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MEMORANDUM

TO: Julie Renehan, Chair Ad-Hoc Adult Business Committee
Members, Ad-Hoc Adult Business Community

FROM: Anthony E. Hayman, ASA AEH

DATE: February 8, 2019

RE: Committee's Legislative Record

Contemporaneous with this memorandum, the Committee will receive a large number of governmental and academic studies, scholarly articles, case law (reported court decisions) and other data pertaining to the relationship between adult businesses and certain secondary effects, including criminal activity, property valuations, pornographic litter, sexually-transmitted diseases, etc. The materials provided are crucial to this Committee, and the County Board, developing solid evidentiary record to support any regulatory framework the County may wish to implement.

Beginning with the United State Supreme Court decision in Young v. American Mini-Theaters, Inc., 427 U.S. 50 (1976), courts grappled with need to balance the U.S. Constitution's First Amendment right of sexually-oriented businesses (adult businesses) to disseminate erotic communications with the recognition that those businesses are associated with various negative and harmful activities. The Supreme Court recognized that local communities have an interest in preserving the quality of life for their residents and, therefore, such communities "*must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.*" Specifically, in American Mini Theaters, the City of Detroit adopted a "dispersal ordinance" which was designed to break up concentrations of adult businesses as a means of combating, mainly, increased crime near sexually-oriented businesses.

Following the American Mini Theaters case, courts have allowed communities to examine and consider the experiences other communities have had with adult businesses when adopting their own regulations. In a later U.S. Supreme Court case, Playtime Theaters, Inc. City of Renton, 475 U.S. 41 (1986), the Court held: "*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.*" And in Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), Justice Souter observed that

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"legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects."

Therefore, a community does not have to wait until it has experienced negative and harmful activities associated with adult businesses within that community. Instead, a community may take proactive action based on the experiences of other communities and may premise proposed regulations on the evidence developed by those other communities. For example, the United State's 7th Circuit Court (which covers Illinois) rejected the proposition that a municipality must conduct its own studies, at the local level, to determine whether adverse secondary effects result when liquor is served on the premises of adult entertainment establishments. Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702 (7th Cir., 2003).

In response to Renton's progeny, adult businesses have mounted three general types of challenges to local regulations based on the legislative record of the subject community. Those arguments contend that: 1) the legislative record is missing or woefully inadequate; 2) the community relied upon shoddy data; and 3) the community relied on evidence that was not relevant to the problem the community sought to address. In most instances, challenge is premised some combination of the above arguments, namely, the second and third.

With respect to the first argument, in R.V.S. L.L.C. v. City of Rockford, 361 F.3d 402 (2004), this Federal Circuit struck a Rockford ordinance when the city produced little or no evidence of harmful secondary effects connected to Exotic Dancing Nightclubs beyond the assumption that such effects exist. In this case, city staff referenced a few studies (reportedly 2-3 studies) and offered brief descriptions of the studies' findings. The City council adopted the struck ordinance at the same meeting without further deliberation or consideration.

Similarly, in Doctor John's, Inc. v. City of Sioux City, Iowa, 305 F. Supp. 2d 1022, 1030 (N.D. Iowa 2004), enforcement of the city's ordinance was enjoined because the legislative record consisted, in sum, of the senior city planner's testimony that he had reviewed a number of studies conducted throughout the country regarding the negative secondary effects of adult businesses. There was no evidence that the senior city planner provided the city council with those studies or even summaries thereof, and no evidence that the members of the city council ever independently reviewed the referenced studies.

The evidentiary burden, though, is actually rather low, and the cities mentioned above probably could have met their burden with slightly more extensive records. But also note that when a community seeks only to establish a minimally acceptable pre-enactment record it runs the risk of having its ordinance invalidated (or enjoined during the pendency of litigation) if a challenger can cast doubt on the little amount of evidence in the record. With a more substantial, better developed record, this is less likely.[1]

[1] In contrast to Rockford's legislative record, the City of Columbia, South Carolina established a legislative record that spanned almost 2,200 pages and included forty-six judicial decisions, twenty-seven studies on the impact of sexually-oriented businesses in various cities, and nineteen summaries of reports concerning negative secondary effects. Communities with substantial records are more likely to overcome challenges for the simple reason that the challenger's evidence and expert need to refute most, if not all, of the community's record. Likewise, Manatee County, Florida developed a record consisting of twenty studies

As for the second line of argument, adult businesses have contested the use of non-empirical studies and anecdotal testimony in support of adult business regulations as being insufficiently reliable (and irrelevant). In Stringfellow's of New York, Ltd. v. City of New York, 694 N.E.2d 407 (1998) the state supreme court upheld New York City's adult zoning ordinance stating that: "*the 'non-empirical, anecdotal evidence that comprised the bulk of the local studies does not render those studies worthless. In the proper context, anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects...*" And in City of Chicago v. Pooh Bah Enterprises, Inc., 224 Ill.2d 390 (2006), the Illinois Supreme Court noted that the existence of academic studies which indicate that the threatened harms are not real will not suffice to cast doubt on a local government's actual experiences with adult businesses. Accordingly, testimony of individual experiences and, or, reports of specific incidents can and should play a role developing adult business regulations.

The second and third arguments are often, if not usually, intertwined. Because the evidence relied upon by a community must be reasonably believed to be relevant to the problem addressed, adult businesses have challenged local regulations on the grounds that the evidentiary record relied upon by the community wasn't relevant.[2] In the case City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002), Justice O'Connor summed up the issue:

> "... a municipality may rely on any evidence that is 'reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest. This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its [regulation]."

An example of this argument is LLEH, Inc. v, Wichita County, 289 F.3d 358 (5th Cir., 2002), in which a Federal appellate court considered, but ultimately rejected, the challenge of an adult business premised on a mostly rural county relying upon studies from urban areas. But, in Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288 (5th Cir., 2003), that same Federal appellate court concluded that the City's evidence didn't delineate adverse effects from "live entertainment" establishments and retail businesses and, thus, the City's record did not support City regulations exclusively applicable to retail businesses.

(many of which were empirically-based research), affidavits and testimony of local sheriff deputies describing criminal activity within adult businesses and newspaper articles from other communities regarding criminal activity within adult businesses.

[2] Reported court decisions also include many examples of trial courts invalidating a local ordinance on account of a weak legislative record, or the relevancy of the record in relation to the regulation at issue, but, on appeal, a higher court reversed. For example, in ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413 (8th Cir. 1994), the district court concluded the city acted unreasonably in relying on other cities' studies that did not specifically address businesses similar to the type of business Rochester sought to regulate. The U.S. Eighth Circuit Court of Appeals, though, disagreed. The lesson from these decisions is that it's cheaper and easier for a community to layout well-developed findings and conclusions when enacting its ordinance than to layout those findings and conclusions years later in an appellate brief.

Accordingly, the Committee members must be cognizant of the differing nature of the studies, research, testimony and caselaw submitted into the record and its findings should reflect the following:

- Distinguish between evidence relating to retail stores (off premises) from that relating to live entertainment (on premises) or indicate how evidence pertaining to one type of business relates to another business type.
- Distinguish between evidence relating to the adverse effects of adult businesses in urban areas compared to rural areas or indicate why evidence pertaining to one area is relevant to the secondary effects experienced in another area. (In this respect, courts have recognized that a rural community may reasonably consider, for example, studies of retail businesses in urban areas.
- Note whenever the secondary effects observed in other jurisdictions are similar to secondary effects observed in DuPage County and the how those other jurisdictions sought to combat such effects.
- Consider all viewpoints, including dissenting ones, concerning the correlation of adult businesses and secondary effects and whenever any body of data has been deemed particularly unpersuasive, identify the criticisms leading to that information is given such little weight.
- Explain how each regulation is anticipated to limit, mitigate or ameliorate a particular secondary effect.

If the Committee requires further guidance as it undertakes its hearings concerning adult business regulations, please don't hesitate to contact me.

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