

RECOMMENDATIONS:

**ZONING FOR SEXUALLY ORIENTED
ENTERTAINMENT & RELATED BUSINESSES**

submitted to

**KENTON AND CAMPBELL COUNTIES, KENTUCKY
NORTHERN KENTUCKY AREA PLANNING COMMISSION**

submitted by

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Introduction

This document represents a second phase to our initial analysis of Sexually Oriented Entertainment and Other Businesses in Kenton and Campbell Counties, submitted in January 2004. After considering our original report, the Fiscal Court of Kenton County adopted a new licensing ordinance for sexually oriented businesses; however, adoption of a new licensing ordinance in Campbell County is still pending. We have now been asked to make specific recommendations for zoning for sexually oriented businesses in the two counties. This study is being conducted by Eric Damian Kelly, Ph.D., FAICP, and Connie B. Cooper, FAICP, working under a contract between the Northern Kentucky Area Planning Commission and Duncan Associates, a consulting firm based in Austin, Texas.

The earlier report included four major parts:

- A summary and analysis of our site visits to existing sexually oriented businesses in Kenton and Campbell Counties;
- An analysis of current local zoning and related ordinances as they affect existing or possible future sexually oriented businesses in the two counties;
- A summary of findings from major studies of the secondary effects of sexually oriented businesses; and
- Our findings and recommendations from this study.

Because of the length of the report, we have included our findings and recommendations at the beginning of this report.

Much of the emphasis of the original report was on the “secondary effects” of sexually oriented businesses. There are two reasons for that emphasis. First, such secondary effects are significant public policy issues of which the legislative bodies should be aware when making decisions about whether and how to regulate particular activities and businesses. Second, local governments have a great deal more flexibility in adopting regulations aimed at the secondary effects of such businesses than in adopting regulations intended to control or limit the message of erotic entertainment or sexually oriented media. The purpose of the local government in adopting the regulations determines the standard which the courts will apply to the ordinance in reviewing it, if it is challenged. If the court finds that the purpose of the local government was to censor the message of those engaging in the adult enterprise, then the court will apply a standard of “strict scrutiny,” meaning that the local government loses the normal “presumption of validity” that attaches to its actions and must instead carry the burden of showing why the ordinance is necessary, a very difficult burden when the First Amendment is at stake. In contrast, if it is found that the purpose of the local government regulation was to reduce negative secondary effects, then the ordinance is subject to “intermediate scrutiny,” thus giving the local government the presumption of validity. As another federal court explained:

The standard of constitutional scrutiny, after *Alameda Books*, and taking into account Justice Kennedy's concurrence, is simply whether Ordinance 97-75 addressed secondary effects of adult speech, as demonstrated by the legislative record submitted by the City.... This court has invariably analyzed ordinances regulating SOBs as content-neutral time,

place, and manner restrictions where the legislative record demonstrated that the municipality's predominant concern was to regulate secondary effects of SOBs and not to censor the expression itself. Thus, in *SDJ, Inc.*, as in other cases, this court treated the ordinance at issue as a content-neutral regulation where "the findings of the Houston council as to the secondary effects of sexually oriented businesses satisfy [the court] . . . that the city's predominant concern was with secondary effects and not the content of expression itself." 837 F.2d at 1273 (emphasis added).

N.W. Enterprises v. City of Houston, 2003 U.S. App. LEXIS 24021 (5th Circ. Tx, 2003), at 10-11.

The easiest way for a court to make a reasonable determination of a governmental body's purpose in taking a particular action is for the decision-makers to provide a legislative record, explaining the purposes. Although such legislative records on acts of Congress are often voluminous, the typical legislative record for a local government consists primarily of minutes or transcripts of meetings, together with findings, exhibits and other materials considered by the decision-makers in reaching their decision.

A governmental body's key purpose in regulating sexually oriented businesses is to mitigate the negative secondary effects. One of the easiest ways is to ensure that the sexually oriented businesses are located away from the types of land uses on which they are most likely to have adverse secondary effects. Zoning is the classic tool for regulating the locations of various uses and for ensuring that uses that are incompatible are kept reasonably separate. In this report, we provide analysis and recommendations specifically related to zoning for sexually oriented businesses in Kenton and Campbell Counties.

Thus, the major purposes of this report are:

- To provide a conceptual framework for recommendations for zoning for sexually oriented businesses in Kenton and Campbell Counties; and
- To provide specific recommendations for amendments to local zoning ordinances to address the complex issues related to sexually oriented businesses.

Context

The Community

The regulation of sexually oriented businesses must be evaluated in the context of a community. In our earlier report and in this one, we treat Kenton and Campbell Counties as the community of Northern Kentucky. We explain our reasons for doing so here.

The entire Northern Kentucky community is, of course, part of Cincinnati's metropolitan area. Covington and Newport, the county seats, look across the Ohio River at the Cincinnati skyline and its sports stadiums; three highway bridges and one pedestrian bridge (a converted railroad bridge) connect these counties to Cincinnati. One indicator of the cohesiveness of the region is the fact that the "Cincinnati" regional office of the Internal Revenue Service is located in Covington, and the Cincinnati-Northern Kentucky Regional Airport is located in Kentucky, on land owned by Kenton County. For most purposes, Boone County, bordering Kenton County on the west, is considered part of the Northern Kentucky community. Boone County officials were invited to become part of this study of sexually oriented businesses and elected not to do so. We have thus confined our analysis of the community to the portions of it that lie within Kenton and Campbell Counties.



Figure 1 Northern Kentucky map. Source: <http://www.northernkentuckyusa.com/index.cfm/content/12.html>

The Tri County Economic Development Corporation provides this description of the Northern Kentucky Community:

Located directly across from Cincinnati, Ohio, on the Ohio River, the three-county Northern Kentucky region is a powerful magnet for regional, national, and international firms wanting to locate in one of America's fastest growing communities. In the last decade, more than 120 new companies have chosen Northern Kentucky as home for their enterprises; while more than 200 existing industries have expanded their facilities during this same period. Northern Kentucky/Cincinnati's charming mix of urban amenities and open space excels in nearly every measure of livability.¹

Northern Kentucky has its own chamber of commerce, the Northern Kentucky Chamber of Commerce (www.nkycc.org). The Chamber provides a community economic forecast for the

¹ From Tri County Economic Development Corporation web site, obtained February 2005, www.northernkentuckyusa.com.

three-county community.² There is also a Tri County Economic Development Corporation that serves the community (www.northernkentuckyusa.com) and a Northern Kentucky Convention and Visitors Bureau that serves the community (www.nkycvb.com).

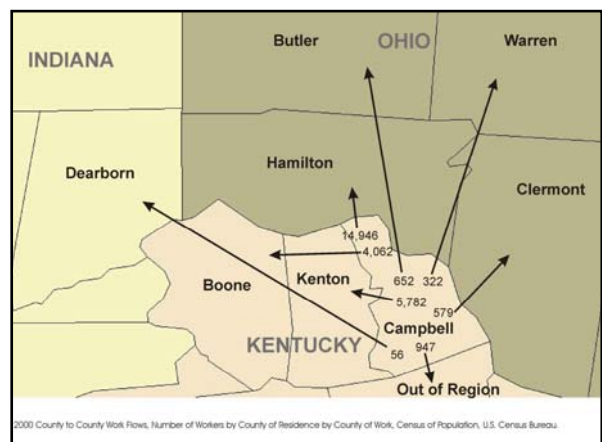
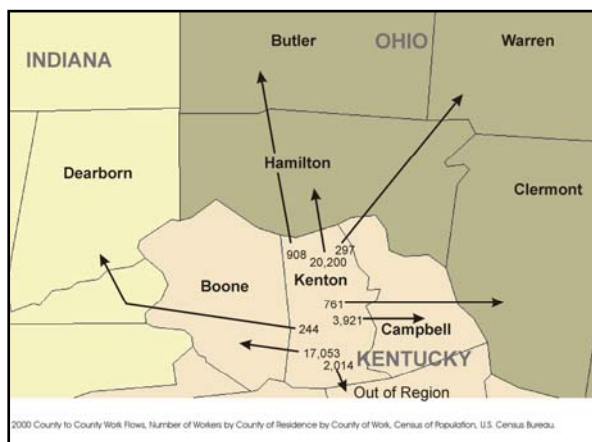
The Northern Kentucky community is economically intertwined in many ways. The economic hub of the community is the Cincinnati/Northern Kentucky International Airport, located in Boone County but on land owned by Kenton County and most readily accessible from northern Kenton County. Also important in the community’s economic base is the Cincinnati Regional Office of the Internal Revenue Service, sprawling across several acres in Covington (Kenton County). Illustrating the broad connections within the community and with the larger region are the commuting patterns.

Table 1 Commuting Patterns, Kenton and Campbell Counties

	Kenton County, KY	Campbell County, KY	Total Workers	Percentage
Total	76,169	42,820	118,989	100%
Worked in state of residence:	52,818	25,815	78,633	66%
Worked in county of residence	30,771	15,474	46,245	59%
Worked outside county of residence	22,047	10,341	32,388	41%
Worked outside state of residence	23,350	17,005	40,355	34%

As Table 1 indicates, of the roughly 119,000 workers in the two counties, some 40,350, or 34 percent, work out of state – primarily in Cincinnati and nearby areas in Ohio, although some also commute to Indiana. Of those working in the state of their residences, 32,388, or 41 percent, work outside their county of residence.

Some 5,782 residents of Campbell County (13 percent) work in Kenton County, while 3,921 (5 percent) of Kenton County residents work in Campbell County. The Northern Kentucky community consists of 35 cities (see table below), many of which are so small that they have few local jobs; thus, even workers who work in their county of residence are likely to commute outside their municipal boundaries. In 2000, these local governments served 240,080 residents.



² The most recent one is entitled “2005 Economic Forecast and Community Profile,” Northern Kentucky Chamber of Commerce and Tri-County Economic Development Corporation.

Table 2 Kenton and Campbell Counties – Population by Jurisdiction

Kenton County		Campbell County	
City	Population	City	Population
Bromley	838	Alexandria	8,286
Covington	43,370	Bellevue	6,480
Crescent Springs	3,931	Cold Spring	3,806
Crestview Hills	2,889	Crestview	471
Edgewood	9,400	Dayton	5,966
Elsmere	8,139	Fort Thomas	16,495
Erlanger	16,676	Highland Heights	6,554
Fairview	156	Melbourn	457
Fort Mitchell	8,089	Mentor	181
Fort Wright	5,681	Newport	17,048
Independence	14,982	Silver Grove	1,215
Kenton Vale	156	Southgate	3,472
Lakeside Park	2,869	Wilder	2,624
Latonia Lakes	325	Woodlawn	268
Ludlow	4,409	Unincorporated Area	15,293
Park Hills	2,977	TOTAL	88,616
Ryland Heights	799		
Taylor Mill	6,913		
Villa Hills	7,948		
Visalia	111		
Walton	2,450		
Unincorporated Area	8,356		
TOTAL	151,464		

Municipal population in the Kenton and Campbell Counties totaled 216,431 in 2000. Simple division yields an average of 6184 residents in the 35 municipal governments, a limited population base by today’s standards. As often occurs with simple calculations, however, that number masks the real issue, which is that few of these cities are large enough to have a full range of community services. Ten of the 35 cities have fewer than 1000 people; ten have between 1000 and 5000 residents; ten have between 5000 and 10,000 residents; and only five have more than 10,000 residents.

From a planning and zoning perspective, the Northern Kentucky community presence as a cohesive area is further strengthened by the existence of the Northern Kentucky Area Planning Council and Northern Kentucky Area Planning Commission (NKAPC). The NKAPC is governed by a seven-member commission elected by the Northern Kentucky Area Planning Council, which is comprised of one elected representative from each of the 20 cities in Kenton County and one from the Kenton County Fiscal Court. In addition, the NKAPC staff serves, by

contract, as the staff for the Kenton County Planning Commission (KCPC). The NKAPC staff is also required to review and make recommendations on all applications for the adoption, revision, or amendment of the comprehensive plan, all local zoning ordinances and the subdivision regulations adopted by the KCPC.

Further establishing the cohesive nature of the Northern Kentucky community is the proposal of setting up a “One-Stop Shop” codes enforcement for Kenton County. This program would allow legislative bodies to designate the NKAPC as their zoning administrator and building inspector. The NKAPC would then be responsible for setting and collecting fees, and administering and enforcing the zoning ordinance and applicable building codes.

Currently, a number of jurisdictions in Kenton County and some in Campbell County utilize NKAPC to administer or enforce their zoning ordinances (see table below). With the establishment of the proposed “One-Stop Shop,” the NKAPC’s zoning administrative role in Kenton County will be greatly expanded. It is clear that the strong regional role of the NKAPC is indicative of the relationships among these multiple local governments in the Northern Kentucky community.

Table 3 NKAPC Provided Zoning Assistance

Kenton County		Campbell County	
Zoning Administration and Enforcement	Zoning Administration Assistance	Zoning Administration and Enforcement	Zoning Administration and Enforcement, as needed
Crescent Springs	Covington	Cold Spring	Alexandria
Crestview Hills	Fort Wright		Bellevue
Edgewood	Park Hills		Crestview
Fort Mitchell	Ryland Heights		Dayton
Kenton Vale			Melbourne
Lakeside Park			Silver Grove
Latonia Lakes			Unincorporated Area
Taylor Mill			
Unincorporated Area			

Historic Perspective on Sex Businesses in the Northern Kentucky Community

The Northern Kentucky community has a long history of dealing with the secondary effects of sexually oriented businesses. As the Sixth Circuit Court of Appeals noted in a decision addressing issues related to Newport’s Adult Entertainment ordinance, there is a long history underlying efforts to regulate sex businesses in Northern Kentucky:

Defendant City of Newport ("City" or "Newport") long ago gained a reputation as home to a veritable smorgasbord of vice, attracting patrons from across the nation. For decades, the small city was considered the Midwest's answer to Las Vegas, and leaders of organized crime were said to operate its gambling casinos and nightclubs.

In the 1960's, public pressure began to demand that Newport be cleaned up. This pressure has continued until the present, with varying degrees of success.

A 1986 report generated by the Newport Alcoholic Beverage Control Administrator indicated that of 28 adult bars opened since 1978 (including successive bars at the same site), 21 had had at least one prostitution-related conviction, and 18 had had multiple convictions. Def. Ex. K, p. 2. The report explained that "all of the prostitution in businesses with adult entertainment involved an alcoholic beverage as the median [sic] of exchange and the solicitation of such drinks by 'mixers.'" Id. In all, 98% of prostitution arrests in Newport occurred in the vicinity of these bars. Id. Adult entertainment establishments, which constituted 12% of all businesses serving alcohol, accounted for 17% of all police runs. Def. Ex. K, p. 21.

A later review, conducted in 1990 by the Newport License Inspector, documented the continued prostitution arrests occurring at several adult dancing establishments. Def. Ex. G. Moreover, the City determined that over \$ 70,000 was expended in 1990 to target, patrol and prosecute the illicit behavior occurring in and around the bars. Def. Ex. H.

Several of Newport's citizens, merchants and church groups also opposed the presence of the semi-nude dancing clubs. These groups generally believed that the adult entertainment clubs were "clouds over [the] neighborhood that keep [it] from growing in the [right] direction." See Def. Ex. I (letter to Mayor from Taylors Landing Business District). Complaints commonly expressed were that the seamy establishments deterred other merchants from locating in Newport's business district, deterred shoppers, served a poor example for the City's youth, and generally tarnished the City's image. Id.

Bright Lights, Inc., v. City of Newport, 830 F. Supp. 378, 380-81 (E. D. Ky. 1993). Based on those findings, the court went on to hold in relevant part:

Having considered the matter carefully, the court concludes that some leeway must be afforded the reform efforts of the City Council of Newport. This body has been elected by the citizens to attempt to "clean up the image" of the City.

To do this, it must overcome the sleazy impression of Newport and Northern Kentucky that survives from "the heyday" when things ran wide open; reform candidates were literally drugged and framed for morals offenses by public officials and police officers; the members of reform citizens groups were vilified and harassed; and a "liberal" in local parlance was a person favoring the continued open and notorious violation of the gambling and morals laws.

To illustrate that the Council's perception of a need to clean up the image of the City is not paranoid, the court notes the following statements in a national magazine's satirical article on Newport's big sister, the city of Cincinnati.

"The city's streets fairly shine; the odd litterer draws a scornful stare. Wide avenues, bosky side streets, the most inviting of thoroughfares. And clean. So clean. No X-rated movie theaters, no adult-book stores, no bare-breasted night joints soil these streets, all of them long ago jettisoned over to the Kentucky side of the river."

Peter Richmond, "Town Without Pity," *Gentlemen's Quarterly*, July 1993, at 102, 104.

This court holds that the City of Newport has the right to secede as Cincinnati's combat zone. The court holds that the City has "an important and substantial governmental interest" in advancing these reform goals, which interest is furthered by the ordinances in question. Barnes, 111 S. Ct. at 2461. The court further finds and holds that in the case of the City of Newport, given its unique history, the ordinances' "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Id. (quoting O'Brien, 391 U.S. at 376-77, 88 S. Ct. at 1678-79).

Newport's image affects that of all of Northern Kentucky, a community of nearly 300,000 people. That City and its community have the right to project a progressive and decent image. The nudity ordinances contribute to the enhancement of this interest and will be upheld.

830 F.Supp. at 384.

The U.S. Supreme Court had earlier noted, in upholding another regulation in Newport, “it is plain that, as in *Bellanca*, the interest in maintaining order outweighs the interest in free expression by dancing nude.” *Newport v. Iacobucci*, 479 U.S. 92, 97, 93 L. Ed. 2d 334, 340, 107 S. Ct. 383, 386 (1986). Although the significance of the opinion itself is now questionable (see *J&B Social Club # 1 v. City of Mobile*, 966 F. Supp. 1131, 1135 (S.D. Ala. 1996)), the quoted part of the opinion stands unchallenged.

We note with great interest the fact that the communities continue their efforts to improve their image and do so on many fronts. Efforts led by Southbank Partners, Inc., who have built a major entertainment center along the river in Newport and encouraged the development of a significant base of hotel rooms in Covington. Southbank Partners has also promoted improved pedestrian and transit connections to and from the ballparks and other attractions along the Cincinnati riverfront. These projects represent a substantial investment of local and state resources to improve the image and quality of life in the communities – goals closely related to the purposes of regulations that we recommend.

Despite these efforts, the areas of downtown Covington and Newport away from the riverfront continue to suffer in many ways; Newport in particular retains a downtrodden image. Although the image problem associated with the strip clubs in Newport and Covington has been substantially abated since 1993, it is not gone. There remain clusters of such establishments in both Newport and Covington. As noted above, our study found extensive physical interaction between patrons and dancers at many of the establishments in both Kenton and Campbell Counties. There were arrests for prostitution at such an establishment while we were working on this study -- at Liberty Showgirls in Covington June 13, 2003.

In short, the types of secondary effects found by studies in other communities are all too familiar to public officials and many citizens in Northern Kentucky. Those studies tell people in these communities little that they have not experienced. The value of the studies is that they affirm that such problems are typical secondary effects of inadequately regulated and poorly located sexually oriented businesses, not simply an aberration that occurred in Newport and the rest of Northern Kentucky.

Zoning for Sexually Oriented Businesses

Overview

Sexually oriented businesses, including movie theaters³, sexually oriented cabarets⁴, and adult book and video stores⁵ are protected by the First Amendment. Much of the discussion that follows deals with the practical limitations that First Amendment law places on a local government's regulation of sexually oriented businesses.

The discussion that follows applies the law as we understand it to the factual context of sexually oriented businesses in Northern Kentucky community. Although there is some discussion of recommendations in this section, our major regulatory recommendations are included in the final chapter of this report.

Traditional Zoning Restrictions

Separating Uses into Districts

Through the zoning ordinance, the local community is divided into districts or zones, and then regulations for each zoning district are established. One of the types of regulations that varies from one district to another is the type of use allowed. The separation of various land uses into compatible groups within the districts is a fundamental and widely accepted use of zoning.

Today, the process of defining uses and determining which uses belong in which districts is an exercise of legislative judgment that is often supplemented by the advice of professional planners. As the Supreme Court long ago recognized, however:

Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.⁶

As Norman Williams explained concisely in his classic work on *American Land Planning Law*:

Obviously certain land uses may have an unfavorable impact on other land uses, if the latter are in the immediate vicinity. This is of course the normal and **most important basis of land use classification**....⁷ [emphasis added]

³ Young v. American Mini-Theatres, Inc., 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976); Playtime Theatres, Inc. v. City of Renton, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed 2d 29 (1986).

⁴ Paps A.M. tdba Kandyland v. City of Erie, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (U.S. 2000); Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471, 483-84 (5th Cir. Tex. 2002), reh'g denied, 2002 U.S. App. LEXIS 16491 (5th Cir. 2002), cert. denied 154 L. Ed. 2d 632, 123 S. Ct. 699 sub nom. Case & Point, Inc., v. City of Dallas.

⁵ World Wide Video v. Tukwila, 117 Wn.2d 382, 389, 816 P.2d 18, 21 (1991), cert. denied 503 U.S. 986, 118 L. Ed. 2d 391, 112 S. Ct. 1672 (1992); Executive Arts Studio, Inc. v. City of Grand Rapids, 227 F. Supp. 2d 731, 748-49 (W.D. Mich. 2002).

⁶ Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388, 47 S. Ct. 114, 118, 71 L. Ed. 303, 310-11 (1926) .

⁷ Norman Williams and John M. Taylor, *Williams American Planning Law : Land Use and the Police Power* (Wilmette, Ill.: Callaghan, 1974)., §17.03, Vol. I., p. 452.

Similarly, in a classic work on land use planning, scholars at the University of North Carolina have listed “Residential communities will be protected from incompatible uses and intrusion of unnecessary traffic” as the number one item on a list of planning principles “for developed areas.”⁸

The earliest classifications in zoning were often based in part on nuisance principles, separating industry, with its smoke, odors and vibration, from other uses. Today, modern environmental controls have eliminated many of those concerns, and the separation of land-uses is often based on more subtle distinctions. One factor that may come into play as residents express concern about sexually oriented businesses located near their neighborhoods is the “symbolism” attached to it. A classic treatise on land-use planning discusses the symbolic significance attached to a neighborhood.⁹ Although the cited work does not discuss sex businesses, it is certainly understandable that residents of a neighborhood might believe that having a sex business in the neighborhood – or at a major entrance to it – would adversely affect the symbolic residential values of their homes.

To prevent such land-use conflicts, a good local system of planning and zoning must separate such incompatible uses from residential neighborhoods but also provide other, logical locations for such uses. As attorneys and managers for the industry have privately admitted to Ms. Cooper and me, the adult industry itself is ill-served by the location of a particular sex business in a place where it creates conflict and controversy.

Classification of Uses under Zoning

Although the separation of uses into the broad categories of residential, commercial, industrial and agricultural may be the best known distinctions made in zoning ordinances, such ordinances contain a number of much finer distinctions. Single-family homes are often in districts that prohibit duplexes and triplexes. Banks or restaurants with drive-through facilities are distinguished from similar facilities without drive-through facilities. Pawn shops and other establishments that deal in used merchandise are not allowed in some districts where the same merchandise may be sold new.

As with the above examples, it is important to distinguish between commercial land-use types for purposes of regulating sexually oriented businesses. Otherwise, a store that specializes in sexually oriented videos would be considered a “video rental store” or, in some communities, a general retail use. A store specializing in sexually oriented toys and novelties would be treated the same as a Hallmark Card store. And a sexually oriented cabaret would be considered the same use as a nightclub featuring jazz singers and dancers.

We have used the following classifications of permitted sexually oriented uses in the licensing ordinances prepared for the Northern Kentucky community of Kenton and Campbell Counties:

⁸ Edward John Kaiser, David R. Godschalk, and F. Stuart Chapin, *Urban Land Use Planning*, 4th ed. (Urbana: University of Illinois Press, 1995), p. 349.

⁹ *Ibid.*, pp. 224.

Table 4 Sexually Oriented Uses – Regulated Under Licensing Ordinance

Use	Definition
Sex Shop	<p>An establishment offering goods for sale or rent and that meets any of the following tests:</p> <ol style="list-style-type: none"> 1. It offers for sale items from any two (2) of the following categories: sexually oriented media; lingerie; leather goods marketed or presented in a context to suggest their use for sadomasochistic practices; and the combination of such items constitute more than ten percent (10%) of its stock in trade or occupies more than 10 percent (10%) of its floor area; 2. More than five percent (5%) of its stock in trade consists of sexually-oriented toys or novelties; or 3. More than five percent (5%) of its gross public floor area is devoted to the display of sexually oriented toys or novelties.
Sexually oriented media store	<p>An establishment that rents and/or sells sexually oriented media, and that meets any of the following three tests:</p> <ol style="list-style-type: none"> 1. More than forty percent (40%) of the gross floor area is devoted to sexually oriented media; or 2. More than forty percent (40%) of the stock in trade consists of sexually oriented media; or 3. It advertises or holds itself out in any forum as a “XXX,” “adult” or “sex” business, or otherwise as a sexually oriented business, other than sexually oriented media outlet, sexually oriented motion picture theater, or sexually oriented cabaret.
Sexually oriented motion picture theater	<p>A commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are frequently shown that are characterized by the depiction or description of “specified sexual activities” or “specified anatomical areas” or that are marketed as or offered as “adult,” “XXX,” or sexually oriented. Frequently shown films, motion pictures, videocassettes, slides or other similar photographic reproductions as characterized herein do not include sexually oriented speech and expressions that take place inside the context of some larger form of expression.</p>
Sexually oriented cabaret	<p>A building or portion of a building which provides or allows the provision of sexually oriented entertainment to its customers or which holds itself out to the public as an establishment where sexually oriented entertainment is available. Signs, advertisements or an establishment name including verbal or pictorial allusions to sexual stimulation or gratification or by references to “adult entertainment,” “strippers,” “showgirls,” “exotic dancers,” “gentleman’s club,” “XXX” or similar terms, shall be considered evidence that an establishment holds itself out to the public as an establishment where sexually oriented entertainment is available.</p>

In order to distinguish between the above sexually oriented retail uses and more mainstream retail uses that carry some sexually oriented merchandise or media, we recommend the use of the following definitions for these retail operations but we do not make them subject to the licensing ordinance:

Table 5 Mainstream Retail with Some Sexually Oriented Merchandise

Media store with <10% sexually oriented media	A business that may include sexually oriented media but that is not regulated as a sexually oriented use. In this context it means a retail store offering media for sale or rent for consumption or enjoyment off the premises and which stock in trade consists of less than 10 percent sexually oriented media. Stores that often fall into this category are mainstream bookstores like Barnes and Nobles and local convenience stores that handle magazines such as Playboy.
Media store with 10% to 40% sexually oriented media	A media store that includes sexually oriented media but which media comprises at least 10 percent but not more than 40 percent of the stock in trade in sexually oriented media nor devotes more than 40 percent of the gross floor area for display or storage of sexually oriented media. Stores that fall in this category are mainstream video stores that handle sexually oriented media in separate backrooms often with controlled access.
Retail store with sexually oriented merchandise	<p>A business that offers for sale items from any two of the following categories: sexually oriented media; lingerie; leather goods marketed or presented in a context to suggest their use for sadomasochistic practices; but which combination of such items does NOT constitute more than 10 percent of its stock in trade, inventory or gross floor area. Establishing a definition that includes “combinations of items” avoids regulating stores such as Victoria Secret’s as a sexually oriented use.</p> <p>A business that offers for sale sexually oriented toys or novelties may not have more than 5 percent of its stock in trade, inventory or gross floor area devoted to sexually oriented toys or novelties. This threshold avoids regulating drug stores that carry vibrators or novelty stores such as Spencers found in malls.</p>

In a classic work on land use planning, Kaiser and his University of North Carolina colleagues explain that “Type of land use is expressed through a hierarchical classification system in which more general classes are divided into levels of increasing detail.”¹⁰ The hierarchical classification system is clearly evident in the zoning ordinances regulating land uses in both Kenton and Campbell Counties. For example, in unincorporated Kenton County, eating and drinking places are permitted in almost every commercial zone but eating establishments with drive-ins are only permitted in the Highway Commercial Zone. In Fort Thomas a wide range of retail sales are permitted in the Central Business District, however, auto sales are restricted to the General Commercial and Highway Commercial zones. In Bellevue, gun shops and gas stations, which are retail in nature, are restricted to the NC-3 Neighborhood-Commercial zone, while a variety of other retail sales are permitted in the NC-1 and NC-2 zones.

¹⁰ Ibid.p. 205.

Location, Location, Location

To paraphrase the Supreme Court *Euclid v. Ambler Realty*, a land-use problem may be simply a legitimate use in the wrong place. That is sometimes the case with sexually oriented businesses. Two of our most useful learning experiences with sex shops involved a chain called Priscilla's; we were hired to help Kansas City, Missouri, develop new regulations for sexually oriented businesses after a Priscilla's opened in Kansas City. Later, we were hired to help Toledo, Ohio address the issue after Priscilla's opened there. Although Priscilla's markets a range of sexually oriented products, each of the cities in which we were hired did not have regulations either adequately defining Priscilla's as a sexually oriented business nor did they require appropriate separation requirements applicable to such sexually oriented businesses.

At first, we found the citizen protests over Priscilla's to be almost counter-intuitive. Priscilla's is a relatively up-scale chain that appears in many ways to be merchandised for women. The stores are clean, the management professional. Operating hours are limited. The media in the stores is relatively limited, with the inventory dominated by racy lingerie, sex devices, novelties and gag gifts. There are no on-premises activities, not even modeling of the wild lingerie. In both Toledo and Kansas City, there were a number of older, dirtier adult bookstores that seemed far more worthy of citizen protest. In both



Figure 2 Priscilla's, across from a Roman Catholic high school in Toledo.

cases, however, Priscilla's had – to the distress of the local adult industry – chosen locations near sensitive land uses. In Kansas City, the chain opened next to a pizza place in a small neighborhood shopping center, adjacent to a major pedestrian route to a nearby grade school and backing up to a residential neighborhood. In Toledo, the chain chose to locate in a freestanding building in a commercial area located directly across the street from a Catholic high school (see Figure 2). In both cases, the protests we heard focused not so much on what was inside the store but on the fact that the existence of the store and its window displays in these locations led to lots of questions from children to their parents that the parents would prefer to avoid. In both cities, the other sexually oriented businesses were located along busy commercial (in Kansas City) or industrial (in Toledo) streets, in locations where only persons seeking out businesses along those streets would be likely walking. Residents generally seemed to accept those businesses located along major business corridors as part of the urban landscape (see Figure 3).



Figure 3 An adult video store in a commercial area in Toledo.

Although we have used store inventory as a basis for establishing the definitions of these businesses, the portion of the inventory protected by the First Amendment (the videos, magazines and other media) can be sold in other establishments that have a different land-use classification other than sexually oriented land use. For example, the amount of sexually related inventory is an objective measure that can be used to differentiate Family Videos which has a portion of its inventory devoted

to sexually oriented videos from the “Adult Video News” that has sexually oriented videos as a majority of its inventory. The real point is that they present different faces to their neighbors, unsuspecting children and other pedestrians.

Need for Additional Separation

A second level of regulation often affecting sexually oriented businesses involves the addition to zoning regulations of separation standards, requiring that, even within the districts in which they are permitted, certain sexually oriented businesses must be separated by a specified distance from specified sensitive uses, such as residences, schools and religious institutions.¹¹ Although the separation technique could obviously be abused through the establishment of such great separations that no reasonable sites remain in a particular community, the basic purpose of this supplemental tool is also one of land-use compatibility.



Figure 2 Reyn-Dor News showing two of the nearby residences.

In our Toledo study, the bookstore which drew the most complaints from citizens was the Reyn-Dor News, located in a converted house at the intersection of Brandon, which is an entirely residential street, and with Reynolds which is a mixture of business, institutional and residential uses. There was a residence adjacent to the store on Brandon and more residences across the street and down the block from the store; there were two churches across Reynolds and within one block of the store. Of further concern to the neighbors was

the fact that the bus stop serving the neighborhood was on Reynolds, meaning that anyone, young or old, who needed to catch the bus, would have to encounter the business and its customers. Normally, heavily traveled commercial streets are appropriate locations for sexually oriented businesses; however, when the business location is in close proximity to residential and religious institutions the site quickly problematic.

Overview of the Legal Issues

Many communities limit sexually oriented businesses to only a few zoning districts, typically intensive commercial districts, industrial districts, or some combination of the two. Subject to limitations discussed below, the courts have generally upheld such limitations.¹²

One of the great challenges in zoning, however, occurs along district lines. That can be a particular problem if a district allowing sexually oriented businesses borders a district intended primarily for residences and the schools, religious institutions and parks typically found in residential areas. Courts have consistently upheld requirements that sexually oriented businesses be separated from residential zoning districts, schools, religious institutions and similar sensitive

¹¹ Such separation requirements were first approved by the Supreme Court in *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976).

¹² *Playtime Theatres, Inc. v. City of Renton*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed 2d 29 (1986) is the leading case on this issue.

uses.¹³ The primary limitations on the imposition of such separation requirements are that there must be a reasonable number of sites available for sexually oriented businesses after application of the separation requirements, and the background studies must support the separation requirements. For example, a federal court struck down a state law requiring that certain sexually oriented businesses be separated by at least 1,000 feet from a “forest preserve,” because there was no record of any evidence of the adverse effects of sex businesses on forests.¹⁴

Another common restriction in local zoning ordinances is that sexually oriented businesses be separated from one another by some distance, typically 500 or 1000 feet. The purpose of such regulation is to prevent the creation of a “combat zone” (concentration of uses) and to avoid the apparent increase in secondary effects that occurs when two or more such businesses are near one another. The courts have consistently upheld such requirements.¹⁵ Because the Supreme Court has tacitly accepted the City of Los Angeles’ study showing the increased impacts of the co-location of such businesses¹⁶, the remaining limitation on the separation requirement is that after applying such separation standards there must still be sites available in the community.

The Supreme Court has held that such separation requirements are to be considered classic “time, place and manner” regulations.¹⁷ “Time, place and manner” regulations must serve an “important governmental interest...unrelated to censorship.”¹⁸ Zoning has been considered an “important governmental purpose” since the Supreme Court upheld the concept against a Constitutional challenge in 1926, the same decade during which most states in the nation adopted model laws on the subject promulgated by the U.S. Department of Commerce.¹⁹ The concept of separating incompatible uses goes back to the earliest days of zoning, when the Supreme Court held:

Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the

¹³ .G. Resturant Corp. v. Myrtle Beach, 953 F.2d 140 (4th Cir. 1991); Thames Enters. v. City of St. Louis, 851 F.2d 199 (8th Cir. 1988); FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir. 1988), modified, 493 U.S. 215 (1990); Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980); S&G News, Inc. v. City of Southgate, 638 F. Supp. 1060 (E.D. Mich. 1986), aff’d, 819 F.2d 1142 (6th Cir. 1987).

¹⁴ Palmetto Props., Inc., v. County of DuPage, 2001 U.S. Dist. LEXIS 3747 (N.D. Ill. 2001).

¹⁵ City of Los Angeles v. Alameda Books, Inc., 152 L. Ed. 2d 670, 122 S. Ct. 1728 (U.S. 2002); Playtime Theatres, Inc. v. City of Renton, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed 2d 29 (1986); Young v. American Mini-Theatres, Inc., 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976).

¹⁶ City of Los Angeles v. Alameda Books, Inc., 152 L. Ed. 2d 670, 122 S. Ct. 1728 (U.S. 2002).

¹⁷ City of Los Angeles v. Alameda Books, City of Los Angeles v. Alameda Books, Inc., 152 L. Ed. 2d 670, 680, 122 S. Ct. 1728, 1733-34 (U.S. 2002) (plurality opinion), citing Playtime Theatres, Inc. v. City of Renton, 475 U.S. 41, 46, 106 S. Ct. 925, 89 L. Ed 2d 29 (1986). Alameda Books was remanded for further proceedings at 295 F.3d 1024 (9th Cir. 2002).

¹⁸ The basic test for “time, place and manner” regulations of protected speech was set out in United States v. O’Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679, 20 L. Ed. 2d 672, 680 (1968).

¹⁹ Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926) was the Supreme Court decision; the widely followed model laws were the Standard Zoning Enabling Act (1926) and the Standard City Planning Enabling Act (1928).

thing considered apart, but by considering it in connection with the circumstances and the locality.²⁰

Implications for the Northern Kentucky Community

The commercial and industrial areas in Kenton and Campbell Counties are modest in area. The larger ones tend to follow highway and railroad routes, forming a relatively long and narrow area. Several of the major commercial areas in the two counties are essentially “strips” of commercial zoning along highways.

This pattern of land use is fairly common in communities, particularly in suburban areas. Commercial areas grew up along highways, and, when zoning first came to a jurisdiction, it was often used to reinforce those patterns. In some cases, commercial zoning was used as a sort of buffer, to keep single-family homes off major thoroughfares. This pattern, however, has significant implications for establishing separation standards from sensitive uses in both Kenton and Campbell Counties. Because heavy commercial zones in which it is most logical to locate sexually oriented businesses and other relatively high-impact uses are relatively narrow, often the available sites are within a few hundred feet of residences, schools and religious institutions. Further, in some cases, the religious institutions followed the patterns of commercial development and located along the major thoroughfares, in areas that are otherwise generally commercial.

The downtown areas of Newport and Covington, where most of the sexually oriented cabarets are now located, are relatively large commercial areas. These two areas, however, do not provide a solution to the locational challenge. As with traditional downtowns, there are religious institutions throughout the downtown areas, thus making it impossible to locate additional sexually oriented businesses in the downtown areas with any sort of separation from religious institutions. Further, the location of additional sexually oriented businesses in these areas would be viewed by some as inconsistent with the current revitalization efforts along the riverfront and throughout the two downtowns.

In short, although there is evidence that the secondary effects of sexually oriented businesses extends upwards of a 1000 feet or more, the land-use patterns of Kenton and Campbell Counties may only allow the use of relatively short separation distances for sexually oriented businesses from sensitive uses, perhaps under 500 feet (subject to field testing). The use of any greater separation distance may eliminate all or most possible sites in the counties, thus rendering the entire regulatory scheme unconstitutional. Thus, the counties may have to rely on the improved licensing ordinance (already adopted in Kenton County) to assist in mitigating the impacts of the businesses.

Requirements for Availability of Sites

Overview

When a local government restricts speech in any way – even when that restriction is based on a substantial, important or otherwise legitimate governmental interest – one test of the validity of the regulation is whether it leaves open adequate “alternative avenues” of expression.²¹

²⁰ Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388, 47 S. Ct. 114, 118, 71 L. Ed. 303, 310-11 (1926) .

When the effect of the governmental regulation is to limit the protected communication to certain geographic areas, the obvious question in considering the availability of adequate “alternative avenues” is whether there are other sites at which the protected communication may be disseminated.

Conceptual Analysis

Several courts have considered the number of sites available for sexually oriented businesses in a particular community in the context of apparent demand for such sites. As the Eleventh Circuit said in a Florida case:

In deciding whether three or four or five sites constitute reasonable alternative avenues of expression, the district court should consider more than just Casselberry's population. It should also consider Casselberry's geographical size, the number of acres available to adult entertainment establishments as a percentage of that size, where the sites are located, the number of adult entertainment establishments currently in existence in Casselberry, and the number of adult entertainment establishments wanting to operate in Casselberry.²²

There is really no formula that applies to every community, whether based on the geography of the community or its population. As the Seventh Circuit noted in a case involving the City of Chicago:

The constitution does not mandate that any minimum percentage of land be made available for certain types of speech. What it does require is that zoning schemes that regulate the location of speech provide a "reasonable opportunity" to disseminate the speech at issue. Requiring a "reasonable opportunity" in each region can, and most likely does, result in vastly different acreage percentages. But those differences in no way imply that the regions with lower percentages are acting unconstitutionally.²³

The court went on to apply a supply and demand test, concluding that, with 35 existing businesses and only “4 or 5” additional applications each year, 22 to 56 additional net sites was adequate for the city of 3.5 million people.

Implications for the Northern Kentucky Community

Clearly there must be some additional sites available for sexually oriented businesses in this community of 240,080 people. Formulas might suggest the need for as many as 10 or so additional sites. The cases applying formula tests, however, disregard the reality of supply and demand. Only one new sexually oriented business has opened in the Northern Kentucky community in the last several years, and another was rebuilt after a fire. Staffs who deal with zoning applications in both counties have reported only a couple of inquiries for new businesses have been made in the last couple of years.

²¹ *Playtime Theatres, Inc. v. City of Renton*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986).

²² *Boss Capital Corp. v. City of Casselberry*, 187 F.3d 1251, at 1254 (11th Cir. Fla. 1999), cert. den. 529 U.S. 1020, 146 L. Ed. 2d 315, 120 S. Ct. 1423 (2000); appeal after remand, 251 F.3d 162 (11th Cir. Fla. 2001); summary judgment denied 2001 U.S. Dist. LEXIS 24786 (M.D. Fla. 2001); case dismissed 2002 U.S. Dist. LEXIS 21806 (M.D. Fla. 2002).

²³ *North Ave. Novelties v. City of Chicago*, 88 F.3d 441, 445 (7th Cir. Ill. 1996), reh. den. en. 1996 U.S. App. LEXIS 17720 (7th Cir. Ill. July 18, 1996), cert. den. 519 U.S. 1056, 136 L. Ed. 2d 609, 117 S. Ct. 684, (1997).

Thus, realistically, we believe that a zoning plan that would allow the establishment of 6 or 8 additional sexually oriented businesses in the two counties would meet Constitutional muster. We do not believe that the counties will see that many new businesses over any reasonable period of time. On the other hand, one or more of the existing sexually oriented businesses, most of which are nonconforming in their current locations, may decide to relocate; such relocation would provide a net benefit to residents of the communities in which they are located. Our principle concern is that the counties are able to defend the regulatory program put in place based on our recommendations; for such a program to be defensible there must be a reasonable number of available sites.

Approval Procedures

Overview of the Legal Issues

Any permitting or licensing procedure for an activity protected by the First Amendment is considered a potential “prior restraint” and is thus subject to “strict scrutiny” in the courts.²⁴ “Strict scrutiny: effectively reverses the presumption of validity if a statute or ordinance is challenged in court. That is, if challenged on an ordinance involving a prior restraint, the legislative body would have the burden of proving why the ordinance should be upheld.

One of the practical implications of this line of case law is that sexually oriented businesses with First Amendment protection must be allowed at least in some locations under objective standards, such as those involved in the issuance of a building permit;²⁵ systems which require that all appropriate sites for sexually oriented businesses be rezoned or go through some sort of conditional use or special use permit process are unconstitutional.²⁶ The Eleventh Circuit held that such compatibility and other general zoning criteria were inadequate to guide such a process:

Such is not the case with subsection (c)(1). None of the nine criteria is precise and objective. All of them--individually and collectively--empower the zoning board to covertly discriminate against adult entertainment establishments under the guise of general “compatibility” or “environmental” considerations. Jacksonville, Fla. Land Use Code §§ 656.131(c)(1)(ii) & (iii). Even the seemingly-innocuous fire safety provision is too broad. It does not say “there must be x number of doors per square foot”; it says that buildings must be “sufficiently accessible to permit entry onto the property by fire, police, rescue and other services.” Id. §§ 656.131(c)(1)(viii) (emphasis added). This is neither precise nor objective.²⁷

²⁴ The leading “prior restraints” case cited in the sex business cases is *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965), a case dealing with a local board set up to censor movies. It was applied to a sex business case in *FW/PBS v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990), modifying 837 F.2d 1298 (5th Cir. 1988).

²⁵ The leading case on this subject is *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988), a case striking down as unconstitutional a discretionary permitting system for newspaper boxes in the city.

²⁶ *Lady J. Lingerie, Inc., v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), cert. denied 2000 U.S.LEXIS 2386 (April 3, 2000).

²⁷ 176 F.3d at 1362.

As the above Eleventh Circuit ruling indicates, procedural requirements for regulations that potentially impose a prior restraint on protected expression for a license or permit must be guided by clear and objective standards.

Implications for the Northern Kentucky Community

Sexually oriented businesses with First Amendment protection in Kenton and Campbell Counties must be allowed in at least some locations as uses by right, subject only to objective standards that can be administered by the staff responsible for zoning administration. Most of the zoning ordinances in the two counties that make any provision for sexually oriented businesses allow them only as conditional uses, special uses or other uses by review; we do not believe that such provisions meet the Constitutional requirements. Thus, we will recommend that, in appropriate locations in the two counties, zoning ordinances be amended to allow these uses by right, subject to specific conditions.

To date, cases presented to the courts dealing with the issue of “alternative avenues” have dealt with single political jurisdictions. The courts have made it clear that no community may opt out of its responsibility to provide for alternative avenues.²⁸ Yet it would be difficult to argue that individual cities such as Visalia (population 111), Kenton Vale (156) or Fairview (156) should create commercial opportunities in their communities simply to allow sexually oriented businesses, even if they allow no other intensive businesses or, in the case of some communities, no businesses at all. It is almost equally difficult to make the argument that a larger but essentially residential community, such as Fort Thomas or Independence should be required to add general industrial or heavy commercial zoning for the sole purpose of providing “alternative avenues” for sexually oriented businesses.

It is the difficulty of applying the doctrines of the cases involving “alternative avenues” and the availability of sites to this patchwork of small cities that led leaders of Kenton and Campbell Counties to suggest that their community should be evaluated as the “Northern Kentucky community” that is a cohesive, economically and socially linked area, rather than evaluating the 35 cities, towns and counties as separate jurisdictions based on political boundaries that have little to do with current land-use patterns and less to do with how the economy functions.

It is this approach that we have followed in this report. We believe that it makes sense that these relatively high-impact retail and entertainment uses should be located in the same parts of the community where community residents go for their other major shopping and entertainment – and where there are other relatively high-impact uses. Residents of Fairview who do not expect to buy roofing shingles or furniture in their community are not likely to expect to be able to acquire sexually oriented videos or novelties at a local convenience store that may be zoned as “rural commercial.” If seeking such goods, they will go to the major commercial areas within one of the counties, which in some cases are also located near to industrial uses. Residents of Ryland Heights know that there is no motion picture theater in their residentially zoned community, so they will certainly expect to go to another part of the Northern Kentucky community to find a sexually oriented motion picture theater if the market decides to establish one. Although residents of Crestview Hills might like to have an Irish pub with live entertainment, they know that such a use is not appropriate within the town’s “limited

²⁸ See, for example, *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981).

neighborhood commercial” zone and thus is more likely to be found in another part of the Northern Kentucky community and are thus likely to look elsewhere in the region to find exotic or erotic dancing.

Video Arcades and Viewing Booths

Legal and Regulatory Overview

Kenton and Campbell Counties have, to date, not been confronted with the challenge of sexually oriented video arcades or viewing booths. These are small (often 3 x 5 feet or so) booths with a television screen, a device for accepting tokens, bills or coins, a channel changer and a seat of some sort; typically a local video feed provides multiple channels of sexually oriented material to the sets, and a user in an individual booth is able to purchase small increments (usually 2 to 5 minutes) of time and to select among 20 or 30 channels of material.

Courts have not been very sympathetic to the sexually oriented video booths. A New Jersey court upheld the constitutionality of a statute that made it a public nuisance to “offer[s] for public use booths, screens, enclosures or other devices which facilitate sexual activity by patrons.” The New Jersey court found that the legislature had adequate evidence of the public health hazards of the sort of “anonymous sex” facilitated by such booths.²⁹

The Third Circuit upheld an open booth statute in Delaware. In rejecting a challenge that the open booth requirement was overbroad, the court cited the testimony before the legislature of a state police captain:

In 1991, after Senator McBride introduced the bill, when a senator asked for further explanation of the purposes of the bill, Captain Hancock explained that as head of the Delaware State Police's Financial Crime and Organized Crime Unit he had many contacts with adult entertainment establishments statewide. He described the booths commonly used and said that it was police experience “that the booths are little more than masturbation booths” and that seminal fluid was commonly found dripping down the walls and on the floor in puddles. App. at 316-18. Senator McBride then added that the legislation was intended to stop the spread of sexually related diseases and that similar legislation in other jurisdictions had been upheld.³⁰

Similarly, the Seventh Circuit upheld a local ordinance requiring that such booths remain open to view:

We are satisfied that Mishawaka's goals of preventing the spread of disease and maintaining sanitary and safe conditions at sexually-oriented businesses “would be achieved less effectively absent the [open booth] regulation.” Id. In the present case, plaintiffs make the same mistake as the plaintiffs in *Matney* did by contending that the restrictions are “not narrowly tailored ... because they believe there are less speech-infringing possibilities.” Id. For example, plaintiffs propose that video cameras or roaming security guards would accomplish Mishawaka's legitimate goals as effectively as the Open Booth Restrictions contained in the Ordinance. While this may be true, the possibility of less-speech-restrictive alternatives is, of course, not the proper inquiry under *Ward*. See *Matney*, 86 F.3d at 697. We thus conclude that the Open Booth Restrictions are

²⁹ *Chez Sex VIII, Inc. v. Poritz*, 297 N.J. Super. 331, 688 A.2d 119 (App. Div.), cert. denied, 694 A.2d 114 (N.J.), cert. denied, 522 U.S. 932 (1997), interpreting and upholding N.J.Stat. § 2C:33-12.2.b.

³⁰ *Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123, 140, 142 (3d Cir. 1993).

not “substantially broader than necessary to achieve the government's interest.” Ward, 491 U.S. at 800.³¹

An Ohio court also cited specific testimony regarding sexual activity in the booths:

Between January and March of 1992, undercover officers with the Fayette County Sheriff's Department and the South Central Ohio Task Force investigated the adult video arcade Interstate operated at 9017 West Lancaster Road in Octa. The arcade contained thirty-two viewing booths, each equipped with a bench, a menu of sexually explicit videos, and a coin-operated video monitor. During the investigation, officers collected samples of semen and pubic hair from various viewing booths. Officers also observed what appeared to be dry semen stains on the walls, floors, and video monitors. Officers described the presence of employees who swept and mopped the floors and collected used paper towels and tissues from the video booths and adjoining hallway.³²

When Duncan Associates consulted with the City of Alachua, Florida (a small city near Gainesville) and reported some of these same findings in the context of adoption of new regulations for sex businesses, the city retained a retired sheriff's investigator to visit two sexually oriented video arcade establishments located outside the city but in the same county and both operating viewing booths. The investigator retrieved and tagged five paper towel specimens taken from waste receptacles in the arcades at the two establishments; they were sent to an out-of-state lab. Four of the five tested positive for semen, and at least two showed semen from two different individuals.

In the 1970s such booths were commonly added to sexually oriented bookstores as what they called “accessory uses.” Although in earlier reports we suggested that we believed that this technology and format had become less significant with the advent of home video players, we have encountered retail stores that have installed new, modular booths in three communities in Florida in the last couple of years. All came from the same manufacturer, which provides both the physical booths and the electronic operating systems. Thus, it is possible that some enterprising retailer might install such booths in an establishment in the counties in the future.

Implications for the Northern Kentucky Community

The current ordinances in the two counties do not address the issue of video viewing booths specifically. We believe that Kenton and Campbell Counties can probably ban the booths by requiring that, at least in any future establishments, such videos and movies be shown only in a space of at least 500 square feet, the area required by Jacksonville [Florida] for sexually oriented live performances, the one aspect of the Jacksonville ordinance that was upheld as Constitutional by the Eleventh Circuit.³³

³¹ *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 1004 (7th Cir., Ind. 2002); see, also, *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243, 1245-1246 & n.2 (9th Cir. 1982),

³² *Interstate Indep. Corp. v. Zoning Bd. of Appeals of Fayette County & Village of Octa*, 123 Ohio App. 3d 511, 704 N.E.2d 611, 613-614 (1997), appeal dismissed, 81 Ohio St. 3d 1443, 690 N.E.2d 15, cert. denied, 525 U.S. 814, 142 L. Ed. 2d 39, 119 S. Ct. 50 (1998).

³³ *Lady J. Lingerie v. City of Jacksonville*, 176 F.3d 1358, 1365-66 (11th Cir. 1999), cert. denied, 2000 U.S. LEXIS 2386 (April 3, 2000).

Existing Zoning Ordinances

Introduction

This section of the report is a previously completed analysis of sexually oriented business (SOB) zoning provisions contained in zoning ordinances in Kenton and Campbell Counties. This work was completed in the Fall of 2003; therefore some changes may have occurred since this material was prepared.

This represents the findings from our review of existing zoning ordinances in 33 municipal jurisdictions and Kenton and Campbell Counties. It supplements our previously completed report, *Site Visit Analysis: Sexually Oriented Entertainment and Related Businesses* completed in August 2003.

Zoning Ordinance Provisions for Sexually Oriented Businesses

As discussed earlier, Kenton County has a population of 151,500 (2000 Census) of which 93% is contained within 20 municipal jurisdictions (Walton did not report any population within Kenton County). Campbell County has a population of 88,600 (2000 Census) of which 83% is contained within 15 municipal jurisdictions. As the table below indicates, only 10 of the 37 municipal and unincorporated county jurisdictions in either Kenton or Campbell Counties have any zoning provisions related to sexually oriented businesses.

Table 6 Review of Zoning Ordinances for Sexually Oriented Business Provisions

Kenton County	Population*	SOB Provisions in Zoning Ordinance	Campbell County	Population*	SOB Provisions in Zoning Ordinance
Kenton County	151,464		Campbell County	88,618	
Bromley	838		Alexandria	8286	Yes
Covington	43,370	Yes	Bellevue	6480	Yes
Crescent Springs	3931	Yes	California	86	No Zoning Ord.
Crestview Hills	2889		Cold Spring	3806	
Edgewood	9400		Crestview	471	
Elsmere	8139		Dayton	5966	Yes
Erlanger	16,676	Yes	Fort Thomas	16,495	Yes
Fairview	156		Highland Heights	6554	
Fort Mitchell	8089		Melbourne	457	
Fort Wright	5681		Mentor	181	No Zoning Ord.
Independence	14,982		Newport	17,048	Yes
Kenton Vale	156		Silver Grove	1215	
Lakeside Park	2869		Southgate	3472	
Latonia Lakes	325		Wilder	2624	Yes
Ludlow	4409		Woodlawn	268	
Park Hills	2977		Unincorporated Area	15,209	
Ryland Heights	799				
Taylor Mill	6913	Yes			
Villa Hills	7948				
Visalia	111	No Zoning Ord.			
Walton	0	Residents in Boone Co.			
Unincorporated Area	10,917				

*2000 Census of Population

The four cities in Kenton and Campbell Counties with populations exceeding 15,000 have some type of SOB provisions in their zoning ordinances (Covington, Erlanger, Newport and Fort Thomas). However, of the remaining 31 municipalities, only six (Alexandria, Bellevue, Crescent Springs, Dayton, Taylor Mill and Wilder) have zoning provisions regulating SOBs. These range in population from 2600 and 8300. There appears little correlation between population and provisions for SOBs. The chart above provides a summary of population and indicates whether or not the existing zoning ordinance contains provisions regulating sexually oriented businesses. With the exception of Covington and Newport, most of the municipalities that have SOB provisions in their zoning ordinances added these provisions within the last few years.

Definitions for Sexually Oriented Business Uses

For those 10 municipal jurisdictions that had provisions for SOBs, the consistency in use of definitions varied substantially. Shown below are the SOB definitions used in the respective zoning ordinances; although a number of ordinances did not define a use, it often listed that use in illustrating the types of use that might fall under that definition.

Table 7 SOB Definitions Contained in Zoning Ordinances

<i>Jurisdiction</i>	Alexandria (CC)	Bellevue (CC)	Covington (KC)	Crescent Spgs (KC)	Dayton (CC)	Erlanger (KC)	Fort Thomas (CC)	Newport (CC)	Taylor Mill (KC)	Wilder (CC)
Adult Arcade			Y	Y		Y	3		Y	Y
Adult Bookstore/Video Store	Y	Y	Y	Y	2	Y	3	Y	Y	Y
Adult Cabaret or Dancing Est.			Y	Y	Y	Y	3	4	Y	Y
Adult Entertainment Establishment	Y	Y			Y			Y		
Adult Motel			Y	Y		Y	3		Y	Y
Adult Motion Picture			Y	Y	2	Y	3		Y	Y
Adult Theater	Y	Y	Y	Y		Y	3	Y	Y	Y
Bath House								4		
Escort or Escort Agency			Y				3			Y
Massage Parlor					2			4		
Massage Therapist & Therapy Clinic										
Nude Modeling Studio			Y				3			Y
Nudity			Y							
Nudity, Semi-Nude			Y							
Peep Booth			1			Y			Y	
Private Room				Y		Y			Y	
Public Area			Y							
Sexual Encounter Est. or Center			Y	Y		Y	3	Y	Y	
Sexually Oriented Business			Y	Y		Y	3		Y	Y
Sexual Oriented Bus. License & Fee				Y		Y			Y	
Specified Anatomical Areas		Y	Y	Y		Y		4	Y	Y
Specified Sexual Activities		Y	Y	Y		Y		4	Y	Y

KC – Kenton County; CC – Campbell County

1 – Covington has taken SOB definitions out of its Zoning Code; all definitions are contained in 111.601 Code of Ordinances; Covington uses term “adult arcade” for peep booth

2 – Dayton refers in its definition of “adult entertainment est. “ to adult bookstore, motion picture theater and massage parlor but does not define them

3 – Fort Thomas uses the term “sexually oriented business” then lists the uses that comprise a SOB, but does not separately defines them.

4 – Newport, in addition to zoning, has separate ordinances that define & regulate SOBs & massage (only medical); bath houses are not defined but included in list of use in adult entertainment est.

Zoning Standards for Sexually Oriented Businesses

Although the 10 municipalities that regulated sexually oriented businesses within their zoning ordinance contained similar types of zoning districts, there was a wide variation as to which district the municipality targeted for inclusion of SOBs. Also, as the table below indicates there are substantial differences in the zoning standards related to SOBs.

Table 8 Zoning Standards for Sexually Oriented Businesses – by Jurisdiction

<i>Jurisdiction</i>	Zoning District Permitting SOB	Uses Permitted	Residential Separation	Religious Separation	Education Separation	Parks Separation	Daycare Separation	SOB Separation	How Measured
Alexandria (CC)	Neigh. Shopping & Highway Commercial	Not Listed	300 ft from zone or blocks wt 50% residential	1000'	2000'	None	None	300'	Straight Line
Bellevue (CC)	Commercial - 1	SOBs	Separation standards were part of previous C-1 Zone standards; taken out and may reappear in Licensing Ordinance when adopted						
Covington (KC)	Urban Industrial/Tech	SOBs	None	None	None	None	None	None	None
Crescent Springs (KC)	Industrial Park-2	SOBs as Conditional Use	None	500'	500'	None	None	None	None
Dayton (CC)	Mixed Land Use	SOBs as planned approval	Subject to overall approval of development plan						
Erlanger (KC)	Industrial - 1	SOBs as Conditional Use	None	None	None	None	None	None	None
Fort Thomas (CC)	RP-River Preservation	SOBs	None	None	None	None	None	None	None
Newport (CC)	Central Business District	Adult Entertainment	300 ft from zone or blocks wt 50% residential	1000'	2000'	None	None	300'	Straight Line
Taylor Mill (KC)	Industrial - 4 River	SOBs as Conditional Use	None	None	None	None	None	None	None
Wilder (CC)	General Commercial	SOBs	1500'	1500'	1500'	1500'	1500'	1500'	Straight Line

KC – Kenton County; CC – Campbell County

Bellevue: Has a draft licensing ordinance that contains many of the provisions the Zoning Ordinance had contained; however, it is on hold until Campbell County makes a decision about licensing SOBs; all definitions of SOBs are planned to be contained in the licensing ordinance

Covington: The City has a separate city ordinance regulating SOBs

Newport: Any development within the commercial districts requires approval of a development plan. Adult Bookstores and Adult Theaters were defined but not listed as a permitted use in any district; the City also has a substantial number of other ordinances regulating issues related to SOBs.

Crescent Springs, Erlanger and Taylor Mill: Conditional use approved by Board of Adjustment

City of Alexandria, Campbell County (pop. 8286)

The City of Alexandria's Zoning Ordinance has provisions related to "adult bookstore, adult entertainment establishment and adult theater" in its Neighborhood Shopping Center (NSC) and its Highway Commercial (HC) Zones. The minimum building site area is five acres in the NSC District and the minimum lot area is 10,000 square feet in both the NSC and HC Districts.

Although these uses are not listed as permitted or conditional uses in either of these districts, there are regulations pertaining to these uses in the "Other Development Controls" section of the respective zoning district standards. It stipulates separation standards for "adult use bookstores/video stores, adult use entertainment establishments and adult use theaters." The required separation is 300 from any other SOB, 300 feet from a residential district or residential block frontage having at least 50% residential development, 1000 feet from permanent structures used as a church or place of religious worship, and 2000 feet from any public or private school. Measurement of distances is a straight line from "the nearest points of the respective properties." This section contains another provision that indicates separation standards "are between and among SOB uses and apply to compartmentalized buildings or structures, the same as if such compartmentalized building or structure were one building."

The Zoning Ordinance includes definitions for "adult bookstore, adult entertainment establishment and adult theater." In the definition of "adult entertainment establishment there is mention of "bathhouses, massage parlors and related or similar activities" but fails to define them separately. In addition, there is a provision under the "adult theater" definition that states, "any permitted, conditionally permitted or accessory uses allowed within any zone shall not be interpreted to include adult theaters." It appears this is included in case the use of the term theater" might be misinterpreted as meaning an adult theater.

City of Bellevue, Campbell County (pop. 6480)

The City of Bellevue's Zoning Ordinance has been recently amended (Aug./Sept. 2003) as it relates to regulating sexually oriented businesses. The City has established a Commercial - 1 Zoning District that permits sexually oriented businesses by right. The City rezoned a large bowling alley building that occupies approximately five acres as C-1 (previously zoned multifamily). Yard setbacks were determined by the setbacks of the existing building. Since building setbacks were based on the present structure, the City did not feel a need to establish additional separation standards for sexually oriented businesses. The minimum site size is five acres.

As amended, the Zoning Ordinance's definition section refers the reader to a yet-to-be adopted licensing ordinance that has been put on hold while Campbell County considers a licensing ordinance. Therefore, the City's Zoning Ordinance does not currently have any definitions of sexually oriented businesses.

Prior to the abovementioned zoning amendment, the City's Zoning Ordinance addressed "adult uses" in the Neighborhood Commercial-One, -Two and -Three Zoning Districts. The section, "Other Development Controls" had specific separation provisions. Separation standards for "adult use bookstores/video stores, adult use entertainment establishments and adult use theaters" were 250 feet from any other SOB, 250 feet from a residential district or residential block frontage having at least 50% residential development, 500 feet from permanent structures uses as religious institutions, and 1000 feet from any educational facility. Measurement of distances was

a straight line from “the nearest points of the respective properties.” It was interesting to note that none of these “adult uses” were shown as a permitted or conditional use in any of these districts. It is unknown what separation standards will be contained in the yet to be adopted licensing ordinance.

City of Covington, Kenton County (pop. 43,370)

The City of Covington’s Zoning Ordinance permits sexually oriented businesses in the Urban Industrial/Technology Zone (ITU). The minimum lot size in the ITU district is ½ acre. There do not appear to be any separation standards for SOBs in the ITU district nor in the City’s Code of Ordinances related to SOBs. Prior to 2002, SOBs were a permitted use in the General Commercial and Central Business Districts of Covington. Since SOBs are only permitted in the ITU district, the five sexually oriented businesses in Covington are considered legal nonconforming uses (Liberty’s Show Lounge, The Pad, Rodney’s Le Foxx, Club Venus and Viva La Foxx).

Covington has deleted definitions of SOBs from the Zoning Ordinance and refers to Section 111.600 for any matters related to SOBs. This section contains findings, definitions, classification of SOBs, standards, fees, etc. for issuance and revocation of licenses, appeals, standards for exhibition of SOB media, operation hours and nudity. Definitions included in Section 111.600 include adult arcade (room for 5 persons or less), adult bookstore/novelty store/adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, employee, escort, escort agency, establishment, licensee, nude modeling studio, nudity or state of nudity, person, public area, semi-nude or semi-nude condition, sexual encounter center, sexually oriented business, specified anatomical areas and activities, specified criminal activities, and transfer of ownership or control.

City of Crescent Springs, Kenton County (pop. 3931)

The City of Crescent Springs’ Zoning Ordinance permits sexually oriented businesses as conditional uses in the Industrial Park Two Zone (IP-2). The ordinance requires application be made to the Board of Adjustment for approval. The SOB location is required to abut an arterial street, and not located closer than 500 feet from any church or school. If the property abuts a residential zone, the hours of operation are limited to 12:00 noon to 11:00 pm and no operation on Sunday. Security personnel are required inside and outside while business is open and for an hour after closure. Police background checks are required for all employees as required by the Kenton County Fiscal Court. The Zoning Ordinance adopts by reference the Kenton County Fiscal Court’s regulations related to sexually oriented businesses (except where Crescent Springs standards are more stringent). The minimum site for an IP-2 zone is 25 acres and the minimum lot area is one acre.

The City’s Zoning Ordinance has an extensive list of definitions for adult uses. These include adult arcade (room for 5 persons or less), adult bookstore, adult cabaret, adult motel, adult motion picture theater, adult theater, peep booth (room having less than 150 sf), private room (room in an adult motel), sexual encounter establishment, sexually oriented business or business license or license fee, specified anatomical areas and activities.

City of Dayton, Campbell County (pop. 5966)

The City of Dayton's Zoning Ordinance permits adult dancing establishments and adult entertainment establishments in the City's Mixed Land Use District (MLU). However, the use is subject to plan approval that requires applicant to submit information on consistency with the comprehensive plan and the purpose of the MLU Zone, adequacy of the site and issues related to traffic and availability of utilities. The minimum site for an MLU Zone is 5 acres and the minimum development area is two acres.

The Zoning Ordinance has lengthy definitions of "adult dancing establishments" and "adult entertainment establishments." This definition goes into describing very graphically what these two types of establishment are. The provisions of the MLU District do not exclude these types of activities; therefore, without additional provisions as that contained in a business licensing ordinance regulating sexually oriented business, it might be interpreted that the ordinance "permits" completely topless dancing; or that dancing in a bikini and not touching the patrons might not be considered an "adult dancing establishment" or an "adult entertainment establishment." Clearly this is not the City's intent. There are no other definitions in the Zoning Ordinance. Also, there are no distance separation standards from other SOBs or facilities frequented by children and families.

City of Erlanger, Kenton County (pop. 16,676)

The City of Erlanger's Zoning Ordinance permits massage parlors and sexually oriented businesses as conditional uses in the Industrial One Zone (I-1). The ordinance requires application be made to the Board of Adjustment for approval. No other locational standards are in the Zoning Ordinance. The minimum site for an I-1 zone is 25 acres and the minimum lot area is one acre.

The City's Zoning Ordinance has an extensive list of definitions for adult uses. These include adult arcade (room for 5 persons or less), adult bookstore, adult cabaret, adult motel, adult motion picture theater, adult theater, peep booth (room having less than 150 sf), private room (room in an adult motel), sexual encounter establishment, sexually oriented business or business license or license fee, specified anatomical areas and activities.

City of Fort Thomas, Campbell County (pop. 16,495)

The City of Fort Thomas permits "sexually adult entertainment" in its River Preservation (RP) Zone as a permitted use. This zone requires a minimum lot area of 5 acres but does not have any additional setbacks or separation standards for sexually oriented businesses. The RP Zone does have a provision that all permitted uses "require a certificate of approval from the City Engineer certifying his approval of the type of, and manner of, construction to be built, which completed certificate shall be submitted to the appropriate officer or Board as required herein."

The Zoning Ordinance of the City of Fort Thomas defines "sexually oriented business as "an adult arcade, adult bookstore, adult novelty store, adult video store, adult cabaret, adult motel, adult motion picture, picture theater, adult theater, escort agency, nude model studio, or sexual encounter center." It does not separately define these uses.

City of Newport, Campbell County (pop. 17,048)

The City of Newport permits “adult entertainment” in its Central Business District (CBD) and Industrial Two Zone (I-2). All development in the commercial and industrial districts requires development plan approval. The minimum lot area for any use in the CBD is 5000 square feet. The minimum lot area for any use in the I-2 Zone is 17,000 square feet. The city currently has three sexually oriented entertainment businesses: The Brass Bull, the Brass Mule, and Centerfold’s Lounge which is being purchased by Campbell County and will be demolished to make way for a new county administration building. All three of these establishments are located in the Central Business District and do meet the separation standards in the Zoning Ordinance (discussed below). Also, there are two retail establishments in the Central Business District (The New Thing Shop and New Attitude) that primarily provide merchandise related to exotic dancing costumes and sexy lingerie.

The Zoning Ordinance includes definitions for “adult bookstore, adult entertainment establishment and adult theater.” In the definition of an “adult bookstore” is also the definition of “specified sexual activities” and “specified anatomical areas.” In the definition of “adult entertainment establishment there is mention of “bathhouses, massage parlors and related or similar activities” but fails to define them separately. The definition of “adult entertainment” also includes a definition for a “sexual encounter center. In addition, there is a provision under the definition of “adult theater” that states, “any permitted, conditionally permitted or accessory uses allowed within any zone shall not be interpreted to include adult theaters.” It appears this is included in case the use of the term “theater” might be misinterpreted as meaning an adult theater. There is no listing of adult bookstores and adult theaters as permitted uses in the Zoning Ordinance even though they are defined uses in the Zoning Ordinance.

The Zoning Ordinance specifies separation standards for adult bookstores, adult entertainment and adult theaters under the “Other Development Controls” section of the respective zoning district standards. The required separation is 300 feet from any other SOB, 300 feet from a residential district or residential block frontage having at least 50% residential development, 1000 feet from permanent structures used as a church or place of religious worship, and 2000 feet from any public or private school. Measurement of distances is a straight line from “the nearest points of the respective properties.” This section contains another provision that indicates separation standards “are between and among SOB uses and apply to compartmentalized buildings or structures, the same as if such compartmentalized building or structure were one building.”

In addition to the Zoning Ordinance, the City of Newport regulates sexually oriented businesses through their “adult entertainment establishment” ordinance. The City also has a code regulating “massage parlors” which stipulates these businesses may only be operated and employee persons meeting national certifications for therapeutic massage. In addition, the City uses other ordinances regulating alcoholic beverage sales, public peace and decency and public nudity.

City of Taylor Mill, Kenton County (pop. 6913)

The provisions of Taylor Mill’s Zoning Ordinance are almost identical to that of the City of Erlanger. The Ordinance permits massage parlors and sexually oriented businesses as conditional uses in the Industrial Four River Zone (I-4). The ordinance requires application be made to the

Board of Adjustment for approval. No other locational standards are in the Zoning Ordinance. The minimum site for an I-4 zone is 25 acres and the minimum lot area is one acre.

Like Erlanger, Taylor Mill's Zoning Ordinance has an extensive list of definitions for adult uses. These include adult arcade (room for 5 persons or less), adult bookstore, adult cabaret, adult motel, adult motion picture theater, adult theater, peep booth (room having less than 150 sf), private room (room in an adult motel), sexual encounter establishment, sexually oriented business or business license or license fee, specified anatomical areas and activities. There is no definition for a massage parlor in the Zoning Ordinance.

City of Wilder, Campbell County (pop. 2624)

The City of Wilder recently revised its Zoning Ordinance to permit sexually oriented businesses in the General Commercial (GC) district. The opening of the Playpen, a sexually oriented entertainment bar on Licking Pike, in part, prompted this. Given the absence of a zoning district that permitted sexually oriented uses, the City was required to allow the Playpen's opening. The location is on a site that fronts a state highway and adjacent to a heavily industrial area.

Wilder's Zoning Ordinance includes an extensive list of defined SOB uses under the overall heading of "sexually oriented businesses." These include adult arcade, adult bookstore, novelty store or video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort, escort agency, nude modeling studio, specified sexual activities, specified anatomical areas, studio, and video store.

The General Commercial (GC) District of the Zoning Ordinance lists "sexually oriented uses" as a permitted use, and includes separation standards in the section on "other development controls." The separation standard is 1500 linear feet from other SOBs, churches, residential zones, schools, daycare centers, parks, playgrounds or other places where children normally assemble. The minimum lot area for the GC District is 7,500 square feet.

Summary

Of the 35 municipal jurisdictions in Kenton and Campbell Counties only 10 have enacted any type of regulations related to regulating sexually oriented businesses. Four of these have specific distance standards for separation of the sexually oriented businesses from each other and from uses that are considered family oriented (residences, religious and educational institutions, daycare centers and parks). The City of Wilder had the greatest distance standard (1500 feet) across the board for all uses and included daycare centers and parks. Four jurisdictions require sexually oriented businesses applications to be reviewed by boards of adjustments or have planned development approval. One jurisdiction went to great lengths to develop standards for sexually oriented businesses but did not show them as a permitted use in any district. There is no consistency as to what uses are included in the definition section of the Zoning Ordinance. There appears to be a movement toward using licensing to regulate many aspects of sexually oriented businesses.

Regardless of which direction jurisdictions take in addressing the issue of sexually oriented uses, there is a strong need to have greater consistency in the way sexually oriented uses are defined, locational and separation standards for differing types of sexually oriented businesses, and a strong link to a licensing ordinance to regulate operational issues of specific types of uses and penalties for violating the standards.

Recommendations

Guidelines/Principles

These guidelines and principles will be used in making our specific recommendations for possible sites for sexually oriented businesses:

- Such businesses should be permitted only in industrial or heavy commercial districts. They are not appropriate in the pedestrian-oriented downtown zoning districts in Covington and Newport or in neighborhood shopping districts.
- Such businesses should be located in relatively large industrial or heavy commercial districts to maximize the possibilities for separation from sensitive uses. However, where small pockets of industrial or heavy commercial zoning exist (usually to accommodate a long-existing use), it is not appropriate to locate sexually oriented businesses.
- It is important that residents who wish to seek out sexually oriented businesses be able to find them in areas where other high-impact retail and entertainment businesses are found, because this is how people in the region currently do their business and entertainment; finding such a business tucked away in one of the small towns or in a predominately residential area would ill-serve those who wish to patronize those businesses.
- Such businesses should be located in areas where the primary access is by auto and where there is little pedestrian traffic. Some of the worst-case land-use conflicts with sexually oriented businesses occur where the businesses are located along pedestrian routes to schools, churches or bus stops; in such locations, people going about their everyday business must be confronted by the sexually oriented businesses on a daily or weekly basis. In contrast, where such businesses are located along heavily traveled, relatively high-speed roadways, people are far less likely to come into unintended contact with the businesses.
- Such businesses should be separated by as much distance as practicable from areas zoned and used for exclusively residential use, religious institutions and K-12 schools, recognizing that the Constitutional requirement to provide some sites in the community will limit the separation distances somewhat.
- Locations identified must be useable by these or similar businesses. We thus do not recommend railroad yards, floodways, lands without access, public property, and other sites that are undevelopable. We have made no study of whether possible sites are currently for sale or lease or what the prices might be, and we do not believe that we are required to do so. If landowners in the private market choose to sell or not to sell to particular users, that is an issue of the market and not one of public regulations.