

STAFF REPORT

January 3, 2003

Background

It has been over seven years since the City adopted its last comprehensive revisions to the adult business ordinance. This area of the law is in a constant state of flux. Hundreds of cases have been decided since 1995, and a split of authority on any given issue seems to be the norm rather than the exception. The reason for this may be the fact that the United States Supreme Court is itself divided on many of the issues (mostly involving the First Amendment) posed by adult business regulations. Each of the last four times that adult business regulations have been addressed by the Supreme Court, the result has been a plurality opinion with multiple concurring and dissenting opinions, meaning that a majority of the Court has failed to agree with the entirety of the reasoning for the outcome in those cases. This leaves the lower courts, local governments and adult businesses all in a quandary concerning the permissible scope of regulation.

What remains constant, however, is the First Amendment prohibition on "content based" regulations. The Constitution dictates that the City cannot regulate a business just because it is adult in nature. To do so would be violative of the First Amendment. The City may, however, enact an adult business ordinance that is content-neutral, narrowly tailored to serve a substantial governmental interest and that leaves open ample alternative channels for that communication. Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46-47 (1986). In an adult business context, the validity of an ordinance depends on the establishment by the City of a substantial governmental interest that is furthered by the proposed regulation. As this Governing Body has indicated in its review of past adult business regulations, this governmental interest is the City's interest in combating the harmful secondary effects associated with adult businesses in general. These secondary effects include, but are not limited to, increased crime, urban blight, and deterioration of property values.

The United States Supreme Court has indicated that the First Amendment does not require a city, before enacting a regulatory 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. Renton v. Playtime Theaters, 475 U.S. 41 (1986). The City may rely upon the experiences of other communities stated in studies or court decisions, demonstrating the harmful secondary effects correlated with the presence of sexually oriented entertainment establishments. Barnes v. Glen Theater, 115 L.Ed. 2d 504 (1991).

Earlier versions of the City's adult business ordinance were predicated upon testimony, case law and studies discussing the adverse secondary effects of adult businesses. In addition to the developing case law, new studies have been completed since 1995 concerning the secondary effects of adult businesses. Perhaps the most significant of these new studies for Overland Park is the study conducted in 1998 for the City of Kansas City, Missouri by Eric Damian Kelly, Ph.D., AICP, and Connie B. Cooper, AICP (the "Kelly & Cooper Study"). The Kelly & Cooper Study is of significance for Overland Park for several reasons. First, it is a study of adult businesses and their effects in the metropolitan area of which Overland Park is a part. Second, the Kelly & Cooper Study appears to be the first secondary effects study to focus on adult retail establishments (what they refer to as "sex shops") such as Priscilla's. During the City's litigation in 1994-1995 with Priscilla's (then known as "Christie's Toy Box"), the business made the argument that the City had no legal basis to regulate that type of business because none of the secondary effects studies relied upon at the time specifically dealt with retail businesses of that type where the "consumption" of the adult material was "off premises." This is still an issue in cases being litigated around the country. The conclusion of the Kelly & Cooper Study that these types of businesses do have adverse secondary effects will strengthen the City's legal position on this issue. Finally, the Kelly & Cooper Study recommends that adult "video viewing booths," which pose substantial public health risks, should be banned due to those health risks and the fact that the protected speech involved is adequately available in other venues that pose lesser risks.

In addition to the Kelly & Cooper Study, the Law Department has reviewed and made available for the Governing Body's review, other secondary effects studies that had not been previously considered. These other studies include the following:

- Summaries of Key Reports Concerning the Negative Effects of Sexually Oriented Businesses, Louis F. Comus III
- Nude Entertainment Study, Adams County, CO (1988)
- Adult Entertainment Study, Manatee County, FL (1987)
- Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses, State of Minnesota (1989)
- A Report Prepared by the City of Las Vegas, NV (1978)
- Adult Business Study, Ellicottville, NY (1998)
- Study & Recommendations for Adult Entertainment Businesses, Islip, NY (1980)
- Adult Entertainment Study, New York, NY (1994)

- Secondary Effects of the Concentration of Adult Use Establishments, Times Square, NY (1994)
- Regulation of Adult Entertainment Establishments, New Hanover County, NC (1989)
- Effects of Adult Entertainment Businesses on Residential Neighborhoods, El Paso, TX (1986)
- An Analysis of the Effects of Sexually Oriented Businesses on the Surrounding Neighborhoods, Dallas, TX (1997)
- Adult Use Study, Des Moines, WA (1984)
- Regulation of Adult Entertainment Establishments, St. Croix County, WI (1993)
- Location of Adult Entertainment Uses, Bellevue, WA (1988)
- Quality of Life: A look at Successful Abatement of Adult Oriented Business Nuisances in Oklahoma City, OK (1992)
- Report to: The American Center for Law and Justice on the Secondary Impacts of Sex Oriented Businesses (1996)

These studies reinforce the conclusions of the studies previously consulted that the adult businesses regulated by the City have adverse secondary effects on the community.

As indicated above, much of the activity regulated by adult business regulations is protected by the First Amendment. Among other requirements that must be met in order to satisfy the First Amendment, an adult business ordinance must not "unreasonably limit alternative avenues of communication." Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986). This requires that the ordinance allow sufficient locations for an adult business to operate. Unfortunately, the lower courts are divided over the practical application of this requirement, some focusing on the percentage of total land area in the city made available for adult uses, some on the percentage of commercially-zoned land area made available for adult uses, some on the discrete number of sites available, and others looking at factors such as the population of the community. Although the City has, in conjunction with prior amendments to the adult business ordinance, previously analyzed the locations within the City at which an adult business could locate, those prior analyses are not particularly relevant today because land use patterns in the City are constantly changing. To get an up to date estimate of areas available for adult businesses to locate, the Planning and Development Services Department has used its GIS capabilities to make some calculations. Those calculations

suggest that given the current separation requirements in the ordinance (an adult business may not be located within 600 feet of residential or certain other "protected uses," and may not be located within 500 feet of another adult business), approximately 1.5% of the total land area of the City, or approximately 27% of commercially-zoned land within the City, is available for adult uses¹. All of those areas are accessible by paved streets and have access to utilities. Further analysis by the Department of Planning and Development Services suggests that of these areas, at least 208 viable building sites would be available for an adult business to locate, notwithstanding the separation requirements, and a number of those building sites either currently have or could be constructed so as to offer multiple tenant spaces in which an adult business could locate². Although there is also case law that may support an opposite result, the better reasoned case law supports a conclusion that the ordinance leaves open ample available sites, particularly since there is only one grandfathered adult business presently located within the City (Priscilla's) and no other known adult business seeking to locate within the City. Therefore, at the present time, the Law Department does not recommend making any changes in the separation requirements in the current ordinance.

Recommended Changes

While many changes are made to the existing ordinance, most of those changes are minor. The more significant changes are summarized below.

Adult Media and Adult Media Outlets. A new definition is provided for "Adult Media," which also allows for the simplification of the definition of "Adult Media Outlet." A business constitutes an Adult Media Outlet if a "substantial or significant" part of its business is devoted to Adult Media. Under the existing ordinance, a business is presumed to be an Adult Media Outlet if fifty percent or more of its merchandise, sales, floor area, etc. consists of or is devoted to Adult Media. In the proposed ordinance, the percentages for the presumption are reduced to forty percent. The forty percent threshold is recommended in the Kelly & Cooper Study. In addition, at least one federal circuit court has held that where forty percent of a business' retail space was devoted

¹ The total land area of the City is approximately 39,559 acres. Of that total area, approximately 2,244 acres are zoned for commercial use. The "protected uses" and the buffer area associated therewith comprise 35,943 acres. After taking into account the buffer area associated with the "protected uses," 603 acres of land presently zoned for commercial use would be available for the location of an adult business.

² The Planning and Development Services Department's analysis is as follows. The 603 acres of land presently zoned for commercial use that would be available for the location of an adult business breaks down into 84 discrete areas of the City. Of those 84 areas, 21 areas, constituting approximately 22 acres, are not viable building sites due to the size, shape or topography of the site or the existence of site improvements preventing construction of a building on the site, e.g., a stormwater detention facility. A number of the remaining 63 areas of the City, constituting approximately 581 acres, are large enough to allow for multiple viable building sites within the area, thereby resulting in the estimate of 208 sites that either already have a commercial building constructed on them or, if undeveloped, are viable commercial building sites. Some of the 208 viable commercial building sites are large enough to encompass multiple tenant spaces. Once an adult business located in one of those 208 sites, the requirement of the ordinance that adult businesses be separated from one another by at least 500 feet would eliminate some of the remaining 207 sites.

to sexually oriented devices, it met the test for a "substantial or significant portion of its stock or trade." Mom N Pops, Inc. v. City of Charlotte, 162 F.3d 1155 (4th Cir. 1998) (unpublished opinion). Other circuit courts have upheld even lower percentages. See BZAPS, Inc. v. City of Mankato, 268 F.3d 603, 605 (8th Cir. 2001) (hereinafter referred to as "BZAPS") (ordinance defined an adult use establishment as one "having more than 10% of its stock in trade or floor area allocated to, or more than twenty percent (20%) of its gross receipts derived from, any adult use"); Allno Enterprises, Inc. v. Baltimore County, 10 Fed.Appx. 197, 2001 WL 589423 (4th. Cir. 2001) (unpublished opinion) (upholding ordinance applicable to businesses with twenty percent of their stock or floor space devoted to adult products); Artistic Entertainment, Inc. v. City of Warner Robbins, 223 F.3d 1306, 1310 (11th Cir. 2000) (business constituted adult entertainment business if more than twenty percent of the performances feature sexual content). New Section 5.05.190 in the proposed ordinance also follows the recommendations from the Kelly & Cooper Study relating to stores in which more than ten percent but less than forty percent of the merchandise, sales, floor area, etc. consists of or is devoted to Adult Media. Although not required to be licensed as an Adult Business, such stores would have to segregate the Adult Media into an area of the store to which minors would not have access.

Adult Retail Establishments. The Kelly & Cooper Study devotes particular attention to Adult Retail Establishments (what they refer to as "sex shops"), such as Priscilla's. The substantial revisions to the definition of Adult Retail Establishment contained in the proposed ordinance are largely based upon the recommendations of that study and the implementing ordinance adopted by Kansas City, Missouri. Under the Kansas City ordinance, a business constitutes a "sex shop" if: (1) it offers for sale items from any two of the following categories: adult media; sexually-oriented toys and novelties; lingerie; leather goods marketed or presented in a context to suggest their use for sadomasochistic practices; and the combination of such items constitutes more than ten percent of the stock in trade of the business or occupies more than ten percent of the gross floor area of the business; or (2) more than five percent of its stock in trade consists of sexually-oriented toys or novelties; or (3) more than five percent of its gross floor area is devoted to the display of sexually-oriented toys or novelties. The proposed ordinance borrows from the Kansas City ordinance in two significant respects. First, a definition of Sexually-Oriented Toys or Novelties is provided for the first time (although the definition is not the same as Kansas City's and incorporates certain criteria that were in the ordinance previously). Second, the proposed ordinance follows the Kansas City format for defining the business in terms of its product mix and by substantially lowering the percentages that satisfy the definition from the fifty percent threshold in the present ordinance to the ten percent/five percent model used by Kansas City. However, the first part of the definition involving a combination of different types of merchandise differs from the Kansas City definition in two respects. First, lingerie is eliminated due to the potential to engulf mainstream lingerie stores such as Victoria's Secret. More significantly, Adult Media is eliminated. Adult Media clearly enjoys First Amendment protection. The Kelly & Cooper Study suggests that stores selling or

renting Adult Media at less than the forty percent level do not pose the same adverse secondary effects as those stores selling more than the forty percent level. Therefore, we were concerned about the propriety of requiring a store that sells Adult Media at the ten percent level to be licensed as an Adult Business if it also sells only one other regulated item. On the other hand, the Kelly & Cooper Study also concludes that "sex shops" definitely have adverse secondary effects. Therefore, we recommend eliminating Adult Media (which has First Amendment protection) from the product mix in the Adult Retail Establishment definition, thereby leaving only merchandise which arguably enjoys no First Amendment protection.

Adult Entertainment Business definitions. The definitions of the various types of Adult Entertainment Businesses have been improved. The definition of Adult Motion Picture Theater has been modified to incorporate language that was upheld in Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471 (5th Cir. 2002) (hereinafter referred to as Baby Dolls). The definition of Adult Theater was modified to incorporate language from a model ordinance prepared for Lake County, Illinois that was disseminated at a 1999 conference of the International Municipal Lawyers Association (hereinafter referred to as the IMLA Model Ordinance). The definition of Adult Entertainment Cabaret was modified to incorporate language from the ordinance upheld in Baby Dolls, language from the IMLA Model Ordinance, and language from an ordinance that was upheld in DLS, Inc. v. City of Chattanooga, 107 F.3d 403 (6th Cir. 1997). With respect to Adult Entertainment Cabarets, the Baby Dolls decision is very significant. In the Starz 103 litigation in 1997, Starz 103 argued that the City's ordinance, which in effect required female entertainers to be clothed in at least a bikini, could not be supported by any secondary effects studies. Starz 103 eventually closed prior to an injunction hearing scheduled by the City, so we never obtained a judicial resolution of this issue. An identical challenge was made to Dallas' ordinance in Baby Dolls. The court of appeals held that even though the evidence does not connect the wearing of bikini tops to the reduction of secondary effects, "it was reasonable for the City to conclude that establishments featuring performers in attire more revealing than bikini tops pose the same types of problems associated with other [sexually-oriented businesses]." 295 F.3d at 482. The definition of Adult Entertainment Studio was amended to incorporate "body painting studio." The separate definitions of "Body Painting Studio" and "Adult Encounter Parlor" were eliminated as subsumed by the definition of Adult Entertainment Studio.

Non-application to mainstream artistic performances. Inevitably, adult business owners challenge adult business regulations as being unconstitutionally overbroad, i.e., as bringing within their sweep matters not intended to be covered and for which no adverse secondary effects can be demonstrated. The City faced such arguments in both the Christie's and Starz 103 litigation matters. Typical examples found in the case law include theatrical productions such as "Hair" or "Equus," which feature nudity, or mainstream movies that depict nudity or sex. Some courts have rejected the overbreadth argument by reference to language in the definitions similar to that in the current Overland Park ordinance that requires that the Adult Entertainment be a

"regular and substantial" portion of the business. See Baby Dolls, 295 F.3d at 482-483. Other courts, however, have refused to apply a limiting construction in the absence of a clear indication of intent to do so on the part of the legislative body adopting the regulations. See Giovani Carandola Limited v. Bason, 303 F.3d 507 (4th Cir. 2002) (hereinafter referred to as Bason). In Bason, the court struck down a North Carolina statute and an implementing administrative regulation prohibiting sexually-oriented dancing in establishments licensed by the North Carolina Alcoholic Beverage Control Commission. The court found that the restrictions would "burden a multitude of mainstream musical, theatrical, and dance productions" and that a limiting construction of the restrictions was not available. 303 F.3d at 517. The court specifically noted the absence of language intended to exclude application to such mainstream productions similar to that at issue in Farkas v. Miller, 151 F.3d 900 (8th Cir. 1998) (hereinafter referred to as Farkas) and J&B Entertainment, Inc. v. City of Jackson, 152 f.3d 362 (5th Cir. 1998). Id. Although the Law Department still believes that the existing language requiring Adult Entertainment to be a "regular and substantial" portion of the business insulates the ordinance from an overbreadth challenge, out of an abundance of caution, the proposed new subsection A.4 of Section 5.05.010 incorporates the language from the Iowa public nudity law upheld in Farkas.

Adult Media Viewing Booths. The Kelly & Cooper Study found "video viewing booths" (also known by other names, such as "peep shows") to be a particularly dangerous type of adult business from a public health standpoint. Given the "ready availability of big-screen adult theatres and rental and purchase videos in Kansas City, we strongly recommend that the city ban video viewing booths, regardless of content, in the future." Kelly & Cooper Study, Final Report, p. 39. The justification for banning adult video viewing booths is that it is not the First Amendment-protected speech that is being banned, but the venue, i.e., a closed booth. The same movie is available for viewing in other places such as an Adult Motion Picture Theater or through purchase or rental in an Adult Media Outlet. The proposed ordinance implements the Kelly & Cooper Study recommendation by defining Adult Media Viewing Booth as a booth containing less than 150 square feet of gross floor area and prohibiting such booths in subsection K of Section 5.05.080. The other new language in that subsection is patterned after an ordinance upheld in TK's Video, Inc. v. Denton County, 24 F.3d 705 (5th Cir. 1994).

Specified Criminal Acts. The ordinance has always made persons ineligible to obtain an adult business license or an adult business manager's, server's or entertainer's license if they have been recently convicted of certain crimes, primarily involving sex offenses or drugs. Such provisions, sometimes referred to as "civil disabilities" provisions, "serve to weed out those applicants most likely to engage in the type of criminal behavior that the Ordinance seeks to redress by temporarily disqualifying those who have recently committed such acts from working for sexually oriented establishments, or alternatively, from declaring any sexually oriented establishment closely associated with such an individual ineligible to operate." Déjà Vu of Nashville, Inc. v. Metropolitan Government, 274 F.3d 377, 392 (6th Cir. 2001) (hereinafter referred to as Déjà Vu). Previously, the

ordinance was not specific about the crimes that would create such civil disabilities. The new definition of Specified Criminal Acts in subsection R of Section 5.05.010 is patterned after a definition in the IMLA Model Ordinance, although tailored to the Kansas Criminal Code. Subparagraph 11 also provides for the City Attorney to issue an interpretive ruling when dealing with crimes from another state that may be similar to Kansas crimes but go by a different name. The courts will give deference to administrative interpretations of an agency enforcing adult business regulations. See Baby Dolls, 295 F.3d at 483.

Separation between Adult Businesses. The Supreme Court's most recent decision involving adult business regulations involved a prohibition on more than one adult business being located in the same building. See City of Los Angeles v. Alameda Books, Inc., ___ U.S. ___, 122 S.Ct. 2585 (2002). The ordinance currently requires a separate license for each Adult Business, and requires a 500-foot separation between Adult Businesses. The combination of these provisions should effectively prevent more than one Adult Business from locating in a given building. Nevertheless, the new language in Section 5.05.045 is patterned after the Los Angeles ordinance and is designed to make it absolutely clear that no more than one Adult Business is permitted in a building. In addition, subsection A.2 of Section 5.05.070 has been revised to prohibit the establishment of a new Adult Business within 500 feet of another business that meets the definition of "Adult Business" whether or not that business is licensed by the City at the time of the proposed Adult Business' application and whether or not that business is located within Overland Park. Therefore, in reviewing the application of the proposed Adult Business, the City would take into consideration the presence within 500 feet of a business meeting the definition of "Adult Business" that (i) has previously submitted its own Adult Business application and is scheduled to obtain its license prior to the time that the applicant's license would be approved³, (ii) is not presently licensed because grandfathered from the requirement to obtain a license⁴, (ii) is not licensed even though required to obtain a license under the ordinance, or (iv) is located in another city.

Ban on alcohol. The Supreme Court's decision in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) called into question the continuing precedential value of the Court's earlier decision in California v. LaRue, 409 U.S. 109 (1972), which upheld the constitutionality of a California law prohibiting certain adult activities in establishments with liquor licenses. The LaRue decision was predicated upon the Twenty-First Amendment. The Tenth Circuit has previously upheld Johnson County's resolution regulating adult entertainment in establishments serving liquor, but the analysis in that decision followed that of LaRue and was based upon the authority of the Twenty-First Amendment. See Dodger's Bar & Grill, Inc. v. Board of County Commissioners, 32 F.3d

³ The business submitting the first application should be given priority.

⁴ As a part of the settlement of the Christie's litigation, the business now known as Priscilla's located at 7125 W. 75th Street is exempted from the requirement to obtain an adult business license so long as that business continues to operate as an "adult retail establishment" within the meaning of Ordinance No. AEB-1846.

1436 (10th Cir. 1994). Nevertheless, 44 Liquormart should not be viewed as standing for the proposition that adult entertainment cannot be banned in establishments serving liquor. Rather, it should be seen only as imposing a requirement that an adult business regulatory scheme be justified under First Amendment analysis. If an adult business regulation satisfies the First Amendment, then the Twenty-First Amendment should provide ample justification for regulating sale or consumption of alcoholic beverages in adult businesses. This rationale has recently been confirmed by two circuit courts. See BZAPS; Wise Enterprises, Inc. v. Unified Government, 217 F.3d 1360 (11th Cir. 2000). A few of the secondary effects studies suggest that the combination of alcohol and adult businesses exacerbates the negative secondary effects.⁵ Subsection F of Section 5.05.080 prohibits the sale or consumption of alcoholic liquor or cereal malt beverages in an Adult Business.

No touch/buffer zone. Ordinances regulating adult entertainment frequently prohibit customers from touching entertainers while they are performing; that prohibition is often reinforced by requirements that the entertainer perform on a stage and that a buffer zone separate the stage from the customers. The current ordinance incorporates these features. Nevertheless, the Law Department believes that the current provisions can be strengthened by adoption of more specific language that has previously been upheld by the courts. To that end, the proposed revisions in subsection H of Section 5.05.080 are patterned after ordinance provisions that have been upheld by the circuit courts in Déjà Vu and LLEH, Inc. v. Wichita County, 289 F.3d 358 (5th Cir. 2002).

⁵ Report to the American Center for Law and Justice on Secondary Impacts of Sex Oriented Businesses, Peter R. Hecht, Ph.D, March 31, 1996
Adult Entertainment, St. Paul, Minnesota (1988)