Fla. 1979) (upholding unpaid tax or fee provision); *Genusa v. City of Peoria*, 619 F.2d at 1219-20 (upholding provision for false statements). Failure to comply with the Ordinance... may be objectively verified, as may approval of premises by health, fire and building officials. ... *see SDJ, Inc. v. City of Houston*, 636 F.Supp. at 1368-69 (S.D.Tex. 1986). Whether an applicant resides with someone

who has been recently denied a license or whose license has been revoked ... may be objectively verified.

648 F.Supp. at 1073. The Fifth Circuit in *FW/PBS, Inc.* affirmed *Dumas*. The Fifth Circuit's discussion is helpful in illustrating the potential difficulties associated with unfettered discretion.

We also agree with the district court that the Ordinance does not give impermissibly broad discretion to the Chief of Police in issuing, suspending, and revoking licenses. Among other things, the Ordinance empowers the Chief of Police to require reasonably necessary information in a license application, to deny a license for failure to comply with applicable [health, fire and building] laws and ordinances, and to revoke a license if the licensee gave false or misleading information in the application or has knowingly permitted illegal conduct on the premises.

837 F.2d at 1305-06. *See also Centaur, Inc. v. Richland County*, 392 S.E.2d 165 (S.C. 1990).

As these examples demonstrate, the ordinance relies on standards that are "susceptible of objective measurement" and thus consistent with the First Amendment. The factual basis necessary for each of these determinations is either implicitly obvious - as in what constitutes "false" information or information "reasonably necessary" for an application - or ascertainable through reference to other sources of law - as in what constitutes a violation of health laws or knowledge of illegal conduct. *SDL Inc. v. City of Houston*, 837 F.2d at 1305-06 (5<sup>th</sup> Cir. 1988). And *see Kunz v. New York*, 340 U.S. 290 (1951).

Generic phrases in ordinances that give the licensor power to deny "in his sound discretion" will not survive constitutional attack. *Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980), *cert. denied* 450 U.S. 919 (1981). Requirements that the applicant be "of good moral character" may be struck down as too vague. *Broadway Books, Inc. v. Roberts*, 642 F.Supp. 486 (E.D.Tenn. 1986); *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272 (Col. 1995). However, some courts have upheld that phrase. *United Health Clubs of America, Inc. v. Strom*, 423 F.Supp. 761, 766 (D. S.C. 1976) (requiring applicants for a license to provide proof of good moral character is "valid and reasonable"); *Club Southern Burlesque, Inc. v. City of Carrollton*, 457 S.E.2d 816 (Ga. 1995) ("good moral character" understood to mean no felony convictions for crimes involving moral turpitude in preceding five years); *Moody v. Board of County Commissioners*, 697 P.2d 1310 (Kan. 1985).

Los Angeles County enacted a conditional use permit for adult businesses that was struck down as a prior restraint on speech because of its vagueness. The ordinance stated that the permit would be granted if schools were not "adversely affect[ed]", if the SOB was "sufficiently buffered" from residences and if its external appearance was not inconsistent with surrounding uses. *Smith v. County of Los Angeles*, 29 Cal.Rep. 2d 680 (Cal.App. 1994). All of these standards are difficult to measure objectively.

Conditional use permits are more problematic for the simple reason that use permits are typically denied when uses will have an adverse effect on the neighborhood. Since all SOBs have "negative secondary effects", the normal use of conditional use permits would allow you to deny every application from an SOB, which is clearly unconstitutional. *Landover Books, Inc. v. Prince George's County*, 566 A.2d 792 (Md.App. 1989). A licensing scheme separate from the distancing requirements contained in your zoning ordinance is therefore the preferred method of regulation.

### **Time Limits for Issuing or Denying a License**

From *FW/PBS*, we know that time limits must be explicitly stated in the ordinance, and that they must be reasonable. The Fourth Circuit struck down a licensing scheme for failing to include specific time limits in *Chesapeake B & M, Inc. v. Harford County*, 58 F.3d 1005 (4th Cir. 1995). In *Worldwide Video v. City of Tukwila*, 816 P.2d 18 (Wash. 1991), 30 days was held to be reasonable, while the Fifth Circuit approved 60 days in *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994). But in *11126 Baltimore Blvd. V. Prince George's County*, 58 F.3d 988 (4th Cir. 1995), 150 days was considered too long.

### **Prompt Judicial Review of License Denial**

*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. The language of *FW/PBS* -- "an avenue for prompt judicial review"; "the possibility of prompt judicial review" would seem to lend support to the former view. But as might be expected without clear guidance, lower courts have split on this issue.

The Sixth Circuit ruled in *East Brooks Books v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995), that access to court is insufficient -- a final judicial determination of a license denial must be made within a specified time period. The city had argued that it was incapable of dictating the docket and schedule of state court judges, but the Sixth Circuit was unpersuaded:

An applicant may wait sixty days before an initial hearing before the Director of Police Services and then -- at a minimum -- ninety days before judicial review. Although the Supreme Court has not expressly defined prompt judicial review, we believe that potential delays of over five months are impermissible.

*See also Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 892-893 (6<sup>th</sup> Cir. 2000).

The Fourth, Sixth, Ninth and Tenth circuits currently agree that prompt judicial review requires a prompt, judicial determination. *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, No. 01-1220, 2002, WL 31546925 (10<sup>th</sup> Cir. Nov. 18, 2002); *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-1102 (9<sup>th</sup> Cir. 1998); *11126 Baltimore Boulevard*, 58 F.3d 988, 999-1000 (4<sup>th</sup> Cir. 1995);

*Chesapeake B & M*, 58 F.3d 1005, 1012 (4<sup>th</sup> Cir. 1995).

The First, Second, Fifth, and Eleventh Circuits have held that “prompt judicial review” only requires access to judicial review, not final determination. *MacDonald v. Safir*, 206 F.3d 183, 194 (2<sup>nd</sup> Cir. 2000); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256-1257 (11<sup>th</sup> Cir. 1999); *TK’s Video Inc. v. Denton County, Tex.*, 24 F.3d 705, 709 (5<sup>th</sup> Cir. 1994) (finding that prompt judicial review fulfilled by giving applicant 30 days to file an appeal.); *Encore Videos, Inc. v. City of San Antonio*, No. 00-51119, 2002 WL 31421656 (5<sup>th</sup> Cir. Oct. 29, 2002) ; *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993) (finding that “prompt judicial review” is provided where applicant may appeal license denial in court).

The Seventh Circuit dealt with the issue of prompt, judicial review in *Graff v. City of Chicago*, 9 F.3d 1309 (7<sup>th</sup> Cir. 1993). In *Graff*, a newsstand vendor challenged a licensing ordinance in Chicago. While the ordinance did not include judicial review explicitly, the state’s common law writ of certiorari made available for review any ordinance suppressing protected speech. This, the court held, was sufficient.

### **License Revocation and Suspension**

License revocation or suspension is sometimes the basis for constitutional attack. It has been argued that the revocation of a license on the basis of a particular criminal conviction or sexual activity is an unconstitutional prior restraint of First Amendment expression. *See, e.g. FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988). So long as the basis for the suspension or revocation is rationally related to the purpose of the ordinance, it should pass constitutional muster. The intent of a revocation cannot be the suppression of expression. The intent must be to prevent the harmful secondary consequences caused by the "adult" use. *Blue Canary Corp. v. City of Milwaukee*, 270 F.3d 1156 (7<sup>th</sup> Cir. 2001) (denial of a license to protect nearby residential area).

A city may have a higher crime rate near "adult" uses, especially heterosexual and homosexual prostitution. The ordinance is enacted to promote health, safety, and morals and prevent activities which cause blight. Thus, it is permissible to revoke or suspend a license for permitting prostitution or sexual activities on the premises. It should also be permissible to deny, suspend or revoke a license for convictions under prostitution, obscenity, child pornography, sexual performance by a child, public lewdness, indecent exposure, sexual assault, solicitation for sex, and similar laws.

Cities have a compelling interest in limiting the involvement of specified convicted persons in the operation of "adult" uses. The city should demonstrate the relationship between sexually oriented businesses and sexually related crimes in its legislative record. License ineligibility resulting from certain convictions must be clearly tailored to achieve the stated purpose of the ordinance. It must result only from activity or offenses that are related to the kinds of criminal activity and other harmful consequences associated with sexually oriented businesses. *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 414 (6<sup>th</sup> Cir. 1997)(may deny for sex offenses and

violations of ordinance governing sexually oriented businesses); *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988); *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994) (requiring disclosure by owners and employees of violations of SOB regulations and convictions for sex crimes); *Tee & Bee, Inc. v. City of West Allis*, 936 F.Supp. 1479, 1489 (E.D. Wis. 1996) (may deny application for certain past sex-related convictions); *Centaur, Inc. v. Richland County*, 392 S.E.2d 165 (S.C. 1990); *Parker v. Whitfield County*, 463 S.E.2d 116 (Ga. 1995). *But see Schultz v. City of Cumberland*, 228 F.3d 831, 853 (7<sup>th</sup> Cir. 2000) (unconstitutional to disqualify license applicants due to past criminal convictions, because it categorically disenfranchises a class from protected expression.); *City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463, 470 (6th Cir. 1986) (prior obscenity conviction not a basis for license revocation); *Brownell v. City of Rochester*, 190 F.Supp.2d 472, 503 (W.D. N.Y. 2001) (Severed license disability provision which denied licenses based on past convictions of enterprise corruption, money laundering, gambling offenses, or drug offenses. Crimes must be of the type associated with crimes related to SOBs to be the basis for license denial.).

*See also, Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (a sexually oriented business could be closed when management was aware of sexual behavior on the premises, in violation of the law); *106 Forsyth Corp. v. Bishop*, 482 F.2d 280, 281 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044 (1975); *Borrigo v. City of Louisville*, 456 F.Supp. 30, 32 (W.D.Ky. 1978); *Airport Book Store, Inc., v. Jackson*, 248 S.E.2d 623 (Ga. 1978), *cert. denied sub. nom. Gateway Books v. Jackson*, 441 U.S. 952 (1979). Remember, the activity which results in revocation or suspension must be relevant to the intent of the ordinance.

Disqualification, revocation, and suspension because of criminal conviction of relevant crimes is supported by the accepted rule that government may attach to criminal convictions disabilities aimed at preventing recidivism. *See DeVeaii v. Braisted*, 363 U.S. 144, 158-59 (1960) (plurality opinion) ("Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas."); *106 Forsyth Corp. v. Bishop*, 482 F.2d 280, 281 (5th Cir. 1973) (per curiam) (holding that the First Amendment permits revocation of theater license for violation of law against sexually explicit screenings), *cert. denied*, 422 U.S. 1044 (1975). Indeed, the Supreme Court's decision in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), reaffirmed this doctrine emphatically. There, the Court upheld closure and forfeiture to the state of an entire bookstore as punishment for obscenity convictions. The Court rejected an argument that closure of a sexually oriented business as punishment for an obscenity RICO conviction was an unconstitutional prior restraint. The Court held that the restraint on presumptively protected speech activities was not an unconstitutional prior restraint. And see discussion *FW/PBS, Inc.*, 837 F.2d at 1305 (occupational limitations frequently follow criminal conviction, and can include First Amendment activities such as labor organizing.)

Some courts have struck down ordinances, under federal and state constitutions, for failing to include a provision allowing an SOB to stay open pending an administrative revocation action. *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497 (7<sup>th</sup> Cir. 1980); *DLS, Inc. v. City of Chattanooga*, 894 F.Supp. 1140 (E.D. Tenn. 1995); *JJR, Inc., v. City of Seattle*, 891 P.2d 720 (Wash. 1995). *But see TK's Video, Inc. v. Denton County, Tex.*, 24 F.3d 705, 708-709 (5<sup>th</sup> Cir.

1995) (prompt judicial review removes need for a stay).

## **License Fees**

License fees are permissible so long as they are "revenue-neutral" -- intended to offset the cost of implementing the ordinance. *Jake's, Ltd., Inc. v. City of Coates*, 284 F.3d 884, 890 (8<sup>th</sup> Cir. 2002)(\$2,500 fee upheld in the absence of evidence demonstrating lack of revenue neutrality). *See also Cox v. New Hampshire*, 312 U.S. 569 (1941).

SOB license fees are sometimes challenged on the grounds that the government is requiring a fee to engage in a constitutionally protected activity. It has also been argued that such fees are constitutionally infirm because they only apply to sexually explicit speech and no other. These arguments are grounded in the Equal Protection Clause and the First Amendment.

The law is clear, however, that government may impose a revenue neutral license fee on "adult" use businesses without a similar fee requirement on non-regulated businesses in an "adult" use zoning ordinances. The fee simply reimburses the government for the cost of administering a regulatory ordinance dealing with such businesses. Simply put, there is no constitutional impediment to a revenue-neutral license fee in an "adult" use ordinance. *Baby Tam & Co., Inc. v. City of Las Vegas*, 247 F.3d 1003 (9<sup>th</sup> Cir. 2001) (\$25 - \$670 depending on semiannual gross sales); *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377 (6<sup>th</sup> Cir. 2001) (\$500. Half reimbursed if application rejected); *Genusa v. City of Peoria*, 619 F.2d 1203 (7<sup>th</sup> Cir. 1980) (\$100); *Bayside Enterprises v. Carson*, 470 F.Supp. 1140, 1148-49 (M.D.Fla. 1979) (\$400); *Borrago v. City of Louisville*, 456 F.Supp. 30 (W.D. Ky. 1978) (\$250); *Airport Book Store v. Jackson*, 248 S.E.2d 623 (Ga. 1978) (\$500).

The fee should be in an amount necessary to administer the ordinance. It should not be used to generate revenue for other purposes. However, the city does not need to provide a specific explanation of costs. The burden is on the SOB to prove the fee is unreasonable. *Jake's, Ltd., Inc. v. City of Coates*, 284 F.3d 884, 890 (8<sup>th</sup> Cir. 2002) (\$2,500 license fee not proved unreasonable); *World Wide Video, Inc. v. City of Tukwila*, 816 P.2d 18 (Wash. 1991) (\$725 for "peep show" operator's license).

## **Disclosure Requirements**

Reasonable disclosure requirements, including information about age and identity, can be required of applicants. *Genusa v. City of Peoria*, 619 F.2d 1203, 1216 (7<sup>th</sup> Cir. 1980). The Fifth Circuit has upheld a requirement that applicant's disclose previous violations of SOB ordinances and criminal convictions for some sex crimes that are "plainly correlated with the side effects that can attend these businesses." *TK's Video*, 24 F.3d at 710.

In *KEV Inc. v. Kitsap County*, 793 F.2d 1053 (9<sup>th</sup> Cir. 1986), the Ninth Circuit upheld an ordinance regulating erotic dance studios that required disclosure of aliases of dancers in an attempt to prevent prostitution. *See also Broadway Books*, 642 F.Supp. 486 (E.D. Tenn. 1986). In

*Schultz v. City of Cumberland*, 228 F.3d 831 (7<sup>th</sup> Cir. 2000), the Seventh Circuit allowed the city to demand, among other things, names and ages. The court, however, barred the city from requiring addresses, photographs, Social Security numbers, and fingerprints. These pieces of information were “redundant and unnecessary for [the city’s] stated purposes.” 228 F.3d at 852; *see also, Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988 (7<sup>th</sup> Cir. 2002).

Although the Supreme Court has never ruled on them, requirements that shareholders sign applications or that corporate applicants reveal shareholders have not fared well in lower courts. *See Genusa*, 619 F.2d at 1215-17 (holding that requirement of shareholder disclosure served no purpose and was meant only to harass); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1366 (11<sup>th</sup> Cir. 1999) (no “relevant” or “substantial” correlation between names of stockholders and secondary effects); *Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219 (9<sup>th</sup> Cir. 1989) (no basis for requesting shareholder information when shareholders not involved in day-to-day running of business); *East Brooks Books*, 48 F.3d 220 (“We agree that the City has a legitimate interest in identifying those who are legally accountable for the operation of a sexually oriented business, and perhaps those who have a controlling or significant share in such a business. The requirement that every person with any ownership interest, regardless of how small, sign the application, however, is impermissibly broad”); *Brownell v. City of Rochester*, 190 F.Supp.2d 472, (W.D.N.Y. 2001)(requiring parties actually running or responsible for SOB is constitutional, but requiring all shareholders with 20% or greater interest to sign application is unconstitutional); *World Wide Video*, 816 P.2d 18 (construed ordinance to comply with *Acorn* in seeking information only from those in managerial role). *But cf. Tee & Bee, Inc. v. City of West Allis*, 936 F.Supp. 1479, 1488 n. 6 (E.D. Wis. 1996) (disclosure of shareholders with over 10% interest held constitutional while acknowledging contrary precedent, but noting “main concern is that licensing and disclosure requirements not attach to shareholders whose interests are *de minimis*.”)

Based at least on dicta from these cases, there appears to be support for the notion of requiring corporate applicants to disclose information about those owners who are involved in management of day-to-day operations. E.g., *Brownell*, 190 F.Supp.2d at 502. Of course, this does not solve the well-documented problem of organized crime figures who run an empire of SOBs but whose names never appear on any official documents.

Municipalities may also want to consider modeling local legislation after a recently enacted and upheld federal law requiring producers and distributors of material depicting “actual sexually explicit conduct” to maintain records of the true names and ages of all performers who participate, and label all such material. *See* 18 U.S.C. §2257, and *American Library Association v. Reno*, 33 F.3d 78, (D.C. Cir. 1995), *cert. denied* 115 S.Ct. 2610 (1995). The reason for the federal law is to protect children from being used in hard-core pornographic videos.

In addition to requiring records to be kept, a city might want, as part of its license requirement, to prohibit any sexually explicit material from being sold if it did not adhere to federal laws regarding recordkeeping.