



A Primer on Zoning and Licensing of Sexually Oriented Businesses

By Pat Trueman

Sexually oriented businesses, commonly referred to as SOBs, are rapidly proliferating throughout America. There are many reasons for this, high profit, lax law enforcement, low skill level needed for management and employees, etc. But, there is one predominant reason for the proliferation. It is the green light given SOBs by counties and communities throughout America. That green light is the lack of proper zoning and licensing requirements for such businesses.

SOBs are popping up in small and large towns, rural areas, poor neighborhoods and upper-class neighborhoods, in communities near interstate highways as well as seemingly out of the way areas. They are indiscriminate. With them comes a raft of problems.

A typical sexually oriented "bookstore" contains private viewing rooms, or "peepshow" booths, where patrons engage in masturbation or promiscuous and unsafe sex acts with prostitutes or other patrons; the booths are covered with bodily fluids and sometime have openings between them to allow anonymous acts of oral and anal intercourse. In nude dancing establishments, patrons and dancers often engage in public sexual contact. Private dances are opportunities for acts of prostitution. With the arrival of SOBs, HIV-AIDs and other sexually transmitted diseases soon flourish within the communities. Sexual assault, rape, and even child prostitution spread. Illicit drug sellers find a home in and near such businesses. In short, SOBs are health hazards and crime magnets. They can overwhelm local law enforcement agencies. In addition, the neighborhoods or business districts surrounding sex businesses become blighted and suffer declines in property values.

The problems associated with sexually oriented businesses, both inside and outside the establishments, are universal. They are referred to as the "negative secondary effects" of SOBs. Yet, all SOB owners/promoters claim that their business will "be different" and that they will run a "clean business" when seeking new locations. They promise an increase to the tax base, increased employment and many other benefits. However, the facts are against them. Numerous communities have conducted impact studies of SOBs. They demonstrate that SOBs deplete, not increase, community resources. They attract troublesome clients and problem employees. They are bad for nearby businesses, churches, schools and residences.

Despite the many problems that SOBs bring, they do have a measure of First Amendment protection. The U.S. Supreme Court has indicated that pornographic

materials are “presumptively protected” by the U.S. Constitution. The status of the material changes after a court determination that, for example, it is child pornography or obscenity (hardcore adult pornography). Until that determination is made, a business selling pornographic materials may not be closed on the notion that it does not fit into the community or that it must be operating illegally. Nor may strip clubs be shuttered on similar claims or that such businesses, are “not allowed” under general zoning ordinances, or have no constitutional protection.

Though SOBs have some First Amendment protection, county and town councils can AND SHOULD use zoning and licensing authority to control their negative secondary effects. SOBs can, in fact be regulated in a more stringent fashion than other types of businesses that have no First Amendment protection. However, caution should be observed in regulating to avoid constitutional defects. The best course to follow is to adhere closely to the guidelines laid down by the Supreme Court and other courts for enacting constitutional “time, place and manner restrictions” on SOBs. These restrictions must be “content-neutral.” This means that they may not be directed at suppressing speech because of its content but rather they must be intended to prevent the negative secondary effects of such businesses only. See, e.g., *Young v. American Mini Theatres*, 427 U.S. 50, (1976) 84. So long as the intent is to protect neighborhoods, keep crime down, and preserve property values, and so long as the community still allows the pornographic (non-illegal) speech to occur (subject to certain regulations), communities may regulate SOBs. On the contrary, laws that regulate or prohibit speech based on content rather than its negative effects are unconstitutional because they serve as impermissible prior restraints on speech. Content-based regulations are presumptively invalid.

It is important to note that the Supreme Court in *Young* gave local governments permission to "experiment with solutions to admittedly serious problems," by creating new regulatory schemes to protect their neighborhoods. These "experiments" have been the subject of much litigation. Case law now provides communities with a good road map to enact restrictions that will be upheld as constitutional and which will be particularly effective in protecting against negative secondary effects. Banning SOBs, however, is not permitted.

In voting to uphold the SOB zoning ordinance in *Young* prohibiting operation of any “adult” movie theater, bookstore and similar establishments within 1000 feet of any other such establishment, or within 500 feet of a residential area, Justice Stevens said he was willing to do so because it was not an absolute ban on such businesses. He said that, “[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech.” *Young* at 71, n.35. This quote and similar ones by other Justices in cases following, has been cited for the principal that zoning authorities may not preclude sexually oriented businesses from opening shop in communities. Nor may they be “effectively precluded” by zoning authorities through “buffer zones” that are so large that no such business could operate within the town or county.

Ten years after *Young*, the Supreme Court faced a similar issue in the case of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Once again, the Court upheld the constitutionality of a city's zoning ordinance against a First Amendment challenge. Relying on the *Young* precedent, the Supreme Court held that the City of Renton's ordinance "does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single or multiple family dwelling, church, park or school. The ordinance is therefore properly analyzed as a form of time, place, and manner regulation." *City of Renton* at 46.

Relying on the district court's determination that the "predominate" intent of the city was to protect against "the secondary effects of such theaters on the surrounding community," the Court concluded, "The city's pursuit of its zoning interest here was unrelated to the suppression of free expression." 475 U.S. at 48. "In short, the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are justified without reference to the content of the regulated speech.'" 475 U.S. at 48 [quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)].

More recently, upholding a ban on nude dancing and utilizing a content-neutral analysis in *City of Erie v. Pap's A.M. TDA "Kandyland"*, 529 U.S. 277, 293-96 (2000), the Court found that: "[The] State's interest in preventing harmful secondary effects [such as crime and other deleterious effects] is not related to the suppression of expression..." Here, Erie's ordinance is on its face a content-neutral restriction on conduct. Even if the city thought that nude dancing at clubs like Kandyland constituted a particularly problematic instance of public nudity, the regulation is still properly evaluated as a content neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing. We conclude that Erie's asserted interest in combating the negative secondary effects associated with adult entertainment establishment like Kandyland is unrelated to the suppression of the erotic message conveyed by nude dancing."

In navigating First amendment waters in *Young* and *Renton*, a four-part test established in *United States v. O'Brien*, 391 U.S. 367 (1968) was used to judge the regulations involved. See *Renton*, 475 U.S. at 45; *Young*, 427 U.S. at 79 (Powell, J., concurring). Under the *O'Brien* test, a regulation is justified despite its impact on First Amendment interests "[1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on ... First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. Incidental burdens on free expression may be analyzed under this test as time, place, and manner regulations. *Renton*, 475 U.S. at 45.

Several important goals will be met in establishing constitutional zoning and licensing regulations. They will, for example, strictly limit the areas of location of SOBs, away from schools, playgrounds, churches, and most businesses; help screen out unsavory characters and criminals who would own, operate or work in an SOB and thus threaten

the community; assist law enforcement in maintaining order at SOBs by allowing inspections during all hours of operation; prohibit sexual conduct on or near the premises; limit the hours of SOBs by prohibiting operations between late night or early morning hours when crime is most likely; enact detailed health and safety regulations for sexually explicit film booths; prohibit full nudity; closely regulate semi-nude performances and conduct; and enact anti-loitering, lighting requirements, and sign posting of all regulations.

The Alliance Defense Fund has been involved in aiding many communities draft zoning and licensing requirements so that they will not face invasions from SOBs unarmed and unprepared. The frequent refrain of public officials, "We never thought they'd come here," should not be heard in your community. If sex businesses have not arrived in your community yet, the risk is that they will. To preserve its character, health and values, the community should be pro-active, rather than reactive. Please be prepared.

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