MINNESOTA STATE LAW LIBRARY

STATE OF MINNESOTA
IN COURT OF APPEALS
Appellate Court File No. A05-2002

County of Morrison,

Respondent,

vs.

Gordon K. Wheeler, Sr.;
Gordon K. Wheeler, Jr.;
and Jonathan M. Wheeler,
together or individually doing
business as Lookin Fine Smut
& Porno,

Appellants.

APPELLANTS' BRIEF

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STATEMENT OF ISSUES

1. Given the unconstitutionality of the county's interim zoning ordinance in effect when Appellants established their business, did Appellants attain lawful non-conforming use rights by commencing business prior to the enactment of a permanent zoning ordinance?

The trial court held in the negative.

2. Was the county's amended zoning ordinance adequately supported by evidence of adverse secondary effects?

The trial court held in the affirmative.

3. If the ordinance was initially supported by sufficient evidence of adverse secondary effects, did Appellants present sufficient contrary evidence to cast direct doubt on the validity of the county's evidence?

The trial court held in the negative.

4. Did the evidence support the trial court's conclusion that the ordinance would not have the effect of suppressing or greatly denying access to constitutionally protected speech?

The trial court held in the affirmative.

STATEMENT OF THE CASE

On October 30, 2003, Respondent commenced a civil action in Morrison County District Court by service of a summons and complaint, a copy of which is set forth in Appellants' Appendix at A.1-A.5, seeking temporary and permanent injunctive relief against Appellants, alleging that Appellants were operating an adults-only use in violation of an interim zoning ordinance and permanent zoning ordinance soon to take effect, alleging that Appellants were operating a food and beverage establishment without a license, and alleging that the septic system violated state law and local ordinance. The action sought permanently to enjoin the continued operation of Appellants' business, "Lookin Fine Smut and Porno."

Appellants served a timely answer and counterclaim, set forth in Appellants' Appendix at A.23-A.36, denying that their operation was illegal and further counterclaiming, seeking a declaration that both the interim zoning ordinance and the permanent ordinance enacted by the county were unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

On November 26, 2003, the District Court, by the Honorable Thomas A. Godzala, issued a memorandum and order, a copy of which is set forth in Appellants' Appendix at A.40-A.43, temporarily enjoining the operation of Appellants' business, on the ground that the septic system on the premises was non-conforming. The order expressly reserved decision on whether the moratorium ordinance on adult uses and the permanent ordinance, effective November 3, 2003 were constitutional.

On July 2, 2004, Respondent moved for summary judgment, seeking to have Appellants

permanently enjoined from operating an adult-use business at their premises. A copy of the notice of motion and motion for summary judgment, together with the documents in support thereof are set forth in Appellants' Appendix at A.44-A.713.

On June 25, 2004, Appellants cross-moved for summary judgment seeking to enjoin the enforcement of both the interim and permanent adult entertainment zoning ordinances. A copy of Appellants' notice of motion, motion for summary judgment and documents in support thereof are set forth in Appellants' Appendix at A.714-A.1262.

On July 16, 2004, pursuant to a stipulation and order set forth in Appellants' Appendix at A.1263-A.1265, the parties resolved the issue of the sewage system, wherein Appellants agreed to be enjoined from operating the restaurant facility until they complied with the requirements set forth in Minn. R. Sec. 7080, and the county agreed to allow compliance through the use of holding tanks.

On October 15, 2004, the District Court entered an order, set forth in Appellants' Appendix at A.1266-A.1276, finding the interim zoning moratorium ordinance to be unconstitutional under the First Amendment, holding that Appellants' adult entertainment business was not entitled to lawful non-conforming use status under the county's permanent adult-use ordinance, and denying the parties' motions for summary judgment as to the constitutionality of the permanent ordinance as premature.

Following a trial on the merits with respect to constitutionality of the permanent zoning ordinance, the District Court, on August 5, 2005, entered an order for judgment, set forth in Appellants' Appendix at A.1277-A.1289, granting Respondent's motion for summary judgment and permanently enjoining Appellants from operating an adult use on the subject premises.

From the judgment entered pursuant to that order, Appellants took a timely appeal. A copy

of the notice of appeal is set forth in Appellants' Appendix at A.1290-A.1291.

STATEMENT OF FACTS

In 1995, the Morrison County Board of Commissioners considered the issue of adult entertainment zoning, based upon adverse secondary effects, and enacted what would become Sec. 1202.8 of its zoning code, zoning adult entertainment. That section, set forth in Appellants' Appendix at A.36, permitted adult uses in commercial and shore land commercial districts, provided that they are located within 1320 feet from residential districts, daycare centers, schools, parks, playgrounds, or religious institutions, or within 200 feet of a building licensed to sell alcoholic beverages.

On November 25, 2001, after the conclusion of litigation with the county over the location of adult uses, Appellant Gordon Wheeler, Sr., wrote a letter to Morrison County Attorney Conrad Freeberg, with copies of every member of the County Board of Commissioners, stating the following:

> "At a previous date I stated that as a result of your actions that I would be starting one if not two new adult uses as defined by County Ordinances and that I didn't think the County Commissioners would approve. You stated that you would discuss my plans with the Commissioners. A week or so later you informed me that they didn't care as it was a legal business and my Commissioner Tom Wenzel told me that it had been discussed.
>
> The purpose of this letter is to inform you and others that apart of non-conforming use as qualified in county ordinances of pre-1995 buildings will open another form of adult use and will be open by April, 2002.
>
> If my rights are still being violated after the opening of the new restaurant/lounge causing a loss I will open a (sic) adult use business in the Little Falls area to be known as the "LITTLE FALLS SMUT & PORNO, etc." Appellants' Appendix at A.38.

Two weeks after receipt of Appellants' letter by county attorney Freeberg, the Board of Commissioners enacted a moratorium ordinance, prohibiting adult uses anywhere in the county.[1]

On November 26, 2002, the Moratorium, prohibiting all new adult businesses within the county, was extended for a period of one year (Appellants' Appendix at A.12).

There was no evidence before the District Court that, other than the fact that Appellant Gordon Wheeler publicly announced his intention to open a second adult use at a location permitted under the 1995 ordinance, that the 1995 ordinance was, in any way, unsatisfactory to combat any adverse secondary effects of adult entertainment

On October 21, 2003, Appellants opened a business entitled "Lookin' Fine Smut & Porno" in unincorporated Morrison County. It is undisputed that the location of the property was absolutely lawful under the 1995 ordinance.[2]

Consequently, from a zoning standpoint, the only reason that the subject property would be illegal is that it violated the moratorium ordinance, which prohibited the location of new adult entertainment establishments anywhere within the county.[3]

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[1]Appellants' Appendix at A.38. A copy of the ordinance is set forth in Appellants' Appendix at A.49-A.50.

[2]Plaintiff's complaint, at paragraph 11, Appellants' Appendix at A.3, alleges that the establishment is located approximately 930 feet from a liquor establishment, and less than 1320 feet from two dwelling units. Neither of those facts violates the 1995 ordinance, which sets the required separation from liquor establishments at 200 feet, and does not contain a setback requirement from individual residences, only from residentially zoned property. See Id. at 36.

[3]Plaintiff's complaint at paragraphs 18-19, Appellants' Appendix at A.4, also alleged that the previous septic system failed, that no new septic system had been installed, and that thus Minn. R. 7080, was being violated. However, Appellants responded that the failure of the old septic system was a failure of the drain field connected to the septic tanks, and that compliance with Rule 7080 could be had by pumping the septic tanks at regular intervals. Appellants'

Effective November 3, 2003, Morrison County adopted a permanent adult entertainment ordinance, zoning, licensing and otherwise regulating adult entertainment. The zoning provisions are contained in Sec. 1405, Appellants' Appendix at A.17-A.18. For the purpose of this lawsuit, the amended zoning ordinance made three significant changes in the locations of adult businesses, as compared to old Sec. 1202.8:

First of all, while, under Sec. 1202.8, adult businesses were allowed in either commercial or shore land commercial districts (Appellants' Appendix at A.36), under the 2003 ordinance, they were restricted to commercial zones (Id. at A.17).

Secondly, while the old ordinance (Id. at A.36) required adult uses to be 1320 feet from residentially zoned property, the new ordinance prohibited them from being within 1320 feet of "any dwelling unit" (Id. at A.17).

Thirdly, while the old ordinance prohibited adult uses within 200 feet of any building licensed to sell alcoholic beverages (Id. at A.36), the new ordinance increased that distance to 1320 feet (Id. at A.18).

Notwithstanding that fact that, at the time the permanent zoning ordinance was under consideration, the 1995 zoning ordinance had been in effect for some 8 years, absolutely no inquiry was made by the Morrison County Board of Commissioners as to whether the existing regulations were adequate to prevent the occurrence of adverse secondary effects. Rather, the Board relied exclusively on studies of adult entertainment from other jurisdictions. These included the report of

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Appendix at A.25. As already noted above, the septic system issue was resolved by the parties stipulating that Appellants would be permitted to pump the tanks pursuant to a plan approved by the county. See Appellants' Appendix at A.1263-1265.

the Attorney General's Working Group on the Regulation of Sexually-Oriented Businesses (1989)[4] a report from the Spokane Coalition for the Protection of Children and Families (Id. at A.124-A.126); news release from the American Planning Association (Id. at A.128-A.129); a report on Zoning and other Methods of Regulating Adult Entertainment in Amarillo, Texas (Id. at A.131-A.151); a report on Adult Oriented Business in Austin, Texas (1986) (Id. at A.152-A.203); a final report to the City of Garden Grove, California, as to the relationship between crime and adult business operations on Garden Grove Blvd. (1991) (Id. at A.204-A.356); the Adult Use Study of the City of Newport News, Va. (1996) (Id. at A.357-A.443); the Adult Entertainment Study of the New York Department of City Planning (2002) (Id. at A.444-A.448); the Spokane, Washington City Plan Commissions Findings, Conclusions, and Recommendations on Proposed Amendment Re: Adult Use Establishments (Id. at A.449-A.455); the City of Whittier, California, Zoning Regulations on Adult Entertainment Establishments (1999) (Id. at A.456-A.548); Kelly and Cooper "Everything You Always Wanted About Regulating Sex Businesses" American Planning Association, Planning Advisory Service (A.549-A.706).

Apparently based upon these materials, and without making any inquiry as to local conditions, the Board of Commissioners, on October 21, 2003, adopted a resolution with respect to adult uses, a copy of which is set forth in Appellants' Appendix at A.51-A.57. Among the "findings" set forth in this resolution are the following:

> WHEREAS, sexually oriented businesses are frequently the site of unlawful activities, including prostitution and drug use and these businesses encourage casual sexual liaisons; and
>
> WHEREAS, prostitution and casual sexual relations often result in sexually

[4]Appellants' Appendix at A.75-A.23.

transmitted diseases, which is (sic) a serious public health problem; and...

WHEREAS, there is substantial documented evidence that sexually oriented businesses have a deleterious effect on both the existing businesses and the residential areas adjacent to them, causing increased crime and the downgrading of property values; and...

Activities exist, have existed or may exist within the county and surrounding counties where sexually oriented physical contact or escort services are offered for pecuniary gain. The people involved in such activities engage in physical contact or touching with the customers, including acts of prostitution, or encourage or entice customers to engage in acts of lewdness." Id. at A.. 51, A.. 53.

These purported "findings" were unsupported by any evidence from Morrison County itself and the evidence supporting the propositions from other jurisdictions was established to be dubious at best. Indeed, the undisputed evidence at the District Court level was that, had the Morrison County Board of Commissioners made the slightest attempt to inquiry, as to whether the existing regulation of adult businesses, in effect for 8 years, had been effective in curbing adverse secondary effects, the answer would have been an overwhelming "yes." Indeed, the uncontradicted evidence at the trial court was that the county's 20 years of experience with adult businesses have produced absolutely no evidence of secondary effects whatsoever.

With respect to property values, it should be noted that in 1994, after twelve (12) years of experience with an adult entertainment establishment at Camp Bar, the Morrison County assessor reported, in response to an inquiry from Benton County,[5] that Morrison County had experienced no decline in property values in the property surrounding the existing adult entertainment establishment.

[5]At the time, Benton County was in the process of adopting its' own adult entertainment zoning ordinance as was seeking data from other jurisdictions to support that enactment.

Appellants' Appendix at A.1063-A.1067.

And while the Morrison County Board of Commissioners was busy enacting a resolution claiming that adult entertainment leads to prostitution, narcotics offenses, and disorderly conduct, it was totally ignoring the fact that twenty (20) years of experience in its own jurisdiction plainly established exactly the contrary to be true. As noted in the Gordon Wheeler Affidavit (A.1018-A.1020), fully supported by the crime statistics attached to the Tigue Affidavit (A.1069-A.1259), at the time the ordinance was adopted, there had never been a single arrest at the existing adult entertainment establishment for prostitution, controlled substances, or other sex offenses.[6]

Moreover, it is clear that the Camp Bar, even in terms of ordinary crime, is no worse than other establishments than Morrison County which do not feature adult entertainment. For example, over a ten-year period, from 1994 to 2004, there nine (9) reports of disorderly conduct at the Camp Bar (fewer than one per year). During a period of nine (9) years (one year fewer), the Canteen had ten (10) such calls, or slightly more than one (1) per year. During the same period of time as was involved in the Camp Bar, the Thirty Seven Acres Bar had some thirty-four (34) incidents of disorderly conduct, nearly four (4) times as many as the Camp Bar. Neither the Canteen nor Thirty Seven Acres feature adult entertainment. Thus, the county board's "findings" on the impact of adult entertainment are plainly disproved by the county's own experience. See affidavit of Sunnie LaMarre and attached exhibits, Id. at A.1260-1262.

Moreover, even with respect to the documents the county did rely upon with respect to

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[6]To be sure, there was one report of prostitution on the premises in 1995 and a second such report in 2002. Both reports were deemed to be "unfounded" after police investigation. The second incident, it is clear, amounted to nothing more than retaliation by an individual who had assaulted Defendant Gordon Wheeler, after Defendant Gordon Wheeler reported the assault to the police. See Wheeler Affidavit, paragraphs 5-10, Appellants' Appendix at A.1018-A.1019.

enacting the new ordinance, Appellants submitted uncontradicted evidence by way of the affidavit of Dr. Daniel Linz and supporting exhibits, suggesting that absolutely none of the studies relied upon are sufficiently reliable to justify the enactment of the ordinance. Dr. Linz, a professor in the department of communication and law and society program at the University of California, Santa Barbara, and former director of that university's survey research center, whose complete credentials are set forth in Exhibit 1 to his affidavit (Appellants' Appendix at A.l750-A.777), both examines the factual predicates relied upon by the county in the adoption of its ordinance, as well as scientifically valid studies on adult entertainment and adverse secondary effects. In his affidavit, Dr. Linz points out that he has collected some 120 "studies" which purport to link adult entertainment and adverse secondary effects and has examined them for "methodological rigor."[7] His initial study was presented as part of an amicus curiae brief on behalf of the First Amendment Lawyers Association to the United States Supreme Court in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000). A revised version of that paper was submitted to the annual meeting of the International Communications Association in 2000, and received a "top three refereed papers in communications law and policy" award following peer review. It ultimately resulted in publication in a peer review journal, entitled "Government Regulation of 'Adult' Business Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects, 6 Comm. Law & Pol'y 355 (2001)."[8]

The analysis done by Dr. Linz concerning the social science involved in the adult

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[7]Linz affidavit, paragraph 6, Id. at A.718.

[8]Id., paragraph 8 (Id. at A.719), with the paper being attached as Exhibit 2, Id. at A.778-A.831.

entertainment studies focused on the following criteria:

The first is "Compared to what?" This criterion refers to attempts to make comparisons between areas containing adult entertainment and areas not containing adult entertainment, but in no way otherwise comparable. An important test of whether the studies are reliable is whether the control area "were sufficient matched regarding important characteristics, such as age of housing stock or racial makeup." Dr. Linz notes that lack of comparability between study and control areas "prevents researchers from determining whether neighborhood deterioration is related to the operation of adult businesses in the area or that some other confounding variable is responsible for the outcome." Id. at 721.

The second criteria is, "Is this just a one-time fluke?" This criterion refers to the fact that crime and property values statistics must be measured over a sufficiently adequate period of time to determine whether an actual relationship exists between adult businesses and negative secondary effects or "whether the data are simply a reflection of an erratic pattern of local activity." Id. at 722.

The third criteria was whether crime was measured according to a reliable source or whether the government went looking for more crime to justify its legislation. This refers to the fact that some adult entertainment studies have made comparisons based upon an increased pattern of police surveillance, thus naturally resulting in more crime, whether more crime naturally occurred.

Finally, with respect to the survey data, Linz asked "did the investigators talk only to people who would give them answers they wanted to hear?" Many studies employ survey techniques using non-random methods which give skewed and biased results. Using these criteria, Linz concluded that:

"With few exceptions, the scientific validity of the most frequently use studies in

questionable and the methods are seriously and often fatally flawed. These studies, relied on by communities throughout the country, to not adhere to professional standards of scientific inquiry and nearly all fail to meet the basic assumptions to calculate an error rate."

Using these criteria, Linz analyzed studies relied upon by Morrison County in enacting its ordinance and determined the following:

a. With respect to the material received from Louisville, Kentucky, it is not an empirical study at all. Id. at A.725.

b. With respect to the Garden Grove study, it was fatally flawed, in that it failed to make proper comparisons. What it compared was the areas surrounding adult entertainment businesses which expanded and compared them with adult entertainment businesses which did not expand. It determined that adult entertainment businesses which expanded caused more adverse secondary effects than those which did not. Obviously, if the question is whether adult entertainment businesses cause adverse secondary effects not caused by non-adult entertainment businesses, this is a meaningless comparison. Obviously, if a Walmart store doubles in size, it will generate more secondary effects, such as increased traffic, increased crime (such as shoplifting), and general law enforcement problems than a Walmart store that does not double in size. That fact, however, does not prove that Walmart stores cause adverse secondary effects not caused by Target stores. Id. at A.725-A.727.

c. Linz determined that report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (Minnesota Attorney General 1989), a

"highly selected reading of other studies undertaken by other communities, at times stating conclusions about the existence of secondary effects that are disavowed by the authors of the study themselves upon close reading," citing, in particular, the 1978 St. Paul study. Id. at A.727-A.728.

d. The 1995 New York Planning Department Study was flawed by failure properly to match control and test areas in order to ensure reliable comparisons in crime rate of property values. Linz notes:

> "New York City admits the same in its own summary of property value and crime activity analyses. The Times Square Business Improvement District collected data for property values for the 1985/1986 and 1993/1994 years. The study concluded: '...while it may be that the concentration of adult use establishments has a general depressive effect on adjacent property...we do not have sufficient data to prove or disprove this thesis.' (Pg. 41, emphasis by Dr. Linz) Similarly, the police department provided the department of city planning with information about criminal complaints drawn from precinct files (p. 52). The Study concludes: 'In summary, it was not possible to draw definitive conclusions from the analysis of criminal complaints (emphasis by Dr. Linz) land uses other than adult entertainment uses, e.g., subway station access, appear to have a far stronger relationship to criminal complaints. It was not possible to isolate the impact of adult uses relative to criminal complaints.' Linz affidavit, paragraph 30. Id. at A.728-A.729.

e. The Newport News study was discounted, in that it used less than two years worth of police calls for services, so that it could not be determined whether this was a one time fluke. Id. at A.729.

f. With respect to the Whittier study, Linz notes that the authors of the study severely

qualified their conclusions, stating, "Not all of it (the data) can be isolated as being directly related only to the presence of adult businesses because a variety of facts influencing the study areas over the last ten years.' p. 3. Id. at paragraph 32, Appellants' Appendix at A.729-A.730.

g. With respect to the City of Austin study, Linz pointed out that of a total of 49 potential adult use cites, the study authors eliminated 43, because they anticipated there would not be sufficient demonstrations of negative secondary effects at those cites. Id. at A.730.

h. With respect to the Amarillo study, the study itself, is not an empirical study but Linz notes that "the police report to the city notes that non-erotic entertainment bars are the source of more crime than semi-nude bars." Id. at paragraph 34, Appellants' Appendix at A.730.

i. The Spokane City plan commission's findings, recommendations, and conclusions is not an empirical study subject to analysis. Id.

j. With respect to Kelly and Cooper's American Planning Association study of December of 2000, this involves descriptions of additional studies in Kansas City Missouri; Rochester, New York; Denver, Colorado; Fort Worth, Texas; Indianapolis, Indiana; Phoenix, Arizona; St. Paul, Minnesota; and Tucson, Arizona. With respect to the Kansas City study, Linz points out that the study, a door-to-door survey of residents and business owners in neighborhoods around sexually oriented businesses, was methodologically flawed due the fact that the investigators spoke to only a biased sample in the community, improperly constructed questions that were either

misleading or had several ideas within a single question, and because it had an unacceptable response rate. There were also no objective determinations of property value appreciation or depreciation surrounding the adult businesses. Notwithstanding all of these flaws, the overwhelming majority of Respondents, nearly 70 percent, said they had no problem with adult businesses. Id. at 37-40, Appellants' Appendix at A.731-A.732.

The Rochester, New York study was a survey of real estate appraisers, which suffered the same methodological flaws as the Kansas City study, especially with the low level response rate. Even Kelly and Cooper admit:

> "This survey does not compare actual property values or appraisals to the responses collected, not is there any reliable statistical method to infer the actual effect on property values from the information collected in this survey." Id. at paragraph 41, Appellants' Appendix at A.732.

k. The Denver study examined police calls for services and other indicators of crime surrounding the adult businesses in the community and compared that to the city as a whole. Linz suggests that this study is fatally flawed in that it failed to ask the "compared to what?" question properly, making no attempt to match the adult areas with comparable areas in the city based upon demographics or other variables. Id. at A.733.

l. The 1984 Indianapolis study was methodologically flawed in numerous areas as set forth in Exhibit 2 of the Linz affidavit. Id. at A.734-A.735.

m. The 1979 Phoenix study claimed to have higher overall crime rates in study areas

containing adult entertainment business, compared to control areas with no such businesses. However, the median income for the study areas was some 30 percent lower than the matching control areas. Obviously, if one compares two areas, the one with the lower median income is likely to generate more crime and lower property values, regardless of the presence of adult entertainment. Indeed, Kelly and Cooper, with respect to the Phoenix study, notes, "the city no longer cites the study and it is difficult to attach a great deal of significance to it." And the study "actually found a lower rate of violent crime in the areas with sex businesses than in the paired areas." Id. at paragraph 58, Appellants' Appendix at A.470.

In addition to finding all of the studies relief upon by the city to be methodologically flawed, the Linz affidavit points out that wherever adult entertainment secondary effects studies have been done using methodology which complies with social science research standards, the studies have revealed either a total absence of correlation between adult entertainment and secondary effects, or, in fact, a reverse correlation, there being fewer secondary effects in areas containing adult entertainment businesses. These include the 1978 St. Paul study, specifically mentioned in the Kelly and Cooper work purportedly relied upon by Morrison County (Id. at paragraphs 60-63, Appellants' Appendix at A.740-A.742); a study of adult cabarets and crime in Fort Wayne, Indiana, which won a "top student paper" at the fifth annual international crime mapping research conference of the United States Department of Justice Exhibit 3, Id. at A.872,. (Id. at paragraph 65, Appellants' Appendix at A.742–A.743), the report being attached as Exhibit 4 to the Linz affidavit (Appellants' Appendix at A.743, A.833-A.860). There was also a study conducted in Charlotte, North Carolina, indicating a total absence of secondary effects, which report was peer reviewed and published in the

Law and Society Review attached as Exhibit 5 to the Linz affidavit; (Id. at A.861-A.894) a study of real estate appreciation in Chapel Hill, North Carolina, attached as Exhibit 7 (Id. at A.895-A.917); a study of secondary effects of peep show establishment in San Diego, California, attached as Exhibit 8 to the Linz affidavit (Id. at A.956-A.990); and a peer-reviewed paper examining the link between sexual entertainment and sexual aggression in the State of Florida, attached as Exhibit 9 to the Linz affidavit.

As a result, the evidence is clear that every peer reviewed scientifically sound examination of adult entertainment and secondary effects done anywhere in the United States has concluded that the notion that adult entertainment causes secondary effects is as factual as Saddam Hussein's weapons of mass destruction in Iraq.

In response to the evidence presented by Appellants to the trial court, Respondent submitted no evidence attacking the validity of the conclusions drawn by Dr. Linz, disputing the factual evidence relating to the absence of local secondary effects, or in any way attempting to justify its ordinance.

On April 5, 2005, an evidentiary hearing was held before Judge Godzala on the issue of whether the new zoning ordinance provided sufficient alternative locations for adult use businesses to be constitutional under the First Amendment.[9] At that hearing, Charles Forss, the county's land use planner and GPS mapper testified and introduced Exhibit 1, which purported to show the land

[9]The transcript of the proceedings of the April 5, 2005 hearing also reflect an evidentiary hearing on order to show cause as to whether the county was in contempt for failure to honor the order permitting Appellants to comply with sewage disposal requirements by pumping septic tanks. See T. 49-T.66. The order arising out of that hearing is not before this Court on appeal.

available for adult uses, under the county's permanent zoning ordinance.[10]

First of all, even assuming that every parcel of land which the county claimed on the map to be available for adult use were in fact available, the available land consisted of approximately 354 acres. Compared to the overall acreage of the county of 737,685 acres, the available acreage of adult uses is less than .05 percent, or 5/100's of one percent of the county's total land acreage.

Secondly, the map, on its face, does not even guarantee this acreage to be available, in that it contains the following caveat:

> "The data provided on an 'as is' basis without any warranty of any type expressed or implied including but not limited to any warrantee as to their performance merchant-ability, or fitness for any particular purpose. Any buffering represented on this map is based upon 1,320 feet from the E911 point location. There is no buffering from residential zones as the location of an Adult Use Premise has not bee identified."

Thirdly, absolutely no testimony was offered to provide a foundation for any of the disqualifying uses contained in the map. Section 1405 of the Morrison County Land Use ordinance prohibits an adult use within 1,320 feet of another adult use, any dwelling unit, pool hall, video arcade, hotel, motel, licensed day care home, public library, licensed child care or day care center, licensed group home family day care, residential subdivision lot line, residential lot line, residential zone, public park, camp ground, public swimming pool, beach or playground, place of worship, educational institution, or place that dispenses intoxicating liquor. Appellants' Appendix at A.17-A.18. Other than residential zones, absolutely no disqualifying use was identified, either in

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[10]Because of the size of Exhibit 1, it was not reproduced in Appellants' Appendix. References to Exhibit 1, therefore, will be to the original map, which will be part of the record produced by the District Court.

testimony, or on the map.[11] Given the fact that no testimony was offered as to the location of any of the disqualifying uses, there is simply no assurance that the map, in any way, represents all of the available adult use areas.

Moreover, the map, on its face, contains areas denominated as available for adult use, which clearly are not. For example, there is a small green[12] area, bounded by 155th Avenue on the east, between 173rd Street and 183rd Street. On its face, this area appears immediately adjacent to a rural residential zone and thus totally disqualified. Indeed, Forss admitted this was the case. T.18.

Moreover, the area bounded by 133rd Street on the north, 123rd Street on the south, 150th Avenue on the west, and 160th Avenue on the east, the green area appears to run immediately adjacent to a shoreland residential district surrounding a lake on 133rd Street. Clearly, according to the map, a quarter mile radius should be drawn from the boundary of this shoreline residential district, disqualifying most of the eastern portion of that green area.[13]

Moreover, Forss admitted that the single largest area allegedly available for adult use, the area between 133rd Street on the north, 123rd Street on the south, Highway 10 on the west, and 155th Avenue on the east, is, in significant measure, composed of the Little Falls - Morrison County Airport. T.28.

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[11]Indeed, even with respect to residential zones, as already noted above, the map contained the qualification that there is "no buffering from residential zones as the location of Adult Use premise has not been identified."

[12]The area denominated is available for adult use appear as green on Exhibit 1.

[13]When confronted with the fact that his own map indicated a substantial disqualification due to the shoreland residential district, Forss testified that what his map showed as a shoreland residential district was not in fact such a district. T.19. Again, this problem arises directly out of the failure to establish a foundation for the map by testifying as to the location of disqualifying uses.

In addition, the Forss also submitted Exhibit 2, maps showing wetland areas. Many of the sites allegedly available along Highway 10 between Little Falls and Randall fall directly within the denominated wetland areas.

Finally, it should be noted that Appellants submitted testimony and a videotape, which appears to disqualify substantial portions of the land the county alleges to be available.[14] As the video tendered by Appellant Gordon Wheeler indicates, driving one-half mile north along Highway 113 and photographing, there appears to be an obvious dwelling unit directly in the middle of the green area identified on the county's map, T.38-T.39. This obviously disqualifies everything within a quarter mile radius, clearly eliminating the one green area identified.[15]

Furthermore, the video clearly identified a dwelling unit and a residential lot slightly to the north of the intersection of 123rd Street and 150th Avenue. A quarter mile radius from this residential lot would clearly disqualify whatever portion of the eastern part of the green area that is not otherwise disqualified by its proximity to the residential shoreland district in the land close to 133rd Street. See T.40-T.42.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DETERMINING THAT APPELLANTS WERE NOT ENTITLED TO LAWFUL NON-CONFORMING USE STATUS AT THEIR

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[14]As with the map contained as Exhibit 1, it is physically impossible to make the video-tape part of Appellants' Appendix. Consequently, Appellants rely upon the court's independent viewing of the videotape, which will be part of the record transmitted by the District Court.

[15]In his testimony, Forss asserted that this dwelling unit was accounted for in the county's map. T.25. However, since the county identified absolutely none of the disqualifying uses that went into the map, there is no way of verifying this testimony. Moreover, Forss admitted that he never actually went into the field to determine the exact location of disqualifying uses. T.15-T.16.

PRESENT LOCATION.[16]

As already noted above, when Appellants opened their adult entertainment use in October of 2003, they opened at a location which was lawful under the terms of the 1995 adult entertainment zoning ordinance then in effect. As a result, the only zoning law which Appellants' use at that location violated was the interim zoning ordinance enacted on December 11, 2001, and extended on November 26, 2002, prohibiting new adult uses anywhere in Morrison County.

As also already noted above, in its order of October 15, 2004, the District Court held the interim zoning ordinance to be unconstitutional under the First Amendment to the United States Constitution. See Appellants' Appendix at A.1266, A.1271. Respondents have not filed a notice of review with respect to the District Court's decision invalidating the interim ordinance. As a result, Respondent is precluded from challenging the District Court decision on appeal. See *City of Ramsey v. Holmberg,* 548 N.W. 302, 305 (Minn. App. 1996).

Consequently, it is clear that Appellants are entitled to lawful non-conforming use status, in that they opened their business prior to the effective date of the new ordinance. Compare *Hooper v. City of St. Paul,* 353 N.W. 2d 138, 140 (Minn. 1984).

The District Court, however, held that Appellants' opening for business, without an approved sewer system, precluded their use from being "lawful" and therefore precluded lawful non-conforming use status. Appellants' Appendix at A.1272-A.1274.

The decision is plainly erroneous under *Hooper*, supra. In that case, it was undisputed that

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[16]Since the above-entitled matter is an appeal from a grant of summary judgment, this Court reviews question of law de novo *Christensen v. Eggen,* 577 N.W. 2d 221, 224 (Minn. 1998). Questions as to the constitutionality of the ordinance in question are likewise reviewed de novo. *State v. Botsford,* 630 N.W. 2d 11, 15 (Minn. App. 2001), *City of Elko v. Abed,* 677 N.W. 2d 455, 460 (Minn. App. 2004).

the land owner had established a carriage house on his land, prior to the city's enactment of the zoning ordinance prohibiting it. However, the city argued that he was not entitled to lawful non-conforming use status, since he never obtained a building permit for either the original construction or post-fire construction of the carriage houses and thus the establishments were unlawful, both before and after the zoning change. The Minnesota Supreme Court rejected this contention, stating the following:

> "The general rule that only existing lawful uses are entitled to due process protection is non-conforming uses is directed primarily to the protection of uses established in compliance with then existing zoning classifications. [Citation omitted, emphasis supplied.] Violations of ordinances unrelated to land use planning do not render the type of use unlawful. [Citations omitted.] If the reconstructed carriage house fails in some respects to meet the requirements of the building code, the city must seek its remedy in the enforcement provision of the building code. The city's remedy does not lie in denying the owners the right to continue the existing two-family residential use of the property, a use permitted under the zoning code when the use was established." Id. at 141.

Among the decisions cited with approval by the Minnesota Supreme Court in *Hooper* was the decision of the Supreme Judicial Court of Massachusetts in *Board of Selectmen of Wrentham v. Monson,* 355 Mass. 715, 247 N.E. 2d 364 (1969), in which that court held that an owner of property used for storage and use of trailers acquired non-conforming use status, notwithstanding the fact that he did not obtain a license from the local Board of Health, at the time he established his use. In holding that the land owner was entitled to non-conforming use status, notwithstanding non-compliance with the licensing law, the Massachusetts Supreme Judicial Court wrote:

> "A case supporting the Defendants' position is *Scanone v. Mayor and Council of Borough of Totowa,* 49 N.Y. Super. 423, 140 A. 2d 238, where the non-conforming use of a used car lot was held not vitiated by the fact that the license of the owner was not properly renewed. It was there stated, [Citation omitted.] 'While it is recognized that the spirit of the zoning statute and the interpretive cases is restrictive of non-conforming uses, nevertheless the owner of property is entitled to stand on the statute

> without being made to suffer erosion of his rights as a non-conforming user under the excuse of serving the public policy represented by regulatory enactments of quite different significance for the enforcement of which appropriate sanctions are available,' [Citations and footnote omitted.] [W]e are persuaded by the reasoning of *Drysdale v. Beachnaw,* 359 Mich. 152, 101 N.W. 2d 346. In that case, the court held that operating a garbage dump in violation of the health laws would affect the validity of a non-conforming use but that the use was valid nonetheless since the health department did not protest over a period of years an immediate correction came on first suggestion from the department. The court said at page 155, 101 N.W. 2d at page 347, 'We do not believe that a violation of a provision of a regulatory ordinance necessarily destroys the lawfulness of the basic use or compliance with the regulation can be had on demand and where such compliance actually follows.'" 247 N.W. 2d at 365.
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> The court concluded:
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> "We therefore hold that a valid non-conforming use is not destroyed in this case by any failure to comply with the local or state licensing provision or the defect, assuming that it exists, can be easily remedied. [Citations omitted.]" Id.

It is absolutely clear that nothing about the use of a non-conforming sewer system should render the underlying use unlawful. To begin with, the sewer system is, by and large, unrelated to zoning and land use planning. Indeed, any use of the land, conforming or non-conforming, would be required to have the appropriate sewer system. Moreover, as this very case shows, there are independent procedures for enforcing the sewage treatment laws and the county has availed itself of those procedures. Finally, it should be noted that Appellants, in making use of the land, did not use the sewer system which actually failed, but rather pumped the existed holding tanks, a procedure absolutely permitted by law, subject only to the county's approval. Indeed, the issue of the sewer was resolved by stipulation of the parties wherein the county expressly agreed to permit Appellants to pump the holding tanks, subject to county approval. See Appellants' Appendix at A.1263-1265.

In holding that Appellants were not entitled to non-conforming use status, the District Court relied upon the language in *Hooper*, stating that violations of ordinances "unrelated to land use

planning do not render the type of use unlawful." *Hooper*, 353 N.W. 2d at 141. The District Court went on to hold that the septic system "is a land use planning issue." Appellants' Appendix at A.1274.

The language relied upon by the District Court in ignores the sentence in the opinion preceding the sentence it relied upon, which states that protection of non-conforming uses "is directed primarily to protections of use as established in compliance with then existing zoning classifications (emphasis supplied)." Clearly, the protection of non-conforming uses extends to uses lawful under the then existing zoning classifications. Other types of violations, such as violations of the building code or a faulty sewer system, can be enforced independently of zoning laws and plainly were not intended to affect lawful non-conforming use status. As already noted above, any use, whether conforming or non-conforming, would have to comply with the sewer system requirements. The sewer system requirements are enforced by means apart from the zoning code, just as were the building code requirements at issue *Hooper*.

As a result, it is clear that Appellants were entitled to lawful non-conforming use status, and this Court need not reach the question of the constitutionality of the underlying ordinance.

II. THE ADULT ENTERTAINMENT ZONING ORDINANCE ADOPTED BY MORRISON COUNTY IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.

A. ENACTMENT OF THE ORDINANCE WAS NOT SUPPORTED BY A LEGALLY SUFFICIENT FACTUAL PREDICATE.

As an examination of the permanent zoning ordinance, on its face, indicates, the ordinance subjects establishments such as Appellants to restrictive zoning and licensure, solely on the basis of constitutionally protected speech presented therein. See definitions of "adult uses" and subordinate terms contained in Sec. 1401 of the ordinance. Appellants' Appendix at A.13-15. Speech of a

sexually explicit nature is subjected to the licensure and zoning; speech of another nature is not. Generally, such content-based discrimination has been clearly condemned by the United States Supreme Court. See for example, *Police Department of Chicago v. Mosley,* 408 U.S. 92, 92 S. Ct. 2287, 33 L. Ed. 2d 212 (1972); *Regen v. Time, Inc.,* 468 U.S. 641, 648-649, 104 S. Ct. 3262, 3266-3267, 82 L. Ed. 2d 487 (1984); *Texas v. Johnson,* 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989); and *Boos v. Barry,* 485 U.S. 312, 105 S. Ct. 1157, 99 L. Ed. 2d 333 (1988).

The only basis for upholding discriminatory treatment of sexually explicit speech have been cases such as *Young v. American Mini-theaters,* 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976), and *City of Renton v. Playtime Theaters, Inc.,* 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), in which the Court upheld content-based adult entertainment zoning ordinances, on the theory that the ordinances were justified, not by objection to the content of protected speech, but rather by the adverse secondary effects caused by such speech. In *Young v. American Mini Theaters,* supra, the Court upheld the constitutionality of a Detroit, Michigan, City Ordinance prohibiting adult theaters from locating within 1,000 feet of any two other regulated uses, including other adult theaters, adult bookstores, cabarets, bars, taxi dance halls and hotels. The constitutional challenge arose in the context of a factual basis for enactment of the ordinance, unrelated to objections to the contents of the film shown at the theaters. The plurality opinion, written by Justice Stevens,[17] specifically noted the following:

> "In the opinion of urban planners and real estate experts who supported the ordinances, the location of several such businesses (adult theaters and other regulated business) in the same neighborhood tends to attract an undesirable quantity and

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[17]The 5-to-4 majority in Young came as a result of a plurality opinion, written by Justice Stevens, in which Chief Justice Burger, and Justices Rehnquist and White joined, and a concurring opinion by Justice Powell.

quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere." 427 U.S. at 55, 96 S. Ct. at 2445.

The plurality opinion particularly relied on the fact that the ordinance was enacted in response to established "secondary effects" such as decline in property values and increase in crime rate, rather than objections to the content of the films shown, as a basis for enacting the ordinance. Mr. Justice Stevens, in his plurality opinion, specifically noted the following:

> "The Common Council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these ordinances attempt to avoid, not the dissemination of 'offensive' speech. In contrast, in Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 268, 45 L.Ed. 2d 125, the justifications offered by the city rested primarily on the city's interest in protecting its citizens from exposure to unwanted, 'offensive' speech. The only secondary effect relied on to support that ordinance was the impact on traffic -- in effect which might be caused by a distracting open-air movie even if it did not exhibit nudity." 427 U.S. at 71, n. 34, 96 S. Ct. 2453, n. 34.

Likewise, in *City of Renton v. Playtime Theaters, Inc.*, supra, the Court continued to rely upon secondary effects, rather than opposition to content, as a basis for upholding that city's adult entertainment zoning ordinance. In that case, the Court rejected the Court of Appeal's finding that censorship of offensive content was "a motivating factor", stating the following:

> "The District Court's finding as to 'predominate' intent, left undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression." Id. at 929.

In *Young* and *Renton*, the ordinances in question were upheld, only upon an evidentiary showing that the ordinances in question would be effective in combating the adverse secondary effects generally attributable to adult businesses. More recently, in *City of Los Angeles v. Alameda Books,* 535 U.S. 425, 122 S. Ct. 1728, (200), the United States Supreme Court substantially increased the evidentiary showing required in order to sustain an ordinance under a secondary effects

theory.

Of key importance is the following language in the plurality opinion of Justice O'Connor:

> "In *Renton*,...[w]e held that municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest [Citations omitted.] This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If Plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If Plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." [Citation omitted.] 122 S. Ct. at 1736.[18]

To be sure, in both *Renton* and in *Alameda Books*, the United States Supreme Court stated that municipalities need not conduct their own studies as to local adverse secondary effects, but rather may rely upon the experience of other jurisdictions and upon any evidence "that is reasonably believed to be relevant" for demonstrating the connection between speech and adverse secondary effects. However, there is a clear distinction between the situation involved in *City of Renton v. Playtime Theaters, Inc.*, 474 U.S. 41, 106 S.Ct. 925, 89 L.Ed. 2d 29 (1986), supra, which involved the initial adoption of an ordinance regulating adult entertainment, in a community which had no pre-existing adult entertainment establishments, on one hand, and the amendment of an existing adult

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[18]To be sure, this standard clearly represents only the stated view of only four justices, to-wit: Justice O'Connor, Chief Justice Rehnquist, Justice Scalia and Justice Thomas. However, it is clear that the four dissenting Justices, Souter, Stevens, Ginsburg, and Breyer, would require a far more stringent evidentiary showing on the part of government. See for example, Id. at 1746-1747, Souter J. dissenting. Consequently, it is clear that the foregoing quotation from the plurality opinion represents the bare minimum which a majority of the United States Supreme Court would require in order to justify an adult entertainment regulation premised on a secondary effects theory. It is clearly the standard which now governs the instant case.

entertainment restriction, in a community that has long experience with pre-existing establishments. In the former situation, it makes perfect sense to say, as did the Supreme Court in Renton, that a municipality is not required to allow deterioration to occur before it takes action, but rather may rely upon experiences from other jurisdictions to justify its ordinance. In the latter situation, however, where a municipality has already attempted a solution to the secondary effects allegedly caused by adult entertainment, and has decades of experience with an adult entertainment establishment in its midst, the rule makes no sense whatsoever. If a community already has an adult entertainment regulation in place, the only reason for adopting additional regulations would be that the existing regulations have proved inadequate to ameliorate the adverse secondary effect of the existing business. This obviously cannot be determined by the study of adult entertainment establishments in any other jurisdiction other than one's own. Indeed, to impose additional restrictions on constitutionally protected speech, not because that speech itself has caused any adverse secondary effects in the community over a period of decades, but rather because the county was able to find a study in Indianapolis, Ind., 22 years ago, indicating that adverse secondary effects are caused by adult entertainment, it is clear that the additional restrictions are not a legitimate response to adverse secondary effects, but rather are a pretext for content-based censorship. Indeed, several courts in recent years have plainly begun to recognize the distinction.

For example, in *XLP, Corp. v. County of Lake,* 743 N.E. 2d 162 (Ill. App. 2000), in which the court reversed a dismissal on the pleadings of a constitutional challenge to various adult business regulations. In their complaint, the Plaintiffs had asserted that because they had been in existence in the county for 15 years, it was improper for the county to have relied upon, as a predicate for enacting an ordinance amortizing the adult businesses out as non-conforming uses, studies conducted

by other municipalities, in the absence of any evidence that long-existing adult uses had generated any local secondary effects. The court specifically addressed *Renton's* discussion on reliance on the experiences of other municipalities by noting:

> "However, this is a conclusion by the *Renton* Court has to be considered in the context of that case. In *Renton*, there were no adult businesses in existence at the time the city enacted its ordinance. Consequently, the Supreme Court determined that the City of Renton could rely on the experiences of other communities, in particular those of Seattle, which had conducted detailed studies of adult use businesses, to adopt its ordinance. Here, however, where Plaintiffs had been in business for 15 years at the time Defendant enacted its ordinance, Plaintiffs' allegation that Defendant wrongly relied on the outside studies instead of considering Plaintiffs' existing businesses to determine whether such businesses cause adverse secondary effects presented an issue of fact. Id. at 170.

Similarly, in *Dr. John's Inc. v. City of Sioux City, Ia.*, 305 F. Supp. 2d 1022 (W.D. Ia. 2004), the court issued a preliminary injunction enjoining the enforcement of an amended adult entertainment zoning ordinance. In that case, the City of Sioux City had a pre-existing ordinance. The Plaintiff, like Appellant Gordon Wheeler in the instant case, publicly announced its intention to open up an adult entertainment business, in full compliance with the then-existing ordinance. In direct response to the Plaintiff's indication to open a new store, the City Council immediately enacted amendments to the zoning ordinance for the obvious purpose of preventing the new establishment from opening, making no showing that the provisions amending the ordinance were required or justified on a secondary effects theory. The District Court enjoined the amended ordinance, holding that the absence of a secondary effects justification for the amended provision made the ordinance content-based, in violation of the First Amendment, stating:

> "[T]he only evidence in the preliminary injunction record is that the series of amendments to the ordinances, beginning in October, 2003, was in direct response to Dr. John's intention to open a store in Sioux City, Iowa, and, more specifically still, in direct response to Dr. John's statement of its intent to comply with the

> existing requirements for the businesses allowed in a BG zone. [Citations omitted.] Moreover, the shifting nature of the definition of 'adult entertainment businesses' - to the point where the business of selling any item of 'adult media' and any item of 'lingerie' would qualify as a 'sex shop' within the meaning of SIOUX CITY MUNICIPAL ORDINANCE 2004-0004 (A-2) (m) [Citation omitted.] - when Dr. John's professed itself prepared to comply with the existing limitations, is sufficient for this court to infer that the purpose of the amendments was to ban Dr. John's store on the basis of its content (emphasis by the court)." Id. at 1036.

However, the case most directly on point is *N.W. Enterprises, Inc. v. City of Houston*, 27 F. Supp. 2d 754 (S.D. Tex. 1998). That case involved, in part, the City of Houston's amendment of an 11-year old ordinance regulating adult entertainment. The original ordinance, enacted in 1986, required adult entertainment establishments to be 750 feet various "protected uses" and 1000 feet from residentially zoned property. Eleven years later, in 1997, the Council amended its ordinance to increase the distance from both protected uses and residentially zoned property from 750 and 1000 feet to 1,500 feet and amortized existing non-conforming uses. The court invalidated the amendment, in large measure because of the total absence of any evidentiary showing that the increase in distance was necessary to combat adverse secondary effects, holding that even if the city could rely upon evidence of secondary effects of adult businesses in general to support the initial enactment of the ordinance, particularized local secondary effects would have to be shown in order to justify an increase in the distance requirement after 11 years of operation. The court stated:

> "When the city first enacted its distance requirements for sexually oriented businesses, it could have chosen to set the minimum distance between the businesses and protected land uses, and the radius for calculating whether a surrounding area is residential, at 1,500 feet, provided, of course, that these restrictions met the requisite elements of the constitutional test (footnote omitted.) However, the City instead chose respective distance requirements, not of 1,500 feet, but instead of 750 and 1000 feet. Now that numerous businesses have relied on that earlier regulatory choice the city may not make the requirements more stringent without somehow justifying those increases by reference to how the revision might better address the negative secondary effects believed to exist. In other words, although 'reform may take one

step at a time' [Citations omitted.] , the City must adduce some justification tied to secondary effects for each step it takes." Id. at 811-812.

Clearly then, in order to pass constitutional muster, the revised zoning ordinance must be tied to some secondary effects justification for altering the boundaries. No such justification appears in this record. Indeed, it appears that the only thing that triggered both the moratorium and the new ordinance is the fact that Appellants told county government that they intended to open up an adults-only business at a location in which such businesses were permissible, just as occurred in Dr. John's supra, this is clearly an unconstitutional justification for an amended ordinance.[19]

As a result, as far as the only amendments to the ordinance which affect Appellants are concerned, to-wit: the extension of the distance between adult establishments and liquor establishments from 200 feet to 1320 feet, and the addition of the requirement that adult establishments not be located within 1320 feet of a single residence, as opposed to a residentially zoned district, the evidence in the record to support these decisions on a secondary effects basis is not only inadequate, it is non-existent. Indeed there is not a shred of evidence in the record to suggest that anything other than Appellant Gordon Wheeler's statement of intention to open a second adult entertainment business at a location permitted by the ordinance, was responsible for these amendments. As a result, the District Court plainly erred in failing to strike them as unconstitutional.

B. EVEN ASSUMING THAT THE FACTUAL JUSTIFICATION FOR THE ORDINANCE WERE OTHERWISE ADEQUATE, APPELLANTS PLAINLY SUCCEEDED

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[19]To be sure, the District Court's decision in *N.W. Enterprises* was reversed by the Fifth Circuit on appeal. See *N.W. Enterprises, Inc. v. City of Houston*, 352 F. 3d 162 (5th Cir. 2003). However, since neither the District Courts nor the Fifth Circuit's opinion have stare decisis effect in this Court, both decisions should be evaluated for their persuasiveness. Clearly, the District Court opinion is far more consistent with the *Young/Renton* requirement of a secondary effects justification than is the Fifth Circuit opinion.

IN CASTING DIRECT DOUBT ON THE BASIS FOR THE COUNTY'S DECISION.

As already noted above, in *City of Los Angeles v. Alameda Books, Inc.*, supra, 535 U.S. 425, 122 S. Ct. 1728, 1736 (2002), the U.S. Supreme Court stated that even where a municipality has made a facially sufficient factual showing to otherwise justify the ordinance, an adult entertainment establishment challenging the validity of the ordinance may "cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings." If the challenger thus succeeds in casting direct doubt, "the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." Clearly, the presentation of the substantial evidence by Dr. Linz questioning the methodology of every study relied upon by the county, by supplying significant peer-reviewed studies which have reached exactly the opposite conclusion, by pointing out that not a single study peer-reviewed for methodological soundness has supported the county's conclusions, and by demonstrating conclusively the absence of adverse secondary effects caused by an adult entertainment establishment that had been present in the county for 20 years, Appellants plainly succeeded in casting direct doubt.

In this regard, it is clear that the instant case is plainly distinguishable from *City of Elko v. Abed*, 677 N.W. 2d 455 (Minn. App. April 13, 2004), pet. for rev. denied (Minn. June 29, 2004). In that case, the Court of Appeals held that the Defendant adult entertainment establishment had failed to cast "direct doubt" by finding inadequate the submission of a single article criticizing the research methodology used in secondary effects studies, prior testimony of a manager of a nude dancing club in an unrelated manner "general commentary criticizing adverse secondary effects studies..." Id. at 465. Clearly, Appellants in the instant case have done far more. They have

submitted a detailed Affidavit by an expert in research methodology severely criticizing every one of the studies relied upon by the municipality in considering its regulations. They have pointed out that every single study of adverse secondary effects done anywhere else in the country, which has been peer reviewed and used scientifically sound methodology, including those done by the government, has led to the conclusion that there is no correlation between adult entertainment and adverse secondary effects. Finally, and most significantly, Appellants have produced uncontradicted evidence indicating that the county's own experience has been that adult entertainment causes absolutely none of the adverse secondary effects set forth in the purported both findings" in its resolution.[20] This includes the fact that, directly contrary to those purported both findings," existing adult entertainment establishments, over a period of more than twenty (20) years, had never produced a single arrest for prostitution, controlled substances offenses, or sex offenses of any kind. Moreover, the city's own assessor has admitted that the existing adult entertainment establishment has not contributed to a decline in property values, and the incidence of arrests for disorderly conduct and assault are less frequent at the adult entertainment venue than at two other alcohol serving establishments within the county.

This is extremely similar to the showing made in *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.*, 337 F. 3d 1251 (11th Cir. 2003). In that case, Manatee County sought to justify its adult entertainment zoning ordinance with the typical array of government studies used by Morrison County in the instant case. However, the Respondents plainly contradicted these studies

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[20]Also instructive in this regard is *Flanigan's Enterprises v. Fulton County, Ga.*, 242 F. 3d 976 (11th Cir. 2001), in which the court held that it was inappropriate for Fulton County, Georgia to rely on many of the same foreign studies relied upon the county in the instant case, when the county's own data, as they do in the instant case, plainly demonstrate the absence of secondary effects, after years of presence of adult establishments.

with satisfactory health and safety inspection reports of the Plaintiffs' businesses; incident reports of criminal activity showing lower crime rate near Plaintiffs' businesses than surrounding businesses; sales and assessment data revealing an increase in property values for property near the business; an award given to the Peek-A-Boo Lounge by the county sheriff for "outstanding contribution of the community"; and three expert studies specifically addressing local conditions in Manatee County showing no evidence connecting adult business with negative secondary effects.

In reviewing this record, the court stated:

> "Taken together, the Adult Lounges argue that this evidence 'casts direct doubt' on the County's alleged rationale in enacting ordinance 99-18 'by demonstrating that [the county's] evidence does not support its rationale' and 'by furnishing evidence that disputes the [county]'s factual findings.' [Citation omitted.] Given the record and procedural posture of this case, we are inclined to agree. Although Manatee County met its minimal initial burden under *Renton* to rely on evidence it reasonably believed to be relevant to addressing the problem of secondary effects, in this case Appellants have successfully cast doubt on the county's rationale by placing into the record substantial and unanswered factual challenges to the County's findings in the specific areas of crime, decreased property values, aesthetic blight and other secondary effects."

Peek-A-Boo Lounge, several courts and other jurisdictions have held that an adult entertainment establishment has succeeded in casting direct doubt on the municipality's rationale on showings far less substantial than that made by Appellants in the instant case. For example, in *Jameson v. Commonwealth,* 2004 Ky. App. LEXIS 229 (Ky. App. 2004), rev. granted, 2005 Ky. LEXIS 196 (Ky., Aug. 17, 2005), the Kentucky Court of Appeals reverse a criminal conviction for violating an ordinance regulating adult entertainment, holding that the criminal Defendant had made a sufficient showing to "cast direct doubt" upon the rationale so as to shift the burden of proof to the state. The court stated:

"In the instant case, our review of the record shows that Jameson presented

> unrebutted evidence before the District Court which tended to cast doubt on the fiscal court's pre-enactment justification for Sec. VII(b). For example, Brent Stringer, Chief Dispatcher for Paducah -McCraken, E-911 Communications Services, offered records from his department indicating that the number of times local police officers had been asked to respond to various incidents at Regina's II and The Playhouse, two sexually-oriented businesses, was lower than at two non-sexually-oriented nightclubs in the same area of the city. In addition, Jameson offered deposition testimony of George Wiley, a realtor, who stated that property values in and around the area where Regina's II was located actually increased over time. Finally, Jameson presented the testimony of Joann Warner, owner of the Playhouse, and Melissa Meyer, an employee of the Playhouse. Both women testified that various rules and regulations that were in place to prevent the spread of sexually-transmitted diseases at that establishment.
>
> Hence, in light of *Alameda Books,* we conclude that Jameson's unrebutted evidence was sufficient to cast doubt on the fiscal court's pre-enactment rationale for Sec. VII(b). In the face of such evidence, the burden has been shifted back to the fiscal court to proffer supplemental evidence justifying the regulation."

Indeed, Appellants in the instant case, have made, if anything, a far more substantial showing than that involved in Jameson.

Similarly, in *For the People Theaters of N.Y., Inc. v. City of New York,* 2005 N.Y. LEXIS 3349 (N.Y. 2005), the New York Court of Appeals reversed a decision of the New York Supreme Court, Appellate division, as it related to a long-running dispute as to zoning adult entertainment in New York City. In *Stringfellow's of N.Y. v. City of New York,* 91 N.Y. 2d 382, 694 N.E. 2d 407, 671 N.Y. S. 2d 406 (1988), the New York Court of Appeals upheld the constitutional validity of New York's zoning of adult entertainment. The ordinance that was upheld applied to establishments which devoted a "substantial portion" of their businesses to adult entertainment. The city's Department of Buildings, responsible for enforcing the ordinance, issued an opinion holding that a business provided a "substantial portion" if at least 40 percent of its floor space accessible to customers was available to adult use. In *City of New York v. LesHommes,* 94 N.Y. 2d 267, 724 N.E.

2d 628, 72 N.Y.S. 2d 576 (1999), the New York Court of Appeals held that an establishment in technical compliance with the 60-40 formula could not be zoned as an adult business, notwithstanding the city's contention that compliance was a "sham." Subsequent to *LesHommes,* the city enacted substantial revisions to the definitions, significantly altering the 60-40 arrangement. In a lawsuit challenging the application of these provisions to the existing establishments, adult establishments presented substantial evidence that 60-40 bookstores and theaters did not negatively affect either property values or crime within the City of New York. The New York Court of Appeals held that the testimony cast direct doubt on the city's rationale, stating:

> "Thus, a triable question of fact has been presented as to whether 60-40 businesses are so transformed in character that they no longer resemble the kinds of adult uses found, both in the 1994 DCP study and studies in court decisions around the country to create negative secondary effects - as Plaintiffs contend - or whether these businesses' technical compliance with the 60-40 formula is merely a sham - as the city contends."[21]

Most recently, the court in *Daytona Grand, Inc. v. City of Daytona Beach,* (M.D. Fla. Jan. 20, 2006), a copy of which is set forth in Appellants' Appendix at A.1292-A.1321, invalidated the city's alcohol and nudity ordinance, relying upon *Alameda Books* and *Peek-A-Boo Lounge,* holding that the Plaintiffs had cast sufficient doubt upon the validity of the city's justification, so as to shift

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[21]In this regard, it should be noted that three judges, including Chief Judge Kaye dissented on the ground that the city had made an inadequate factual showing to support its ordinance stating: "Having intentionally limited the reach of its 1995 legislation to ensure that it did not 'sweep too broadly' [Citation omitted.], the City cannot now evade constitutional review of the preclusive 2001 statute by characterizing as merely a clarification. The City was obliged to present some evidence demonstrating a nexus between the 60-40 businesses and the deleterious social effects supporting its 2001 regulation. The city cannot rely on the studies justifying the 1995 ordinance because the businesses within the reach of the 2001 law are different in character than those the city sought to regulate ten years ago. While it produced voluminous evidence that the businesses targeted by the 1995 law were the source of deleterious negative secondary effects, the city has offered nothing of the kind here."

the burden back to the city. The Plaintiffs in that case tendered expert reports from Dr. Linz and Dr. Randy Fisher, who, as did Dr. Linz in the instant case, strongly challenge the methodological soundness of the data relied upon the city, and further produced local studies plainly indicating that the existing adult businesses cause no adverse secondary effects. In evaluating the evidence, the court concluded:

> "Plaintiffs have succeeded in their attempt to case direct doubt on the city's rationales for its ordinances. As persuasively demonstrated by Plaintiffs' expert studies, the City's pre-enactment evidence consist methodological purely anecdotal evidence or opinions based on highly unreliable data. Most notably, the city's evidence lacks data which would allow for comparison of the rate or crime occurring in and around adult entertainment establishments with the rate of crime occurring in and around similarly situated establishments. Absent the context that such a comparison might provide, the City's data is (sic), as Plaintiffs assert 'meaningless.'...
>
> The doubt created solely by virtue of Plaintiffs' systematic critique of the City's evidence is only cemented by the conclusion of Plaintiffs' expert that, based on the study of CAD data,[22] nude dancing in Daytona Beach is not the source of crime. At trial, the City had the opportunity to undermine the methodology of Plaintiffs' experts but did not do so. Viewed in the very best of lights, the only thing that the City was establish at trial is that some criminologists performing secondary effects studies prefer to rely on data other than CAD data. This does not mean, of course, that CAD data is an unreliable data source. To the contrary, the only testimony of record on this point is of Dr. Linz, who testified that, notwithstanding any disagreements among criminologists, reliance on CAD data in secondary effects studies is accepted by the criminological community. This is evinced (sic) not only by Dr. Linz's testimony but also by the fact that the studies of Dr. Linz have been peer-reviewed and published. Given these facts, the Court can only conclude that the methodology of Plaintiff's experts is sound and that the conclusions they reach regarding the secondary effects of nude dancing in Daytona Beach are, therefore valid." Id. at 1318-A.1319.

As a result, the court invalidated the ordinance at issue and stated that, "gone are the days when a municipality may enact an ordinance ostensibly regulating secondary effects on the basis of

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[22]The opinion describes CAD data as "police dispatch records of calls for service". Appellants' Appendix at A.1304-A.1305.

evidence consisting little more than the self-serving assertions of municipal officials." Id. at A.1319.

In light of this authority, it was clear error, even assuming the county met its burden with respect to an initial factual showing amending the ordinance, that Appellants did not cast direct doubt upon the validity of the county's actions, thus shifting the burden of proof to the county.[23]

C. THE ORDINANCE IS FURTHER UNCONSTITUTIONAL IN THAT IT GREATLY RESTRICTS ACCESS TO CONSTITUTIONALLY PROTECTED SPEECH.

In *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976), supra, both the plurality opinion of Justice Stevens and the concurring opinion of Justice Powell upheld Detroit's adult entertainment zoning ordinance, only upon a factual showing being made that the ordinance would not have an overall negative impact upon the continuing availability of adult entertainment to the residents of the City of Detroit. Writing for the plurality, Justice Stevens stated:

> "The ordinances are not challenged on the ground that they impose a limit on the total of adult theaters which may operate in the city of Detroit. There is no claim that distributors or Exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained." 427 U.S. at 62, 96 S. Ct. at 2438.

Later on in the opinion, Justice Stevens made it absolutely clear that the foregoing factual finding of an unrestrained market for adult entertainment, was absolutely essential to the plurality's reasoning in upholding the Detroit ordinance. Justice Stevens wrote:

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[23]As already noted above, the county, as was the case with the City of Daytona Beach, offered no evidence to contradict the conclusions of Dr. Linz with respect to the studies relied upon by the county, no evidence impeaching the validity of the studies relied upon by Dr. Linz, and no evidence contradicting the absence of secondary effects demonstrated by Appellants' evidence. In light of these facts, this Court should reach the same conclusion reached by the court in *Daytona Grand, Inc.*, namely the invalidation of the ordinance in question because of the county's failure to meet its shifted burden of proof under *Alameda Books.*.

"The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that '[t]he Ordinances to do affect the operation of existing establishments but only the location of new ones.

There are myriad locations in the city of Detroit which must be over 1,000 feet from existing regulated establishments. This burden on First Amendment rights is slight.' 373 F. Spp.. at 370."

Similarly, Justice Powell, in his concurring opinion, made it absolutely clear that it was only because the ordinance in question did not result in suppression or restricted access to adult entertainment, that he voted to uphold the constitutionality of the ordinance. Justice Powell wrote:

"In this case, there is no indication that the application of the Anti-Skid Row Ordinance to adult theaters has the effect of suppressing production of or, to any significant degree, restricting access to adult movies. Norton [one of the adult theaters challenging the constitutionality of the ordinance] conceitedly will not be able to Exhibit adult movies at its present location, and the ordinance limits the potential location of the proposed Pussy Cat [the other theater challenging the ordinance]. The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustained zoning against claims of serious economic damage. [Citation omitted.]

The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression. This prompts essentially two inquiries: (i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and (ii), Does it restrict in any significant way the viewing of those movies by those who desire to see them? On the record in this case, these inquiries must be answered in the negative. At most the impact of the ordinance on these interests is incidental and minimal (footnote omitted). Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view them. The ordinance is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content. Nor is there any significant overall curtailment of adult movie presentations, nor the opportunity for message to reach an audience. On the basis of the District Court's findings [citations omitted], it appears that if a sufficient market exists to support them, the number of adult movies theaters in Detroit will remain approximately the same, free to purvey the same message." 427 U.S. at 77-79, 96 S. Ct. at 2456.

Since *Young*, courts have not hesitated to invalidate adult entertainment zoning ordinances, even facially patterned after *Young*, when the ordinances would have the effect of substantially reducing the availability of sexually explicit, but constitutionally-protected speech. See, for example, *Alexander v. City of Minneapolis*, 698 F. 2d 936 (8th Cir. 1983), hereinafter referred to as *Alexander I*; *Walnut Properties, Inc. v. City of Whittier,* 861 F. 2d 1102 (9th Cir. 1988); and *Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696 (M.D. Fla. 1978); *Avalon Cinema Corp. v. Thompson*, supra, 667 F. 2d 659 (8th Cir. 1981); *Marco Lounge, Inc. v. City of Federal Heights*, 625 P. 2d 982 (Colo. 1981); *Basiardanes v. City of Galveston*, 682 F. 2d 1203 (5th Cir. 1981); *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981); and *Christy v. City of Ann Arbor*, 824 F. 2d 489 (6th Cir. 1987).

As already noted above, even if all doubts were resolved in the county's favor, the best the county could establish is that it has made .05 percent or 5/100th of one percent of its land available for adult uses. This is clearly constitutionally inadequate, as a matter of law.

For example, in *Renton*, the ordinance left some 5 percent of the entire land available for adult uses, see 475 U.S. at 53, 106 S. Ct. at 925. This amounts to one hundred times the land left available under the Morrison County ordinance.

The question was most recently addressed by the United States Court of Appeals for the Sixth Circuit in *Executive Arts Studio, Inc. v. City of Grand Rapids,* 391 F. 3d 783 (6th Cir. 2004). In that case, the court held that, in a city with over 2500 parcels of commercially usable real estate, having no more than half dozen available was inadequate to meet First Amendment constitutional standards. In so doing, the court cited with approval the standard adopted by the court in *Dia v. City of Toledo,* 937 F. Supp. 673, 678 (N.D. Ohio 1996):

"Courts have generally found the number to be inadequate if fewer than a dozen sites

or under 1 % of the city acreage, is potentially available."[24]

A similar holding was reached in *University Books and Videos, Inc. v. Miami-Dade County, Fla.,* 132 F. Supp. 2d 1008 (S.D. Fla.) here the court stated:

> "The developed area of unincorporated Miami-Dade County which is subject to the challenge regulation is over 432,000 acres, based upon the above findings of fact and is stipulated by the parties. Thus, available BU-3 area is only 0.0092 percent of the developed area of Miami-Dade County. This percentage is exceedingly low.
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> In *Renton*, the Supreme Court approved a zoning law that left some 5 percent of the total land area available. The circumstances here, however, are much different than those in *Renton*. In contrast with the acres offered to adult businesses for a small Seattle suburb here, the county offers a few dozen acres in a large metropolitan area where the population of well over a million. Adult businesses could legally operate anywhere within 5 % of *Renton's* land area - the ordinance did not require that they be distanced from each other, as is the case here, so the entire 5% of the city of Renton was in fact legally available. Here, the percent of land available is minuscule - less than three-fourths of one percent of the area zoned for business and an infinitesimal percentage of the entire land area involved. The disbursal requirement establishes an overwhelming restraint when superimposed on the ordinances other geographical limitations." Id. at 1014.

In this regard, it should be noted that the percentage of total land available in Morrison County is only slightly more than what the court in *University Books* called "exceedingly low" and "infinitesimal."

Also instructive is *T & A's, Inc. v. Town Board of the Town of Ramapo,* 109 F. Supp. 2d 161 (S.D.N.Y. 2000), in which the court invalidated an ordinance which left .6 percent of the city's total land area available for adult uses, or more than ten times the percentage allowed by Morrison County in the instant case. In holding this percentage to be constitutionally invalid, the court stated:

> "In contrast to the Ramapo ordinance, which, as *T & A's* proved, allocated less than .6 % of the available land for adult entertainment, the recent New York City Adult Use Legislation upheld in *Stringfellow's [v. City of New York,* 91 N.Y. 2d 382, 671 N.Y.S. 2d 406, 694 N.E.2d 407 (1998)]; *Hickerson [v. City of New York,* 140 F. 3d 134 (2nd Cir. 1998)]; and *Buzzetti [v. City of New York,* 140 F. 3d 134 (2nd Cir. 1998)], permitted properties for adult uses in the five boroughs of New York City amounting to over 11 percent of the total area (footnote omitted) of New York City

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[24]See *Executive Arts,* 393 F. 3d at 797.

> and then was reduced to 4% by excluding properties not legally available. [Citation omitted.] In *Renton*, ...the City of Renton left available over 5% of the entire land (footnote omitted) of Renton for use by adult establishments. [Citation omitted.] In *O'malley v. City of Cyracuse,* 813 F. Supp. 133, 146-147 (N.D.N.Y. 1993), the municipality left open 4% of the entire area of the municipality. In *Town of Islip [v. Caviglia,* 73 N.Y. 2d 544, 542 N.Y.S. 2d 139, 540 N.E. 215 (1989)], a municipality left over 10% of its entire area available for adult uses [Citations omitted.]
>
> To be sure, the fact that establishments like T & A's must 'fend for themselves in the real estate market, and on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation' and Ramapo is not compelled to insure that any speech related business will be able to obtain sites at bargain prices [Citation omitted.] However, the amount of usable land reserved by Ramapo is de minimus and far smaller than the amount that passed constitutional muster in litigation involving other municipalities, and consequently, denies T & A the reasonable alternative avenues of expression to which it is entitled. As a practical matter, the ordinance, as drafted, effectively prohibits the constitutionally protected activity in the Town of Ramapo [Citations omitted.]" Id. at 173-174.

In this regard, it should be noted that the ordinance which provided usable land deemed de minimus by the court and which was held to deny the Plaintiffs "reasonable alternative avenues of expression to which it is entitled," made more than ten times as much land available than does Morrison County, even viewed in the light most favorable to Morrison County.

To be sure, in *City of Crystal v. Fantasy House, Inc.,* 569 N.W. 2d 225 (Minn. App. 1997), this Court upheld an ordinance which allowed .9 percent of the city's land for adult uses. However, even this is roughly 18 times more land than the Morrison County ordinance makes available.

Even though the law plainly compels the invalidation of the ordinance, even assuming all the land set forth in Exhibit 1 were in fact available, the overwhelming evidence at trial indicates that substantial portions, if not a majority of the land sited is not available.

This is most obvious with respect to the fact that the single largest parcel of land claimed to be available is occupied, in large part by the City of Little Falls/Morrison County Airport. Courts have universally held that land underneath airports cannot be considered available for adult uses. See *Topanga Press v. City of Los Angeles,* 989 F. 2d 1254 (9th Cir. 1993), and *Woodall v. City of El*

Paso, 49 F. 3d 1120, 1124 (5th Cir. 1995).

Secondly, Defendants, through their video tape have presented substantial evidence indicating that because of the location of houses not accounted for on the city's map, significant portions of the land otherwise available is clearly not.

Finally, it should be noted that several sites along Highway 10 between Little Falls and Randall are unquestionably in wetland areas. As such, they are plainly governed by Minn. Stat. Sec. 103 G222 Subd. 1(a), which provides in pertinent part:

> "Wetlands must not be drained or filled, wholly or partially, unless replaced by restoring or creating wet land areas of at least equal public value under a replacement plan approved as provided in Sec. 103G.2242, a replacement plan under a local government units' comprehensive wet land protection and management plan approved by the board [of Water and Soil Resources] under Sec. 103G.2243..."

Sec. 103G.2242 requires approval of a replacement plan by a resolution of a governing body of the local government unit "consistent with the provisions of the rules or comprehensive wetland protection or management plan approved under Sec. 103G.2243."

Consequently, none of the wetland areas are developable, as a matter of right, rather, they are developable only at the discretion of the local county board, which must approve any wet land replacement plan in order for draining or filling the wet lands to take place.

The law is absolutely clear that land which is available for adult uses only at the discretion of government is not to be considered available for First Amendment purposes. See for example, *University Books and Video v. Miami-Dade County,* supra, 132 F. Supp. 2d 1008, 1016-1017 (S.D. Fla. 2001); *Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F. 3d 1358, 1362 (11th Cir. 1999); *Bukaka, Inc. v. County of Benton,* 852 F. Supp. 807 (D. Minn. 1993); and *Mga Susu, Inc. v. County of Benton,* 853 F. Supp. 1147 (D. Minn. 1994).

CONCLUSION

For all of the foregoing reasons, grant of summary judgment to Respondent should be reversed. Either Appellants should be determined to be a lawful non-conforming use, or, in the alternative, the amended zoning ordinance should be invalidated as unconstitutional under the First Amendment.

Respectfully submitted,

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