

Sex, Sex and More Sex

Suggested Outline/Content for 3/14/16 IMLA Webinar

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Opening Question: What do cities need to be aware of when they regulate sexually-oriented businesses (SOBs)?

1. Choosing what to regulate: location alone through zoning or also operation through licensing.
2. How to establish a legal and factual basis for their regulations.
3. Drafting regulations identifying and defining sexually-oriented businesses.
4. For zoning: determining where SOBs should be allowed and whether the locations provide a reasonable opportunity for SOBs to open and operate.
5. For licensing: What should licensing address and how should it address it?

- 1. Choosing what to regulate: location alone through zoning or also operation through licensing.**
- 2. How to establish a legal and factual basis for their regulations.**

Government may single out SOBs for special restrictions *only* if it can show:

1. a substantial public interest in regulating such businesses unrelated to the suppression of speech
2. the regulations allow for “reasonable alternative avenues of communication.”

Q: What is “a substantial public interest unrelated to suppression of speech?”

A: Prevention of “negative secondary effects.”

- Crime: criminal activity on/off the premises of the SOB; *e.g.*,: assault, rape, drugs.
- Prostitution or other illicit sexual activity: may occur on/off the premises by SOB employees or patrons; *e.g.*,: oral sex in car parked near-by or illegal lap dances.
- Property blight and deterioration: decrease in property values and increase in vacant/abandoned buildings.in area surrounding SOB.

Q. What do courts mean by the “Secondary Effects Doctrine?”

A. It’s a legal concept that says cities are allowed to identify SOBs by the content of their expression, but they can only regulate SOBs because of their association with negative secondary effects, *not* because of distaste for the content of their expression.

The secondary effects doctrine allows courts to view regulation of SOBs as content-neutral and thus apply intermediate scrutiny, not strict scrutiny, when reviewing local government regulation of SOBs.

To take advantage of the secondary effects doctrine, a city has to demonstrate that it has a reasonable belief that SOBs are associated with negative secondary effects and that reducing the likelihood that such secondary effects will occur is the reason for the regulation.

City of Renton v. Playtime Theatres, Inc. 475 U.S. 41 (1986)

- Cities don’t have to prove the existence of “negative secondary effects.”
- Cities may rely on the experience of other communities.

Q. Ideally, what should a city do?

- Obtain and distribute copies of “studies” (etc.) to city council for review.
- Create a record showing that council members “considered” studies (etc.) before enactment and based enactment on them.
- “Etc”: anecdotal evidence (public, police, SOB employees), expert testimony, court rulings, *your own study*

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002)

- Reaffirmed *Renton*'s substantial deference review for legislation.
- **But** opened door to P's evidence or argument that refutes the city's "rationale" ... thereby *shifting evidentiary burden* back to city.

Justice O'Connor

Burden shifts back to city if P can "cast direct doubt" on city's "rationale" by:

- showing that the city's evidence doesn't support its rationale, or
- furnishing evidence that disputes the city's factual findings

Justice Kennedy

"Rationale" must suppress secondary effects, not speech.

SOBs use *Alameda*, plus experts, to attack validity of studies.

1. Not "scientifically valid."
2. Don't evaluate specific type of SOB (e.g., "take-out" businesses) or specific type of community (e.g., rural vs. urban).
3. Their experts' studies refute those relied on by city.

Not "scientifically valid"

- Try to convince court city's evidence must meet *Daubert* standards.
- Try to convince court city's evidence must meet experts' "rules."

Courts have mostly rejected these claims.

Don't evaluate specific type of SOB

- Argue that "take-out" businesses are different re: secondary effects ... and ... city's studies don't address "take-out" businesses; e.g., *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003).

Don't evaluate type of community

- Argue a rural area is relying on studies that were exclusively from urban communities ... so . . . studies relied on don't support a reasonable belief that problems would be the same; e.g., *Abilene Retail #30, Inc. v. Board of Commissions of Dickinson County*, 492 F.3d 1164 (10th Cir. 2007)

My colleague Dick McCleary and I addressed these claims in our law review article: *The Association of Adult Businesses With Secondary Effects: Legal Doctrine, Social Theory, and Empirical Evidence*, 29 CARDOZO A&E L. REV. 565 (2011).

Their experts' studies refute the studies relied on by city

- Prof. Daniel Linz and colleagues for crime data
- R. Bruce McLaughlin for evidence of neighborhood deterioration

If this happens, city should strongly consider retaining its own experts.

3. Drafting regulations defining and identifying SOBs.

Definitional issues arise in two ways: (1) a definition may be challenged as unconstitutionally vague or overbroad if it sweeps non-adult protected speech within its regulatory ambit and (2) an overly broad definition of what constitutes an SOB may undercut the “secondary effects” rationale that sustains the regulation; *i.e.*, if the definition of an SOB is so broad that it may also be applied to so-called “mainstream”(non-“adult”) businesses, the regulation will fail to substantially advance the only lawfully permissible goal of such an ordinance, to control negative secondary effects.

The definition of an SOB must have two components: (1) a qualitative element that defines what constitutes adult “material” or an adult “performance” and (2) a quantitative element that defines how much of the adult material is needed to classify a particular business as “adult.”

It is also good practice to “identify” different types of SOBs; *e.g.*, adult cabarets, adult media stores, adult theatres.

Qualitative Element

Most adult entertainment ordinances use a similar two-part approach to defining the qualitative element for what constitutes adult material or an adult performance. The first part defines certain “specified anatomical areas” and the second defines certain “specified sexual activities.” These terms were implicitly approved by the Supreme Court in *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976) and again in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

- “Specified sexual activities” are: (i) human genitals in a state of sexual stimulation or arousal; (ii) actual or simulated acts of human masturbation, sexual intercourse or sodomy; or (iii) fondling or other erotic touching of human genitals, pubic region, buttock, anus or female breast.

- “Specified anatomical areas” are: (i) less than completely and opaquely concealed: (a) human genitals, pubic region, (b) human buttock, anus, or (c) female breast below a point immediately above the top of the areola; or (ii) human male genitals in a discernibly turgid state, even if completely and opaquely concealed.

To avoid overbreadth claims and the possibility of including mainstream venues in the SOB definition, this two-part definition should be prefaced by terms such as “regularly features” and/or “characterized by an emphasis on.”

Quantitative Element

Text definition vs. percentage definition.

Text definition uses terms such as: “substantial or significant portion of its stock in trade” or “one of the principal business purposes” to determine when a particular business may be regulated as an SOB. Courts have generally upheld these provisions.

Percentage definitions – *e.g.*, at least 40% of material offered for sale -- appear to add certainty, but are often problematic. First, SOB operators will evade percentage by filling shelves with non-adult junk such as out-of-date paperback books and Beta-format videotapes. Second, if the percentage is too low, then it will sweep-in mainstream businesses which creates an overbreadth issue.

Q. What about massage parlors that are fronts for prostitution? Are they SOBs?

A. No. They are not engaging in any expressive activity, so they should not be dealt with the same way as SOBs that are protected under the first amendment. If they are engaging in prostitution, they should be prosecuted criminally and shut-down.

4. Determining where SOBs should be allowed and whether the locations provide a reasonable opportunity for SOBs to open and operate.

“Reasonable Alternative Avenues of Communication” Test

Zoning regulations for SOBs must allow for “reasonable alternative avenues of communication.” This means that government must demonstrate there is a reasonable opportunity for SOBs to locate in a particular community.

What Does Reasonable Opportunity to Locate Mean ?

- Are there an “adequate” number of “potential sites” for SOBs within the “relevant local real estate market.”
- Must consider physical, legal and economic factors to define the “relevant real estate market.”
- No need to consider "commercial viability" for particular sites within the “relevant real estate market.”

What Are “Physical, Legal and Economic Factors” ?

Refers to locations that present insuperable physical, legal or economic barriers to development or operation. For example, sites that:

- are “unbuildable” (steep slope, etc.)
- lack access to streets, utilities, etc.
- have excessive minimum lot requirements, no parking, etc.
- are effectively not for sale/lease

You need to ask: Is it unreasonable to believe the sites will ever be available to a commercial enterprise?

- Are they reasonably accessible to the public?
- Do they have a proper infrastructure of sidewalks, roads and lighting?
- Are the sites reasonable for some commercial enterprise (not necessarily for an SOB)?

How Does “Commercial Viability” Differ?

It doesn't matter if: (1) potentially “available” sites are not those preferred by the SOB operator or (2) the commercial success of an SOB at these sites would be questionable.

What should you do to zone for SOBs?

- Choose whether you want to disperse or concentrate locations ... almost all cities choose dispersion.
- Disperse from what? Most cities choose dispersion between SOBs and from SOBs to: residential districts plus schools, churches, libraries, museums, parks and playgrounds.

- If you already have SOBs, identify locations and check the effect of various separation distances on creating non-conformities and providing locations for new and relocated SOBs.
- If no current SOBs, check the effect of various separation distances on providing locations for new and relocated SOBs.

Minimum Number of Sites Needed?

- No one measurement or ratio or approach will yield a “magic number” defining how many sites are needed to pass judicial scrutiny.
- The legal analysis is fact-dependent and the number of “required” sites can vary from township to township.
- The cases provide no clear guide to the minimum number of potential sites that are needed to survive a legal challenge.
- But the better choice is to err on the side of more, rather than fewer, potential sites.
- The risk in having “too many” potential sites is that a site you’ve chosen might become home to an SOB.
- The risk in having “too few” potential sites is that an SOB will begin operating where it wants to and your ordinance will be declared unconstitutional and unenforceable.
 - We can briefly discuss amortization re: SOBs here.

What’s the Relevant Jurisdiction?

- In almost all cases it’s the political subdivision. Briefly discuss *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981).
- Some courts have questioned *Schad* recently.
 - *Illinois One News, Inc. v. City of Marshall, Illinois*, 477 F.3d 461 (7th Cir. 2007)(Chief Judge Easterbrook argued, on constitutional grounds, that town A might not have to provide land for SOBs if there are lots of existing SOBS in surrounding towns).
 - *Tollis, Inc. v. County of San Diego*, 505 F.3d 935 (9th Cir. 2007)(noting that counties could be treated differently when most of the commercially-zoned areas— where existing SOBs are located -- are within incorporated cities and thus outside the county’s jurisdiction).
 - PLUS ... New Jersey Supreme Court approved a “regional market” approach that extends beyond the political boundary of a single jurisdiction; *see*

Township of Saddle Brook v. A.B. Family Center, Inc., 156 N.J. 587, 722 A.2d 530 (1999) and in 2012 ruled that the region could extend into neighboring communities in another state, *see Borough of Sayreville v. 35 Club, L.L.C.*, 208 N.J. 491, 33 A.2d 1200 (2012).

5. Should a city also regulate the operation of SOBs through licensing?

Short answer is Yes. It allows a city to address operational aspects that are most likely to be associated with negative secondary effects.

Examples of licensing provisions that do that include:

- Prohibiting physical contact between patrons and performers or achieving that by requiring minimal distances be maintained between patrons and performers
- Requiring specified minimum lighting levels
- Providing for criminal background checks for owners/operators ... but only for crimes closely associated with relevant negative secondary effects; for example, conviction for soliciting prostitution would be disqualifying but a conviction for auto-theft would not

Dan/Dwight: I could do more with licensing but that would require cutting back on the zoning discussion, so let me know what you think about that.