

SUMMARY

Regulating Sexually Oriented Businesses

Regulation of sexually oriented businesses became one of the more challenging tasks faced by Toledo, as a balance is required between the concerns of the citizens and the rights of the sexually oriented businesses and their customers to operate within the City of Toledo.

This issue was brought to the forefront with the opening of Priscilla's, a "sex shop," selling racy lingerie, sex toys and gag gifts across the street from an all girls Catholic High School. The City initially allowed the store to open and then after a number of citizen protests attempted to close it because it was located within 500 feet of a school and a church in what the City claimed was a violation of a City zoning ordinance. Priscilla's filed litigation and the City allowed the store to remain open. Citizens believed the City was regulating the locations of these businesses.

In actuality, the City had not been attentive to the issues involving sexually oriented businesses. They had been attempting to regulate these businesses through the use of zoning, which was a good tool for dealing with the issues of location but a poor tool for dealing with the actual operation of the business. The City needed to develop regulations on the adult entertainment industry that were clearer, more effective and more easily enforced.

It was clear to the City that the regulation of sexually oriented businesses was going to be a challenging task. The concerns of the community and the First Amendment rights of the business and their customers had to be balanced. The City realized they would be in a better legal position if they conducted their own study of the problem instead of relying on the studies conducted in other communities. Therefore, the City decided to hire a nationally known consulting firm of Duncan and Associates to assist with the study.

A review of existing zoning and licensing ordinances as well as state statutes and previous and on going litigation was conducted. Crime reports were reviewed to better understand the types of complainants' occurring at these establishments. On site visits at each establishment were also conducted. A public hearing was also held where citizens talked about the adverse effect on the quality of life in their neighborhoods.

Based upon all the information gathered, several City Ordinances were repealed and new ones enacted to establish reasonable and uniform regulations regarding sexually oriented businesses.

Description

SCANNING

The regulation of sexually oriented businesses has become one of the more challenging tasks facing communities today. There needs to be a balance between the concerns of the citizens and the rights of the sexually oriented businesses and their customers to operate in the City.

The issue that brought the sexually oriented business to the forefront in Toledo was the opening of Priscilla's, a "sex shop" located opposite the Notre Dame Academy, an all girls' Catholic high school. This store sells racy lingerie, sex toys, gag gifts, adult videos and magazines. The City allowed the store to open, but then after a public outcry attempted to close it based upon its location in the immediate proximity of a school and church. Priscilla's threatened litigation and the City allowed the store to remain open despite the zoning violation. It became quite clear to the community that the City had not been very attentive to the issues surrounding sexually oriented businesses and its duty to regulate them.

A review of these businesses by the Planning Commission revealed three adult clubs had permits to operate as a bar, but were passively allowed, with the City's knowledge, but not official approval, to feature sexually oriented entertainment. Two of the establishments were located too close to residential areas and one was in the wrong zoning district for adult entertainment.

Neighbors were also complaining of the noise coming from the live entertainment until the early morning hours. Others complained of seeing prostitutes walking in the area, though they may not have been associated with any business. There were

complaints of finding used condoms and viewing booth tokens in the neighborhoods. Additionally residents were also concerned about the reduction of property values with an adult entertainment venue located in the neighborhood.

Neighborhood complaints were being addressed on an ad hoc basis. The police department would receive a complaint and dispatch a crew. There was no coordinated effort to solve the problem. Occasionally the Vice squad would make an arrest.

ANALYSIS

The City Law Department, Zoning Commission, Police Department and City Council members began to examine what other cities have done to address the problem but soon realized they would be in a better legal position if they conducted their own study regarding sexually oriented businesses instead of relying on one completed for another community. City Council authorized \$19,500 for a consultant to provide a fresh and objective look at the sexually oriented businesses and to assist in developing a comprehensive set of recommendations balancing the concerns of the citizens with the rights of the businesses. The City needed regulations that were clear, more effective and easily enforced.

A committee was formed consisting of representatives from City Council, the Zoning Commission, the Toledo-Lucas County Planning Commission, the Law Department and the Police Department to assist the consultant in the study. A review of existing zoning and licensing ordinances as well as state statutes and previous case law was conducted. Zoning ordinances were reviewed by examining the provisions that directly affect sexually oriented businesses and the zoning characteristics of non-residential areas that may provide appropriate locations for these businesses.

Twenty-five sexually oriented businesses were identified in Toledo and were separated into the following categories: Adult cabarets (5), Adult Theater (1), Adult Book Stores (7), Contact / Encounter Business (6), Sex Shop (1), Byrne Road "strip mall" (5)

Crime reports at these identified sexually oriented businesses were reviewed for the preceding two years to assist in understanding the types of complaints that these establishments were generating. A total of 338 police reports had been taken at 25 separate locations. Forty percent of these reports were at the Byrne Road 'strip mall,' a shopping plaza that contains four different types of sexually oriented businesses: a sex shop, adult cabaret, adult bookstore and a massage parlor.

Of the 338 of reports, 104 were for crimes of violence, 65 involved vehicles, 14 involved sex crimes, 10 involved public indecency, 57 involved a theft offense, 6 involved narcotics complaints, and 82 were miscellaneous reports.

With the exception of massage parlors, site visits were conducted at each of the identified sexually oriented businesses within Toledo.

The committee looked at two types of data. First were the secondary effects of the business on the surrounding neighborhood. A basic principal of First Amendment law is that protected speech may not be restricted because of its content, but speech can be restricted to reduce the "secondary effects" of the business on the surrounding neighborhood.¹

Secondly, activities were examined that concerned residents but are not protected by the First Amendment. For example, what a newspaper prints is protected by the First Amendment. However, the location of the building in which it is printed is subject to

¹ Playtime Theatres, Inc. v. City of Renton, 475 U.S. 41, 106 S. Ct. 925, 89 L.Ed 2d 29 (1986)

zoning laws. The First Amendment protects the dancers on stage as a form of expression but it does not protect activities such as lap dancing which constitutes interaction between dancers and the public.

The most common secondary effect occurs when the business is located close to a residential area or an area where families frequent. People unwittingly come into contact with the business when used condoms and tokens for viewing booths in their neighborhoods are found. Children finding these items are of particular concern.

It was discovered that one of the adult cabarets was providing transportation for male patrons to a nearby home rented by a dancer from the club. Further investigation yielded enough information for a search warrant to be issued resulting in the subsequent seizure of narcotics. The owner of the residence was notified and the tenant was evicted.

A citywide meeting was organized by the committee for citizens to express their concerns regarding issues related to sexually oriented businesses. The most prominent concerns were the concentration of sexually oriented businesses - especially those with live entertainment - within North Toledo neighborhoods and the negative effect on "legitimate business" when a sexually oriented business moves into a shopping plaza.

Others complained of the noise generated by the live entertainment businesses that stretched into the early morning hours on weekends. One resident expressed concern of children seeing scantily dressed dancers taking breaks behind a club abutting a residential area.

RESPONSE

From the site visits, discussions with businesses and residents, and a review and analysis of litigation and judicial decisions in this city and others, the committee decided

to repeal current ordinances and implement new ones. It was not the intent of these ordinances to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Nor did the City with these ordinances condone or legitimize the viewing and distribution of obscene material. The requirements set forth in these new ordinances did not "grandfather" existing businesses.

Chapter 767 entitled Sexually Oriented Businesses was enacted. The first part of the ordinance set forth definitions of terms (which had previously never been defined) such as, sexually oriented business, adult media, adult media store, booth, entertainer, gross public floor area, hard core material, lingerie modeling or photography studio, massage, nude, semi nude, sex shop, sexual encounter center, sexually oriented cabaret, cinema and theater and specified sexual activities. The second part of the ordinance regulates sexually oriented businesses by limiting their hours of operation and location of business, specifying requirements for arcades, cabarets, lingerie modeling and photography studios, setting forth the responsibilities of the operators of these businesses, and listing certain prohibitions and unlawful acts such as having physical contact with an entertainer while they are engaged in a performance of live, sexually oriented entertainment. This new ordinance also prohibits a massage parlor from operating. A massage parlor is defined as an establishment not employing persons licensed by the State of Ohio ORC 4731.16. Unlike previous ordinances directed at sexually oriented businesses, this ordinance did not "grandfather" existing businesses but gave them 90 days from the effective date to comply with the provisions of this chapter.

City Council also passed an ordinance that will regulate where a sexually oriented business can locate. Previously they were allowed to operate in areas zoned only C-3 Commercial or C-5 Central Business District. They are now additionally permitted to operate in areas Zoned M-1 Restricted Industrial District and M-2 Industrial District, which actually brought several businesses into compliance. Further restrictions for a sexually oriented business requires that they shall not locate within five hundred (500) feet of any residential district, school (K-12), pre school, child care center, religious institution, public park or playground, public library or other use established for minors, or within one thousand (1,000) feet of another existing sexually-oriented business.

A third ordinance was passed repealing previous Massage Parlor licensing provisions. Massage Studios must now operate with a State certified massage therapist under ORC 4731.16 or under the direct supervision of a licensed physician.

With these ordinances Toledo was seeking a balance in regulating land use. The City recognized they can not ban all sexually oriented businesses but made reasonable provisions for sexually oriented businesses to operate. They also did not allow these businesses to offer all the products or activities they might like to offer. With the enforcement of these changes, the negative impact upon residential areas by sexually oriented businesses have been minimized.

ASSESSMENT

To assess the impact of the ordinances on sexually oriented businesses, the department has engaged the following techniques:

- Tracking the calls for service at these businesses
- Examining Crime Analysis information for the areas surrounding these establishments
- Direct observation

Community involvement through Block Watch groups
Examining advertisements in local newspapers

As a result of this work, massage parlors have been eliminated within the City. Advertisements in the local newspaper are now appearing for massage parlors operating approximately 40 miles from Toledo.

Sexually-oriented businesses not licensed to sell alcoholic beverages are now limited in their hours of operations from 6 a.m. - 2:30 a.m. Monday through Saturday and Noon -2:30 a.m. on Sunday. This has eliminated many complaints of noise continuing throughout the night.

Sexually oriented businesses licensed to sell alcohol are abiding by the hours of operation permitted by their liquor license.

Random inspections during business hours by the Police Department, Department of Economic Development, the Fire Department, Department of Finance (Licensing Agency) and the Health Department are conducted to ensure compliance with all regulations.

AGENCY INFORMATION

The problem solving initiative was adopted by the entire City.

All officers in the police department began to receive training in problem oriented policing in 1995 and are expected to practice it in their daily work. This training has now been incorporated into the Academy curriculum.

A committee selected by the Chief reviews exceptional problem solving projects. The committee examines the problem, the analysis conducted by the officers, their response and the assessment. Awards (palm pilots) are then presented to officers who the committee believes exhibited the best response in their problem-solving project.

Officers in the department are trained in the SARA model of problem solving.

City Council authorized \$19,500 to hire a consultant to assist with a study of sexually oriented businesses in Toledo.

Contact information

Lieutenant Robert Henry
2145 N. Cove Blvd.
Toledo, Ohio 43606
(419) 936-3852
FAX (419) 936-3859
Email tpd1134@noris.org

APPENDIX

Zoning regulations M-1 and M-2

An area Zoned M-1 is intended to accommodate uses such as wholesale activities, warehouses and industrial operations that are job intensive and are compatible with adjacent commercial and residential land uses. Landscaped sites with adequate off-street parking and loading areas are encouraged by the ordinance. Commercial uses that are desirable to service the employees and visitors of the industrial uses are also permitted.

An area zoned M-2 Industrial District are primarily manufacturing, assembling and fabricating businesses, including large scale or specialized operations requiring good access and needing special sites or public and utility services. Reasonable regulations apply to users in this District so as to permit the location of industries, which will not cause adverse effects on residential and commercial areas.

Sexually-Oriented Businesses

Definitions.

(a) 'sexually-oriented business' - as used in this Chapter, 'sexually-oriented business' means an inclusive term used to describe collectively: adult media store, bathhouse, lingerie modeling or photograph studio, massage studio (not employing persons as licensed by the State of Ohio in Revised Code Section 4731.16), motion picture arcade booth, sex shop, sexual encounter center, sexually-oriented cabaret or sex-oriented cabaret, sexually-oriented cinema, sexually-oriented motion picture theater, or sex-oriented cinema.

(b) 'adult media' - means magazines, books, videotapes, movies, slides, cd-roms or other devices used to record computer images, or other media that are distinguished or characterized by their emphasis on matter depicting, describing, or relating to hard-core material.

(c) 'adult media store' - means an establishment that rents and/or sells media, and that meets any of the following three tests: forty (40) percent or more of the gross public floor area is devoted to adult media; forty (40) percent or more of the stock-in-trade consists of adult media; or it advertises or holds itself out in any forum as 'XXX', 'adult', 'sex', or otherwise as a sexually-oriented business other than an adult media store, sexually-oriented cinema, sexually-oriented motion picture theater, or sex-oriented cinema, or sexually-oriented cabaret or sex-oriented cabaret.

(d) '**bathhouse**' -- means an establishment or business which provides the services of baths of all kinds, including all forms and methods of hydrotherapy; this definition is not intended to apply to or affect the operation of hydrotherapy facilities by any person licensed by the State of Ohio Medical Board.

(e) 'book or **media store**' - means a book or media store which devotes less than ten percent (10%) of its gross public floor area or ten percent (10%) of the number of items in inventory to hard-core material shall be treated for zoning purposes as a retail establishment. A book or media store which devotes more than ten percent (10%) of its gross public floor area or ten percent (10%) of the number of items in inventory to hard-core material, but which devotes less than forty percent (40%) of its gross public floor area and less than forty percent (40%) of the number of items in inventory to hard-core material shall be treated as a book or media store and not as an adult media store, provided that it meets the following conditions: all hard-core material shall be maintained in a room that is separated from other material by an opaque wall that extends to the ceiling or eight feet above the floor, whichever is less; access to the room containing the hard-core material shall be through an opaque door; the room containing hard-core material shall be posted with a notice indicating that only persons 18 years of age or older (adults) are allowed in the room; and access to the room will be physically limited to adults through control of access by an employee of the store, through use of an access release located at least 66 inches off the floor, or through constant monitoring of the room by an employee on duty through electronic means or through a window or mirror providing visibility into the room from the manager's or cashier's work station.

(f) **'booth'** - means any booth, cubicle, stall, room or compartment which is designed, constructed or used to hold or seat patrons/customers and is designed such that the booth is separated from the common areas of the premises and is used for presenting sexually-oriented entertainment including, but not limited to, viewing sexually-oriented moving pictures or viewing sexually-oriented publications by any photographic, electronic, magnetic, digital or other means or medium (including, but not limited to, film, video or magnetic tape, laser disc, cd-rom, books, magazines or periodicals) for observation by patrons therein. "Booth" shall not mean a room or enclosure that is designed, constructed and regularly used to seat more than ten persons.

(g) **'covering'** - means, with respect to nudity, any clothing or wearing apparel, including pasties, but does not include any substance that can be washed off the skin, such as paint or makeup, or any substance designed to simulate the appearance of the anatomical area beneath it.

(h) **'display publicly'** –means the act of exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a street, highway, or public sidewalk, or from the property of others, or from any portion of the premises where items and material other than adult media are on display to the public.

(i) **'employee'** - means any and all persons, including independent contractors, who work in or at or render any services directly related to the operation of a sexually-oriented business. The term employee shall include a person or persons designated as a manager.

(j) **'entertainer'** - means any person who provides live entertainment within a sexually-oriented business as defined in this Chapter, whether or not a fee is charged or accepted for entertainment and whether or not entertainment is provided as an employee or an independent contractor.

(k) **'establishment'** - means any sexually-oriented business as defined in Section 767.01(a).

(l) **'existing sexually-oriented business'** - means a sexually-oriented business that is operating within the City as of the effective date of this Ordinance.

(m) **'explicit sexual material'** - means any hard-core material.

(n) **'gross public floor area'** - means the total area of the building accessible or visible to the public, including showrooms, sexually-oriented cinemas, sexually-oriented motion picture theaters, or sex-oriented cinemas, motion picture arcades booths, service areas, behind-counter areas, storage areas visible from such other areas, restrooms (whether or not labeled 'public'), areas used for sexually-oriented cabarets or sex-oriented cabarets, plus aisles, hallways, and entryways serving such areas.

(o) '**hard-core material**' - means media characterized by sexual conduct that includes one or more of the following: erect male organ; contact of the mouth of one person with the genitals of another; penetration with a finger or male organ into any orifice in another person; open female labia; penetration of a sex toy into an orifice; male ejaculation; or the aftermath of male ejaculation.

(p) '**lingerie modeling or photograph studio**' - means an establishment or business which provides the services of live models modeling lingerie, bathing suits, or similar wear or without clothing to individuals, couples or small groups in a room smaller than 600 square feet. This definition does not apply to a person appearing in a state of nudity or semi-nudity in a modeling or art class in a college, university, or museum conducting classes where, in order to participate in class, a student must enroll at least three (3) days in advance of the class.

(q) '**location**' - means a single site for which only one use and occupancy permit would be required.

(r) 'massage' - means touch, stroking, kneading, stretching, friction, percussion and vibration, and includes holding, positioning, causing movement of the soft tissues and applying manual touch and pressure to the body (excluding an osseous tissue manipulation or adjustment).

(s) 'massage **parlor**' --means an establishment not employing persons licensed by the State of Ohio under Revised Code Section 4731.16, which provides massages to patrons.

(t) 'massage **studio**' --means an establishment offering massage therapy and/or body work by a massage therapist licensed under Revised Code Section 4731.16 or under the direct supervision of a licensed physician.

(u) '**massage therapy**' - means the profession in which a State of Ohio certified massage therapist applies massage techniques with the intent of positively affecting the health and well-being of the client, and may adjunctively (i) apply allied modalities, heat, cold, water and topical preparations not classified as prescription drugs, (ii) use hand held tools or devices designed as t-bars or knobblies, and (iii) instruct self care and stress management. 'Manual' means by use of hand or body.

(v) '**media**' - means anything printed or written, or any picture, drawing, photograph, motion picture, film, videotape or videotape production, or pictorial representation, or any electrical or electronic reproduction of anything that is or may be used as a means of communication. Media includes but shall not necessarily be limited to books, newspapers, magazines, movies, videos, sound recordings, cd-roms, other magnetic media, and undeveloped pictures.

(w) **'motion picture arcade booth'** --means any booth, cubicle, stall or compartment which is designed, constructed or used to hold or seat customers and is used for presenting motion pictures or viewing publications by any photographic, electronic, magnetic, digital or other means or medium (including, but not limited to, film, video or magnetic tape, laser disc, cd-rom, books, magazines or periodicals) for observation by customers therein. The term 'booth', 'arcade booth,' 'preview booth', and 'video arcade booth' shall be synonymous with the term 'motion picture arcade booth'.

(x) **'new sexually-oriented business'** - means a sexually-oriented business not in operation as of the effective date of this Ordinance.

(y) **'nude'** or **'nudity'** --means exposing for view specified anatomical areas.

(z) **'operate or cause to be operated'** - means to cause to function or to put or keep in operation.

(aa) **'operator'** - means any person, partnership, limited partnership, joint venture, corporation or any other type of legal entity owning, operating, conducting, managing, or maintaining a sexually-oriented business.

(bb) **'person'** - means an individual, partnership, limited partnership, joint venture, corporation or any other type of legal entity.

(cc) **'patron'** - means a customer or client of a business.

(dd) **'premises'** - means a building or structure containing a sexually-oriented business and any vehicle parking lot or area owned, leased by, or under the control of an operator.

(ee) **'primary live entertainment'** - means entertainment that characterizes the establishment, as determined (if necessary) from a pattern of advertising as well as actual performances.

(ff) **'sadoomasochistic practices'** - means flagellation or torture by or upon a person clothed or naked, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed or naked.

(gg) **'semi-nude'** or **'semi-nudity'** - means a state of dress in which clothing covers no more than the genitals, pubic region, and areola of the female breast, as well as portions of the body covered by supporting straps or devices.

(hh) **'sex shop'** - means an establishment offering goods for sale or rent and that meets any of the following tests: it offers for sale items from any two (2) of the following categories: adult media; lingerie; leather goods marketed or presented in a context to suggest their use for sadomasochistic practices, and the combination of such items make up more than ten percent (10%) of its stock in trade or occupies more than 10 percent (10%) of its gross public floor area; more than five percent (5%) of its stock in trade consists of sexually-oriented toys or novelties; or more than five percent (5%) of its gross public floor area is devoted to the display of sexually-oriented toys or novelties.

(ii) **'sexual conduct'** - means the engaging in or the commission of an act of sexual intercourse, oral-genital contact, or the touching of the sexual organs, pubic region, buttock or female breast of a person for the purpose of arousing or gratifying the sexual desire of another person.

(jj) **'sexual encounter center'**- means a business or commercial establishment that, as one of its principal business purposes, offers for any form of consideration a place where two or more persons may congregate, associate, or consort for the purpose of 'specified sexual activities'. The definition of sexual encounter center or any sexually-oriented business shall not include an establishment where a medical practitioner, psychologist, psychiatrist, or similar professional person licensed by the state engages in medically approved and recognized sexual therapy.

(kk) **'sexual gratification'** - means sexual conduct as defined herein.

(ll) **'sexually-oriented acts'** - means sexual conduct as defined herein.

(mm) **'sexually-oriented cabaret or sex-oriented cabaret'** - means an establishment and/or building or portion of a building regularly featuring dancing or other live entertainment if the dancing or entertainment which constitutes the 'primary live entertainment' is distinguished or characterized by an emphasis on the exhibiting of 'specific sexual activities' or 'specified anatomical areas' for observation by customers therein.

(nn) **'sexually-oriented cinema, sexually-oriented motion picture theater, or sex-oriented cinema'** - means a cinema or motion picture theater which shows hard-core material on more than half the days that it is open, or which is marketed as or offers features described as 'adult', 'XXX', or sexually oriented.

(oo) **'specified anatomical areas'** - means (1) less than completely and opaquely covered: human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and (2) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(pp) **'specified sexual activities'** - means human genitals in a state of sexual stimulation or arousal or acts of human masturbation, sexual intercourse, sodomy, or fondling or other erotic touching of human genitals, pubic region, buttock, or female breast.