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“Handling SOBs: Tips for Successfully Regulating Sexually Oriented Businesses”

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I. Scope of Local Government Authority to Regulate Sexually-Oriented Businesses¹

A. Statutory General Welfare Authority

1. U.C.A. § 10-8-84 (general authority to enact ordinances); see also U.C.A. § 17-53-223 (to same effect for counties)
2. U.C.A. § 10-8-41 (authority to prohibit prostitution, lewd or perverted acts, gambling, and obscene or lewd publications)
3. U.C.A. § 47-1-2 (brothels declared a nuisance; procedures to abate)
4. U.C.A. § 10-8-60 (authority to abate nuisances)
5. U.C.A. § 78-38-1 (nuisance defined; right of action)
6. U.C.A. § 76-10-803, 806 (public nuisance defined; action for abatement)

B. Zoning Authority

1. U.C.A. § 10-9a-102 (municipalities may enact wide array of land use controls unless expressly prohibited by law)
2. U.C.A. § 17-27a-102 (to same effect for counties)

C. Licensing Authority

1. U.C.A. § 10-1-203 (municipalities may regulate businesses by ordinance)

D. Authority to Regulate Alcohol

1. 21st Amendment to U.S. Constitution gives States authority to regulate alcoholic beverages, including regulation of adult businesses, *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981)

¹ State law citations (“U.C.A.”) are to the Utah Code; other states have similar laws.

2. 21st Amendment does not confer greater power upon local government to regulate other activities to the detriment of Constitutional considerations
 - a. Local governments may not rely upon regulation of alcohol to justify SOB regulation, *44 Liquormart v. Rhode Island*, 517 U.S. at 484 (1996)
 - b. However, “entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations” (including SOB’s), *id.*
3. U.C.A. 32A-10-101(1) (sale of beer may be licensed, taxed and regulated)
4. U.C.A. § 32A-10-206(12), (13) and (14) (explicit regulations prohibiting sexual acts or conduct on premises where beer is sold); see also U.C.A §§ 32A-4-106(20), (21), and (22); and 32A-5-107(38), (39) and (40) (to same effect for restaurants and private clubs)

II. What Kinds of Activities Have First Amendment Protection

A. SOB’s Involving Protected Speech

1. SOB’s involving expression are entitled to First Amendment protection (although they are close to its “outer perimeters,” *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 70-72 (1976)
 - a. **Protected Businesses** - those that include “expression,” e.g.: bookstores, video stores, dancing, theaters
 - b. **Unprotected Businesses** - those having no expressive component, e.g.: escort services, massage parlors, sale of intimate clothing and “sex toys”

B. Obscenity Not Protected

1. Having tried on several prior occasions to define obscenity, the Supreme Court in 1973 set out three-part test in *Miller v. California*, 413 U.S. 15 (1973):
 - a. whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; and
 - b. whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;
 - c. whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value
2. Miller is still good law

III. Standard of Review - How Courts Will Evaluate a Claim

- A. **Rational Basis** - a regulation is **rationaly related** to a **legitimate** government

interest

1. Government usually wins
2. Burden of proof is on the challenger

B. **Intermediate Scrutiny** - a regulation is **substantially related** to an **important** government interest

C. **Strict Scrutiny** - the regulation is **narrowly tailored** and necessary to meet a **compelling** government interest

1. Government has burden of proof; usually loses
2. Any less restrictive alternative that solves the problem makes the law unnecessary
3. Used when the law involves a **fundamental right** (which includes free expression) or **suspect classification**

IV. **Constitutional Basis of SOB Regulation**

A. **Content-based Restrictions on Speech**

1. “Suppress, disadvantage, or impose differential burdens upon speech because of its content”
2. Are subject to “the most exacting scrutiny”
3. E.g., regulation of content on the Internet

B. **Content Neutral Time, Place and Manner Regulation**

1. Time, place, and manner regulation of speech activities are valid if they:
 - a. Can be justified **without reference to the content** of the regulated speech
 - b. Are **narrowly tailored** to serve a significant or substantial government interest (depending on the level of scrutiny)
 - c. Leave open **adequate alternative channels** of communication
2. Content-neutral restrictions
 - a. “Pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue” because they are unrelated to the content of speech
 - b. Subject to intermediate scrutiny *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)
3. In determining whether a regulation is content-neutral, “the **government's purpose** [in enacting the regulation] is the **controlling consideration**,” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)
 - a. Avoid public comments that may indicate an improper motive in regulating SOB’s

- b. When acting legislatively local officials have the same immunity from civil rights liability under 42 U.S.C. § 1983 as do state and federal legislators, *Bogan v. Scott-Harris*, 118 S.Ct. 440 (1998)
4. If the regulation “serves purposes unrelated to the content of expression” it is considered content neutral, “even if it has an incidental effect on some speakers or messages but not others,” *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)

C. Avoiding Secondary Effects - A Content Neutral Basis Regulating SOB Locations

1. Zoning ordinances which place limits on the location of adult uses are valid exercises of the police power, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62-63 (1976)
 - a. Though such regulations treat adult uses differently from other uses based on their sexually explicit nature, they are “designed to prevent crime, . . . maintain property values, . . . and preserve . . . the quality of urban life,” *Renton*, 475 U.S. at 48
 - b. Ordinances intended to curb secondary effects of SOB’s burden speech only incidentally and receive intermediate scrutiny, *N.W. Enters. v. City of Houston*, 352 F.3d 162 (5th Cir., 2003)
2. **SOBs may be regulated to prevent or minimize undesirable “secondary effects” resulting from the SOB if the effects are not related to the suppression of speech**, *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini-Theatres*, 427 U.S. 50 (1980); *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000)
3. Types of secondary effects:
 - a. Neighborhood “blight”
 - b. Lower property values
 - c. More crime, especially sexually-related crimes
 - d. Increase in sexually-transmitted diseases
4. Local governments may rely on studies by others to establish secondary effects, *Renton*, 475 U.S. 41 (1986); *Z.J. Gifts v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998)
 - a. Do not have to experience secondary effects before taking action to avoid it
 - b. But – for every SOB regulation there must be a corresponding secondary effect that government wants to prevent (must be able to articulate it)

D. Adequate Alternative Channels of Communication

1. SOB ordinances **cannot**, consistent with the First Amendment, **entirely prohibit SOBs having an expressive component**, but must afford them adequate alternative avenues of communication, *Young v. American Mini-Theatres*, 427 U.S. 50 (1980)
2. Must evaluate how much land will be available for SOBs, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)
 - a. In *Renton*, an ordinance limiting SOBs to 5 percent of the total land in the city was held constitutional
 - b. Cases provide no clear standard or basis of analysis.
 - (1) Some courts use the **percentage of land available** as the determining factor
 - (2) Other courts evaluate the **number of sites available**
3. **Factors to consider**
 - a. **Physical and economic conditions**
 - (1) Cases mixed; no firm rule
 - (2) *Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995) (relevant consideration is whether physical characteristics present an unreasonable obstacle to opening a business)
 - (3) *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993) (economic factors are relevant in determining whether there is a reasonable relocation site in the city; economic considerations should be a factor in determining whether a specific relocation site is part of the relevant market but economic impact on the SOB itself is not a relevant factor).
 - (4) *3570 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F.Supp. 1257 (C.D. Cal, 1995) (after the relevant real estate market has been determined economic considerations are not relevant)
 - (5) *Centerfold Club, Inc. v. City of Saint Petersburg*, 969 F.Supp. 1288 (M.D. Fl., 1997) considers five standards:
 - (a) *Renton* assumes a relevant real estate market exists
 - (b) Whether a site is available and part of the relevant real estate is measured in terms of “genuine possibility”
 - (c) When a site is part of the relevant market, it is irrelevant whether the owner of the land will lease it to the adult establishment
 - (d) Factors that render the land more expensive to purchase or lease are not relevant

- (e) Once a court determines the relevant market, there is no constitutional requirement setting forth how many sites or what percentage of land must be available

b. Amount of land available

- (1) No precise mathematical formula that will be used
- (2) Reasonableness will be considered in light of the circumstances, e.g., *Pack Shack, Inc. v. Howard County*, 377 Md. 55 (2003) (ordinance limiting land for SOBs to one ten-thousandth of county not a reasonable alternative avenue of communication)
- (3) *City of Crystal v. Fantasy House, Inc.*, 569 N.W.2d 225 (Minn. Ct. App., 1997)
 - (a) City's adult use ordinance left only .9% of the land available for adult businesses
 - (b) Approximately 6% of city zoned for commercial or industrial uses
 - (c) Of that amount, 15% (approximately 14 acres) was available for adult businesses
 - (d) Court concluded that because of the city's overwhelmingly residential character, the amount of land that had been set aside for adult businesses to locate was reasonable
- (4) *Red-Eyed Jack, Inc. v. City of Daytona Beach*, 322 F. Supp. 2d 1361 (D. Fla., 2004) (proportion of sites an important factor)

c. Number of potential sites

- (1) *DIMA Corp. v. City of St. Cloud*, 562 N.W.2d 312 (Minn. Ct. App. 1997) (15-17 sites deemed sufficient)
- (2) *Grand Britain, Inc. v. City of Amarillo*, 27 F.3d 1068 (5th Cir. 1994) (ordinance upheld based on 63 possible sites even though some would require extension of municipal water and sewer)
- (3) *1995 Venture I, Inc. v. Orange County*, 947 F.Supp. 271 (E.D. Tex. 1996) (ordinance upheld with only five potential sites)
- (4) *3570 E. Foothill Blvd., Inc. v. City of Pasadena*, 912 F.Supp. 1257 (C.D. Cal. 1995) (relationship between number of available sites and city population an important factor)
- (5) *City of National City v. Wiener*, 3 Cal. 4th 832 (1992) (“We find no authority that mandates a constitutional ratio of adult businesses to a particular population figure”)

d. Type of land available

- (1) Locational restriction arguments that generally fail: land does

not have public infrastructure; is in an undesirable location; or needs to be subdivided

- (2) *DG Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir., 1991) (plaintiffs complained, unsuccessfully, that SOB areas were “limited to a few poorly lit sites in industrial areas, far away from the tourist-oriented businesses”)
- (3) *Holmberg v. City of Ramsey*, 12 F.3d 145 (8th Cir. 1994) (fact that subdivision was required not an improper impediment to SOB location requirement)
- (4) *City of Crystal v. Fantasy House*, 569 N.W.2d 225 (Minn. Ct. App., 1997) (industrial areas are acceptable)

e. **Effect of restrictive covenants**

- (1) Generally applicable restrictive covenants not aimed at suppressing speech are constitutional, *Tool Box v. Ogden City Corp.*, 355 F.3d 1236 (10th Cir., 2004)

V. Permissible Business Licensing Regulations

A. **Define SOB Types, e.g.:**

1. Outcall services
2. Adult businesses
3. Semi-nude entertainment businesses
4. Semi-nude dancing agency

B. **Specify How Activities May Occur**

1. Dress standards - Pastie v. bikini standard
 - a. Pastie standard
 - (1) “Showing of the female breast with less than a fully opaque covering of any part of the nipple”
 - (2) See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)
 - b. “Bikini” standard
 - (1) “It shall be unlawful for any female to appear in such manner or attire as to expose to view the portion of the breast below a horizontal line across the top of the areola at its highest point or simulation thereof”
 - (2) See *Bright Lights, Inc. v. Newport*, 830 F.Supp. 378 (E.D. Ky. 1993) (upholding “bikini” standard)
 - (3) Upheld by Tenth Circuit, despite assertions that *Barnes* only permits the “pastie” standard; see *Dodger’s Bar & Grill v. Johnson County*, 32 F.3d 1436 (10th Cir. 1994); see also *Café 207, Inc. v. St. John’s County*, 856 F.Supp. 641 (M.D. Fla.

1994) (*aff'd per curiam*, 66 F.3d 272 (11th Cir. 1995) *cert. denied*, 116 S.Ct. 1544 (1996)

c. See also *Heideman v. S. Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003) (ban on nudity upheld)

2. Liquor limitations (see, e.g., Utah liquor licensing provisions above)
3. Anti-mingling provisions
4. Minimum distance between customers and performers
5. Hours of operation, *Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir., 2003)

C. Employee Regulation and SOB Licensing

1. Basic rule: the regulation must further a legitimate government interest
2. The type and amount of information that can be required will vary with the type of SOB
 - a. Can require disclosure of basic information
 - (1) Name, address, but not social security number
 - (2) Photo I.D. may be required for performers and employees when on duty
 - b. Criminal background check OK for owners or operators and performers (but may not be justifiable in some instances [e.g., bookstore employees])
 - c. May be able to require disclosure of ownership (depends on the type of business and identifying a legitimate government interest)
 - d. See, e.g., *TK's Video v. Denton County*, 24 F.3d 705 (5th Cir.1994)
3. Can require inspections, but cannot single out SOB's for disparate treatment
4. May deny license for serious criminal violations, violations of sexual or drug crimes, or violations of the licensing ordinance in order to avoid secondary effects of SOBs
5. Can require owners to have insurance
6. Licensing officials may not have unfettered discretion
 - a. Need objective (measurable) approval standards not related to protected expression
 - b. Include time limits for action to approve or deny an application
 - c. Must allow status quo while license application is reviewed
 - d. Put basis of the decision on the record to allow for judicial review
 - e. Must allow prompt judicial review of license denial, *City of Littleton v. Z. J. Gifts D-4, L.L.C.*, 124 S. Ct. 2219 (2004)

f. See also *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990)

7. May impose license fees
 - a. Do not impose a fee which exceeds regulatory costs; see *Acorn Investments, Inc. v. Seattle*, 887 F.2d 219 (9th Cir. 1989); see also *I.D.K., Inc. v. Ferdinand*, 277 Ga. 548 (Ga., 2004) (fees to fund enforcement upheld)
 - b. Fees generally applicable to all businesses may also be charged to adult businesses

D. SOB Premises Design

1. A business licensing ordinance may require particular design features as long as they further a legitimate government interest
 - a. Can prohibit private rooms and private performances
 - (1) Limits possible sexual contact between employees and customers, avoiding spread of sexually transmitted diseases; see, e.g., *Ben Rich Trading, Inc., v. City of Vineland*, 126 F.3d 155 (3rd Cir. 1997)
 - (2) “Open booth” laws have been upheld; see e.g., *Mitchell v. Commissioners*, 10 F.3d 123 (3rd Cir. 1993)
 - b. Minimum illumination
 - (1) Can justify as a basic safety measure
 - (2) Aids in identifying customers
 - c. Elevated stage area for performers
 - (1) Avoids physical contact between performers and customers

VI. Permissible Zoning Regulations

A. Development Standards

1. Can limit location of SOBs in relation to other residences, schools, churches, other SOBs, to negate possible secondary effects
2. Site plan design requirements OK as long as they are content-neutral
3. Sign control
 - a. An ordinance may regulate:
 - (1) Size
 - (2) Location (e.g. flat wall signs only)
 - (3) Design (e.g. no animation)
 - (4) No display of objectionable material (products or entertainment offered)
 - (5) Require open vision (windows cannot be darkened or made opaque)

- b. See *Excalibur Group, Inc., v. City of Minneapolis*, 116 F.3d 1216 (8th Cir. 1997)

B. Conditional Use Permits

1. Zoning ordinances requiring SOB conditional use permits have been upheld, but not recommended because discretion too high
2. May be challenged on the basis that conditional use permit criteria allow too much discretion by the approving body
 - a. Conditional use permit criteria must be objectively precise to avoid content-based discretion; see *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990)
 - b. Lack of objective criteria is an unconstitutional prior restraint; see *CR of Rialto, Inc., v. City of Rialto*, 975 F.Supp. 1254 (C.D. Cal. 1997)

C. Moratoria

1. Disfavored as a prior restraint on protected speech
2. Better approach is to adopt an SOB ordinance as soon as possible

D. Amortization

1. May amortize non-conforming uses if allowed by state law
2. See, e.g., U.C.A. 10-9a-511(2)(b) (termination of nonconforming uses allowed within a reasonable time period so owner may recover investment)

VII. Other Considerations

A. Ordinance Drafting

1. The ordinance must be clear to avoid claims it is impermissibly overbroad or vague
 - a. **Overbreadth**
 - (1) If the ordinance burdens substantially more speech than is necessary to meet a compelling or substantial government interest, it violates the First Amendment
 - (2) Unless a regulation is intended to avoid a negative secondary effect, it may be overbroad, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)
 - (3) Requiring dancers to wear more clothing than at the beach or a swimming pool is not overbroad, *Dodger's Bar & Grill v. Johnson County*, 32 F.3d 1436 (10th Cir. 1994)

b. **Vagueness**

- (1) If a law gives no clear notice of what is prohibited, it violates due process and is “void for vagueness”
- (2) A statute is not vague if a “person exercising ordinary common sense can sufficiently understand and comply with” the law, *Dodger’s Bar & Grill v. Johnson County*, 32 F.3d 1436 (10th Cir. 1994)
- (3) Definition of adult use referring to a “preponderance” of material characterized by emphasis on sexual activity is not vague and can be interpreted as referring to the importance and emphasis of the material on display rather than its quantity, *South Blvd. Video & News, Inc., v. Charlotte Zoning Board of Adjustment*, 498 S.E.2d 623 (N.C., 1998)

2. Have separate ordinances for licensing and zoning
3. Cite enabling authority in SOB ordinance recitals
4. Incorporate findings of fact reflecting negative secondary effects of SOBs
5. Allow a hardship exception in amortization provisions
6. Include a severability clause

B. Use Correct Secondary Effects Studies

1. Different studies available for different problems
2. Make studies available for public review

C. Map SOB Areas

1. Make sure adequate sites are available
2. Make available for public review

D. Make a Proper Legislative Record

1. Give required notice
2. Allow public comment in an orderly manner
3. Avoid public clamor
4. Avoid comments that tend to show an improper motive for regulation
5. Establish a record to show the regulation is a bonafide method of mitigating possible negative secondary effects
 - a. Land use studies
 - b. Case law findings
 - c. Police reports