

# The ABC's of SOB's - Basic Legal Principles of SOB Regulation

- \* The starting point for all SOB regulation analysis is the First Amendment, which provides, “Congress shall make no law ... abridging the freedom of speech or of the press ...”
- \* What does this mean?
- \* It means that a governmental entity's ability to regulate SOB's is limited.

# The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* SOB regulations can generally be broken down into two categories –
  - \* Content-based, which impose the very heavy “compelling state interest” burden on a local government to justify; and
  - \* Negative-secondary-effects based, which are content-neutral and subject to the less burdensome “intermediate scrutiny” standard
    - \* See *City of Los Angeles v. Alameda Books, Inc.*, 122 S.Ct. 1728 (2002).

# The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* But why are SOB's even subject to First Amendment analysis in the first place? Aren't they just selling sex?
- \* Well yes, but ...
- \* “[T]he First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value ...”
  - \* *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976).

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* If an SOB regulation is challenged, the first question is whether it is content or non-content based.
- \* If it is content-based, the regulation must be precisely drawn and narrowly tailored, with no less intrusive means of advancing a substantial governmental interest.
  - \* *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).
- In other words, avoid content-based regulations because the odds of getting them upheld are slim.

# The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* A regulation is content-neutral if it only attempts to regulate the “time, place and manner” in which protected speech/expressive conduct is conveyed.
- \* That is:
  - \* (1) the regulation is within the power of the government;
  - \* (2) it furthers an important government interest;
  - \* (3) the government interest is unrelated to the suppression of speech; and
  - \* (4) the incidental restrictions on free speech are no greater than are essential to further the interest.
  
- \* *United States v. O'Brien*, 391 U.S. 367 (1968).

# The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* Wait a second. Don't you HAVE to at least peak at the message (and thus know it's content) if you're going to employ a "time, place, manner" restriction on it?
- \* Yes.
- \* While the First Amendment protects communication in this area from total suppression, the Supreme Court has held that local governments may legitimately use their content as the basis for employing "time, place, manner" restrictions.
  - \* *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976).

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* *American Mini-Theaters, Inc.* was the first modern decision upholding local regulation of SOB's.
- \* In it, the Court upheld a Detroit zoning ordinance imposing 1,000-foot separation between SOB's.
- \* But why?

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* Because the Court recognized that SOB's can alter and even threaten the character of neighborhoods by virtue of negative/harmful activities associated with them.
- \* Cities, they said, have an interest in preserving the quality of urban life and “must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.”
  - \* *American Mini Theaters, Inc.*, 427 U.S. at 71-72.

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* The *American Mini Theaters* decision recognized that SOB's can become the focus of crime and it is that “secondary effect” dispersion zoning ordinances attempt to avoid or mitigate and not the dissemination of “offensive” speech.

# The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* Turns out, there's no need to reinvent the wheel.
- \* Local governments can (and probably must) rely on the experiences of other locales in adopting their own standards.
- \* “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.”
  - \* *Playtime Theatres, Inc. v. City of Renton*, 475 U.S. 41 (1986).

# The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* In *Renton*, the court heard:
  - \* extensive testimony regarding the history and purpose of these ordinances.
  - \* testimony on the adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts.
  - \* testimony regarding the effects of adult movie theaters on residential neighborhoods.

# The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* What does this mean for my local government's regulations?
- \* It means not only that your SOB regulation must reference all available, applicable studies demonstrating “negative secondary effects,” but you should also have copies of those studies as part of your legislative record.
- \* It also means that you should have live testimony (police department, city or county health department, etc.) as part of the presentation when your governing body is considering the regulation to be adopted.

# The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* Adequate documentation and analysis of the negative secondary effects your local government is trying to mitigate is critical to survive any legal challenges to your ordinance.
- \* Only by reference to and consideration of negative secondary effects can your local government demonstrate it aims to achieve its substantial governmental interest and not censor unpopular speech.

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* Thus, any evidence “reasonably believed to be relevant” for demonstrating a connection between the regulation and the negative secondary effect it is attempting to eliminate or mitigate is the key to a successful defense of your regulation.
  - \* *City of Renton*, 475 U.S. at 49-52.

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* But along comes the Fifth Circuit and *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5<sup>th</sup> Cir. 2003).
- \* In 1995, the city enacted an ordinance defining “sexually oriented business” as one with 20% or more of inventory or floor space devoted to sexually explicit material, and prohibited them from operating within 1,000 feet of each other, residential neighborhoods, etc.

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* Encore Videos was an adult video store that unquestionably devoted more than 20% of its inventory to sexually explicit material; however, it never sought or obtained a SOB permit.
- \* It filed suit against the city challenging the ordinance on the grounds that the evidence relied upon by the city was not relevant to an “off-premises” video/bookstore where the material was only purchased or rented and taken off-premise for viewing ... or using ... as the case may be.

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* San Antonio relied on three studies (1989 Seattle study; 1986 Austin study; 1991 Garden Grove study) in support of its position that it could draw reasonable inferences that off-premise bookstores had negative secondary effects and that its time, place, manner restriction was reasonably related to a substantial governmental interest.

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* Okay, that's not quite true.
- \* What the court really said was that the studies relied upon by the city did not differentiate between off-premise and on-premise establishments.
- \* It also ultimately held that the city's zoning restriction for off-premise SOB's was not sufficiently narrowly tailored and that its 20% inventory cut-off was arbitrary, thus subjecting the ordinance to the dreaded strict scrutiny.

# The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* Shortly after it issued *Encore*, the Fifth Circuit (probably feeling chagrined for making such a lousy ruling for cities) issued its decision in *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162, 173 (5<sup>th</sup> Cir. 2003).
- \* This decision was slightly less draconian and the court held that local governments could adduce evidence to support their SOB regulations not only prior to the regulation's enactment, but also at trial.
- \* This is particularly helpful for local governments that have not updated their SOB regulations recently (though I suppose it means you've been sued, which is a bummer).

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* What's the takeaway from the Supreme Court's deference in *Renton* and the Fifth Circuit's skepticism in *Encore*?
- \* The short answer is that the Fifth Circuit has been much more critical in its analysis of the studies upon which local governments rely when adopting their regulations.

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* The Fifth Circuit's seemingly heightened scrutiny dates back a number of years and is not likely to abate any time soon.
- \* For example, in *J&B Entm't, Inc. v. City of Jackson, Miss.*, 152 F.3d 362 (5<sup>th</sup> Cir. 1988), the court overturned the trial court, which had granted the city's summary judgment, finding that the record was "too bare" to conclude that the ordinance had been adopted to serve a substantial governmental interest unrelated to suppression of speech.

# The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* *J&B* was cited extensively in *Encore* and in later opinions, though to be fair, the Fifth Circuit has usually upheld the local government's regulations (not counting *Encore*).
- \* For example ...

# The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* In *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, the court noted that:
  - \* A local government must produce some evidence of adverse secondary effects produced by the adult entertainment in question in order to justify a challenged enactment using the secondary effects; and
  - \* That a local government must present sufficient evidence to demonstrate “a link between the regulation and the asserted governmental interest,” under a “reasonable belief” standard.
    - \* 295 F.3d 471, 481 (5th Cir. 2002)

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* In upholding the Dallas ordinance, the court noted that the city relied on studies specifically related to the regulation in question, which found a significant increase in the incidence of sex-related crime within proximity to SOB's.
- \* This was a problem with the Dallas SOB's because they were all taking advantage of a loophole in the city's earlier law, which allowed SOB's to classify themselves as "dance halls," and thus avoid the proximity regulations.

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* The Fifth Circuit also deferred to the local government's findings in *LLEH, Inc. v. Wichita County*, 289 F.3d 358, 366 (5<sup>th</sup> Cir. 2002), which the SOB tried to attack on the grounds that the studies dealt with urban areas, whereas the location in question was more rural in character.
- \* Again, the court found that the studies in question were specifically related to the SOBs in question and the secondary effects resulting therefrom that they were trying to address.

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* The Fifth Circuit also deferred to the legislative findings and studies relied upon the city in *H & A Land Corp v. City of Kennedale*, 480 F.3d 336 (5th Cir. 2007).
- \* Differentiating its finding in *Encore*, the court noted that “Kennedale, unlike San Antonio, offers evidence that purports to show a connection between purely off-site businesses, or ‘bookstores,’ and harmful secondary effects.”

# The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* So while the Fifth Circuit has always been somewhat more critical than other circuits of the evidence relied upon by local governments to justify their regulations, the fundamental flaw in its premise in *Encore* was explained in the *Kennedale* case -
  - \* “Off-site businesses differ from on-site ones, because it is only reasonable to assume that the former are less likely to create harmful secondary effects. If consumers of pornography cannot view the materials at the sexually oriented establishment, they are less likely to linger in the area and engage in public alcohol consumption and other undesirable activities.”
    - \* *Kennedale*, 480 F.3d at 339.

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* With the *Encore* ruling in mind, the Texas City Attorneys Association commissioned a negative secondary effects study aimed directly at the effects of off-premise SOB's.
- \* The study's conclusion?
  - \* They have effects.
  - \* And those effects are negative.

# The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* But seriously –
- \* The study examined the question from two angles:
  - \* The effect of off-premise SOB's on market value;  
and
  - \* The effect of off-premise SOB's on crime in and  
around their immediate vicinity.

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* It found that even off-premise establishments, that is, those presumably (by the Fifth Circuit anyway) to have the least negative secondary effect, negatively impact both property values and crime in the vicinity surrounding them.
- \* Secondary Effects of Sexually-Oriented Businesses on Market Values and Crime-Related Secondary Effects of “Off-Site” Sexually-Oriented Businesses, by Cooper & McCleary, Texas City Attorneys Association 2008

# The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* This study is an important tool at the local government's disposal and should certainly be included in any SOB regulation modifications.
- \* And although it deals with off-premise establishments only, following the Fifth Circuit's logic, if off-premise SOB's can diminish property values and see increased crime, then we can only assume that on-premise establishments would have a greater impact.
- \* Right?

# The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* More recently, the Fifth Circuit adopted a “hybrid” test to determine if a SOB regulation will pass constitutional muster.
- \* In *Illusions – Dallas Private Club, Inc. v. Steen*, 482 F.3d 299 (5<sup>th</sup> Cir. 2007), the court held that a regulation will survive if:
  - \* It does not completely prohibit adult entertainment;
  - \* It is aimed and addressing negative secondary effect, not suppressing speech;
  - \* It serves a substantial government interest and reasonable alternative avenues of communication remain available, or its restriction on expressive conduct is no greater than essential for the furtherance of that interest.

## The ABC's of SOB's – Basic Legal Principles of SOB Regulation

- \* It remains to be seen whether the Fifth Circuit will return to its *Encore* ways, but the smart local government official will be sure to cite as many studies as possible and include them in the legislative record.
- \* This is no guarantee that the local government won't be sued, but it does give it a better chance to succeed if it draws that black bean.

## The ABC's of SOB's – How About - How To Draft a SOB Ordinance That Stands a Good Chance of Withstanding a Constitutional Challenge

- \* There are certain basic principles applicable to drafting any ordinance so that it falls within constitutional confines. Generally, they are –
  - \* Make LOTS of legislative findings. These are your friends.
  - \* Back up your legislative findings with evidence (studies, anecdotal evidence, live testimony).
  - \* Don't bite off more than you can chew. That is, tailor your ordinance to the problem you're trying to solve.
  - \* Use common terms and avoid legalese as much possible. People already hate lawyers. Don't make it worse for us.
  - \* If you go the permit route, create specific guidelines for officials to grant or deny them.
  - \* Create deadlines for action and follow them. (e.g. If a permit is not granted or denied within "x" days, it is automatically granted.)
  - \* Create an appeals process, including judicial review.

The ABC's of SOB's –  
How About - How To Draft a SOB Ordinance That Stands a  
Good Chance of Withstanding a Constitutional Challenge

- \* When it comes to the First Amendment, even though nude dancing and the like are within the very “outer ambit” of protected speech, courts are most interested in how your ordinance is tailored.
- \* *City of Erie v. Pap's A.M.*, 529 U.S. 277, 319 (2000).

The ABC's of SOB's –  
How About - How To Draft a SOB Ordinance That Stands a Good  
Chance of Withstanding a Constitutional Challenge

- \* Remember, your ordinance is not regulating morality. It isn't addressing sinful activity. It isn't disapproving and it doesn't condemn.
- \* It is eliminating or at least mitigating the specific negative secondary effects attributable to the kind of business it is regulating – be that a SOB or a landfill.

The ABC's of SOB's –  
How About - How To Draft a SOB Ordinance That Stands a Good  
Chance of Withstanding a Constitutional Challenge

- \* Thus, while a local government is perfectly entitled to rely on the experiences of other jurisdictions when enacting its own SOB regulation, staff should do adequate leg work before putting it on the agenda for consideration.

The ABC's of SOB's –  
How About - How To Draft a SOB Ordinance That Stands a Good  
Chance of Withstanding a Constitutional Challenge

- \* Right. Leg work.
- \* In other words, gather all of the relevant studies. They're all available on the internet now and are easily found.
- \* Gathering the studies is not enough. Including them in the legislative record so that the governing body has to actually look at them in an open meeting is critical.
- \* This will be a voluminous amount of paper. But now is not the time to be ecologically sensitive. That impressive amount of paper is worth the cost.

## The ABC's of SOB's – How About - How To Draft a SOB Ordinance That Stands a Good Chance of Withstanding a Constitutional Challenge

- \* But don't stop with killing a forest's worth of trees. Live testimony from your experts (who will be called to testify anyway should your local government get sued) is particularly helpful.
- \* What experts?
  - \* Chief of Police/Sheriff
  - \* City or County Health Inspector
  - \* Ask your chief to call in a favor and have a TABC inspector come address your local government.
  - \* Have staff run a Youtube search using the term "strip club raid," for example, and play some of the news stories from around the country AT YOUR MEETING that describe all of the criminal activity that can go on at some of these places.
  - \* Be creative. You can't have too much supporting data when adopting a SOB regulation.

The ABC's of SOB's –  
How About - How To Draft a SOB Ordinance That Stands a Good  
Chance of Withstanding a Constitutional Challenge

- \* If your locale is “lucky” enough to have recently had a strip club raid by the state and feds, fantastic. Reference it.
- \* If your locale is “lucky” enough to be close to one that has, make fun of those poor suckers, and reference it.

The ABC's of SOB's –  
How About - How To Draft a SOB Ordinance That Stands a Good  
Chance of Withstanding a Constitutional Challenge

- \* The Legislative Motive – what is it and how do I keep my elected officials from being deposed?
  - \* A city can only act by and through its governing body as a whole. Individual statements of elected officials are not binding on the governmental entity.
    - \* *Stirman v. City of Tyler*, 443 S.W.2d 354 (Tex.Civ.App.--Tyler 1969, writ ref'd n.r.e.).

The ABC's of SOB's –  
How About - How To Draft a SOB Ordinance That Stands a Good  
Chance of Withstanding a Constitutional Challenge

- \* If the legislative intent is not sufficiently clear (i.e. your legislative findings are inadequate), courts will sometimes allow legislators to be deposed in order to flesh out the legislative intent.
- \* (And even if it is clear, some judges will still allow legislators to be deposed.)

The ABC's of SOB's –  
How About - How To Draft a SOB Ordinance That Stands a Good  
Chance of Withstanding a Constitutional Challenge

- \* However, the more extensive the legislative record is (the actual legislative findings in the regulation, minutes from meetings where the regulation was considered; live testimony from your experts and citizens; copies of studies considered by the governing body), the better your chances are in litigation.
  - \* *Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss.*, 973 F.2d at 1259 (city planning board held a public meeting at which the planning director and other city staff members and citizens discussed secondary effects and the work that had gone into the preparation of the proposed ordinance. testimony and the official minutes of the meeting show the discussion and information presented).

# The ABC's of SOB's – Can we just skip to the actual legislative findings, please?

**WHEREAS**, Section 215.074 of the Local Government Code authorizes home rule municipalities to regulate the location and conduct of theaters, movie theaters and other places of public amusement; and

**WHEREAS**, Section 215.075 of the Local Government Code authorizes home rule municipalities to license any lawful business or occupation that is subject to the police power of the municipality; and

**WHEREAS**, Section 54.004 of the Local Government Code authorizes home rule municipalities to enforce ordinances necessary to protect health, life, and property and to preserve the good government, order, and security of the municipality and its inhabitants; and

**WHEREAS**, the Texas Legislature has determined that the unrestricted operation of certain sexually oriented businesses may be detrimental to the public health, safety, and welfare by contributing to the decline of residential and business neighborhoods and the growth of criminal activity; and

**WHEREAS**, Section 243.003 of the Local Government Code authorizes municipalities and counties to adopt regulations restricting the location of sexually oriented businesses, which

# The ABC's of SOB's – Can we just skip to the actual legislative findings, please?

are defined in Section 243.002 to include a massage parlor, nude studio, modeling studio, topless dancing bar, love parlor, or other similar commercial enterprise the major business of which is the offering of a service that is intended to provide sexual stimulation or sexual gratification to the customer; and

**WHEREAS**, the City Council finds that sexually oriented businesses tend to require special supervision from public safety agencies of the City in order to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the residents of the City; and

**WHEREAS**, the City 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 City Council finds that churches and schools are centers of family oriented activities; and

**WHEREAS**, the City Council finds that sexually oriented businesses can exert a dehumanizing influence on persons attending churches or schools in the surrounding area; and

## The ABC's of SOB's – Can we just skip to the actual legislative findings, please?

**WHEREAS**, the City Council finds a concentration of sexually oriented businesses can contribute to a decline in the value of surrounding properties; and

**WHEREAS**, the City Council finds that a concentration of sexually oriented businesses can contribute to an increase in criminal activities in surrounding areas; and

**WHEREAS**, the City Council finds that sexually oriented businesses having alcoholic beverage licenses and permits exert the same influences on churches and schools, have the same effect on property values, and contribute in the same manner to criminal activities as do those which do not serve alcohol, and that they should be included in the scope of the regulations regarding sexually oriented businesses; and

**WHEREAS**, the City Council finds that sexually oriented businesses exert the same influences on day care centers as on churches and schools, and that child care facilities should be afforded the same degree of land use protection; and

**WHEREAS**, the City Council acknowledges that sexually oriented businesses should be located in particular areas; and

**WHEREAS**, the City Council recognizes that sexually oriented businesses should not be located near churches, schools or within residential areas; and

**WHEREAS**, in order to protect the health and welfare of all residents within the City of Boerne, the City Council has found it necessary to restrict the areas in which sexually oriented businesses shall be located.

## The ABC's of SOB's – Can we just skip to the actual legislative findings, please?

Therefore, based on evidence concerning the adverse secondary effects of Sexually Oriented Businesses on the community presented in hearings and in reports made available to the Council, and on findings incorporated in the cases of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382 (2000); *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728 (2002); *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002); *LLEH, Inc. v. Wichita County, Texas*, 289 F.3d 358 (5th Cir. 2002); *Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123 (3rd Cir. 1993); *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995); *2300, Inc. v. City of Arlington*, 888 S.W.2d 123 (Tex. App. – Fort Worth, 1994); *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998), cert denied, 529 U.S. 1053 (2000); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986); *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003); *DLS, Inc. v. Chattanooga*, 107 F.3d 403 (6th Cir. 1997); *Jake's, Ltd., Inc. v. Coates*, 384 F.3d 884 (8th Cir. 2002); and on studies, reports and/or testimony in other communities including, but not limited to: Phoenix, Arizona; Minneapolis, Minnesota; St. Paul, Minnesota; Houston, Texas; Indianapolis, Indiana; Dallas, Texas; Amarillo, Texas; Garden Grove, California; Los Angeles, California; Whittier, California; Austin, Texas; Seattle, Washington; Oklahoma City, Oklahoma; Cleveland, Ohio; Beaumont, Texas; Newport News, Virginia; Bellevue,

## The ABC's of SOB's – Can we just skip to the actual legislative findings, please?

Washington; New York, New York; St. Croix County, Wisconsin; Kitsap County, Washington; Los Angeles, California Police Department (dated August 12, 2003); Arlington, Texas, License and Amortization Appeal Board hearings, 2001 and 2002; Arlington Community Health Profile (dated July 2003); a summary of land use studies compiled by the National Law Center for Children and Families; and also on findings from the *Report of the Attorney General's Working Group On The Regulation Of Sexually Oriented Businesses* (June 6, 1989, State of Minnesota), and the study entitled *Survey of Texas Appraisers – Secondary Effects of Sexually-Oriented Businesses on Market Values* by Cooper and Kelley and *Crime-Related Secondary Effects – Secondary Effects of “Off-Site” Sexually-Oriented Businesses* by McCleary, June 2008, the Council finds:

1. Sexually Oriented Businesses lend themselves to ancillary unlawful and unhealthy activities that are presently uncontrolled by the operators of the establishments. Further, absent municipal regulation aimed at reducing adverse secondary effects there is no mechanism to make the owners of these establishments responsible for the activities that occur on their premises.
2. Certain employees of Sexually Oriented Businesses, defined in this Ordinance as Sexually Oriented Theater, Nude Model Business, Escort Agency, and Sexually Oriented Cabaret, engage in higher incidence of certain types of illicit sexual behavior than employees of other establishments.

## The ABC's of SOB's – Can we just skip to the actual legislative findings, please?

3. Sexual acts, including masturbation, prostitution, sexual contact, and oral and anal sex, occur at Sexually Oriented Businesses, especially those which provide private or semiprivate booths or cubicles, or rooms for viewing films, videos, or live sex shows.
4. Offering and providing private or semi-private areas in Sexually Oriented Businesses encourages such sexual activities, which creates unhealthy conditions.
5. Persons frequent certain Sexually Oriented Theaters, Sexually Oriented Arcades, and other Sexually Oriented Businesses for the purpose of engaging in sex within the premises of such Sexually Oriented Businesses.
6. At least 50 communicable diseases may be spread by activities occurring in Sexually Oriented Businesses, including, but not limited to, syphilis, gonorrhea, human immunodeficiency virus infection (HIV-AIDS), genital herpes, hepatitis B, Non A, Non B amebiasis, salmonella infections and shigella infections.
7. Since 1981 and to the present, there has been an increasing cumulative number of reported cases of AIDS (acquired immunodeficiency syndrome) caused by the human immunodeficiency virus (HIV) in the United States: 600 in 1982; 2,200 in 1983; 4,600 in 1984; 8,555 in 1985, and 253,448 through December 31, 1992.
8. As of December 31, 2001, there have been 57,199 reported cases of AIDS in the State of Texas.
9. Since the early 1980s and to the present, there has been an increasing cumulative number of persons testing positive for the HIV antibody test in Tarrant County, Texas and

## The ABC's of SOB's – Can we just skip to the actual legislative findings, please?

across the State of Texas.

10. The number of cases of early (less than one year) syphilis in the United States reported annually has risen, with 33,613 cases reported in 1982, and 45,200 through November, 1990. According to Texas Department of Health records there were 1,175 cases of early syphilis reported in the State of Texas during 2000 and an additional 972 cases reported in 2001.

11. The number of cases of gonorrhea in the United States reported annually remains at a high level, with over one-half million cases being reported in 1990. Again, according to Texas Department of Health records there were 32,895 cases of gonorrhea reported in the State of Texas during 2000 and an additional 30,116 cases reported in 2001. During the same time period there were also 138,692 cases of Chlamydia reported in the State of Texas. [Arlington Community Health Profile (dated July 2003)]

12. In his report of October 22, 1986, the Surgeon General of the United States has advised the American public that AIDS and HIV infection may be transmitted through sexual contact, intravenous drug abuse, exposure to infected blood and blood components, and from an infected mother to her newborn.

13. According to the best scientific evidence, AIDS and HIV infection, as well as syphilis and gonorrhea, are principally transmitted by sexual acts.

14. Sanitary conditions in some Sexually Oriented Businesses are unhealthy, in part, because the activities conducted there are unhealthy, and, in part, because of the

## The ABC's of SOB's – Can we just skip to the actual legislative findings, please?

unregulated nature of the activities and the failure of the owners and the operators of the facilities to self-regulate those activities and maintain those facilities.

15. Numerous studies and reports have determined that semen is found in the areas of Sexually Oriented Businesses where persons view "sexually oriented" films.

16. Sexually Oriented Businesses have operational characteristics which should be reasonably regulated in order to protect substantial governmental concerns.

17. A reasonable licensing procedure is an appropriate mechanism to place the burden of that reasonable regulation on the owners and the operators of the Sexually Oriented Businesses. Further, such a licensing procedure will place an incentive on the operators to see that the Sexually Oriented Business is run in a manner consistent with the health, safety, and welfare of its patrons and employees, as well as the citizens of the City. It is appropriate to require reasonable assurances that the licensee is the actual operator of the Sexually Oriented Business, fully in possession and control of the premises and activities occurring therein.

18. Removal of doors on booths and requiring sufficient lighting on premises with booths advances a substantial governmental interest in curbing the illegal and unsanitary sexual activity occurring in Sexually Oriented Theaters.

19. Requiring licensees of Sexually Oriented Businesses to keep information regarding current employees and certain past employees will help reduce the incidence of certain types of criminal behavior by facilitating the identification of potential witnesses or suspects and by

## The ABC's of SOB's – Can we just skip to the actual legislative findings, please?

preventing minors from working in such establishments.

20. The disclosure of certain information by those persons ultimately responsible for the day-to-day operation and maintenance of the Sexually Oriented Business, where such information is substantially related to the significant governmental interest in the operation of such uses, will aid in preventing the spread of sexually transmitted diseases.

21. In the prevention of the spread of communicable diseases, it is desirable to obtain a limited amount of information regarding certain employees who may engage in the conduct that this Ordinance is designed to prevent, or who are likely to be witnesses to such conduct.

22. The fact that an applicant for a Sexually Oriented Business license has been convicted of a sexually related crime leads to the rational assumption that the applicant may engage in that conduct in contravention of this Ordinance. There is a correlation between Sexually Oriented Businesses, specifically their hours of operation and the type of people which such businesses attract, and higher crime rates. [*Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002)].

23. The barring of such individuals from the management of Sexually Oriented Businesses for a period of years serves as a deterrent to, and prevents conduct which leads to, the transmission of sexually transmitted diseases.

24. It is reasonably believed that to better protect the public health, safety, and welfare, it is necessary to adopt additional amendments to this chapter.

25. It is reasonably believed that to prevent the exploitation of a loophole in the Ordinance (which would have permitted such businesses to avoid the location restrictions), partially

## The ABC's of SOB's – Can we just skip to the actual legislative findings, please?

nude performances in such businesses are also included within the purview of the regulations, since they have the same harmful secondary effects on the surrounding community as Sexually Oriented Businesses currently regulated under the Ordinance. [*Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002)].

26. There is no Constitutional right for Sexually Oriented Business employees in a state of nudity to touch customers. [*Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995)]

27. One court has characterized the acts of Sexually Oriented Business employees in a state of nudity and being paid to touch or be touched by customers as prostitution. [*People v. Hill*, 2002 Ill. App. LEXIS 792 (Ill. App. 2 Dist. Sep. 4, 2002); See also, Tex. Penal Code Sections 43.01 ("sexual conduct" and "sexual contact") and 43.02 ("prostitution")].

28. Attempts by the City of Arlington to require Sexually Oriented Businesses to advise customers and employees in a state of nudity to refrain from intentionally touching and fondling each other through signage posted at the business entrance have not been effective.

29. Sexually Oriented Businesses have not complied with the "no touch" provisions, but have flagrantly disregarded them and/or encouraged employees and customers to violate the "no touch" provision.

30. Provocative touching between customers and employees in a Sexually Oriented Business where at least one is in a state of nudity frequently leads to the commission of sex crimes, illegal drug use, and increased health risks due to sexually transmitted diseases.

31. Compelling signage at the entrances of Sexually Oriented Businesses has not been

## The ABC's of SOB's – Can we just skip to the actual legislative findings, please?

effective in halting "no touch" violations.

32. The City of Arlington has had to expend considerable law enforcement resources to enforce the "no touch" provisions.

33. The City Council reasonably believes that requiring employees in a state of nudity to be physically separated from customers by the use of elevated stages and buffer zones is necessary to better ensure ordinance compliance while still not inhibiting constitutionally protected expressive conduct or speech. [*LLEH, Inc. v. Wichita County, Texas*, 289 F.3d 358 (5th Cir. 2002)]

34. The City Council reasonably believes that sexual activity occurring in private viewing booths at sexually oriented businesses leads to unhealthy and unsanitary conditions and to the transmission of sexually transmitted and other communicable diseases. [*Matney v. County of Kenosha*, 86 F.3d 692, 695 (7th Cir. 1996)]

35. The City Council reasonably believes that certain negative secondary effects, including prostitution, drug trafficking and assaultive offenses are associated with nude or semi-nude dancing in environments where alcohol is served or allowed. [*J.L. Spoons, Inc. v. Dragani*, 538 F.3d 379, 382 (6th Cir. 2008)]

36. The City Council reasonably believes that the licensing and permit requirements imposed on Sexually Oriented Businesses that offer on-site entertainment comport with the *prompt judicial review* and *preservation of the status quo* requirements enunciated by the United States Supreme Court, and thus do not constitute an unconstitutional prior restraint. [*Richland Bookmart, Inc. v. Knox County, Tenn.*, 2009 FED App. 0052P (6th Cir. 2009)]

## The ABC's of SOB's – Can we just skip to the actual legislative findings, please?

37. The City Council reasonably believes that inadequately illuminated parking lots and parking lots that are not visible from the public right of way by virtue of being fenced or otherwise shielded from view present increased opportunities for criminal and sexual activity.

38. The City Council reasonably believes that video monitoring the parking lots of Sexually Oriented Businesses will deter individuals from engaging in criminal and sexual activity in the area being monitored and retaining recordings will assist law enforcement in criminal investigations should any crimes be committed in the area.

39. It is reasonably believed by the City Council that the general welfare, health, and safety of the citizens of the City will be promoted by the enactment of this Ordinance.

40. The findings noted in Subsections (1) through (40) raise substantial governmental concerns.

- Taken from ORDINANCE NO 2010-16 of the City of Boerne, Texas

- I might have had a small hand in drafting these findings. Just sayin'.

The ABC's of SOB's –  
Can we just forget about the legislative findings, please?

- \* That was rough. My apologies. Here's something to cheer you up. This is one of the clever ways SOBs have skirted regulations aimed at making topless dancers less topless.
- \* I'll warn you now, if you're easily offended, you may want to look away.
- \* Seriously.

The ABC's of SOB's –  
Is this almost over? Please?

- \* In short, you may have the most up to date, advanced SOB regulation on the books today.
- \* Give it five or ten years and the SOB industry will have figured out a way to skirt it.
- \* It's a multi-billion dollar industry and it isn't going away. So don't even try.

The ABC's of SOB's –  
Is this almost over? Please?

- \* Almost.
- \* The best you can do is to remind your city that while they can't bar the door on SOB's, they can enact meaningful time, place, manner restrictions that preserve neighborhood character, maintain property values, and disburse the negative secondary effects, so as to avoid neighborhood blight and increased crime.