City of Lake Elmo

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Lake Elmo, Minnesota 55042

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NOTICE OF MEETING

The City of Lake Elmo
Planning Commission will conduct a meeting on
Monday, July 23, 2007, at 7:00 p.m.

AGENDA

1. Pledge of Allegiance
2. Approve Agenda
3. Approve Minutes
    a. July 9, 2007
4. Public Hearings:
    a. None
5. Business Items:
    a. Direction to Examine Pool Covers
    b. Sexually Oriented Uses
6. Informational Items:
    a. City Council Updates
        i. July 10 – Lake Elmo Comprehensive Airport Plan
        ii. July 17 – Verbal Update on the I-94 to 30th Street Infrastructure Project
        iii. July 18 – Rezoning/Holding District approval
        iv. July 18 – Planning Grant
    b. 2007 Work Plan – verbal update
    c. Planning Director Position Posted
    d. Volunteer Recognition Event – September 21, 2007
7. Adjourn

City of Lake Elmo
Planning Commission Meeting
Minutes of July 9, 2007

Chairman Ptacek called to order the meeting of the Lake Elmo Planning Commission at 7:00 p.m. COMMISSIONERS PRESENT: Ptacek, Pelletier, Schneider, Fliflet, Armstrong, Deziel, Lyzenga, McGinnis and Van Zandt. STAFF PRESENT: Senior Planner Gozola and Planner Matzek.

Agenda
M/S/P, Lyzenga/Van Zandt to accept the Agenda as presented. Vote: 9:0.

Minutes
May 30, 2007
Commissioner Fliflet said her name should be added to those commissioners present.

M/S/P, Armstrong/Fliflet to accept the Minutes of May 30, 2007 as amended. Vote: 8:0. Abstained: Pelletier.

May 31, 2007
M/S/P, Deziel/Lyzenga to accept the Minutes of May 31, 2007 as presented. Vote: 7:0. Abstained: Armstrong and Lyzenga.

June 11, 2007
M/S/P, Lyzenga/Deziel to accept the Minutes of June 11, 2007 as presented. Vote: 6:0. Abstained: Armstrong, Schneider, McGinnis

Zoning Code Text Amendment, Creation of Limited Business Sewered Residential Holding District (HD-LB-SRD)
Senior Planner Gozola stated that the new holding district will affect two properties near Keats Avenue. This district was missed the first time due to concurrent work updating the previous zoning map. The districts put together were for Highway Business, but the properties had since been rezoned. This holding district is identical in structure as those recently approved by the Commission and Council previously. The minimum lot size is raised to a nominal 20 acres.

Chairman Ptacek said this rezoning is in response to the Comprehensive Plan which was completed a year and a half ago. Statutory requirements mandate updating the zoning code to make it compatible with the Comprehensive Plan.

THE CHAIRMAN OPENED THE PUBLIC HEARING AT 7:09 P.M.

No one spoke.

THE CHAIRMAN CLOSED THE PUBLIC HEARING AT 7:09 P.M.

M/S/P, Armstrong/Pelletier to recommend approval of the zoning code text amendment for the HD-LB-SRD district. Vote: 9:0.

Zoning Code Text Amendment, Amending HD-RR-SRD, HD-RR-BP, HD-RR-LB, HD-RE-SRD, HD-RE-LB, and VR-RR Holding districts.
Senior Planner Gozola this is to correct an issue after the Council had already approved the zoning districts approved. The intent of the holding district is to keep parcels from developing into less than 20 acres. For the holding district areas with previous RR and RE zoning, language was not previously included in the holding district to prevent Open Space Preservation developments.

Chairman Ptacek clarified that the 20 acre minimum is still the regulation.

Senior Planner Gozola agreed that was still the minimum lot size. This language should have been added before and does not change what was already approved.

Commissioner Fliflet clarified that this is only true for properties within a holding district.

Senior Planner Gozola said by State law, the city must restrict development in the areas identified for sewer to a 20 acre minimum.

THE CHAIRMAN OPENED THE PUBLIC HEARING AT 7:17 P.M.

Bonnie McCloud, 30th Street
She is concerned about the timeframes for some of the areas. The village has been under a building moratorium for four or five years. She does not like to see things written in stone. She said it seemed unreasonable that some people will not be able to develop until 2015. She does not think a blanket approach is appropriate.

THE CHAIRMAN CLOSED THE PUBLIC HEARING AT 7:20 P.M.

Commissioner Deziel said only properties forty acres or larger would be impacted by this addition as they are the only ones large enough to develop as an OP.

M/S/P, Deziel/Van Zandt to approve the proposal for the elimination of OP developments in HD-RR-SRD, HD-RR-BP, HD-RR-LB, HD-RE-SRD, HD-RE-LB, and VR-RR Holding districts. Vote: 9:0.

City Council Updates
Planner Matzek said at the June 19th meeting, the City Council approved the variances for Mr. DuFresne at 8961 37th St N, the variances for Mr. Paul at 8186 Hill Trl N, and the rezoning and zoning map for the Village Area and South of 10th Street. Also at that meeting the Preliminary Plan, Preliminary Plat, and Conditional Use Permit review were approved for Whistling Valley III.

Commissioner Fliflet asked why items on the work plan have not been included on the last few meeting agendas.

Senior Planner Gozola said the rezoning for the holding districts has taken up much of the time as it is a time-sensitive issue.

Adjourned at 7:25 p.m.

Respectfully submitted,

Kelli Matzek
Planner

Planning Commission
Date: 7/23/07
Not a public hearing
Item: ___

ITEM: **Pool Covers**

REQUESTED BY: City Council

SUBMITTED BY: Ben Gozola, Senior Planner

REVIEWED BY: Susan Hoyt, City Administrator
Kelli Matzek, Assistant City Planner

PURPOSE:

- At the 7-17-07 City Council meeting, the City Council directed staff to add "pool covers" to the 2007 Work Plan in response to resident requests. The request is to allow certain pool covers as an alternative safety device to fencing.
- To acquaint the planning commission with the issue, staff is providing the informational material provided by the interested residents and researched by staff.

REASON FOR BEING BROUGHT FORWARD:

- Staff is seeking feedback from the commission on what questions you may like researched and/or your thoughts on this topic. Staff will take the direction from the City Council and Planning Commission and prepare an ordinance for consideration.

ISSUES:

- Providing Pool Safety – **Arguments for accepting** pool covers in lieu of a fence generally focus on two points: 1) covers create a complete barrier to the water for the safety of people *on* and off the premises; and 2) fences do not prevent access to the water as they can be climbed, gate latches tend to fail if not maintained, etc. **Arguments against** allowing covers in lieu of fencing focus on fencing being permanent while covers can be removed.
- Providing Safety Alternatives – some believe that fencing is out of character for many of the larger lots typical to Lake Elmo, and that allowing pool covers in lieu of a fence provides a needed alternative to address the same goal.

ADDITIONAL INFORMATION (ATTACHMENTS):

- Powered pool covers meeting certain specifications (A.S.T.M. F 1346.91) are being accepted as an alternative to pool fencing throughout the County. As an example, attached is a 2005 ordinance from Stillwater that accepts covers as an acceptable safety alternative.
- Also attached are numerous documents provided by the interested residents to support why pool covers should be a preferred alternative to fencing.

- Summary of Attachment Key points:
  - Minnesota cities individually determine what, if any, fencing or other safety standards are required for private pools.
  - Stillwater currently accepts pool covers as one option for addressing the safety requirement.
  - No safety mechanism offers 100% safety: fences can be climbed, latches on gates may not be maintained, covers may not be closed.
  - Pool covers, if closed, are the only safety devise that obstructs access to the water. Water accumulating atop a pool cover can still be a danger to very young children.
  - Myths of drowning:
    - "Isn't it more important to have a locked gate to keep neighbors out?" No. According to the US CPSC Drowning Study, nearly 65% of the children were at their own home at the time of [a drowning] incident; 46% of the children were last seen safe inside the house just before the drowning; and 72% had direct access to the pool once they were outside the home.
    - Is there any proof that fences or safety barriers work? Can't a child climb over a fence? Yes. In studies conducted in Australia and New Zealand, the findings suggest that adequate, four-sided pool fencing reduced drownings by 80 percent while studies in Arizona demonstrated a 50 percent reduction.
  - Florida state law (a state in which swimming pools are very common) requires new pools to have one of four devices: a 4-foot high barrier surrounding all sides of the pool, an approved pool cover, an alarm on all entrances to the pool area, or self-closing and self-locking devices on all entrances to the pool area.
  - A Los Angeles study in 2000 showed that requiring fences around residential swimming pools had not reduced the drowning rates especially among toddlers aged 1 to 4 years...81% of all drownings occurred in pools that were regulated by pool-fencing ordinances.

ATTACHMENTS: Stillwater Ordinance; Oakdale Ordinance; League of MN Cities article: *Swimming Pool Safety;* Email request from resident Ken Kelton; City of Phoenix Fire Department Memo; Letter from the Drowning Prevention Coalition of Central Arizona; Baby Guard™ Informational Flyer; "9 Myths of Drowning" Flyer; St. Petersberg Times Article: *New Pools Now Must Have Safety Device;* Reuters Health article: *Fences Around Pools Prevent Child Deaths?;* Handout with talking points in favor of pool covers; Handout entitled "Reasons Why Automatic Safety Covers are a Viable Alternative to Fencing."; Pool cover advertisement (provides pictures);

ORDINANCE NO. 961

AN ORDINANCE AMENDING THE STILLWATER CITY CODE; CONSTRUCTION OF SWIMMING POOLS; FENCE REGULATIONS

THE CITY COUNCIL OF THE CITY OF STILLWATER DOES ORDAIN:

1. Amending The fence regulations found in Chapter 33–2, Construction of Swimming Pools, of the City Code are amended as follows:

City Code Chapter 33–2, Subd. 14. Fences, is amended to hereafter read as follows:

"All swimming pools must be provided with safeguards to prevent children from gaining uncontrolled access. This may be accomplished with a cover, fencing, screening, or other enclosure or any combination thereof of sufficient density and strength as to be impenetrable.

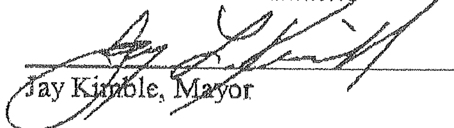
If fencing is used, all fence openings or points of entry into the pool area must be equipped with gates. The fence and gates must be at least four feet in height and constructed of a minimum No. 11 gauge, woven–wire mesh, corrosion–resistant material or other material approved by the building official. All gates must be equipped with self–closing and self–latching devices placed at the top of the gate or otherwise be inaccessible to small children. All fence posts must be decay or corrosion–resistant and set in concrete bases or other suitable protection. The openings between the bottom of the fence and the ground or other surface may not be more than four inches."

2. Saving. In all other ways the City Code will remain in full force and effect.

3. Effective Date. The regulations established in this Ordinance apply only to fences built or replaced after the effective date of this Ordinance. This Ordinance will be in effect from and after its publication according to law.

4. Adopted by the City Council of the City of Stillwater this 21st day of June, 2005.

CITY OF STILLWATER



Jay Kimble, Mayor

ATTEST:

Diane F. Ward, Clerk

Fax

To:	Kelly	From:	Sue
Fax:	777-9615	Fax:	
Phone:		Phone:	430-8803

Date:

Subject:

Comments:

Chapter 33 BUILDING CODE*

***Cross references:** Zoning, ch. 31; subdivision code, ch. 32; building demolition, ch. 34; stormwater drainage utility, ch. 35; wetland conservation act, ch. 59.

State law references: State building code, Minn. Stat. § 16B.59 et seq.

Sec. 33-1. Adopting the 2003 State Building Code.
Sec. 33-2. Construction of swimming pools.
Sec. 33-3. Consultant and administrative fees.

Subd. 1. *Application, administration and enforcement.* The application, administration, and enforcement of the code shall be in accordance with Minnesota Rule Chapter 1300. The code shall be enforced within the extraterritorial limits permitted by Minnesota Statutes, 16B.62, subdivision 1, when so established by this ordinance.

The code enforcement agency is the City of Stillwater.

This code shall be enforced by the Minnesota Certified Building Official designated by the City Council to administer the code (Minn. Stat. §16B.62, subd. 1.)

Subd. 2. *Permits and fees.* The issuance of permits and the collection of fees shall be as authorized in Minn. Stat. §16B.62, subd. 1.

Permit fees shall be assessed for work governed by this code in accordance with the fee schedule adopted by the city council by resolution from time to time. In addition, a surcharge fee shall be collected on all permits issued for work governed by this code in accordance with Minn. Stat. § 16B.70.

Subd. 3. *Violations and penalties.* A violation of the code is a misdemeanor (Minn. Stat. § 16B.69 and Minnesota Rules, Chapter 1300).

Subd. 4. *Building Code.* The Minnesota State Building Code, established pursuant to Minn. Stat. §§ 16B.59--16B.75 is hereby adopted as the building code for the City of Stillwater. The code is hereby incorporated in this ordinance as if fully set out herein.

(1) The Minnesota State Building Code includes the following chapters of Minnesota Rules:

i. 1300, Administration of the Minnesota State Building Code;

ii. 1301, Building Official Certification;

iii. 1302, State Building Code Construction Approvals;

iv. 1303 Minnesota Provisions;

v. 1305, Adoption of the 2000 International Building Code;

vi. 1306, Special Fire Protection Systems;

vii. 1307, Elevators and Related Devices;

viii. 1309, Adoption of the 2000 International Residential Code;

ix. 1311, Adoption of the 2000 Guidelines of the Rehabilitation of Existing Buildings;

x. 1315, Adoption of the 2002 National Electrical Code;

xi. 1325, Solar Energy Systems;

xii. 1330, Fallout Shelters;

xiii. 1335, Floodproofing Regulations;

xiv. 1341, Minnesota Accessibility Code;

xv. 1346, Adoption of the Minnesota State Mechanical Code;

xvi. 1350, Manufactured Homes;

xvii. 1360, Prefabricated Structures;

xviii. 1361, Industrialized/Modular Buildings;

xix. 1370, Storm Shelters (Manufactured Home Parks);

xx. 4715, Minnesota Plumbing Code;

xxi. 7670, 7672, 7674, 7676 and 7678, Minnesota Energy Code.

(2) The following optional provisions are hereby adopted and incorporated as part of the building code for the City of Stillwater.

i. 1306.0010, Special Fire Protection Systems, option subp. 2 and 1306.0030 (e), option 1;

ii. 1335, Floodproofing regulations;

iii. Appendix Chapter K (Grading of the 2001 Supplements to the International Building Code.)

Subd. 5. *Fire zones.* Fire zones in the city are as follows:

(1) Pursuant to appendix C of the state building code, the following described area is declared to be in fire zone no. 1. Beginning at a point where the north line of East Pine Street extended easterly would intersect the west shore of Lake St. Croix, and running thence northerly along the shore to a point where Lake St. Croix intersects with the south line of East Elm Street extended to the shores of Lake St. Croix; thence westerly along the south line of East Elm Street extended to the line of North Second Street; thence southerly along the east line of North Second Street to the southerly line of East Mulberry Street; thence westerly along the south line of East Mulberry Street, to a point 150 feet westerly from the west line of North Second Street; thence southerly along the centerline of Block 19 to a point in the south line of Commercial Avenue if extended westerly; thence westerly along the extension of the south line of Commercial Avenue to the east line of North Third Street; thence southerly along the east line of North Third Street and the east line of South Third Street, to the north line of East Olive Street; thence easterly along the north line of East Olive Street to the east line of South Second Street; thence southerly along the east line of South Second Street, to the south line of East Nelson Street; thence easterly along the south line of East Nelson Street to a point 75 feet westerly from the west line of South Main Street; thence southerly on a line drawn parallel with and 75 feet westerly from the west line of South Main Street to a point in the north line of East Pine Street if extended easterly; thence easterly along the easterly extension of East Pine Street to the point of beginning.

(2) All other properties in the city are declared to be in fire zone no. 3.

Subd. 6. *Appeals.* Appendix D of the state building code is amended to read as follows:

Section 4. Appeals. Whenever the building official disapproves an application or refuses to grant a permit applied for or when it is claimed that the provisions in the code do not apply or that the true intent and meaning of the code have been misconstrued or wrongfully interpreted,

the applicant may appeal from the decision to the city council within 30 days from the date of the decision.

Subd. 7. *Fees.* The fee for a building permit, plumbing permit, mechanical permit and other permit, inspections and plan reviews will be as set forth by the city council by resolution.

Subd. 8. *Service availability charge.* Holders of building permits for all new residential, commercial or industrial construction are required to pay a sewer service availability charge in that amount authorized in the Metropolitan Waste Control Commission's Reserve Capacity Charge Manual, in addition to any city area or connection charge.

(1) *Computation of units.* The number of units must be computed as follows:

a. Single-family houses, townhouses and duplex units each comprise one unit.

b. Apartments each comprise 80 percent of a unit.

c. Mobile homes each comprise one unit.

d. Other buildings and structures are assigned one unit for each 100,000 gallons of flow discharged and commercial and industrial building units are assigned a minimum of one unit.

e. Public housing units and housing units subsidized under any federal program for low and moderate income housing are 75 percent of the unit equivalent for that type of housing.

f. Units existing prior to January 1, 1973, which seek connection to municipal sewer services, are charged at the full rate.

Subd. 9. *Refunded sewer service availability charge; delinquent or corrected sewer availability charge.* Amounts refunded to the city from the metropolitan waste control commission for unused but collected sewer availability charges are the property of the city, and must be placed in the general fund. If the sewer availability charge required to be collected by the city for the metropolitan waste control commission or other sewer fees or charges collected by the city in its own behalf are determined to have been improperly calculated and if additional or corrected charges are due from a property owner, or ifthe charges are delinquent, the city treasurer must prepare notice to the property owner of the additional or delinquent charges and if after 30 days from the notice, the funds remain unpaid, the clerk may, without further notice to the property owner, spread the charges as a service charge against the property and certify the charges to the county auditor for collection with the real estate taxes.

Subd. 10. *Variances to the building code.* Variances to the building code shall be granted according to the following regulations:

(1) The city council may grant variances from the provisions of the state building code, relating to the construction, repair, alteration, enlargement, restoration and moving of buildings or structures for existing buildings or structures when, in the opinion of the city council, the buildings have historic significance and the granting of a variance will not impair the public's interest of health, safety and welfare.

(2) The application for a variance must be made to the building official and submitted with complete plans prepared by an engineer or architect. The application must contain a detailed request and justification for being granted.

(3) The building official must submit the application and a written recommendation to the planning commission.

(4) The planning commission must make a recommendation to the city council within 60 days.

(5) The city council may hold a public hearing on the request. In any event, they must

act on the request within 30 days of the receipt of the recommendation from the planning commission.

(Code 1980, § 33.01; Ord. No. 806, 5-1-95; Ord. No. 916, §§ 1a--1e, 12-18-01; Ord. No. 935, §§ 1, 2, 4-15-03)

Sec. 33-2. Construction of swimming pools.

Subd. 1. *Permit required.* No person, corporation, partnership or firm must construct, repair, enlarge, alter, change, remodel or otherwise significantly improve a swimming pool without first having obtained a permit from the city.

Subd. 2. *Definitions.* The following words, terms and phrases, when used in this section, shall have the meanings ascribed to them in this subdivision, except where the context clearly indicates a different meaning:

Public or semipublic swimming pool means any swimming pool other than a private swimming pool.

Residential swimming pool means any pool used or intended to be used as a swimming pool in connection with a single-family residence and which is available only to the family of the householder and private guests.

Swimming pool means any permanently located pool, used for swimming or bathing which is over 24 inches in depth or which has a surface area exceeding 150 square feet.

Subd. 3. *Approval by building official; building permit.* Before work is commenced on the construction of a swimming pool or any major alteration, addition, remodeling or other improvement is done to an existing swimming pool, detailed plans and specifications must be approved by the building official before a building permit is issued.

Subd. 4. *Plans to be submitted.* Plans, specifications and explanatory data that must be submitted with an application for a permit to construct a swimming pool or for any major alteration, addition or other improvement to a pool must contain the following information:

(1) The general layout of the lot on which the pool is to be located.

(2) The distances of the pool from the lot lines.

(3) Water supply systems, buried sewers and sewage disposal systems, other utilities and any sources of possible contamination of the pool.

(4) A description of the pool's infiltration and chlorination equipment.

(5) All dimensions, including the length, width, depth of the pool, the size of the pool deck and the liquid capacity of the pool. Plans must be drawn to a scale of not smaller than one-fourth of an inch to one foot.

(6) Additional information may be requested by the building official.

Subd. 5. *Permit fees.* Permit fees will be set by resolution adopted by the city council from time to time.

Subd. 6. *Pool piping.* Pool piping systems must be constructed of materials prescribed in the state plumbing code. Installation of the piping including the pool water supply line must be done by a licensed plumber and must be inspected by the city plumbing inspector prior to covering the piping.

Subd. 7. *Main outlets.* Pools must be equipped with facilities for completely emptying the pool and effecting surface drainage (by gravity if elevations permit). The drainage system must be constructed in conformance with the provisions of the state plumbing code and under the

supervision of a licensed plumber, and shall not discharge directly on the land of an adjoining neighbor or in a manner that threatens or endangers fish or wildlife.

Subd. 8. *Water supply.* Water supplies serving all swimming pools must be safe, sanitary and be acceptable to the public health authority. The installation of the pool water supply piping and connection to the source of supply must be under the supervision of a licensed plumber.

Subd. 9. *Electrical requirements.* All electrical installations provided for, installed and used in conjunction with residential swimming pools must conform to the state electrical code and must be inspected and approved by the state electrical inspector. No current-carrying electrical conductors must cross residential swimming pools, either overhead or underground, or within 15 feet of a pool, except as necessary for pool lighting or pool accessories.

Subd. 10. *Heating requirements.* Permits are required for all heating units used in conjunction with swimming pools. Installation must be made by installers licensed by the city and in accordance with any lawful code in effect at the time of installation.

Subd. 11. *Pressure relief valves.* Pool contractors must certify that they have examined the construction site with respect to the water table level and potential soil saturation. If it is determined to be necessary, in the opinion of the building official, pools must be designed and constructed with underdrain systems and pressure relief valves to prevent pool flotation.

Subd. 12. *Shielding lights.* Lights used to illuminate swimming pools must be arranged and shielded to reflect light away from adjoining properties.

Subd. 13. *Location.* All swimming pools or appurtenances must be located in the rear yard at a distance of at least ten feet from any property line.

Subd. 14. *Fences.* All swimming pools must be provided with safeguards to prevent children from gaining uncontrolled access. This may be accomplished with a cover, fencing, screening, or other enclosure or any combination thereof of sufficient density and strength as to be impenetrable.

If fencing is used, all fence openings or points of entry into the pool area must be equipped with gates. The fence and gates must be at least four feet in height and constructed of a minimum No. 11 gauge, woven-wire mesh, corrosion-resistant material or other material approved by the building official. All gates must be equipped with self-closing and self-latching devices placed at the top of the gate or otherwise be inaccessible to small children. All fence posts must be decay or corrosion-resistant and set in concrete bases or other suitable protection. The openings between the bottom of the fence and the ground or other surface may not be more than four inches.

Note: The regulations established in this Subd. 14 apply only to fences built or replaced after the effective date of Ord. No. 961.

Subd. 15. *Safety equipment.* Every swimming pool must be equipped with one or more throwing ring buoys not more than 15 inches in diameter and having 60 feet of 3/16 of an inch manila line, or its equivalent, attached.

Subd. 16. *Aboveground swimming pools.* Ladders or stairs which are attached to or placed against the outside of aboveground tank type swimming pools having a depth of 24 inches or more must be removed from the outside of the pool when the pool is not being used. In addition, aboveground pools are subject to the requirements of subdivisions 12 and 13 of this section.

Subd. 17. *Public or semipublic swimming pools.* Swimming pools other than residential pools must be constructed and operated in conformance with standards for installation promulgated by the state board of health. In addition, prior to the beginning of any construction, a copy of the report prepared and issued by the state health department showing approval of the plans must be filed with the building official.

State law references: Public pools, Minn. Stat. § 144.1222.

Subd. 18. *Operation and maintenance.* Pool contractors shall instruct the pool owner in the operation and maintenance of the pool and its filtration and chlorination equipment and the procedures to be followed in preparing the pool for winter.

(Code 1980, § 33.02; Ord. No. 961, § 1, 6-21-05)

Sec. 33-3. Consultant and administrative fees.

Subd. 1. *Definitions.* The following words, terms and phrases, when used in this section, shall have the meanings ascribed to them in this subdivision, except where the context clearly indicates a different meaning:

Consultant fees means any charges billed to the city for services performed by the city planner, engineer and attorney, exclusive of services performed as part of the consultant's normal retainer or by special agreement between the city and its consultants.

Development means any rezoning, subdivision, special use permit variance, building addition, change in site plan, request for project review, request for city assistance and requests for tax increment assistance.

Owner means any person.

Subd. 2. *Establishment of fees.* An owner that causes the city to expend monies for consultant fees associated with a development or proposed development, shall reimburse the city for the fees.

Subd. 3. *Deposit with city.* When the expenditure of consultant fees is anticipated, the city may require the owner to deposit with the city, in advance, a sum equal to the estimated amount of fees.

Subd. 4. *Unpaid fees.* When any consultant fees are unpaid 30 days after notice given by the city, the fees and costs may be spread against the property in the development as a service charge and certified to the county for collection with the real estate taxes.

(Code 1980, § 33.03)

(e) Evergreen shrubs used for screening purposes shall be at least 3 feet in height at planting. Evergreen shrubs will have a minimum spread of 24 inches.

(10) Landscape plans and screening plantings shall be completed within one year from the date of building permit.

(i) **Site Lighting:** All exterior lighting shall be designed and arranged to direct illumination away from adjacent properties. All exterior lighting shall be arranged and designed to illuminate directly below or inboard of the property lines of the property such that the point source of light is not directly discernable by pedestrian or vehicular traffic in the public right of way. Site lighting shall have a maximum height of 30' to the illumination source. Lighting shall be designed such that there is a maximum 0.5 foot – candles at any property line. No offsite glare will be allowed. A photometric plan inclusive of all site lighting and specification sheets for each lighting fixture shall be submitted for review.

(j) **Technology Adaptable Buildings:** If, in any case, the building were to change ownership and/or uses in an attempt to adapt to market shifts, the current project shall consider, and where feasible implement, future technological infrastructure and improvements so that the ability to convert and adapt to changes may be done in an efficient and effective manner.

Sec.25-176 Swimming Pools.

(a) **A building permit shall be required for the construction or installation of any swimming pool which shall have a capacity of 3,000 gallons or more.**

(b) **An application for a building permit shall include the following information:**

1) Type and size of pool.
2) Site plan to scale.
3) Location of pool.
4) Location of house, garage, fencing and other structures on the lot.
5) Location of structures on all adjacent lots.
6) Location of filter unit, pump, and wiring (indicating type of such equipment).
7) Location of back-flush and drainage outlet.
8) Grading plan, finished elevations, and final treatment (decking, landscaping etc) around the pool.
9) Location of existing overhead or underground wiring and utility easements.

(c) **In single family and two-family areas:**

1) Pools for which a building permit is required shall not be located within ten (10) feet of any side or rear lot line nor within six (6) feet of any principal structure or frost footing. Pools shall not be located within the front or side-yard setback area.

2) Pools shall not be located beneath overhead utility lines nor over underground utility lines of any type.
3) Pools shall not be located within any private or public utility, walkway, drainage, or other easement.

4) To the extent feasible, back-flush water or water from pool drainage shall be on the owners' property or into approved public drainage ways. Water shall not drain onto adjacent land.

5) Any mechanical or electrical equipment which produces noise, such as pumps or filters, shall be located at least thirty (30) feet from any dwelling on adjacent property and not closer than ten (10) feet to any lot line unless such equipment is enclosed in a sound-resistive enclosure. In all cases, noise shall not exceed minimum standards as set froth in Ordinance 234.

6) Lighting for the pool shall be directed into or onto the pool and shall not spill onto adjacent property. Any floodlights shall be shielded sufficiently to prevent the spillover of light onto adjacent properties.

7) Swimming Pools: For any pool of over 18" of water depth, a safety fence and/or poolside of a non-climbable type of at least four (4) feet in height shall completely enclose the pool, prior to filling of the pool. Temporary pools are exempt from this requirement. Temporary pools are defined as those that are removable and/or portable which are removed seasonably for winter.

8) Water in the pool shall be maintained at all times in a suitable manner to avoid health hazards of any type. Water shall be subject to periodic inspection by the City.

9) All wiring, lighting, installation of heating units, grading, installation of pipes, and all such other installations and construction shall be subject to inspection by the City for code compliance.

10) Above ground pools utilizing removable ladders for ingress and egress shall have the ladder removed when unattended. Above ground pools utilizing fixed stairs shall be affixed with a four (4) foot, non-climbable fence or gate to be locked when unattended.

11) Any proposed deviation from these standards and requirements shall require a variance in accordance with normal zoning procedures.

(d) **In multiple-family areas and non-residential use areas:** Pools in multiple-family areas (residential structure containing three or more dwelling units) shall conform to the standards set out in (c) above with the following added restrictions:

1) No part of the water surface of the swimming pool shall be closer than thirty (30) feet to any lot line.

2) No pump, filter, heating units, or other apparatus used in connection with or to service a swimming pool shall be located less than thirty (30) feet from any lot line.

3) All deck areas, patios, or other similar areas used in conjunction with a swimming pool shall be located not closer than thirty (30) feet to any adjacent residential district line. Adequate screening, including both fencing and landscape treatment, shall be placed between said areas and adjacent single-family and two-family lot lines.

4) All-season pool enclosures shall require site plan review by the Planning and Park Commission and City Council.

(4) **In all areas:**

1) Required safety fencing shall be completely installed within three (3) weeks following installation of pool and prior to pool being filled.

2) Nuisances such as undue noise, lighting onto adjacent property, health and safety hazards and the like shall not be permitted.

(f) **Permit Fee:** Prior to the issuance of a construction or installation permit, the applicant shall pay a permit fee based upon the estimated value of the proposed pool. The amount of the fee shall be determined by using the City of Oakdale table of Inspection Department Building Permit Fees. These fees shall apply to all pools requiring a building permit pursuant to Section 25-190 (a) of this Ordinance.

Sec. 25-177

(a) **Garage sales** are allowed in all residential zoning districts with the following restrictions:

1) There shall be not more than three (3) sales events in each calendar year per dwelling unit, including the annual citywide Oakdale garage sale.

2) Sale events are limited to any consecutive four-day period.

3) Garage and craft sale signs must comply with the sign ordinance including sections of the City Code.

Sec. 25-178 to 25-180 Reserved

Swimming Pool Safety

By Scott M. Kelly

Swimming pools are wonderful sources of backyard entertainment and a valued component of any city's parks and recreation program. Unfortunately, too many afternoons spent poolside turn tragic with drowning and near-drowning incidents.

After reviewing materials on drownings, child behavior, pools, and pool fencing, the U.S. Consumer Product Safety Commission (CPSC) recommends that all pools owners construct and maintain proper barriers to prevent young children's access. While Minnesota requires certain, specific safety precautions on "public" swimming pools, cities currently have sole authority to determine what will be required for "private" pools.

What's a pool? A pool is broadly defined by Minnesota Rules as any structure, chamber or tank containing an artificial body of water for swimming, diving, relaxation or recreational use, including swimming pools, lap pools, spa pools (whirlpools), water parks, plunge pools, water therapy pools, flume water slides, wave pools, splash pools, and various other special-purpose pools.

A "private residential pool" is a pool connected to a single-family residence (or owner-occupied duplex), under the control of the homeowner, the use of which is limited to family members or invited guests. A "public pool" is any pool (other than a private residential pool) intended to be used collectively by a number or persons, whether or not a fee is charged for use.

A public pool includes, but is not limited to pools at a city park, school, licensed childcare facility, group home, hotel/motel/resort, campground, club, apartment building/condominium, and manufactured home park.

The Minnesota pool code. The Minnesota Department of Health administers the Minnesota pool code (Minnesota Rules, Chapter 4717). Applicable to public pools, some of the Minnesota pool code regulations include plan submittal, review, and approval; inspections; construction in accordance with applicable standards; personnel training; recordkeeping and reporting; lifesaving equipment and signage; water sanitation and conditioning; access and fencing requirements.

Minnesota cities must ensure that any current or planned pool facilities comply with all applicable construction, inspection, and operation requirements.

Generally, access to a public pool must be designed and maintained to effectively prevent the unauthorized entrance of children. Among the required standards, new fencing must:

- Be at least five-feet high.
- Be equipped with self-closing, self-latching gates capable of being locked.
- Have latches four feet above the ground.
- Not have any openings within the fencing greater than four inches in diameter.
- Not have any opening below the fencing greater than two inches.
- Be designed to prevent easy access by climbing over the fencing.

Wading pools/Childcare facilities. Since 2002, the use of wading pools is permitted in licensed childcare facilities. The pools must be inaccessible to children except during supervised use. The childcare facility must be staffed by an individual who has successfully completed a swimming pool operator training course and is proficient in First Aid and CPR. Finally, a child may not use a portable wading pool unless a parent or legal guardian has provided written consent.

Private residential pools. Some states require fencing around all swimming pools, regardless of any public or private designation. Minnesota, through the Department of Health, does not regulate private residential pools. While provisions of the pool code may be a good template to follow when crafting city ordinances, a Minnesota city, alone, determines what, if any, fencing or other safety standards are required for private pools within its city limits. According to the CPSC, a successful barrier will prevent children from going over, under or through the fencing in order to gain water access.

A residential pool ordinance may require:

- Residents to apply for and obtain permits prior to construction.
- Submitting a fencing plan as part of the permitting process.
- The use of approved, temporary fencing throughout pool construction.
- Erecting permanent fencing prior to filling the pool with water.
- Fencing without hand or footholds for climbing to meet minimum-height requirements.
- Minimal clearance to prevent crawling under fencing.
- Gates opening outward away from the pool area that are equipped with locking devices located above a young child's reach.
- Power safety covers that are able to withstand the weight of several adults, used as either an additional or alternative means of protection.

Cities should adopt ordinances that effectively address resident safety concerns in light of their budget, staff and enforcement capabilities.

For more information. For additional information (including sample ordinances), contact the League's Research Department at (651) 281-1220 or (800) 925-1222, or the Minnesota Department of Health Pool Program at (651) 201-4503.

Scott Kelly is research attorney with the League of Minnesota Cities. Phone: (651) 281-1224. E-mail: skelly@lmnc.org.

Ben Gozola

From: Susan Hoyt [Susan.Hoyt@lakeelmo.org]
Sent: Tuesday, June 26, 2007 10:58 AM
To: kenkelton@comcast.net
Cc: Ben Gozola; Kelli Matzek
Subject: RE: City code

Thanks for the explanation.
I will refer this to our city planner to review our code and see what makes sense.
I appreciate your thorough explanation of the topic.

Susan Hoyt
City Administrator
City of Lake Elmo
651-233-5401(office)

From: kenkelton@comcast.net [mailto:kenkelton@comcast.net]
Sent: Monday, June 25, 2007 12:26 PM
To: Susan Hoyt
Subject: RE: City code

Thanks for your reply. I thought there may be like a general form I had to fill out first.

This pertains to swimming pool covers vrs latched fences. I have read Stillwater's city code and it would be more something on that line.

With the advent of technologies such as the new pool covers that are virtually rodent tight and can withstand the weight of several hundred pounds there is evidence that these covers may be even safer than traditional fencing. I didn't believe this either but after I looked into it, it made sense. In the long run it's comes down to the individual home owners responsibility.

We lived next to a property that had a swimming pool with a fence and my then young boys were climbing on the fence and the fence gate was constantly being defeated by the home owner to allow easy entrance to the pool which I am sure was unintentional.

We also know of instances while people are away on vacations that strangers love to have the pool for a day or two. With a cover this couldn't happen.

Also from what I understand that in many cases after a couple of years the automatic latching mechanisms on fence gates become defective because of ground settling and people don't bother to repair them.

There is no monetary gain by not having a fence because the pool covers of this type cost over $10,000. The incentive to the home owner to keep the pool closed is huge. The heating bill and chemical saving is about 90% and of course the addition of safety.

Where we live in Lake Elmo (Lake Elmo heights second addition) the lots must be over 2.5 acres

which further reduces the chance of someone wandering on to our property and getting to the pool.

The following is Stillwaters section of the code that outlines Swimming Pool protection.

Subd. 14. *Fences.* All swimming pools must be provided with safeguards to prevent children from gaining uncontrolled access. This may be accomplished with a cover, fencing, screening, or other enclosure or any combination thereof of sufficient density and strength as to be impenetrable.

Before we go out and buy an additional safety measure we would at least like to present our case as to the safety of the pool. We would be willing to bring in as a consultant the pool manufacture who could express in better terms the safety of these covers.

Thank you for your assistance. We look forward to hearing from you and working with the city on what our next steps should be.

Ken and Marcela Kelton
2760 Imperial Av N.
Lake Elmo Mn 55042

-------------- Original message --------------
From: "Susan Hoyt" <Susan.Hoyt@lakeelmo.org>
It will help if you can tell me what section of the code since it varies if it requires Planning Commission review.
Thanks. Susan

Susan Hoyt
City Administrator
City of Lake Elmo
651-233-5401(office)

From: kenkelton@comcast.net [mailto:kenkelton@comcast.net]
Sent: Friday, June 22, 2007 4:32 PM
To: Susan Hoyt
Subject: City code

I am a resident of Lake Elmo and I am inquiring about information on what the formal process is for trying to have a city code modified or changed.

City of Phoenix
FIRE DEPARTMENT
ADMINISTRATION

May 26, 1994

To whom it may concern:

The Phoenix Fire Department has investigated over 700 drowning and near-drowning calls involving swimming pools. We have not had an incident, which involves a Safety Pool Cover. In addition, we encouraged the City of Phoenix Building Officials to include Motorized Safety Pool Covers in our Swimming Pool Barrier Code. Motorized safety covers offer an alternative to fence-only codes.

Doug Tucker
Division Chief

520 West Van Buren. Phoenix Arizona 85003-1632 602-252-6002

August 24, 1992

Dear Pam:

The Drowning Prevention Coalition of Central Arizona is a community based organization comprised of parents, health and safety professionals, business leaders, and concerned citizens. It exists to provide a forum to prevent drowning, near drowning, and other water related incidents through the promotion of educational efforts, legislative action, and enhanced product safety.

Our group has spent much time in the development of what we feel are appropriate barrier codes to be used by legislative or political jurisdictions. The Coalition was instrumental in helping the City of Phoenix develop what we consider one of the strongest barrier codes in the Country at this point-in-time.

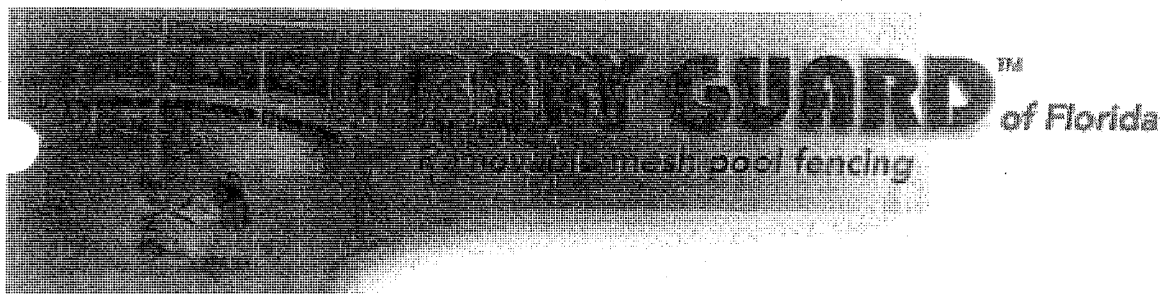
As part of the recommendations developed by the Drowning Coalition, we included motorized safety pool covers as an acceptable alternative. The Coalition supports the installation of a barrier between the home and the pool. Currently this would include motorized safety pool covers, four-sided fencing or self-closing devices on doors and windows that lead to the pool area. In review of statistics, which is done monthly at the Coalition meetings, we have not been made aware of any water related incidents, which involved approved safety pool covers.

It is the belief of the Coalition that the addition of additional layers of protection will substantially reduce the risk of child drownings (this would include motorized safety pool covers.)

Sincerely,

J.L. Harrington, Jr., President

JH/ka
J026



Drowning Prevention/Water Safety

Parents whose children have drowned say the day of the tragedy started out just like any other day. No matter how the drowning happened, one thing was the same for all these parents: The three tragic seconds that claimed their child's life slid silently, without warning, and can never be brought back.

Learn the action steps you can take for safeguarding children in and around water.

Protection:

Use layers of barrier protection between children and water to warn and impede:

- A non-climbable four-foot fence that separates the pool/spa from the residence. Opening should be no more than four inches wide so children cannot squeeze through the spaces.
- Self-closing and self-latching fence gates, side gates and doors leading to the pool/spa area, with latches above a child's reach (54 inches high). Gates should open outward.
- Alarms on doors and windows leading to the water, installed about five feet above ground level so that a child cannot reach them.
- Pool safety covers (power-operated are the safest and easiest to use).

In addition to these protective devices, routinely follow these practices:

- Maintain all safety devices to ensure they are in good working order.
- Secure and lock all doors, windows and gates leading to the pool/spa area when not in use.
- Drain standing water from pool/spa covers. Remove covers completely before using the pool/spa and replace them immediately after use.
- Never leave toys in or around the pool/spa. And, place items which can be used for climbing (tables, chairs, planters) away from fences.

Supervision:

Curiosity, rapidly changing skills and an ability to understand danger place young children at high risk. Adults must establish and communicate responsibility for child supervision:

- Assign an adult "water watcher" to supervise the pool/spa area, especially during social gatherings.
- Assign a second adult to maintain constant visual contact with children in the pool/spa area. Don't assume someone else is watching a child.
- Never leave a child alone near a pool or spa, bathtub, toilet, water-filled bucket, pond or any standing water in which a child's nose and mouth may be submersed.
- Don't rely on swimming lessons, life preservers or other equipment to make a child "water safe."
- Don't allow children to play in the pool/spa area.
- Look in the pool area first if a child is missing.
- Communicate pool safety measures with the baby-sitter and train the sitter in infant/child CPR.

Preparation:

- Insist anyone over 14 years old has current certification in infant/child CPR.
- Learn how to swim and learn rescue techniques. o Mount rescue equipment by the pool (lifesaving ring, shepherd's hook and CPR sign). Many float-type toys are thought to be lifesavers. They aren't. They are only toys and should be used only as toys (arm floats and inflatable rings).
- Post the 9-1-1 emergency phone number on your phones. Have a phone near the pool area. Don't leave children unattended while talking on the phone.
- Teach everyone how to use safety equipment and how to call 9-1-1.

Drowning Statisitcs

Parents whose children have drowned say the day of the tragedy started out just like any other day. No matter how the drowning happened or where it happened - pool, spa, or any other body of water - one thing was the same: the seconds that claimed their child's life slid by silently, without warning, and can never be brought back.

Drowning is the second leading cause of unintentional injury-related deaths to children ages 14 and under. It can happen in a matter of seconds - in the time it takes to answer the phone. There is often no splashing to warn of trouble. Children can drown in small quantities of water and are at risk in their own homes from wading pools, bathtubs, buckets, diaper pails, and toilets, as well as swimming pools, spas, and hot tubs.

The statistics are frightening. Each year in the United States, 1,150 children (ages 14 and under) drown - more than half of these children are preschoolers (ages 0-4). An estimated 5,000 children (ages 14 and under) are hospitalized due to near-drownings, and of children surviving near-drownings, 5-20 percent suffer severe and permanent disability.

Summer can be one of the most exciting and fun-filled times of the year, but also one of the most dangerous. Two-thirds of yearly drowning accidents happen between May and August so be prepared! In recognition of Drowning Prevention and Awareness month, take a few moments to familiarize yourself with what it takes to stay safe and have fun.

Common Myths About Drowning and Water Safety

Drowning isn't really a problem, is it?
Yes. Drowning is the leading cause of unintentional death among children ages one to four in California. A residential pool is 14 times more likely to cause a death than an automobile.

Don't more children die in open water than in pools?
No. More than 50 percent of deaths by drowning occur in residential pools. Natural bodies of water comprise 19 percent. Public pools another 19 percent.

Isn't it more important to have a locked gate to keep neighbors out?
No. Nearly 65 percent of the children were at their own home at the time of the incident. Forty-six percent of the children were last seen safe inside the house just before the drowning and 72 percent had direct access to the pool once they were outside the home.

Isn't it just parental neglect that causes drowning?
No. According to the U.S.CPSC Drowning Study, conscientious parents who understand the need for supervision were almost always present.

Won't swimming lessons protect a child from drowning?
No. Swimming lessons do not prepare a child for a drowning or near-drowning situation.

Isn't constant supervision enough to prevent drowning?
No. Experts recommend "layers" of protection which include a well-maintained fence with a self-closing, self-latching gate and alarm systems, powered safety pool covers, and self-closing, self-latching doors with automatic sliding door closers.

Is there any proof that fences or safety barriers work? Can't a child climb over a fence?
Yes. In studies conducted in Australia and New Zealand, the findings suggest that adequate, four-sided pool fencing reduced drownings by 80 percent while studies in Arizona demonstrated a 50 percent reduction.

Do pool owners without young children need to install protective barriers?
Yes. Statistics show that 35 percent of residential drownings are not at the home of the victim.

General Water Safety Tips to Live By

- When the sun comes out and the weather heats up, community pools open for the season and people head to the beach for the first time. Many lives can be saved and injuries prevented this summer by following some simple water safety tips:
- Learn to swim. The best thing anyone can do to stay safe in and around the water is to learn to swim.
  Always swim with a buddy; never swim alone.

- Know your swimming limits and stay within them. Don't try to keep up with a stronger skilled swimmer or encourage others to keep up with you.
- Swim in supervised areas only.
- Obey "No Diving" signs.
- Watch out for the "dangerous too's"--too tired, too cold, too far from safety, too much sun, too much strenuous activity.
- Don't mix alcohol and swimming. Alcohol impairs judgment, balance, and coordination, affects swimming and diving skills and reduces the body's ability to stay warm.
- Always wear a U.S. Coast Guard-approved life jacket when boating and fishing.
- Know local weather conditions and prepare for electrical storms. Because water conducts electricity, it is wise to stop swimming or boating as soon as you see or hear a storm.

Preparation is Key to Prevention

Home pools are becoming more common every day. They provide an excellent means of recreation for the entire family and friends for a large part of the year. But beware; they are dangerous if not monitored properly. You must be aware of the potentially hazardous properties of a pool.

Just how serious is the problem? Drowning is the number one cause of death for children under five in Florida, Arizona, and California with a ranking of number two for over a dozen other states. For every drowning there are eleven near drowning incidents, according to government statistics, many of which result in totally disabling brain damage.

The majority of the parents involved were responsible people who thought it could never happen to their family. They were careful and had close supervision over their children. Many were in upper income brackets, educated, and could afford nice homes with pools in family-oriented communities. So we are literally talking about people who could live next door to you.

Supervision is always the primary layer of protection, but as studies show, 69 percent of drowning incidents occurred when parental supervision failed and there were not other "backup layers" in place, such as pool gates (with locks) or alarms on access doors. There can be no compromise on pool safety as it can truly become a life and death situation. Pool rules need to be set and obeyed. A pool drowning is not necessarily an "accident", it is foreseeable and therefore preventable. Keep your family safe this summer and be prepared!

9 MYTHS Of DROWNING

1. Is drowning really a problem?
   A. Yes. Drowning is the leading cause of unintentional death among children ages 1-4 in California. A residential pool is 14 times more likely to cause a death than an automobile.

2. Don't more children die in open water than in pools?
   A. No. 50% of deaths by drowning occur in residential pools. Natural bodies of water comprise 19%. Public pools another 19%.

3. Isn't it more important to have a locked gate to keep neighbors out?
   A. No. 65% of the children were at their own home at the time of the incident. 46% of the children were last seen safe inside the house just before the drowning. 72% had direct access to the pool once they were outside the home.

4. Isn't it just parental neglect that causes drowning?
   A. No. According to the U.S.CPSC Drowning Study, conscientious parents who understand the need for supervision were almost always present.

5. Won't swimming lessons protect a child from drowning?
   A. No. Swimming lessons do not prepare a child for a drowning or near-drowning situation.

6. Isn't constant supervision enough to prevent drowning?
   A. No. We recommend "layers" of protection which include a well maintained fence with a self-closing, self-latching gate and alarm systems, powered safety pool covers, and self-closing, self-latching doors with automatic sliding door closers.

7. Is there any proof that fences or safety barriers work? Can't a child climb over a fence?
   A. In studies conducted in Australia and New Zealand, the findings suggest that adequate, four-sided pool fencing reduced drownings by 80%. Studies in Arizona demonstrated a 50% reduction.

8. Won't fences detract from the aesthetics of pools?
   A. There are several kinds of fences to choose from which meet safety requirements and there is also the alternative of an approved safety cover.

9. Do pool owners without young children need to install protective barriers?
   A. 35% of residential drownings are not at the home of the victim.

New pools now must have safety device

Drowning is Florida's leading cause of death for children 1 to 4 years old. It took a state representative three years to get the measure approved.

By SHELBY OPPEL

© St. Petersburg Times, published May 26, 2000

TALLAHASSEE -- Starting Oct. 1, new residential swimming pools in Florida must be sold with safety devices aimed at preventing child drownings, under a bill Gov. Jeb Bush signed into law Thursday.

The law requires new pools to have one of four devices: a 4-foot-high barrier surrounding all sides of the pool, an approved pool cover, an alarm on all entrances to the pool area, or self-closing and self-locking devices on all entrances to the pool area.

The cost to pool buyers will range from $50 for the cheapest alarm to $5,000 for the most expensive barrier, according to the Florida Pool and Spa Association.

The duty to install the safety device will fall to manufacturers. If a building code inspector finds that a new pool doesn't comply with the law, the manufacturer could be charged with a second-degree misdemeanor, punishable by up to 60 days in jail and a $500 fine.

Drowning is the leading cause of death for Florida children ages 1 to 4. State Rep. Debbie Wasserman Schultz, a Weston Democrat, has sponsored the safety device bill for three years with the hope of erasing that statistic.

State Sen. Don Sullivan, R-Seminole, sponsored the measure this year in the Senate.

"If there's any state in the country that should be a leader in protecting children from drowning in swimming pools, then it's Florida," Wasserman Schultz said Thursday.

The new law is named, in part, for Preston de Ibern, a Palm Harbor boy who suffered severe brain damage after almost drowning in his backyard pool in 1995. While his mother was in another room of the house, Preston fell into the water and was discovered minutes later, not breathing.

Preston, now 9, is unable to speak or walk. His mother has fought for three years to persuade lawmakers to adopt safety measures that may prevent what happened to her son from happening to other children.

"I am just elated. This is a triumph for the children of Florida," said Carole de Ibern, 47.

"I'll never know how many kids will be saved or who they were, but when I die, I will know children were indeed saved because of my son's accident and because of being diligent, patient and persistent," she said.

According to a Senate staff analysis, of 420 children who drowned in the state between 1992 and 1997, 208 drowned in swimming pools at home. Drowning is also a leading cause of death among the elderly and infirm.

The new law won't apply to the estimated 1-million residential pools that already exist in Florida. It will, however, affect the 23,000 new pools that are built or sold each year.

"My ultimate goal in doing all of this is to make people, when they buy a pool, perceive the safety device as part of the package," de Ibern said.

"You wouldn't buy a car without a seat belt. It should be like that. You don't give it a thought."

Fences Around Pools Prevent Child Deaths?

NEW YORK, Mar 31 (Reuters Health)

Pool fence laws do not prevent drownings

The passing of ordinances requiring fences around residential swimming pools in Los Angeles County, California, has not reduced the drowning rates, especially among toddlers aged 1 to 4 years. ``Our major finding was that the overall rate of childhood drowning was not lower in pools regulated by fencing ordinances than in pools unregulated by fencing ordinances in Los Angeles County," according to Dr. Hal Morgenstern and colleagues from the University of California, Los Angeles. The investigators examined the influence of pool-fencing ordinances and other factors on the rate of childhood drowning in residential swimming pools in Los Angeles County from 1990 through 1995, expecting to find a decrease in drowning rates after the ordinances were passed. Their findings are published in the April issue of the American Journal of Public Health.

During the 6-year study period, 146 childhood drownings occurred, for an average rate of nearly two drownings per 100,000 children per year, the authors report. Most drownings occurred at the victim's home (67.8%), and most occurred at single-family dwellings (87.7%).

Toddlers were 9 to 10 times likelier than infants or school-aged children to drown in a residential pool, the results indicate. Furthermore, drowning rates were 3 times higher in boys than in girls and 45% higher in African-American children than in white children. Contrary to what the researchers expected, the chance of drowning in pools built or modified under pool-fencing ordinances was 27% higher than that in pools built before such ordinances. ``Indeed," they write, ``81% of all drownings occurred in pools that were regulated by pool-fencing ordinances." The authors suggest that the laws enacted may not be inadequate, that their enforcement may have been weak, or that parents buoyed by a sense of false security may have supervised their children less carefully.

``In conclusion," Morgenstern and colleagues write, ``local ordinances enacted in Los Angeles County before 1996 to regulate barriers around residential swimming pools do not appear to have been effective overall in reducing the rate of childhood drowning in pools regulated by these ordinances. We believe a major reason for this lack of effectiveness is that the ordinances did not require 4-sided fencing or other methods to limit pool access from the house," they add.

SOURCE: American Journal of Public Health 2000;90:595-601.

ADDITIONAL TALKING POINTS
from
CHILDHOOD DROWNING: ALTERNATIVES IN PREVENTION
by
DOLLIE BRILL
(excerpts)

A locked four-foot high fence surrounding the pool could have prevented as many as forty—six percent of the incidents (those last seen in the house) in the CPSC case study. **Conversely, a power safety cover could have prevented as many as sixty-nine percent of the incidents, both those in the house and those in the yard.**

The first written barrier code can be found in the Code of Jewish Law (volume 4, chapter 190, page 83). It reads, "Anyone who fails to provide proper protection, violates an affirmative precept, and also transgresses a negative precept, as it is written (loco citato): 'Thou shalt not bring blood upon thy house.' For instance, if a person has a well in his courtyard, he is obligated to put a fence, ten hand-breadths (forty inches) high around it, **or he must cover it so that no one may fall therein."**

A distinction must be drawn between types of covers. Some are designed primarily for either maintenance or heat retention. **In contrast, power safety covers, while they also serve to maintain he pool, are designed to prevent accidental or unauthorized entry.**

Performance standards for power safety covers, including specifications for materials and manufacture, fastening mechanisms, ability to withstand load, surface drainage, perimeter deflection and penetration have been developed in conjunction with ASTM (ASTM F1346-91, enclosure C).

A power safety cover's viability as a drowning prevention component is directly related to the ease of use, and to the consistency with which consumers can be expected to use them each time the pool area is unsupervised. The time it takes to secure a power safety cover is equal to the time it takes to check and secure two gates, which generally are included in the enclosure of a pool.

Inspection of gate closure and maintenance of closing devices are highly unlikely. On the other hand, power safety cover closure not only provides protection, but has other substantial benefits. Closing the cover reduces the cost of heating, and reduces the time and associated cost of maintenance.

REASONS WHY AUTOMATIC SAFETY COVERS ARE A VIABLE ALTERNATIVE TO FENCING

**All references to "Covers" means Automatic Covers that comply with the A.S.T.M. F 1346. 91 Standard

I. SAFETY ADVANTAGES

A. Covers have an unblemished record.

1. Since 1960 when covers were first introduced, there has never been a drowning in a pool or spa that was equipped with a cover.

B. Covers are equivalent of a horizontal fence.

1. Covers are the only barriers that prevent access to the pool water. Fences or "vertical" barriers, at best, prevent access to the pool area. Once inside the fence you have unlimited access to the water.

C. Covers seal and hide from view the attraction of pool water.

D. Covers seal and hide from view the attraction of any floating objects in the pool

1. Claims have been made that the pool water and/or toys floating in the pool attracted children, resulting in their drowning.

E. Covers will not block the view of the pool area.

1. Fences in the pool attracted children, resulting in their drowning.

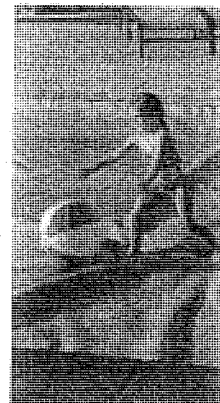
F. Covers can be monitored from a distance as to their closed and secure position.

1. When viewed from the house, it is difficult, at best, to determine if the latch on a gate is secured. With a cover, it is obvious if the pool is covered or uncovered.

G. Covers have a standard in place to measure against.

1. A.S.T.M. F 1346 .91 is a standard that sets forth, warning labels and performance criteria for covers. Among other things, it details requirements to prevent children from un-securing the pool.

SAFETY

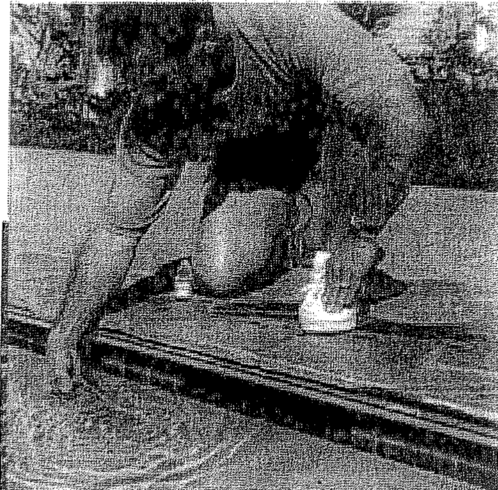


PEACE OF MIND IS KNOWING YOUR CHILDREN AND PETS ARE SAFE.

SwimWise's cover material exceeds the ASTM safety pool cover standards, providing a powerful layer of protection for your pool. SwimWise's durable UL approved safety cover is placed where it needs to be - between the water and the children in the pool area. Worrying about the safety of loved ones was never a part of your dream. And it shouldn't be.

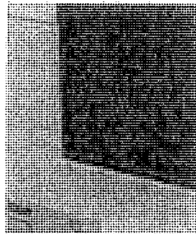
The American Society of Testing and Materials has created a standard for powered safety covers. SwimWise is classified and tested by Underwriters Laboratories to exceed this F1346-01 safety standard. In addition, SwimWise is UL listed to meet all electrical and safety standards.

MORE FUN – LESS WORK



CAN YOU KEEP YOUR DREAM FROM TURNING INTO A LOT OF WORK ?

Your swimming pool isn't like your self-cleaning oven. Unfortunately, without a pool cover, your pool will require frequent maintenance and upkeep. The changing of the seasons, evaporation, and heat loss make it more difficult and expensive to keep your swimming pool in top shape and ready for use. Simply put, it doesn't have to be.



* US Department of Energy - [illegible] Program

SEAL IN THE GOOD, KEEP OUT THE BAD, AND HAVE A WHOLE LOT MORE FUN !

The elements can't hurt what they can't reach. SwimWise prevents the bad stuff from going in - leaves and dirt. And, the good stuff - heat, water and chemicals - from going out. With less time spent worrying about maintenance, upkeep, chemicals, heat, and safety, you'll have more time to actually relax and enjoy your swimming pool. SwimWise pool cover systems provide up to:*

8 -10 degrees warmer water

90% reduction in evaporation

70% reduction in heating bills

70% reduction in chemicals

Planning Commission
Date: 7/23/07
Not a public hearing
Item: ___

ITEM: **Sexually Oriented Uses**

SUBMITTED BY: Ben Gozola, Senior Planner

REVIEWED BY: Susan Hoyt, City Administrator
Kelli Matzek, Assistant City Planner

PURPOSE:

To provide the Planning Commission and City Council with studies and other information on the secondary effects of sexually oriented uses.

SUMMARY:

On February 20, 2007, the City Council enacted an interim ordinance creating a moratorium on the establishment of adult uses within the City and directed city staff to conduct a study to determine how best to regulate such uses. Staff has completed our research and we will be recommending that the City adopt an ordinance to address the negative secondary effects of sexually oriented uses at a public hearing in August. However, to ensure the planning commission and city council can make an informed decision on this recommendation, staff is providing both bodies with a number of studies relating to the issue.

Upon reviewing the information being provided, staff has concluded that:

(1) Adult uses have an impact on the neighborhoods surrounding them, which is distinct from the impact caused by other commercial uses;

(2) Residential neighborhoods located within close proximity to adult theaters, bookstores and other adult uses experience increase crime rates (sex-related crimes in particular), lowered property values, increased transiency, and decreased stability of ownership;

(3) The adverse impacts which adult uses have on surrounding areas diminish as the distance from the adult uses increases;

(4) Studies of other cities have shown that among the crimes which tend to increase either within or in the near vicinity of adult uses are rapes, prostitution, child molestation, indecent exposure and other lewd and lascivious behavior;

(5) The City of Phoenix, Arizona study confirmed that the sex crime rate was on the average 500 percent higher in areas with sexually oriented businesses;

(6) Many members of the public perceive areas within which adult uses are located as less desirable than other areas which do not have such uses;

(7) Studies of other cities have shown that the values of both commercial and residential properties either are diminished or fail to appreciate at the rate of other comparable properties when located in proximity to adult uses; and

(8) The Indianapolis, Indiana study established that professional real estate appraisers believe that an adult bookstore would have a negative effect on the value of both residential and commercial properties within a one to three block area of the store.

(9) The characteristics of Lake Elmo are substantially similar to cities citied in the documentation which demonstrates that adult uses may have adverse secondary effects to surrounding properties, public health, safety, and general welfare.

(10) Adverse secondary effects tend to diminish if adult uses in a city are regulated by locational and licensing requirements.

(11) The City cannot prohibit all sexually oriented uses

ACTION REQUESTED:

Staff is requested that the planning commission review the provided documentation as needed to prepare for the proposed August public hearing. Staff will also be presenting some initial thoughts on how the proposed ordinance may be crafted to best address this issue.

ATTACHEMENTS:

- Report of the Minnesota Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (June 6, 1989)
- *Focus on New Laws: Implications of new adult entertainment law warrant close scrutiny.* Cities Bulletin. August 23, 2006
- CD containing multiple studies and documents pertaining to Sexually Oriented Uses

Appendix F: Report of the Minnesota Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (June 6, 1989)

Introduction

Many communities in Minnesota have raised concerns about the impact of sexually oriented businesses on their quality of life. It has been suggested that sexually oriented businesses serve as a magnet to draw prostitution and other crimes into a vulnerable neighborhood. Community groups have also voiced the concern that sexually oriented businesses can have an adverse effect on property values and impede neighborhood revitalization. It has been suggested that spillover effects of the businesses can lead to sexual harassment of residents and scatter unwanted evidence of sexual liaisons in the paths of children and the yards of neighbors.

Although many communities have sought to regulate sexually oriented businesses, these efforts have often been controversial and equally often unsuccessful. Much community sentiment against sexually oriented businesses is an out growth of hostility to sexually explicit forms of expression. Any successful strategy to combat sexually oriented businesses must take into account the constitutional rights to free speech which limit available remedies.

Only those pornographic materials which are determined to be "obscene" have no constitutional protection. As explained later in more detail, only that pornography which, according to community standards and taken as a whole, "appeals to the prurient interest" (as opposed to an interest in healthy sexuality), describes or depicts sexual conduct in a "patently offensive way" and "lacks serious literary, artistic, political or scientific value," can be prohibited or prosecuted. *Miller v. California*, 413 U.S. 15, 24 (1973).

Other pornography and the businesses which purvey it can only be regulated where a harm is demonstrated and the remedy is sufficiently tailored to prevent that harm without burdening First Amendment rights. In order to reduce or eliminate the impacts of sexually oriented businesses, each community must find the balance between the dangers of pornography and the constitutional rights to free speech. Each community must have evidence of harm. Each community must know the range of legal tools which can be used to combat the adverse impacts of pornography and sexually oriented businesses.

On June 21, 1988, Attorney General Hubert Humphrey III announced the formation of a Working Group on the Regulation of Sexually Oriented Businesses to assist public officials and private citizens in finding legal ways to reduce the impacts of sexually oriented businesses. Members of the Working Group were selected for their special expertise in the areas of zoning and law enforcement and included bipartisan representatives of the state Legislature as well as members of both the Minneapolis and St. Paul city councils who have played critical roles in developing city ordinances regulating sexually oriented businesses.

The Working Group heard testimony and conducted briefings on the impacts of sexually oriented businesses on crime and communities and the methods available to reduce or eliminate these impacts. Extensive research was conducted to review regulation and prosecution strategies used in other states and to analyze the legal ramifications of these strategies.

As testimony was presented, the Working Group reached a consensus that a comprehensive approach is required to reduce or eliminate the impacts of sexually oriented businesses. Zoning and licensing regulations are needed to protect residents from the intrusion of "combat zone" sexual crime and harassment into their neighborhoods. Prosecution of obscenity has played an important role in each of the cities which have significantly reduced or eliminated pornography. The additional threat posed by the involvement of organized crime, if proven to exist, may justify the resources needed for prosecution of obscenity or require use of a forfeiture or racketeering statute.

The Working Group determined that it could neither advocate prohibition of all sexually explicit material nor the use of regulation as a pretext to eliminate all sexually oriented businesses. This conclusion is no endorsement of pornography or the businesses which profit from it. The Working Group believes much pornography conveys a message which is degrading to women and an affront to human dignity. Commercial pornography promotes the misuse of vulnerable people and can be used by either a perpetrator or a victim to rationalize sexual violence. Sexually oriented businesses have a deteriorating effect upon neighborhoods and draw involvement of organized crime.

Communities are not powerless to combat these problems. But to be most effective in defending itself from pornography each community must work from the evidence and within the law. The report of this Working Group is designed to assist local communities in developing an appropriate and effective defense.

The first section of the report discusses evidence that sexually oriented businesses, and the materials from which they profit, have an adverse impact on the surrounding communities. It provides relevant evidence which local communities can use as part of their justification for reasonable regulation of sexually oriented businesses.

The Working Group also discussed the relationship between sexually oriented businesses and organized crime. Concerns about these broader effects of sexually oriented businesses underlie the Working Group's recommendations that obscenity should be prosecuted and the tools of obscenity seized when sexually oriented businesses break the law.

The second section of this report describes strategies for regulating sexually oriented businesses and prosecuting obscenity. The report presents the principal alternatives, the recommendations of the Working Group and some of the legal issues to consider when these strategies are adopted.

The goal of the Attorney General's Working Group in providing this report is to support and assist local communities who are struggling against the blight of pornography. When citizens, police officers and city officials are concerned about crime and the deterioration of neighborhoods, each of us lives next door. No community stands alone.

Summary

The Attorney General's Working Group on the Regulation of Sexually Oriented Businesses makes the following recommendations to assist communities in protecting themselves from the adverse effects of sexually oriented businesses. Some or all of these recommendations may be needed in any given community. Each community must decide for itself the nature of the problems it faces and the proposed solutions which would be most fitting.

(1) City and county attorneys' offices in the Twin Cities metropolitan area should designate a

prosecutor to pursue obscenity prosecutions and support that prosecutor with specialized training.

(2) The Legislature should consider funding a pilot program to demonstrate the efficacy of obscenity prosecution and should encourage the pooling of resources between urban and suburban prosecutor offices by making such cooperation a condition for receiving any such grant funds.

(3) The Attorney General should provide informational re- sources for city and county attorneys who prosecute obscenity crimes.

(4) Obscenity prosecutions should begin with cases involving those materials which most flagrantly offend community standards.

(5) The Legislature should amend the present forfeiture statute to include as grounds for forfeiture all felonies and gross misdemeanors pertaining to solicitation, inducement, promotion or receiving profit from prostitution and operation of a "disorderly house."

(6) The Legislature should consider the potential for a RICO-like statute with an obscenity predicate.

(7) Prosecutors should use the public nuisance statute to enjoin operations of sexually oriented businesses which repeatedly violate laws pertaining to prostitution, gambling or operating a disorderly house.

(8) Communities should document findings of adverse secondary effects of sexually oriented businesses prior to enacting zoning regulations to control these uses so that such regulations can be upheld if challenged in court.

(9) To reduce the adverse effects of sexually oriented businesses, communities should adopt zoning regulations which set distance requirements between sexually oriented businesses and sensitive uses, including but not limited to residential areas, schools, child care facilities, churches and parks.

(10) To reduce adverse impacts from concentration of these businesses, communities should adopt zoning ordinances which set distances between sexually oriented businesses and between sexually oriented businesses and liquor establishments, and should consider restricting sexually oriented businesses to one use per building.

(11) Communities should require existing businesses to comply with new zoning or other regulation of sexually oriented businesses within a reasonable time so that prior uses will conform to new laws.

(12) Prior to enacting licensing regulations, communities should document findings of adverse secondary effects of sexually oriented businesses and the relationship between these effects and proposed regulations so that such regulations can be upheld if challenged in court.

(13) Communities should adopt regulations which reduce the likelihood of criminal activity related to sexually oriented businesses, including but not limited to open booth ordinances and ordinances which authorize denial or revocation of licenses when the licensee has committed offenses relevant to the operation of the business.

(14) Communities should adopt regulations which reduce exposure of the community and minors to the blighting appearance of sexually oriented businesses, including but not limited to regulations of signage and exterior design of such businesses, and should enforce state law requiring sealed wrappers and opaque covers on sexually oriented material.

Impacts of Sexually Oriented Businesses

The Working Group reviewed evidence from studies conducted in Minneapolis and St. Paul and in other cities throughout the country. These studies, taken together, provide compelling evidence that sexually oriented businesses are associated with high crime rates and depression of property values. In addition, the Working Group heard testimony that the character of a neighborhood can dramatically change when there is a concentration of sexually oriented businesses adjacent to residential property.

Minneapolis Study

In 1980, on direction from the Minneapolis City Council, the Minneapolis Crime Prevention Center examined the effects of sex-oriented and alcohol-oriented adult entertainment upon property values and crime rates. This study used both simple regression and multiple regression statistical analysis to evaluate whether there was a causal relationship between these businesses and neighborhood blight.

The study concluded that there was a close association between sexually oriented businesses, high crime rates and low housing values in a neighborhood. When the data was reexamined using control variables such as the mean income in the neighborhood to determine whether the association proved causation, it was unclear whether sexually oriented businesses caused a decline in property values. The Minneapolis study concluded that sexually oriented businesses concentrate in areas which are relatively deteriorated and, at most, they may weakly contribute to the continued depression of property values.

However, the Minneapolis study found a much stronger relationship between sexually oriented businesses and crime rates. A crime index was constructed including robbery, burglary, rape and assault. The rate of crime in areas near sexually oriented businesses was then compared to crime rates in other areas. The study drew the following conclusions:

(1) The effects of sexually oriented businesses on the crime rate index is positive and significant regardless of which control variable is used.

(2) Sexually oriented businesses continue to be associated with higher crime rates, even when the control variables' impacts are considered simultaneously.

According to the statistical analysis conducted in the Minneapolis study, the addition of one sexually oriented business to a census tract area will cause an increase in the overall crime rate index in that area by 9.15 crimes per thousand people per year even if all other social factors remain unchanged.

St. Paul

In 1978, the St. Paul Division of Planning and the Minnesota Crime Control Planning board conducted a study of the relationship between sex-oriented and alcohol-oriented adult entertainment businesses and neighborhood blight. This study looked at crime rates per thousand and median housing values over time as indices of neighborhood deterioration. The study combined sex-oriented and alcohol-oriented businesses, so its conclusions are only suggestive of the effects of sexually oriented businesses alone. Nevertheless, the study reached the following important conclusions:

(1) There is a statistically significant correlation between the location of adult businesses and neighborhood deterioration.

(2) Adult entertainment establishments tend to locate in somewhat deteriorated areas.
(3) Additional relative deterioration of an area follows location of an adult business in the area.

(4) There is a significantly higher crime rate associated with two such businesses in an area than is associated with only one adult business.

(5) Housing values are also significantly lower in an area where there are three adult businesses than they are in an area with only one such business.

Similar conclusions about the adverse impact of sexually oriented businesses on the community were reached in studies conducted in cities across the nation.

Indianapolis

In 1983, the City of Indianapolis researched the relationship between sexually oriented businesses and property values. The study was based on data from a national random sample of 20 percent of the American Institute of Real Estate Appraisers.

The Study found the following:

(1) The appraisers overwhelmingly (80%) felt that an adult bookstore located in a neighborhood would have a negative impact on residential property values within one block of the site.

(2) The real estate experts also overwhelmingly (71%) believed that there would be a detrimental effect on commercial property values within the same one block radius.

(3) This negative impact dissipates as the distance from the site increases, so that most appraisers believed that by three blocks away from an adult bookstore, its impact on property values would be minimal.

Indianapolis also studied the relationship between crime rates and sexually oriented bookstores, cabarets, theaters, arcades and massage parlors. A 1984 study entitled "Adult Entertainment Businesses in Indianapolis" found that areas with sexually oriented businesses had higher crime rates than similar areas with no sexually oriented businesses.

(1) Major crimes, such as criminal homicide, rape, robbery, assault, burglary and larceny, occurred at a rate that was 23 percent higher in those areas which had sexually oriented businesses.

(2) The sex-related crime rate, including rape, indecent exposure and child molestation, was

found to be 77 percent higher in those areas with sexually oriented businesses.

Phoenix

The Planning Department of Phoenix, Arizona, published a study in 1979 entitled "Relation of Criminal Activity and Adult Businesses." This study showed that arrests for sexual crimes and the location of sexually oriented businesses were directly related. The study compared three areas with sexually oriented businesses with three control areas which had similar demographic and land use characteristics, but no sexually oriented establishments. The study found that,

(1) Property crimes were 43 percent higher in those areas which contained a sexually oriented business.

(2) The sex crime rate was 500 percent higher in those areas with sexually oriented businesses.

(3) The study area with the greatest concentration of sexually oriented businesses had a sex crimes rate over 11 times as large as a similar area having no sexually oriented businesses.

Los Angeles

A study released by the Los Angeles Police Department in 1984 supports a relationship between sexually oriented businesses and rising crime rates. This study is less definitive, since it was not designed to use similar areas as a control. The study indicated that there were 11 sexually oriented adult establishments in the Hollywood, California, area in 1969. By 1975 the number had grown to 88. During the same time period, reported incidents of "Part 1" crime (i.e., homicide, rape, aggravated assault, robbery, burglary, larceny and vehicle theft) increased 7.6 percent in the Hollywood area while the rest of Los Angeles had a 4.2 percent increase. "Part 11" arrests (i.e., forgery, prostitution, narcotics, liquor law violations and gambling) increased 3.4 percent in the rest of Los Angeles, but 46.4 percent in the Hollywood area.

Concentration of Sexually Oriented Businesses

Neighborhood Case Study

In St. Paul, there is one neighborhood which has an especially heavy concentration of sexually oriented businesses. The blocks adjacent to the intersection of University Avenue and Dale Street have more than 20 percent of the city's adult uses (4 out of 19), including all of St. Paul's sexually oriented bookstores and movie theaters.

The neighborhood, as a whole, shows signs of significant distress, including the highest unemployment rates in the city, the highest percentage of families below the poverty line in the city, the lowest median family income and the lowest percentage of high school and college graduates. (See 40-Acre Study on Adult Entertainment, St. Paul Department of Planning and Economic Development, Division of Planning, 1987, at 19.) It would be difficult to attribute these problems in any simple way to sexually oriented businesses.

However, it is likely that there is a relationship between the concentration of sexually oriented businesses and neighborhood crime rates. The St. Paul Police Department has determined that St. Paul's street prostitution is concentrated in a "street prostitution zone" immediately adjacent to the intersection where the sexually oriented businesses are located. Police statistics for 1986 show that, of 279 prostitution arrests for which specific locations could be identified, 70 percent (195) were within the "street prostitution zone." Moreover, all of the locations with 10 or more arrests for prostitution were within this zone.

The location of sexually oriented businesses has also created a perception in the community that this is an unsafe and undesirable part of the city. In 1983, Western State Bank, which is currently located across the street from an adult bookstore, hired a research firm to survey area residents regarding their preferred location for a bank and their perceptions of different locations. A sample of 305 people were given a list of locations and asked, "Are there any of these locations where you would not feel safe conducting your banking business?"

No more than 4 percent of the respondents said they would feel unsafe banking at other locations in the city. But 36 percent said they would feel unsafe banking at Dale and University, the corner where the sexually oriented businesses are concentrated.

The Working Group reviewed the 1987 40-Acre Study on Adult Entertainment prepared by the Division of Planning in St. Paul's Department of Planning and Economic Development. This study summarized testimony presented to the Planning Commission regarding neighborhood problems:

> Residents in the University/Dale area report frequent sex-related harassment by motorists and pedestrians in the neighborhood. Although it cannot be proved that the harassers are patrons of adult businesses, it is reasonable to suspect such a connection. Moreover, neighborhood residents submitted evidence to the Planning Commission in the form of discarded pornography literature allegedly found in the streets, sidewalks, bushes and alleys near adult businesses. Such literature is sexually very explicit, even on the cover, and under the present circumstances becomes available to minors even though its sale to minors is prohibited.

Testimony

The Working Group heard testimony that a concentration of sexually oriented businesses has serious impacts upon the surrounding neighborhood. The Working Group heard that pornographic materials are left in adjacent lots. One person reported to the police that he had found 50 pieces of pornographic material in a church parking lot near a sexually oriented business. Neighbors report finding used condoms on their lawns and sidewalks and that sex acts with prostitutes occur on streets and alleys in plain view of families and children. The Working Group heard testimony that arrest rates understate the level of crime associated with sexually oriented businesses. Many robberies and thefts from "johns" and many assaults upon prostitutes are never reported to the police.

Prostitution also results in harassment of neighborhood residents. Young girls on their way to school or young women on their way to work are often propositioned by johns. The Flick theater caters to homosexual trade, and male prostitution has been noted in the area. Neighborhood boys and men are also accosted on the street. A police officer testified that one resident had informed him that he found used condoms in his yard all the time. Both his teenage son and daughter had been solicited on their way

to school and to work.

The Working Group heard testimony that in the Frogtown neighborhood, immediately north of the University-Dale intersection in St. Paul, there has been a change over time in the quality of life since the sexually oriented businesses moved into the area. The Working Group heard that the neighborhood used to be primarily middle class, did not have a high crime rate and did not have prostitution. St. Paul police officers testified that they believed the sexually oriented businesses caused neighborhood problems, particularly the increase in prostitution and other crime rates. Property values were suffering, since the presence of high crime rates made the area less desirable to people who would have the ability and inclination to improve their homes.

The Working Group made some inquiry to determine to what extent smaller cities outside the Twin Cities Metropolitan area suffered adverse impacts of sexually oriented businesses. The Working Group was informed by the chiefs of police of Northfield and Owatonna that neither city had adult bookstores or similar sexually oriented businesses. Police chiefs in Rochester and Winona stated that sexually oriented businesses in their communities operate in nonresidential areas. In addition, there is no "concentration" problem. In Rochester, there are two facilities in a shopping mall and a single bookstore in a depressed commercial/business neighborhood. The Winona store is located in a downtown business area. The police chiefs stated that they had no evidence of increased crime rates in the area adjacent to these facilities. They had no information as to the effect which these businesses might have on local property values.

Information presented to the Working Group indicates that community impacts of sexually oriented businesses are primarily a function of two variables, proximity to residential areas and concentration. Property values are directly affected within a small radius of the location of a sexually oriented business. Concentration may compound depression of property values and may lead to an increase in crime sufficient to change the quality of life and perceived desirability of property in a neighborhood.

The evidence suggests that the impacts of sexually oriented businesses are exacerbated when they are located near each other. Police officers testified to the Working Group that "vice breeds vice." When sexually oriented businesses have multiple uses (i.e., theater, bookstore, nude dancing, peep booths), one building can have the impact of several separate businesses. The Working Group heard testimony that concentration of sexually oriented businesses creates a "war zone" which serves as a magnet for people from other areas who "know" where to find prostitutes and sexual entertainment. The presence of bars in the immediate vicinity of sexually oriented businesses also compounds impacts upon the neighborhood.

The Attorney General's Working Group believes that regulatory strategies designed to reduce the concentration of sexually oriented businesses, insulate residential areas from them, and reduce the likelihood of associated criminal activity would constitute a rational response to evidence of the impacts which these businesses have upon local communities.

Sexually Oriented Businesses and Organized Crime

Infiltration of organized crime into sexually oriented businesses reinforces the need for prosecution of obscenity and requires specific regulatory or law enforcement tools. The Working Group attempted to assess both the present and potential relationship between organized crime and sexually oriented businesses.

The Working Group heard testimony from a witness who had been prosecuting obscenity cases for the

past thirteen years that many sexually oriented businesses have out-of-town absentee owners. If the manager of a local business is prosecuted on an obscenity charge, his testimony may make it possible to pierce the corporate veil and identify the true owners.

The Working Group heard testimony that an organized crime entity may operate somewhat like a franchisor. In order to stay in business, the local manager of a sexually oriented business may have to pay fees to organized crime. The makers and wholesalers of pornographic materials are also likely to be involved with organized crime.

The Working Group conducted additional research to assess the relationship between sexually oriented businesses and organized crime. The Working Group was informed by prosecutors of obscenity that there were many ways in which organized crime entities could derive a benefit from sexually oriented businesses. There is a large profit margin in pornography. The presence of coin-operated peep booths provides an opportunity to launder money. Cash obtained from illegal activities, such as prostitution or narcotics, can be explained as the income of peep booths. Cash income can also escape taxation, in violation of law.

Although it is clear that organized crime is involved to some degree in the pornography industry, various sources reach different conclusions as to the depth and extent of this involvement. Part of the difference in assessment is based on differences in the way the term "organized crime" is defined. Authorities who restrict their definition of organized crime to the highly organized ethnic hierarchy known as La Cosa Nostra (LCN) tend to find fewer links than those who define the term to include other organized criminal enterprises. Where there has been intensive law enforcement and prosecution, it is more likely that linkage between sexually oriented businesses and organized crime figures will be evident.

The Working Group has adopted the definition of organized crime contained in Minnesota's Report of the Legislative Commission on Organized Crime (1975). The Working Group is concerned about the relation between sexually oriented businesses and any "organized criminal conspiracy of two or more persons that is continuous in nature, involves activity generally crossing jurisdictional lines and results in third-party profit." The threat from organized crime includes, but is not limited to involvement of national crime enterprises such as LCN.

Recent federal indictments of James G. Hafiz in Indiana for perjury [1] and of *Harry v. Mohney* in Michigan for tax evasion suggest a possible connection between organized crime and a Minnesota pornography business. Hafiz, a Minnesota resident who is an agent of Beverly Theater, Inc., the company which operated the Faust Theater in St. Paul, [2] has been linked to Mohney, a major pornographer based in Michigan. The indictments allege that Mohney caused the incorporation of the company which operated the Faust, that a corporation owned by Mohney paid for improvements to the Faust and that Mohney is, in fact, the owner of numerous sexually oriented businesses, including the Faust. (*See United States v. Hafiz*, Indictment, No. IP 88-102-CR (S. D. Ind., Sept. 15, 1988); *United States v. Mohney*, Indictment No.88-50062 (E.D. Mich. Sept. 9, 1988).)

Mohney, in turn, has been linked with national organized crime enterprises. A 1977 report of the United States Justice Department stated:

> It is believed that Harry V. Mohney of Durand, Michigan, is one of the largest dealers in pornography in the United States. . . He is alleged to have close association with the LCN Columbo and the LCN DeCavalcante, both of which are very influential in pornography in the eastern United States. In Michigan,

> Mohney is known to hire individuals with organized crime associations to manage his businesses. His businesses and corporations consist of 60 known adult bookstores, massage parlors, art theaters, adult drive-in movies, go-go type lounges and pornographic warehouses in Michigan, Indiana, Illinois, Kentucky, Tennessee, Wisconsin Iowa, Ohio and California. He is involved in the financing and production of pornographic movies, magazines, books and newspapers. He also directs the importation and distribution of his own and other pornographic publications to retail and wholesale outlets throughout the United States and Canada. . . He has a working relationship with DeCalvalcante's representative Robert DiBernardo and has met with Vito Giacalone and Joseph Zerilli of the LCN Detroit. He has to cater to both to operate in Michigan.

U.S. Justice Dep't, Organized Crime Involvement in Pornography, reprinted in the Attorney General's Comm'n on Pornography (hereinafter "Pornography Commission"), 2 Final Report at 1229-30 (1986).

Organized crime has the potential to infiltrate Minnesota's pornography industry. Evidence on a national level highlights the vulnerability of sexually oriented businesses to criminal control. A number of sources have reported that there is a connection between organized crime and the pornography industry.

The Pornography Commission reported that the Washington, D.C., Metropolitan Police Department determined that traditional organized crime was substantially involved in and did essentially control much of the major pornography distribution in the United States during the years 1977 and 1978." 2 Final Report at 1044-45. The Washington, D.C., study "further concluded that the combination of the large amounts of money involved, the incredibly low priority obscenity enforcement had within police departments and prosecutors' offices in an area where manpower intensive investigations were essential for success, and the imposition of minimal fines and no jail time upon random convictions resulted in a low risk and high profit endeavor for organized crime figures who became involved in pornography." *Id.* at 1045.

The FBI concluded in 1978:

> Information obtained . . . points out the vast control of the multi-million dollar pornography business in the United States by a few individuals with direct connections with what is commonly known as the organized crime establishment in the United States, specifically, La Cosa Nostra. . . Information received from sources of this bureau indicates that pornography is [a major] income maker for La Cosa Nostra in the United States behind gambling and narcotics. Although La Cosa Nostra does not physically oversee the day-to-day workings of the majority of pornography business in the United States, it is apparent that they have "agreements" with those involved in the pornography business in allowing these people to operate independently by paying off members of organized crime for the privilege of being allowed to operate in certain geographical areas.

Id. at 1046 (quoting Federal Bureau of Investigation report Regarding the Extent of Organized Crime Development in Pornography 6 (1978)).

A brief survey of 69 FBI field offices conducted in 1985 found that about three-quarters of those offices could not verify that traditional organized crime families were involved in the manufacture or distribution of pornography. Several offices did, however, report some involvement by members and associates of organized crime. *Id.* at 1046-47.

Stanley Ronquest, Jr., a supervisory FBI special agent for traditional organized crime at FBI headquarters in Washington, D.C., was interviewed by Attorney General staff. Ronquest stated that

LCN has not been directly involved in the pornography industry in the last ten years. However, a former FBI agent told the Pornography Commission:

> In my opinion, based upon twenty three years of experience in pornography and obscenity investigations and study, it is practically impossible to be in the retail end of pornography industry [today] without dealing in some fashion with organized crime either the mafia or some other facet of non-mafia never-the-less [sic] highly organized crime.

Id. at 1047-48.

Thomas Bohling of the Chicago Police Department Organized Crime Division, Vice Control Section, told the Pornography Commission that "it is the belief of state, federal and local law enforcement that the pornography industry is controlled by organized crime families. If they do not own the business outright, they most certainly extract street tax from independent smut peddlers." *Id.* at 1048 (emphasis in original).

The Pornography Commission stated that it had been advised by Los Angeles Police Chief Daryl F. Gates that "organized crime families from Chicago, New York, New Jersey and Florida are openly controlling and directing the major pornography operations in Los Angeles." *Id.*

The Pornography Commission was told by Jimmy Fratianno, described by the Commission as a member of LCN, "that large profits have kept organized crime heavily involved in the obscenity industry." *Id.* at 1052. Fratianno testified that "95% of the families are involved in one way or another in pornography. ... It's too big. They just won't let it go." *Id.* at 1052-63.

The Pornography Commission concluded that "organized crime in its traditional LCN forms and other forms exerts substantial influence and control over the obscenity industry. Though a number of significant producers and distributors are not members of LCN families, all major producers and distributors of obscene material are highly organized and carry out illegal activities with a great deal of sophistication." *Id.* at 1053.

The Pornography Commission reported that Michael George Thevis, reportedly one of the largest pornographers in the United States during the 1970's was convicted in 1979 of RICO (Racketeer Influenced and Corrupt Organizations) violations including murder, arson and extortion. The Commission also reported examples of other crimes associated with the pornography industry, including prostitution and other sexual abuse, narcotics distribution, money laundering and tax violations, copyright violations and fraud. *Id.* at 1056-65.

Although the Pornography Commission report has been criticized for relying on the testimony of unreliable informants in drawing its conclusions finding links between pornography and organized crime (*See* Scott, Book Reviews, 78 J. Crim. L. & Criminology 1145, 1158-59 (1988)), its conclusions find additional support in recent state studies.

The California Department of Justice recently reported that:

> California's primacy in the adult videotape industry is of law enforcement concern because the pornography business has been prone to organized crime involvement. Immense profits can be realized through pornography operations, and until recently, making and distributing pornography involved a relatively low risk of prosecution. But more aggressive law enforcement efforts and turmoil within the pornography business has destabilized the smooth flow of easy money

> for some of its major operations....
>
> As long as control over pornography distribution is contested, and organized crime figures continue their involvements in the business, the pornography industry will remain of interest to law enforcement officials statewide.

Bureau of Organized Crime and Criminal Intelligence, Department of Justice, State of California, Organized Crime in California 1987: Annual Report to the California Legislature at 59-62 (1988).

The Pennsylvania Crime Commission similarly determined in a 1980 report that most pornography stores examined were affiliated or owned by one of three men who had ties with "nationally known pornography figures who are members or associates of organized crime families." Pennsylvania Crime Commission, A Decade of Organized Crime: 1980 Report at 119.
For example, Reuben Sturman, a leading pornography industry figure based in Cleveland, was reported by the FBI in 1978 to have built his empire with the assistance of LCN member DiBernardo. Federal Bureau of Investigation Report Regarding the Extent of Organized Crime Involvement in Pornography (1978). Sturman, who reportedly controls half of the $8 billion United States pornography industry, was recently indicted by a federal grand jury in Las Vegas for racketeering violations and by a federal grand jury in Cleveland for income tax evasion and tax fraud. Newsweek, August 8, 1988, at 3.

Evidence of the vulnerability of sexually oriented businesses to organized crime involvement underscores the importance of criminal prosecution of these businesses when they engage in illegal activities, including distribution of obscenity and support of prostitution. Prosecution can increase the risk and reduce the profit margin of conducting illegal activities. It may also disclose organized crime association with local pornography businesses and increase the costs of criminal enterprise in Minnesota.

In addition to prosecution, forfeiture of property used in the illegal activities related to sexually oriented businesses can cut deeply into profits. Regulation to permit license revocation for conviction of subsequent crimes may also expose and increase control over criminal enterprises related to sexually oriented businesses.

Prosecutorial and Regulatory Alternatives

The regulation of many sexually oriented businesses, like other businesses dealing in activity with an expressive component, is circumscribed by the First Amendment of the United States Constitution.[3] Nonetheless, the First Amendment does not impose a barrier to the prosecution of obscenity, which is not protected by the First Amendment, or to reasonable regulation of sexually oriented businesses if the regulation is not designed to suppress the content of expressive activity and is sufficiently tailored to accomplish the regulatory purpose.

The Working Group believes that communities have more prosecutorial and regulatory opportunities than they may currently recognize. The purpose of this section of the Report is to identify and recommend enforcement and regulatory opportunities. Of course, each community must decide on its own how to balance its limited resources and the wide variety of competing demands for such resources.

I. Obscenity Prosecution

Obscene material is not protected by the First Amendment. *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973). The sale or distribution of obscene material in Minnesota is a criminal offense. The penalty was recently increased to up to one year in jail and a $3,000 fine for a first offense, and up to two years

in jail and a $10,000 fine for a second or subsequent offense within five years. Minn Stat. § 617.241, subd. 3 (1988).[4]

The Working Group believes that Minnesota's obscenity statutes are adequate to prosecute and penalize the sale and distribution of obscene materials. However, historically, widespread obscenity prosecution has not occurred.

The Working Group believes this is not because the sale or distribution of obscene publications in Minnesota is rare, but because prosecutors have been reluctant to bring obscenity charges, because of limited resources, difficulties faced when prosecuting obscenity, and because obscenity has historically been considered a victimless crime.

Obscenity, however, should no longer be viewed as a victimless crime.[5] There is mounting evidence that sexually oriented businesses are, as described earlier in this report, often associated with increases in crime rates and a decline in the quality of life of neighborhoods in which they are located. Further, as discussed previously, when there is no prosecution of obscenity, large cash profits make pornographic operations very attractive to members of organized crime. The Working Group thus believes that prosecution of obscenity, particularly cases involving children, violence or bestiality, should assume a higher priority for law enforcement officials.

In addition, many of the difficulties faced when prosecuting obscenity can be addressed by adequate training and assistance. In order to prove that material is obscene, a prosecutor must prove:

> (i) that the average person, applying contemporary community standards[,] would find that the work, taken as a whole, appeals to the prurient interest in sex;
>
> (ii) that the work depicts sexual conduct . . . in a patently offensive manner; and
>
> (iii) that the work, taken as a whole, lacks serious literary, artistic political, or scientific value.

Minn. Stat. § 617.241, subd. 1(a)(i-iii) (1988). This statutory standard was drawn to be consistent with constitutional standards set forth in *Miller, supra.*

To be sure, prosecutors face a number of hazards in prosecuting obscenity. They include inadequate training in this specialized area of law, attempts by defense attorneys to remove jurors who find pornography offensive, the offering into evidence of polls and surveys through expert testimony to prove tolerant community standards, efforts to guide jurors with jury instructions favorable to the defense, and discouragement with unsuccessful prosecutions.

But the hazards can be overcome. Alan E. Sears, former executive director of the U.S. Attorney General's Commission on Pornography, has stated:

> Prosecutors can successfully obtain obscenity convictions in virtually any jurisdiction in the United States. In order to obtain a conviction, it is incumbent upon a prosecutor to prepare well, know the law, not fall into the "one case syndrome" trap, obtain a representative jury through proper voir dire, keep the focus of the trial on the unlawful conduct of the defendant, and obtain legally sound instructions.

Sears, *How To Lose A Pornography Case*, The CDL Reporter (n.d.).

The Working Group heard testimony from prosecutors who have pursued obscenity cases nationally regarding effective ways to prosecute obscenity cases. Materials can be bought or rented, rather than seized under warrant. In the absence of survey data, community standards can be left to the wisdom of the jury. In that case, experts should be prepared to testify if the defense attempts to make a statistical case that the material is not obscene. Prosecution of obscenity is also likely to be most effective if initial prosecutions focus on materials which are patently offensive to the community, such as those involving children, violence or bestiality.

The experience of other cities has demonstrated that vigorous and sustained enforcement of obscenity statutes can sharply reduce or virtually eliminate sexually oriented businesses. Cincinnati, Omaha, Atlanta, Charlotte, Indianapolis and Fort Lauderdale were cited to the Working Group as examples of cities which have successful programs of obscenity prosecution.[6] The Working Group encourages prosecutors to take advantage of increasing training opportunities and other assistance for obscenity prosecutions and to reassess the desirability of increased enforcement. The Working Group is pleased to note that county attorneys and law enforcement groups in Minnesota have recently held forums and seminars on obscenity law enforcement and prosecution. The U.S. Justice Department's [Child Exploitation and Obscenity Section] offers assistance to local prosecutors, including sample pleadings, indictments, search warrants, motions, responses and trial memoranda.[7]

Recommendations

(1) City and county attorneys' offices in the Twin Cities metropolitan area should designate a prosecutor to pursue obscenity prosecutions and support that prosecutor with specialized training.

(2) The Legislature should consider funding a pilot program to demonstrate the efficacy of obscenity prosecution and should encourage the pooling of resources between urban and suburban prosecuting offices by making such cooperation a condition of receiving any such grant funds.

(3) The Attorney General should provide informational resources for city and county attorneys who prosecute obscenity crimes.

(4) Obscenity prosecutions should concentrate on cases that most flagrantly offend community standards.

II. Other Legal Remedies

A. RICO/Forfeiture

In addition to traditional criminal prosecutions, use of RICO statutes and criminal and civil forfeiture actions may also prove to be successful against obscenity offenders. By attacking the criminal organization and the profits of illegal activity, such actions can provide a strong disincentive to the establishment and operation of sexually oriented businesses. For example, the federal government and a

number of the twenty-eight states which have enacted racketeer influenced and corrupt organization (RICO) statutes include obscenity offenses as predicate crimes. Generally speaking, to violate a RICO statute, a person must acquire or maintain an interest in or control of an enterprise, or must conduct the affairs of an enterprise through a "pattern of criminal activity." That pattern of criminal activity may include obscenity violations, which in turn can expose violators to increased fines and penalties as well as forfeiture of all property acquired or used in the course of a RICO violation. These statutes generally enable prosecutors to obtain either criminal or civil forfeiture orders to seize assets and may also be used to obtain injunctive relief to divest repeat offenders of financial interests in sexually oriented businesses. *See* 18 U.S.C. §§ 1961-68 (West Supp. 1988). RICO statutes may be particularly effective in dismantling businesses dominated by organized crime, but they may be applied against other targets as well.

The Working Group believes that Minnesota should enact a RICO-like statute that would encompass increased penalties for using a "pattern" of criminal obscenity acts to conduct the affairs of a business entity. Provisions authorizing the seizure of assets for obscenity violations should be considered, but the limitations imposed by the First Amendment must be taken into account.

It has been argued that a RICO or forfeiture statute based on obscenity crime violations threatens to "chill protected speech" because it would permit prosecutors to seize non-obscene materials from distributors convicted of violating the obscenity statute. American Civil Liberties Union, *Polluting The Censorship Debate: A Summary And Critique Of The Final Report Of The Attorney General's Commission On Pornography* at 116-117 (1986).

However, a narrow majority of the United States Supreme Court recently held that there is no constitutional bar to a state's inclusion of substantive obscenity violations among the predicate offenses for its RICO statute. *Sappenfield v. Indiana*, 57 U.S.L.W. 4180, 4183-4184 (February 21,1989). The Court recognized that "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene." *Id.* at 4184. But the Court ruled that, "the mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedent." *Id.* The Court specifically upheld RICO provisions which increase penalties where there is a pattern of multiple violations of obscenity laws.

However, in a companion case, the Court also invalidated a pretrial seizure of a bookstore and its contents after only a preliminary finding of "probable cause" to believe that a RICO violation had occurred. *Fort Wayne Books, Inc. v. Indiana*, 57 U.S.L.W. 4180, 4184-4185 (February 21, 1989). The Court explained there is a rebuttable presumption that expressive materials are protected by the First Amendment. That presumption is not rebutted until the claimed justification for seizure of materials, the elements of a RICO violation, are proved in an adversary proceeding. *Id.* at 4185.

The Court did not specifically reach the fundamental question of whether seizure of the assets of a sexually oriented business such as a bookstore is constitutionally permissible once a RICO violation is proved. The Court explained:

> [F]or the purposes of disposing of this case, we assume without deciding that bookstores and their contents are forfeitable (like other property such as a bank account or yacht) when it is proved that these items are property actually used in, or derived from, a pattern of violations of the state's obscenity laws.

Id. at 4185. The Working Group believes that a RICO statute which provided for seizure of the contents of a sexually oriented business upon proof of RICO violations would have the potential to significantly

curtail the distribution of obscene materials.

Although Minnesota does not have a RICO statute, it does have a forfeiture statute permitting the seizure of money and property which are the proceeds of designated felony offenses. Minn. Stat. § 609.5312 (1988). But, this statute does not permit seizure of property related to commission of the offenses most likely to be associated with sexually oriented businesses. Obscenity crimes are not among the offenses which justify forfeiture. Although solicitation or inducement of a person under age 13 (Minn. Stat. § 609.322, subd. 1) or between the ages of 16 and 18 to practice prostitution (Minn. Stat. § 609.322, subd. 2) are included among the offenses which could justify seizure of property, many crimes involving prostitution are outside the reach of the present Minnesota forfeiture law.

The following crimes are not included among the crimes which can justify seizure of property and profits: solicitation, inducement, or promotion of a person between the ages of 13 and 16 to practice prostitution (Minn. Stat. § 609.322, subd. 1A); solicitation, inducement or promotion of a person 18 years of age or older to practice prostitution (Minn. Stat. § 609.322, subd. 3); receiving profit derived from prostitution (Minn. Stat. § 609.323); owning, operating or managing a "disorderly house," in which conduct habitually occurs in violation of laws pertaining to liquor, gambling, controlled substances or prostitution (Minn. Stat. § 609.33).

Although its reach would be much more limited, the legislature should also consider providing for forfeiture of property used to commit an obscenity offense or which represents the proceeds of obscenity offenses. Under the holding in Fort Wayne Books, Inc. v. Indiana, such forfeiture could not take place, if at all, until it was proved that the underlying obscenity crimes had been committed.

There are no comparable constitutional issues raised by enacting or enforcement of forfeiture statutes based on violations of prostitution, gambling, or liquor laws. The legislature may require sexually oriented businesses which violate these laws to forfeit their profits. The Working Group believes that such an expansion of forfeiture laws would give prosecutors greater leverage to control the operation of those businesses which pose the greatest danger to the community.

Recommendations

(1) The legislature should amend the present forfeiture statute to include as grounds for forfeiture all felonies and gross misdemeanors pertaining to solicitation, inducement, promotion or receiving profit from prostitution and operation of a "disorderly house."

(2) The legislature should consider the potential for a RICO-like statute with an obscenity predicate.

B. Nuisance Injunctions

Minnesota law enforcement authorities may obtain an injunction and close down operations when a facility constitutes a public nuisance. A public nuisance exists when a business repeatedly violates laws pertaining to prostitution, gambling or keeping a "disorderly house." The Minnesota public nuisance law permits a court to order a building to be closed for one year. Minn. Stat. §§ 617.80-.87 (1988).

Nuisance injunctions to close down sexually oriented businesses which repeatedly violate laws pertaining to prosecution, gambling or disorderly conduct are potentially powerful regulatory devices. The fact that a building in which prostitution or other offenses occur houses a sexually oriented business does not shield the facility from application of nuisance law based on such offenses. *Arcara v. Cloud Books, Inc.*, 478 U.S.697, 106 S.Ct. 3172 (1986) (First Amendment does not shield adult bookstore from application of New York State nuisance law designed in part to close places of prostitution).

Although the Working Group believes that nuisance injunctions with an obscenity predicate would be effective in controlling sexually oriented businesses, such provisions would probably be unconstitutional under current U.S. Supreme Court decisions. Six Supreme Court justices joined in the *Arcara* result, but two of them–Justices O'Connor and Stevens–concurred with these words of caution:

> If, however, a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review. Because there is no suggestion in the record or opinion below of such pretextual use of the New York nuisance provision in this case, I concur in the Court's opinion and judgment.

Arcara, supra, 478 U.S. at 708, 106 S.Ct. at 3178.

In an earlier case, *Vance v. Universal Amusement*, 445 U.S. 308, 100 S.Ct. 1156 (1980), the Court ruled unconstitutional a Texas public nuisance statute authorizing the closing of a building for a year if the building is used "habitual[ly]" for the "commercial exhibition of obscene material." *Id.* at 310 n.2, 100 S. Ct. at 1158 n.2.

The Court's recent holdings in *Sappenfield* and *Fort Wayne Books, Inc.* give no indication that the Court would now look more favorably upon an injunction to close down a facility which sold obscene materials. The Court assumed without deciding that forfeiture of bookstore assets could be constitutional in a RICO case. But, in making this assumption, the Court distinguished forfeiture of assets under RICO from a general restraint on presumptively protected speech. The court approved the reasoning of the Indiana Supreme Court that, "The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity." *Fort Wayne Books, Inc.* at 4185. The Court assumed that RICO provisions could be upheld on the basis that "adding obscenity-law violations to the list of RICO predicate crimes was not a mere rule to sidestep the First Amendment." *Id.* Without the relationship to proceeds of crime, a remedy which closed a facility for obscenity violations would be far less likely to withstand constitutional scrutiny.

Recommendations

(1) Prosecutors should use the public nuisance statute to enjoin operations of sexually oriented businesses which repeatedly violate laws pertaining to prostitution, gambling or operating a disorderly house.

III. Zoning

Zoning ordinances can be adopted to regulate the location of sexually oriented businesses without violating the First Amendment. Such ordinances can be designed to disperse or concentrate sexually oriented businesses, to keep them at designated distances from specific buildings or areas, such as churches, schools and residential neighborhoods or to restrict buildings to a single sexually oriented

usage. Because zoning is an important regulatory tool when properly enacted, the Working Group believes a careful explanation of the law and a review of potential problems in drafting zoning ordinances may be helpful to communities considering zoning to regulate sexually oriented businesses.

A. Supreme Court Decisions

The U.S. Supreme Court upheld the validity of municipal adult entertainment zoning regulations in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 96 S. Ct. 2440 (1976), and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S. Ct. 926 (1986).[8]

In *Young*, the Court upheld the validity of Detroit ordinances prohibiting the operation of theaters showing sexually explicit "adult movies" within 1,000 feet of any two other adult establishments.[9] The ordinances authorized a waiver of the 1,000-foot restriction if a proposed use would not be contrary to the public interest and/or other factors were satisfied. *Young, supra*, 427 U.S. at 54 n.7, 96 S. Ct. at 2444 n.7. The ordinances were supported by urban planners and real estate experts who testified that concentration of adult-type establishments "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere." *Id.* at 55, 96 S. Ct. at 2445. A "myriad" of locations were left available for adult establishments outside the forbidden 1,000-foot distance zone, and no existing establishments were affected. *Id.* at 71 n.35, 96 S. Ct. at 2453 n.35.

Writing for a plurality of four, Justice Stevens upheld the zoning ordinance as a reasonable regulation of the place where adult films may be shown because (1) there was a factual basis for the city's conclusion that the ordinance would prevent blight; (2) the ordinance was directed at preventing "secondary effects" of adult-establishment concentration rather than protecting citizens from unwanted "offensive" speech; (3) the ordinance did not greatly restrict access to lawful speech, and (4) "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 63 n.18, 71 nn.34, 35, 96 S. Ct. at 2448-49 n.18, 2452-53 nn.34, 35.

Justice Stevens did not expressly describe the standard he had used, but it was clear that the plurality would afford non-obscene sexually explicit speech lesser First Amendment protection than other categories of speech. However, four dissenters and one concurring justice concluded that the degree of protection afforded speech by the First Amendment does not vary with the social value ascribed to that speech. In his concurring opinion, Justice Powell stated that the four-part test of *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968), should apply. Powell explained:

> Under that test, a governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interest, "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedom is no greater than is essential to the furtherance of that interest."

427 U.S. at 79-80, 96 S. Ct. at 2457 (citation omitted) (Powell, J., concurring).

Perhaps because Justice Stevens' plurality opinion did not offer a clearly articulated standard of review, post-Young courts often applied the O'Brien test advocated by Justice Powell in his concurring opinion. Many ordinances regulating sexually oriented businesses were invalidated under the *O'Brien* test. *See* R.M. Stein, *Regulation of Adult Businesses through Zoning After Renton*, 18 Pac. L.J. 351, 360 (1987) ("consistently invalidated"); S.A. Bender, *Regulating Pornography Through Zoning: Can We "Clean*

Up" Honolulu?, 8 U. Haw. L. Rev. 75, 105 (1986) (ordinances upheld in only about half the cases).

Applying *Young*, the Eighth Circuit Court of Appeals invalidated a zoning ordinance adopted by the city of Minneapolis. *Alexander v. City of Minneapolis*, 698 F.2d 936 (8th Cir. 1983). In Alexander, the challenged ordinance had three major restrictions on sexually oriented businesses: distancing from specified uses, prevention of concentration and amortization. It prohibited a sexually oriented business from operating within 600 feet of districts zoned for residential or office-residences, a church, state-licensed day care facility and certain public-schools. It forbade an adults-only facility from operating within 500 feet of any other adults-only facility. Finally, the ordinance required existing sexually oriented entertainment establishments to conform to its provisions by moving to a new location, if necessary, within four years.

The Eighth Circuit ruled that the Minneapolis ordinance created restrictions too severe to be upheld under the Young decision. It would have required all five of the city's sexually oriented theaters and between seven and nine of the city's ten sexually oriented bookstores to relocate and would have required these facilities to compete with another 18 adult-type establishments (saunas, massage parlors and "rap" parlors) for a maximum of 12 relocation sites. The effective result of enforcing the ordinance would be a substantial reduction in the number of adult bookstores and theaters, and no new adult bookstores or theaters would be able to open, the Court concluded. *Alexander, supra*, 698 F.2d at 938.

In *Renton, supra*, the United States Supreme Court adopted a clearer standard under which regulation of sexually oriented businesses could be tested and upheld. The Court upheld an ordinance prohibiting adult movie theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park or school.

Justice Rehnquist, writing for a Court majority that included Justices Stevens and Powell, stated that the Renton ordinance did not ban adult theaters altogether and that, therefore, it was "properly analyzed as a form of time, place and manner regulation." *Id.* at 46, 106 S. Ct. at 928. When time, place and manner regulations are "content-neutral" and not enacted "for the purpose of restricting speech on the basis of its content," they are "acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication," Rehnquist stated. *Id.* He found the Renton ordinance to be content-neutral because it was not aimed at the content of films shown at adult theaters. Rather, the city's "predominant concerns" were with the secondary effects of the theaters. *Id* at 47, 106 S. Ct. at 929 (emphasis in original). Once a time, place or manner regulation is determined to be content-neutral, "[t]he appropriate inquiry . . . is whether the . . . ordinance is designed to serve a substantial governmental interest and allows for reasonable avenues of communication," Rehnquist wrote for the Court. *Id.* at 50, 106 S. Ct. at 930.

The Supreme Court found that Renton's "interest in preserving the quality of urban life" is a "vital" governmental interest. The substantiality of that interest was in no way diminished by the fact that Renton "relied heavily" on studies of the secondary effects of adult entertainment establishments by Seattle and the experiences of other cities, Rehnquist added. *Id.* at 51, 106 S. Ct. at 930-31.

> The First Amendment does no require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here. Nor is our holding, affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by *Renton*, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to *Renton*.

Id. at 51-52, 106 S. Ct. at 931.

Rehnquist's inquiry then addressed the means chosen to further *Renton's* substantial interest and inquired into whether the Renton ordinance was sufficiently "narrowly tailored."

His comments on *Renton's* means to further its substantial interest suggest that municipalities have a wide latitude in enacting content-neutral ordinances aimed at the secondary effects of adult-entertainment establishments. He quoted the *Young* plurality for the proposition that:

> It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas . . . [The] city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

Id. at 52, 106 S. Ct. at 931 (quoting *Young, supra*, 427 U.S. at 71, 96 S.Ct. at 2453).

As to the "narrowly tailored" requirement, Rehnquist found that the *Renton* ordinance only affected theaters producing unwanted secondary effects and, therefore, was satisfactory. *Id.*

The second prong of *Renton's* "time place, manner" inquiry–the availability of alternative avenues of communication–was satisfied by the district court's finding that 520 acres of land, or more than five percent of *Renton*, were left available for adult-entertainment uses, even though some of that developed area was already occupied and the undeveloped land was not available for sale or lease. A majority of the Court found:

> That [adult theater owners] must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation . . . In our view, the First Amendment requires only that Renton refrain from effectively denying [adult theater owners] a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

ld. at 54, 106 S. Ct. at 932.

B. Standards and Need for Legal Zoning

Unlike *Young,* the *Renton* case spells out the standards by which zoning of sexually oriented businesses should be tested. Renton and several lower court decisions rendered in its wake suggest that the two most critical areas by which the ordinances will be judged are (1) whether there is evidence that ordinances were enacted to address secondary impacts on the community, and (2) whether there are enough locations still available for sexually oriented businesses so that zoning is not just a pretext to eliminate pornographic speech.[10]

This section first describes some of the legal considerations which communities must keep in mind in drafting zoning ordinances for sexually oriented businesses. Then, some suggestions are provided, based on evidence reviewed by the Working Group, of types of zoning which can be enacted to reduce the secondary effects of sexually oriented businesses.

1. Documentation to Support Zoning Ordinances

Sexually oriented speech which is not obscene cannot be restricted on the basis of its content without running afoul of the First Amendment. The justification for regulating sexually oriented businesses is based on proof that the zoning is needed to reduce secondary effects of the businesses on the community.

Since Renton, a number of adult entertainment zoning ordinances have been invalidated for failure of the enacting body to document the need for zoning regulations. Thus, one court invalidated a zoning ordinance because there was "very little, if any, evidence of the secondary effects of adult bookstores . . . before the City Council." *11126 Baltimore Boulevard, supra*, 684 F. Supp. at 895; *see also Tollis Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987) (ordinance construed to prohibit single showing of adult movie in zoned area; invalidated for failure to present evidence of secondary effects of single showing); *but see Thames Enterprises v. City of St. Louis,* 851 F.2d 199, 201-02 (8th Cir. 1988) (observations by legislator of secondary effects sufficient).

On the other hand, it is not necessary for each municipality to conduct research independent of that already generated by other cities. The Renton court held that evidence of the need for zoning of sexually oriented businesses can be provided by studies from other cities "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton* at 51, 106 S. Ct. at 931. *See also SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1274 (5th Cir. 1988) (public testimony from experts, supporters and opponents and consideration of studies by Detroit, Boston, Dallas and Los Angeles sufficient evidence of legitimate purpose).

The first section of this report summarizes evidence from various cities documenting the secondary effects of sexually oriented businesses. Following Renton, it is intended that local communities will make use of this evidence in the course of assembling support for reasonable regulation of sexually oriented businesses.

2. Availability of Locations for Sexually Oriented Businesses

Courts also evaluate whether zoning of sexually oriented businesses is merely a pretext for prohibition by reviewing the alternative locations which remain for a sexually oriented business to operate under the zoning scheme. A municipality must "refrain from effectively denying . . . a reasonable opportunity to open and operate" a sexually oriented business. *Renton, supra*, 476 U.S. at 54, 106 S. Ct. at 932.

Access may be regarded as unduly restricted if adult entertainment zones are unreasonably small in area or if the number of locations is unreasonably few. There is no set amount of land or number of locations constitutionally required. The Renton court found that 620 acres of "accessible real estate," including land "criss-crossed by freeways"- more than five percent of the entire land area in *Renton* - was sufficient. 475 U.S. at 53, 106 S.Ct. at 932. The *Young* court found the availability of "myriad" locations sufficient. 427 U.S. at 72 n.35, 96 S.Ct. at 2453 n.35.

Whether .058 square miles constituting .23 of 1 percent of the land area within the city's central business zone is sufficient is not clear. *See Alexander v. The City of Minneapolis (Alexander II)*, No. 3-88-808, slip op. at 22 (D. Minn. May 22, 1989) (less than 1% of land area could be valid if "ample actual opportunities" for relocation exist); *Christy v. City of Ann Arbor*, 824 F.2d 489, 490, 493 (6th Cir. 1987) (remanding for a determination of excessive restriction). *See also* 11126 *Baltimore Boulevard, Inc. v. Prince George's County of Maryland*, 684 F. Supp. 884 (D. Md. 1988) (20 alternative locations sufficient); *Alexander v. City of Minneapolis*, 698 F.2d 936, 939 n.7 (8th Cir. 1983) (pre-Renton; 12 relocation sites for at least 28 existing adult establishments not sufficient).

The sufficiency of sites available for adult entertainment uses may be measured in relation to a number

of factors. *See, e.g., Alexander II, supra*, slip op. at 22-23 (insufficient if relocation site owners refuse to sell or lease); *International Food & Beverage Systems, Inc.*, 794 F.2d 1520, 1526 (11th Cir. 1986) (suggesting number of sites should be determined by reference to community needs, incidence of establishments in other cities, goals of city plan); *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1209 (5th Cir. 1982) (pre-Renton case striking zoning regulation restricting adult theaters to industrial areas that were "largely a patchwork of swamps, warehouses, and railroad tracks . . . lack[ing] access roads and retail establishments").

However, the fact that land zoned for adult establishments is already occupied or not currently for sale or lease will not invalidate a zoning ordinance. *Renton, supra*, 475 U.S. at 53-54, 106 S. Ct. at 932; *but see Alexander II, supra*, slip op. at 22-23 (reasonable relocation opportunity absent where owners refuse to sell or rent). There is no requirement that it be economically advantageous for a sexually oriented business to locate in the areas permitted by law.

3. Distance Requirements

Another factor that may be examined by some courts is the distance requirement established by an adult entertainment zoning ordinance. In *SDJ, Inc. v. Houston*, 837 F.2d 1268 (5th Cir. 1988), the Court was asked to invalidate a 760-foot distancing requirement on the ground that the city had not proved that 760 feet, as opposed to some other distance, was necessary to serve the city's interest.

The Court found that an adult entertainment zoning ordinance is "sufficiently well tailored if it effectively promotes the government's stated interest" and declined to "second-guess" the city council. *Houston, supra*, 837 F.2d at 1276.

Courts have sustained both requirements that sexually oriented businesses be located at specified distances from each other, *see Young, supra*, (upholding distance requirement of 1000 feet between sexually oriented businesses), and requirements that sexually oriented businesses be located at fixed distances from other sensitive uses, see Renton, supra, (upholding distance requirement of 1000 feet between sexually oriented businesses and residential zones, single-or-multiple family dwellings, churches, parks or schools).

The Working Group heard testimony that when an ordinance establishes distances between sexually oriented uses, an additional regulation may be needed to prevent operators of these businesses from defeating the intent of the regulation by concentrating sexually oriented businesses of various types under one roof, as in a sexually oriented mini-mall. The city of St. Paul has adopted an ordinance preventing more than one adult use (e.g., sexually oriented theater, bookstore, massage parlor) from locating within a single building. A similar ordinance was upheld in the North Carolina case of *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980).

The experience with multiple-use sexually oriented businesses at the University-Dale intersection suggests that these businesses have a greater potential for causing neighborhood problems than do single-use sexually oriented businesses. Following Renton, it is suggested that lawmakers document the adverse effects which the community seeks to prevent by prohibiting multiple-use businesses before enacting this type of ordinance.

4. Requiring Existing Businesses to Comply with New Zoning

Zoning ordinances can require existing sexually-oriented businesses to close their operations provided they do not foreclose the operation of such businesses in new locations. Under such provisions, an existing business is allowed to remain at its present location, even though it is a non-conforming use, for a limited period.

The Minnesota Supreme Court has explained the theory this way:

> The theory behind this legislative device is that the useful life of the nonconforming use corresponds roughly to the amortization period, so that the owner is not deprived of his property until the end of its useful life. In addition, the monopoly position granted during the amortization period theoretically provides the owner with compensation for the loss of some property interest, since the period specified rarely corresponds precisely to the useful life of any particular structure constituting the nonconforming use.

Naegele Outdoor Advertising Co. v. Village of Minnetonka, 162 N.W.2d 206, 213 (Minn. 1968).

Such provisions applied to sexually oriented businesses have been said to be "uniformly upheld." *Dumas v. City of Dallas*, 648 F. Supp. 1061, 1071 (N.D. Tex. 1986), *aff'd, FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988) (citing cases).

As detailed in the first section of this report, there are significant secondary impacts upon communities related to the location of sexually oriented businesses. These impacts are intensified when sexually oriented businesses are located in residential areas or near other sensitive uses and when sexually oriented businesses are concentrated near each other or near alcohol oriented businesses. The Working Group believes that evidence from studies such as those described in the first section of this report and anecdotal evidence from neighborhood residents and police officers should be used to support the need for zoning ordinances which address these problems.

Recommendations

(1) Communities should document findings of adverse secondary effects of sexually oriented businesses prior to enacting zoning regulations to control these uses so that such regulations can be upheld if challenged in court.

(2) To reduce the adverse effects of sexually oriented businesses, communities should adopt zoning regulations to set distance requirements between sexually oriented businesses and sensitive uses, including but not limited to residential areas, schools, child care facilities, churches and parks.

(3) To reduce adverse impacts from concentration of sexually oriented businesses, communities should adopt zoning ordinances which set distance requirements between liquor establishments and sexually oriented businesses and should consider restricting sexually oriented businesses to one use per building.

(4) Communities should require existing businesses to comply with new zoning or other regulation pertaining to sexually oriented businesses within a reasonable time so that prior uses will conform to new laws.

IV. Licensing and Other Regulations

Licensing and other regulations may also be used to reduce the adverse effects of sexually oriented businesses. The critical requirements which communities must keep in mind are that regulations must be narrowly crafted to address adverse secondary effects, they must be reasonably related to reduction of these effects and they must be capable of objective application. If these standards can be met, licensing and other regulatory provisions may play an important role in preventing unwanted exposure to sexually oriented materials and in reducing the crime problems associated with sexually oriented businesses.

It is clear that failure to act upon a license application for a sexually oriented business cannot take the place of regulation. Without justification, denial or failure to grant a license is a prior restraint in violation of the First Amendment. *Parkway Theater Corporation v. City of Minneapolis*, No. 716787, slip. op. (Henn. Co. Dist. Ct., Sept. 24, 1975). An ordinance providing for license revocation of an adult motion picture theater if the licensee is convicted of an obscenity offense is also likely to be held unconstitutional as a prior restraint of free speech. *Alexander v. City of St. Paul*, 227 N.W.2d 370 (Minn. 1975). The Alexander court stated:

> [W]hen the city licenses a motion picture theater, it is licensing an activity protected by the First Amendment, and as a result the power of the city is more limited than when the city licenses activities which do not have First Amendment protection, such as the business of selling liquor or running a massage parlor.

Id. at 373 (footnote omitted); *see also Cohen v. City of Daleville*, 695 F. Supp. 1168, 1171 (M.D. Ala. 1988) (past sale of obscene material cannot justify revocation of license).

However, the courts have permitted communities to deny licenses to sexually oriented businesses if the person seeking a license has been convicted of other crimes which are closely related to the operation of sexually oriented businesses.

In *Dumas v. City of Dallas, supra*, the court reviewed a requirement that a license applicant not have been convicted of certain crimes within a specified period. Five of the enumerated crimes were held to be not sufficiently related to the purpose of the adult entertainment licensing ordinance because the city had made no findings on their justification. The invalid enumerated offenses were controlled substances act violations, bribery, robbery, kidnapping and organized criminal activity. The court upheld requirements that the licensee not have been convicted of prostitution and sex-related offenses. *Id.* at 1074. If a community seeks to require that persons with a history of other crimes be denied licenses, clear findings must first be made which justify denial of licenses on that basis.

The Dumas court also invalidated portions of the licensing ordinance permitting the police chief to deny a license if he finds that the applicant "is unable to operate or manage a sexually oriented business premises in a peaceful and law abiding manner" or is not "presently fit to operate a sexually oriented business." Neither provision satisfied the constitutional requirement that "any license requirement for an activity related to expression must contain narrow, objective, and definite standards to guide the licensing authority." *Id.* at 1072. *See also Alexander II, supra*, slip op. at 16 (unconstitutionally vague to define regulated bookstores as those selling "substantial or significant portion" of certain publications); *11126 Baltimore Boulevard, supra*, 684 F. Supp. at 898-99 (striking ordinance allowing zoning officials to deny permit if adult entertainment establishment is not "in harmony" with zoning plan, does not "substantially impair" master plan, does not "adversely affect" health, safety and welfare and is not "detrimental" to neighborhood because such standards are "subject to possible manipulation and arbitrary application").

A number of courts have upheld ordinances requiring that viewing booths in adult theaters be open to

discourage illegal and unsanitary sexual activity. *See, e.g., Doe v. City of Minneapolis*, 693 F. Supp. 774 (D. Minn. 1988).

Licensing provisions and ordinances forbidding massage parlor employees from administering massages to persons of the opposite sex have withstood equal protection and privacy and associational right challenges. *See Clampitt v. City of Ft. Wayne*, 682 F. Supp. 401, 407-408 (N.D. Ind. 1988) (equal protection); *Wigginess, Inc. v. Fruchtman*, 482 F. Supp. 681, 689-90 (S.D. N.Y. 1979), *aff'd*, 628 F.2d 1346 (2d Cir. 1980), *cert. denied*, 449 U.S. 842, 101 S. Ct. 122. However, some courts have found same-sex massage regulations to be in violation of Title VII of the Civil Rights Act of 1964. *See Stratton v. Drumm*, 445 F. Supp. 1305, 1310-11 (D. Conn. 1978); *Cianciolo v. Members of City Council*, 376 F. Supp. 719, 722-24 (E.D. Tenn. 1974); *Joseph v. House*, 353 F. Supp. 367, 374-75 (E.D. Va.), *aff'd sub nom. Joseph v. Blair*, 482 F.2d 575 (4th Cir.), *cert. denied*, 416 U.S. 955, 94 S. Ct. 1968 (1974). *Contra, Aldred v. Duling*, 538 F.2d 637 (4th Cir. 1976).

Although the Working Group expressed strong concern about the operation of prostitution under the guise of massage parlors, this type of regulation is not advisable because legitimate therapeutic massage establishments could find their operations curtailed. Prostitution may be better controlled through prosecution and use of post-conviction actions such as forfeiture or enjoining a public nuisance.

In 1985, a court upheld an ordinance making it unlawful to display for commercial purposes material "harmful to minors" unless the material is in a sealed wrapper and, if the cover is harmful to minors, has an opaque cover. *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985). Last year, the legislature enacted a state law similarly prohibiting display of sexually explicit material which is harmful to minors unless items are kept in sealed wrappers and, where the cover itself would be harmful to minors, within opaque covers. Minn. Stat. § 617.293 (1988). This law has the potential to protect minors from exposure to sexually oriented materials. Communities also have considerable discretion to regulate signage so that the exterior of sexually oriented businesses does not expose unwitting observers to sexually explicit messages.

Recommendations

(1) Prior to enacting licensing regulations, communities should document findings of adverse secondary effects of sexually oriented businesses and the relationship between these effects and proposed regulations so that such regulations can be upheld if challenged in court.

(2) Communities should adopt regulations which reduce the likelihood of criminal activity related to sexually oriented businesses, including but not limited to open booth ordinances and ordinances which authorize denial or revocation of licenses when the licensee has committed offenses relevant to the operation of the business.

(3) Communities should adopt regulations which reduce exposure of the community and minors to the blighting appearance of sexually oriented businesses including but not limited to regulations of signage and exterior design of such businesses and should enforce state law requiring sealed wrappers and opaque covers on sexually oriented material.

Conclusion

There are many actions which communities may take within the law to protect themselves from the adverse secondary effects of sexually oriented businesses. Prosecution of obscenity crimes can play a vital role in decreasing the profitability of sexually oriented businesses and removing materials which violate community standards from local outlets. Forfeiture and injunction to prevent public nuisance should be available where sexually oriented businesses are the site of sex-related crimes and violations of laws pertaining to gambling, liquor or controlled substances. These actions will remove the most egregious establishments from communities.

Zoning can reduce the likelihood that sexually oriented businesses will lead to neighborhood blight. Licensing can sever the link between at least some crime figures and sexually oriented businesses. Regulation and enforcement can protect minors from exposure to sexually explicit materials.

The Attorney General's Working Group on the Regulation of Sexually Oriented Businesses believes that prosecution, seizure of profits, zoning and regulation of sexually oriented businesses should only be done in keeping with the constitutional requirements of the First Amendment. Rational regulation can be fashioned to protect both our communities and our constitutional rights.

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[1]

Hafiz was acquitted of the perjury charges. St. Paul Pioneer Press, Jan. 11, 1989 at 10A.

[2]

The City of St. Paul bought out the Faust for $1.8 million, closing the entertainment complex on March 7, 1989.

[3]

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, or to petition the government for redress of grievances." The constitutional guarantee of freedom of speech, often the basis for challenges to regulation of sexually oriented businesses, restricts state as well as federal actions. *See, e.g., Fiske v. Kansas*, 27 U.S. 380, 47 S.Ct. 655 (1927).

[4]

The prior penalty was a fine only – up to $10,000 for a first offense and up to $20,000 for a second or subsequent offense. Minn. Stat. § 617.241, subd. 3 (1986). Obscenity arrests are so infrequent that incidents involving possible violations of section 617.241 are not separately compiled by the Minnesota Bureau of Criminal Apprehension. *See Bureau of Criminal Apprehension, 1987 Minnesota Annual Report on Crime, Missing Children and Bureau of Criminal Apprehension Activities.*

[5]

Two blue ribbon commissions have reached different conclusions regarding the harmfulness of sexually explicit material to individuals. A presidential Commission on Obscenity and Pornography concluded in 1970 that there was no evidence of "social or individual harms" caused by sexually explicit materials and, therefore, "federal, state and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed." *The Report of the Comm'n on Obscenity and Pornography* at 57-8 (Bantam Paperback ed. 1970). However, in 1986, the Attorney General's Commission on Pornography concluded that 'sexually violent materials . . bear . . . a causal relationship to antisocial acts of sexual violence [and that] the evidence supports the conclusion that substantial exposure to [nonviolent] degrading material increases the likelihood for an individual [to] commit an act of sexual violence or sexual coercion.' Attorney General's Comm'n on Pornography, 1 *Final Report* at 326, 333 (1986).

[6]

Memorandum to Jim Bellus, executive assistant to St. Paul Mayor George Latimer (prepared by St. Paul Department of Planning and Economic Development (July 5, 1988); see also Waters "The Squeeze on Sleaze," *Newsweek*, Feb. 1, 1988, at 45 ("After more than 10 years of Levin heavy fines and making arrests, Atlanta has won national renown as 'the city that cleaned up pornography.'").

[7]

The Address of the [Child Exploitation and Obscenity Section] is U.S. Justice Department, 10th & Pennsylvania Ave. N.W., Room 2216, Washington, D.C. 20530. Its telephone number is 202-[514]-5780. Assistance is also available from [Community Defense Counsel, 15333 N. Pima Rd., Suite 165 Scottsdale, AZ 85260; cdc@communitydefense.org which makes available "The Preparation and Trial of an Obscenity Case: A Guide for the Prosecuting Attorney." Its telephone number is 480-444-0020. The National Obscenity Law Center, another private organization is located at 475 Riverside Drive, Suite 239, New York, N.Y. 10115. It publishes an Obscenity Law Bulletin and the "Handbook on the Prosecution of

Obscenity Cases." Its telephone number is 212-870-3222; mim@moralityinmedia.org].

[8]

The only reported Minnesota court case reviewing an adult entertainment zoning ordinance is *City of St. Paul v. Carlone*, 419 N.W.2d 129 (Minn. App. 1988) (Upholding facial constitutionality of St. Paul ordinance).

[9]

The ordinances also prohibited the location of an adult theater within 600 feet of a residential area, but this provision was invalided by the district court, and that decision was not appealed. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 62 n.2 , 96 S.Ct. 2440, 2444 n. 2 (1976).

[10]

Of 11 recent post-*Renton* adult-entertainment zoning decisions by federal courts, five invalidated ordinance, three upheld ordinances and three ordered a remand to district court for further proceedings. Zoning ordinances were struck in *Avalon Cinema Corp. v. Thompson,* 667 F.2d 659 (8th Cir. 1987) (city council failed to offer evidence suggesting neighborhood decline would result); *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987) (no evidence presented to legislative body of secondary harmful effects); *Ebel v. Corona*, 767 F.2d 636 (9th Cir.)(lack of effective alternative locations; *11126 Baltimore Boulevard, Inc. v. Prince George's County of Maryland*, 684 F. Supp. 884 (D. Md. 1988)(insufficient evidence of secondary effects presented to legislative body; special exception provisions grant excessive discretionary authority to zoning officials); and *Peoples Tags, Inc. v. Jackson County Legislature,* 636 F.Supp. 1345 (W.D. Mo. 1986)(improper legislative purpose to prevent continued operation of adult-entertainment establishment). Zoning ordinances were upheld in *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988); *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (6th Cir. 1988); and *S & G News Inc. v. City of Southgate,* 638 F.Supp. 1060 (E.D. Mich. 1986), *aff'd without published opinion*, 819 F.2d 1142 (6th Cir. 1987), *cert. denied*, __ U.S. __, 108 S.Ct. 1013 (1988) (remand for determination of excessive restrictions); *International Food & Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986) remand for reconsideration in light of *Renton, supra;* nude bar ordinance); and *Walnut Properties, Inc. v. City of Whittier,* 808 F.2d 1331 (9th Cir. 1986) (remand, in part, for determination of and availability).

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Focus on New Laws: Implications of new adult entertainment law warrant close scrutiny

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By Tom Grundhoefer

This past session the Legislature enacted HF 3779 (Chap. 240), in an attempt to respond to concerns about adult business establishments. In particular, the new law includes a number of far-reaching regulations that could dramatically affect how our state deals with these activities. The law also provides specific municipal opt-out authority that city officials ought to carefully consider.

The regulation of adult uses has always been a tricky business. While municipalities have sought to regulate these uses in order to minimize their secondary effects, local governments have had to be cognizant of the constitutional First Amendment protections that are implicated. The new state adult entertainment law must similarly be evaluated with these considerations in mind.

What businesses are affected by the new law?

The law applies to "adult entertainment establishments," which are defined as a business open only to adults and that present "live performances" that depict "sexual conduct" or "nudity." The law does not purport to regulate other adult uses such as bookstores or movie establishments.

What does the law provide?

Notice requirement. The law provides that operators of new establishments may not operate until they have given at least 60 days notice to the local unit of government. Upon receipt of the notice, the local government is authorized to hold public hearings.

Local zoning requirements. A local unit of government is not required to provide by zoning or otherwise for a place for the adult entertainment establishment to locate, so long as an adult entertainment establishment already exists within 50 miles of the local government. This requirement represents a significant departure from existing case law, which has generally required cities to provide for a place for adult business establishments to locate.

Cajun Club - gentlemen's club

North Hudson St. Joe Twp.

Proximity requirements. The law provides that an adult entertainment establishment may not be located within 1,500 feet of another adult entertainment establishment; within 500 feet of residential property, regardless of how it is zoned; or within 2,800 feet of a public or private elementary or secondary school, or a church, synagogue, mosque, or other place of worship. The law does not indicate how this requirement applies to existing uses.

Hours of operation. The law provides that these establishments may not be "open for business before 10 a.m., or after 10 p.m." and may not be open at all on Sundays or legal holidays. The law allows for local governments to establish alternative hours of operation. Again, it is unclear how this law would effect existing establishments. In the absence of a local regulation to the contrary, existing businesses would presumably be subject to the new closing requirements, just as all bars have been subject to past

state law amendments governing hours of operation.

Restrictions on ownership. The law limits the ability of individuals convicted of certain sexually related crimes from "operating or managing" an adult entertainment establishment. In particular, any person convicted of prostitution, criminal sexual conduct, solicitation of children, indecent exposure, distribution of obscene material, use of a minor in a sexual performance, or possession of pornographic material involving minors are prohibited from operating or managing one of these businesses for three years after discharge of the sentence for the offense. Again, the law does not describe how this would affect existing establishments, but in all likelihood on this point the law would probably not be given retroactive effect.

What is the city's role?

The law states that it applies if the applicable local unit of government has not enacted an ordinance or regulation governing "adult entertainment establishments." The law is silent as to enforcement responsibility; however, it can be presumed that city peace officers or county sheriffs are expected to enforce the law's provisions as they would other statutes.

The law does explicitly provide that a local government may adopt an ordinance or regulation that is "consistent with" the law, "supersedes" the law, or "is in whole or part more restrictive than" the law, or that provides that the law does not apply. In short, all cities—particularly those with existing regulations—need to carefully consider how they want the law to apply within their jurisdiction.

Is the law constitutional?

As discussed at the beginning of this article, regulation of adult business is a complex matter, and involves a host of First Amendment considerations. Chapter 240 is bold law that attempts to establish far-reaching and largely unprecedented restrictions on adult entertainment establishments. It is unclear at this time whether the law (in whole or in part) will withstand a constitutional challenge.

One federal district court judge has already raised questions about some of the provisions. Judge Michael Davis in responding to a preliminary injunction request related to a city of Duluth action, stated the business owner had demonstrated a likelihood of success on the merits that the 50-mile provision and the 60-day notice requirement would violate the First Amendment. Judge Davis also concluded that the proximity provisions had the effect of precluding the business from operating, and therefore the law likely violated the First Amendment because it "provides no reasonable alternative avenues for communication."

What should a city do?

For cities that are concerned about the presence of adult-only business in their community, the League recommends taking proactive measures to adopt local regulations. It is much easier to respond to a proposed new business if regulations are already in place. Until the constitutional questions regarding the new law are resolved, the League does not recommend that cities rely on it as the sole mechanism for regulating adult entertainment establishments within your boundaries. Cities with existing adult-use ordinances may even want to consider opting out of the state law to avoid potential unintended conflicts between local regulations and the new state provisions. It may also be prudent to take a "wait-and-see" approach before undertaking any sort of aggressive enforcement of the law.

As discussed, regulation of adult uses involves complex legal issues. Accordingly, we highly recommend that you consult with your city attorney in deciding how to respond to the new law and/or in making decisions about the regulation of these types of business. If you have questions concerning the new law, you can contact **Tom Grundhoefer**, LMC, at (651) 281-1266 or tgrundho@lmnc.org.