MINNESOTA STATE LAW LIBRARY

NO. A05-2002

State of Minnesota
In Court of Appeals

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.

RESPONDENT'S BRIEF AND APPENDIX

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STATEMENT OF LEGAL ISSUES

I. WHETHER JURISDICTION IS LACKING WHERE THE ISSUES PROPOSED TO BE RAISED ON APPEAL ARE NOT RIPE FOR REVIEW?

The trial court permanently enjoined Appellants, doing business as Lookin' Fine Smut & Porno, from operating until it complies with septic rules – something it has failed to do.

Apposite Authorities:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)
Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)
Thompson v. City of Red Wing, 455 N.W.2d 512 (Minn. App. 1990).

II. WHETHER THE TRIAL COURT PROPERLY DETERMINED LOOKIN' FINE SMUT & PORNO DOES NOT QUALIFY AS A LEGAL NONCONFORMING USE WHEN IT ATTEMPTED TO SURREPTITIOUSLY "OPEN" FOR BUSINESS IMMEDIATELY BEFORE THE COUNTY'S ORDINANCE BECAME EFFECTIVE?

The trial court found Lookin' Fine Smut & Porno does not qualify as a legal nonconforming use.

Apposite Authorities:

Morrison County Land Use Control Ordinance 304.2(a)
Minn. Stat. §561.01 (2005)
Hooper v. City of St. Paul, 353 N.W.2d 138 (Minn. 1984)
State v. Reinke, 702 N.W.2d 308 (Minn. App. 2005)
Union County v. Hoffman, 512 N.W.2d 168 (S.D. 1994)

III. WHETHER THE TRIAL COURT PROPERLY DETERMINED MORRISON COUNTY'S ADULT USE ORDINANCE DOES NOT VIOLATE THE FIRST AMENDMENT?

The trial court upheld Morrison County's Adult Use Ordinance.

Apposite Authorities:

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)
Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)
City of Los Angeles v. Alameda Books, 535 U.S. 425 (2001)
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Kismet Investors, Inc. v. County of Benton, 617 N.W.2d 85 (Minn. App. 2000)

STATEMENT OF CASE

This case represents a premature appeal by a non-operational business. On August 5, 2005, the Honorable Thomas A. Godzala granted Morrison County's Motion for Summary Judgment and permanently enjoined Gordon and Jonathan Wheeler from operating Lookin' Fine Smut & Porno at the location in question. In doing so, Judge Godzala also denied the Wheelers' Motion for Summary Judgment, challenging the constitutionality of Morrison County's adult use ordinance.

A number of trial court decisions preceded the August 5, 2005, Order and relate to this appeal. On October 21, 2003, the Morrison County Board of Commissioners had amended an existing Morrison County adult use ordinance. Four days before the Board's action, the Wheelers surreptitiously opened, without any permits, a new adult use business on recently acquired property which did not have a functioning sewage system. On October 30, 2003, Morrison County obtained an injunction against Lookin' Fine Smut & Porno, for operating in violation of the law.

In response to the County's action, Appellants brought a counterclaim, alleging First and Fourteenth Amendment violations. On July 16, 2004, the parties entered into a stipulation, approved by the Honorable Thomas Godzala, which permanently enjoined Lookin' Fine Smut & Porno from operating its business until

Lookin' Fine Smut & Porno obtained County certification of compliance with septic requirements.

On August 12, 2004, Judge Godzala held the Wheelers in contempt for continuing to operate Lookin' Fine Smut & Porno without compliant sewer. Judge Godzala ordered the Morrison County Sheriff to intervene and shut Lookin' Fine Smut & Porno down until it complied with the sewer requirements. The record contains no evidence showing Lookin' Fine Smut & Porno has satisfied the conditions of the July 16, 2004, permanent injunction.

On April 15, 2005, Judge Godzala heard the parties' cross-motions for Summary Judgment. On August 15, 2005, Judge Godzala granted the County's motion, denied the Wheelers' motion and issued the second injunction, which permanently enjoined the Wheelers from operating Lookin' Fine Smut & Porno. This appeal ensued.

STATEMENT OF FACTS

On April 23, 2001, Morrison County (the "County") began discussing the adoption of a comprehensive adult use ordinance. *Appellants' App.* at A47. In 2001, Appellant Gordon Wheeler knew about these discussions. *Id.* at A38. After nearly two years of research, the Morrison County Board of Commissioners (the "Board") amended the existing Morrison County adult use ordinance and passed a new ordinance regulating sexually oriented businesses on October 21, 2003. *Id.* at

A8, A13-19, A51-A73. The ordinance regulating sexually oriented businesses ("SOB ordinance") creates a licensing procedure for sexually oriented businesses. The trial court declined to rule on the constitutionality of the SOB Ordinance, making it not a part of this appeal. *Id.* at A1289; *see also, Appellants' Br.* at 6. The adult use amendments also passed created more restrictive set backs on adult use businesses. *Appellants' App.* at A13-A19 (current adult use ordinance cited as *Morrison County Zoning Ordinances* (2003) 1400 et. seq.); *Id.* at A36 (previous adult use ordinance cited as *Morrison County Zoning Ordinances* (1995) 1202.8).

Before adopting the adult use amendments, the Board reviewed and analyzed various studies relating to the negative effects of sexually oriented business. *Appellants' App.* at A58, A75-A1123 (Minnesota Attorney General 1989), A124-A125, A449-A455 (Spokane, Washington), A128-129 (Chicago, Illinois 2001), A131-A203 (Amarillo, Texas 1977), A204-A356 (Garden Grove, California 1991), A357-A444 (Newport News, Virginia 1996, which includes studies from St. Paul, Minnesota, Indianapolis, Indiana and Phoenix, Arizona), A444-448 (New York 1994), A456-A548(Whittier, California 1999) and A551-A706 (report from American Planning Association). One of these studies was compiled by the Minnesota Attorney General's Task Force on Sexually Related Businesses. *Id.* at A47, A51-A57.

The Board supplemented these studies with other pre-enactment research, including holding a series of meetings with public comment regarding adult use businesses. *Id.* at A47:8. After holding these meetings, receiving citizen input and analyzing the studies, the Board passed a Resolution, with detailed Findings of Fact, amending the adult use ordinance. *Id.* at A51-A57. In its Resolutions and Findings, the Board set forth its reasons for amending the adult use ordinance, including (1) decreasing acts of lewdness or illegal activities, including prostitution; (2) decreasing the number of transients; (3) avoiding devaluation of neighboring properties; (4) decreasing criminal activities; (5) avoiding the spread of communicable diseases and (6) protecting impressionable minors. *Id.*

On October 17, 2003, four days before the Board meeting addressing final resolution of adult use amendments, Gordon Wheeler, Sr., Gordon Wheeler, Jr. and Jonathan Wheeler (the "Wheelers"), purchased the property in question on a contract for deed from Swanville State Bank. *Id.* at A23. Without even attempting to satisfy the mandatory county and state health and safety regulations applicable to all new businesses, the Wheelers, doing business as Lookin' Fine Smut & Porno, (hereinafter collectively "LF Smut & Porno") surreptitiously opened for business the very next day. *Id.* Preceding the Wheelers' purchase, the County had shut down the prior business which had occupied the property for operating with a

non-compliant septic system. *Id.* at A4, A20-25; *Respondent's App.* at R1-R23. The Wheelers did not remedy the septic issues before opening for business. *Id.*

By Order dated July 16, 2004, the district court approved the parties' stipulation, which permanently enjoined LF Smut & Porno from operating its business until it fully complied with all applicable rules and regulations. *Id.* at A-1265. Appellants have yet to comply with the 7080 Rules.

On August 12, 2004, the district court held the Wheelers in contempt for continuing to operate LF Smut & Porno without a compliant septic system. *Respondent's App.* at R24-R26. The district court ordered the Morrison County Sheriff to intervene and shut LF Smut & Porno down until it complied with the septic requirements. *Id.* The July 16, 2004, permanent injunction remains in place, as Appellants have failed to demonstrate compliance with all applicable rules and regulations. Consequently, LF Smut & Porno cannot lawfully operate (and never has lawfully operated) regardless of the outcome of this appeal.[1]

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[1] The land in question has a long history of significant septic issues. *Respondent's App.* At R-1; R-4. Prior to Appellants purchasing the property, Ralph Freeman operated a restaurant called Country Hearthside which closed as a result of septic system failure. *Id.* at R-1; R-4. On June 13, 2000, Morrison County served a letter on former owner Freeman suspending his food and beverage license effective on June 28, 2000, and requesting repair of the septic issues. *Id.* at R-4.

STANDARD OF REVIEW

The trial court decided this case on cross motions for summary judgment. The issues on this appeal represent questions of law subject to *de novo* review. *See generally, Fingerhut Corp. v. Suburban National Bank,* 460 N.W.2d 63, 65 (Minn. App. 1990). The construction and constitutionality of an ordinance represent questions of law, reviewed *de novo. Frank's Nursery Sales, Inc. v. City of Roseville,* 295 N.W.2d 604, 608 (Minn. 1980) (construction of ordinance); *City of Elko v. Abed*, 677 N.W.2d 455, 460 (Minn. App. 2004) (constitutionality of ordinance). This includes reviewing de novo all inquiries inherent to the constitutionality of an ordinance, including determination of any evidentiary burden shifting. *City of Elko,* 677 N.W.2d at 460-461.

ARGUMENT

I. JURISDICTION IS LACKING WHERE LF SMUT & PORNO'S APPEAL IS NOT RIPE FOR JUDICIAL REVIEW.

On July 16, 2004, the district court approved the parties' stipulation, which permanently enjoined LF Smut & Porno's operations until resolution of the septic issues. *Appellants' App.* at A1263-A1265. On August 12, 2004, the district court held the Wheelers in contempt for not ceasing operations, ordering the Morrison County Sheriff to shut down the business. *Respondent's App.* at R-24 – R-26. To date, LF Smut & Porno has not demonstrated compliance with the applicable septic rules and regulations and, as a result, cannot lawfully operate and, for that matter,

has never lawfully operated at any time. When no operational business exists, there is nothing for the adult use ordinance to regulate, making this appeal premature.

The ripeness doctrine intends "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-149 (1967). In *Abbott Laboratories*, the United States Supreme Court held ripeness of a case turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* at 149; *Pacific Gas & Elec. Co. v. State Energy Resources, Conservation & Dev. Comm'n,* 461 U.S. 190, 201 (1983).

This Court has refused to accept premature appeals from zoning decisions. *Wheeler v. City of Wayzata,* 533 N.W.2d 405, 407 (Minn. 1995) (Minnesota Supreme Court refused review based on ripeness because plaintiffs had neither perfected their application for rezoning nor applied for a variance); *Hay v. City of Andover,* 436 N.W.2d 800, 804-805 (Minn. App. 1989) (failure to apply for a variance made takings claim not ripe). A premature zoning appeal arises when no final decision regarding a land regulation exists. *Williamson County Regional*

Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985) (landowner had not obtained final decision regarding application for land use from administrative board, making the appeal not ripe); *Thompson v. City of Red Wing,* 455 N.W.2d 512, 515-516 (Minn. App. 1990) (failure to submit development plan showing proposed land uses made takings claim not ripe).

In *Thompson,* landowners entered into an agreement with a road construction contractor to extract gravel from the landowners' property. *Id.* at 514. The landowners requested rezoning from the city, as well as applied for conditional use permits, to allow for the gravel extraction. *Id.* The city denied these requests based on the presence of Indian burial mounds. *Id.* Landowners filed an action, alleging a taking. *Id.* This Court found the landowners' claim not ripe against the State since the State could not take final action against landowners until landowners submitted a development plan. *Id.*

Here, the parties agreed to the permanent injunction of LF Smut & Porno until (1) LF Smut & Porno submitted to the County proof of septic compliance; and (2) received approval by the County of its septic. *Appellants' App.* at A-1265. To date, LF Smut & Porno wholly failed to bring its septic system into compliance or otherwise satisfy the requirements contained in the stipulation. Without a functioning septic system, LF Smut & Porno cannot operate as a lawful business and, as such, cannot be injured by the adult use ordinance. To find otherwise

would reward LF Smut & Porno's strategic decision to unlawfully open for business without jumping through the health and safety hoops required of everyone else. This appeal represents not only a premature adjudication of a claim, but also judicial interference with the County's statutory power to protect the health and welfare of the public.[2]

II. LF SMUT & PORNO DID NOT ACQUIRE LEGAL NONCONFORMING USE STATUS BY SURREPTITIOUSLY OPENING A BUSINESS IN VIOLATION OF THE LAW.

LF Smut & Porno contends the district court erred in holding it had failed to qualify as a legal nonconforming use with grandfather rights under *Morrison County Land Use Control Ordinance* 304.2(a). Specifically, Ordinance 304.2(a) provides:

> Uses not permitted by this ordinance but which were legally in existence prior to the effective date of this ordinance shall be legal nonconforming uses. Such uses may be continued but shall not be intensified, enlarged, or expanded beyond the permitted or delineated boundaries of the use allowed in the most recent permit issued prior to the adoption of this ordinance . . .
>
> Nonconforming uses which are declared to be public nuisances shall not be allowed to continue as legal nonconforming uses.

Pre-existing nonconforming use status grants due process rights to businesses lawfully operating before the date of enactment of a zoning amendment or change. To obtain grandfather rights, however, the prior use of land must be lawful. *Hooper v. City of St. Paul,* 353 N.W.2d 138, 140 (Minn. 1984); *State v.*

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[2] LF Smut & Porno also lacks standing with respect to the underlying constitutional claim since it was not (and is not) a lawful business subject to the ordinances.

Reinke, 702 N.W.2d 308, 313 (Minn. App. 2005) (not a pre-existing nonconforming use since dog breeder never applied for or received conditional use permit); *State v. Lee*, 584 N.W.2d 11, 15 (Minn. App. 1998) (past illegal use did not entitle landowner to any vested rights).

Businesses or property owners not operating lawfully, particularly when their unlawful operation involves land use violations, have no due process protection. In *State v. Lee*, the Minnesota Court of Appeals rejected the argument a landowner's long term use of his property granted him vested property rights when the long term use was unlawful. *Lee,* 584 N.W.2d at 15. In *State v. Reinke,* this Court found a dog breeding business not a lawful prior use protected from a zoning change limiting the number of dogs per residential premises, since the dog breeder never had obtained a special use permit for her business. *Reinke,* 702 N.W.2d at 313. Similarly, LF Smut & Porno failed to obtain any permits or authority to operate a business, particularly where there is no functioning septic system.

Appellants' reliance on *Hooper v. City of St. Paul* is misplaced. In *Hooper*, the Minnesota Supreme Court found an existing carriage house, built without a permit and prior to an ordinance prohibiting carriage houses, represented a lawful, nonconforming use. The *Hooper* Court acknowledged its decision diverged from the well established law in Minnesota to only

afford due process protection to existing lawful uses. *Id.* at 141. However, the *Hooper* court made an exception for the carriage house, finding the significant passage of time (sixty years) along with the minimal effect the building permit had on public land use, justified recognition of a prior lawful use. *Id.*

Unlike *Hooper*, the septic system involved in this case falls squarely within the parameters of land use planning. *City of Lake Elmo v. Metropolitan Council,* 685 N.W.2d 1, 11-12 (Minn. 2004) (city's comprehensive land use plan includes consideration of sewer infrastructure); *City of New Brighton v. Metropolitan Council,* 237 N.W.2d 620, 623 fn. 7 (Minn. 1975) (court referenced *Timing and Sequential Control – The Essential Basis for Effective Regional Planning* as a resource for discussion of how sewer planning relates to regional development); *Hill v. Wright County Board of Adjustments,* 2005 WL 3159775 at *6 (Minn. App. 2005) (considerations of potential sewer problems fall within county's land-use plan); *Mendota Heights Associates v. Friel,* 414 N.W.2d 480, 482 (Minn. App. 1987) (court ordered city to amend its comprehensive plan to reflect changes of land use and sewer changes). The availability of sewer is directly related to ability to develop land. In short, LF Smut & Porno can not create an artificial legal nonconforming use by simply opening in violation of the law.

In addition to protecting only prior lawful businesses, *Morrison County Zoning Ordinance* 304.2(a) also prohibits continuation of those nonconforming uses which qualify as public nuisances. Ordinance 304.2(a) is consistent with case law refusing to grant non-conforming use status to public nuisances.[3] *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 633 (D.R.I. 1990) (discharge of raw sewage into a river as a result of a failed septic system was a nuisance); *Wolfe v. Village of Brice, Ohio*, 37 F. Supp. 2d 1021, 1027 (S.D. Ohio 1999) (adult entertainment represented a nuisance not entitled to grandfather rights); *Union County v. Hoffman,* 512 N.W.2d 168, 170-171 (S.D. 1994) (operation of trailer park found to be a public nuisance is not entitled to nonconforming use status); *Booghier v. Wolfe*, 587 N.E.2d 375 (Ohio App. 3rd Dist. 1990) (adult use business was a nuisance). In *Booghier,* the landowner had used the property as an adult entertainment establishment since 1969. *Booghier,* 587 N.E.2d at 375. In 1985, a nuisance action was filed against the landowner for prostitution, resulting in the permanent injunction of the adult use business. *Id.* at 376. In May 1987, the municipality passed zoning regulations prohibiting adult use facilities, unless in existence as a valid nonconforming use at the time of the zoning change. *Id.* The

[3] Minnesota Statute § 561.01 defines a public nuisance as: anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance.

Booghier court refused to grant the landowner grandfather rights because the injunction had shut down the business prior to establishment of the zoning regulation. *Id.* at 379.

Minnesota Statutes defines nuisance as "anything which is injurious to health or indecent or offensive to the senses . . . so as to interfere with the comfortable enjoyment of life or property." Minn. Stat. § 561.01 (2005). Failed septic systems meet this definition and represent a public nuisance. *Sakonnet v. Dutra,* 738 F. Supp. at 23; *Moore v. Weeks,* 85 S.W.3d 709, 717-718 (Mo. App. W.D. 2002); *Union County v. Hoffman,* 512 N.W.2d at 170. Obvious significant health risks arise with improper sewage disposal. In fact, the sewage problems at LF Smut & Porno involved sewage surfacing from the system, causing an imminent threat to public health and safety. *Respondent's App.* at R1-R3.

Here, LF Smut & Porno not only did not open lawfully prior to the zoning change, the noncompliant sewer represents a public nuisance. The County never stood idly by. It pursued injunctions against the current and former owners of this property because of a deficient septic system. *Appellants' App.* at A2-A5. The County, as well as the State, has septic regulations in place. Minn. R. 7080 et. seq.; *Morrison Land Use Ordinances* 1301.1. The County shut down the previous business for noncompliant septic. *Id.; see also Resp. App.* At R-4 – R-9. As soon as LF Smut & Porno opened, the County sought and obtained an injunction

because of the non-compliant septic system. *Appellants' App.* at A2-A5. LF Smut & Porno still has not cured the septic issues. *Id.; Respondent's App.* at R-24. To allow Lookin' Fine Smut and Porno to avoid complying with the adult use ordinance by hurriedly opening its doors, without jumping through all the processes aimed at protecting public health, would offend public policy and diminishes the Board's statutory police power inherent to zoning.

III. MORRISON COUNTY'S ADULT USE ORDINANCE DOES NOT VIOLATE THE FIRST AMENDMENT.

The United States Supreme Court categorizes erotic nude dancing as an expressive conduct afforded minimal protection within the outer ambit of the First Amendment. *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991) (nude dancing is expressive conduct marginally protected within outer ambit of First Amendment). In fact, the United States Supreme Court has articulated a clear distinction between speech and expressive conduct. *Barnes*, 501 U.S. at 560 (nude dancing); *City of Los Angeles v. Alameda Books,* 535 U.S. 425, 433-434 (2002) (adult books); *City of Elko v. Abed*, 677 N.W.2d 455, 461-462 (Minn. App. 2004) (comparing *Barnes* with *Almaeda Books* (books) and *Jacobellis* (movies)).

Morrison County's Adult Use Ordinance does not prohibit nude dancing. Rather, it increases the distance between adult use businesses and liquor establishments, as well as amends existing set back language to include a mandatory distance from "residential units." *Appellants' App.* at A13-A19. The

County can regulate First Amendment protected uses by ordinance when the ordinance: (1) is content-neutral with respect to time, place, and manner; (2) is designed to serve a substantial governmental interest; and (3) does not unreasonably limit alternative avenues of communication. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (ordinance regulating nude dancing); *Barnes*, 501 U.S. at 560 (ordinance regulating nude dancing); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (ordinance regulating nudity); *Alameda Books, Inc.*, 535 U.S. at 430 (ordinance regulating adult bookstore).

A. **Morrison County's Adult Use Ordinance is content neutral with respect to time, place and manner.**

As stated above, the threshold inquiry into the constitutionality of ordinances is whether the ordinance represents a content based restriction or a content-neutral time, place and manner restriction. *Renton,* 475 U.S. at 48; *ILQ Investments Inc. v. City of Rochester,* 25 F.3d 1413, 1416 (8th Cir. 1994). In *Renton*, the United States Supreme Court defined content neutral regulations as ones "justified without reference to the content of the regulated speech." *Renton,* 475 U.S. at 48. The Renton City Council passed an ordinance regulating theaters. After its pre-enactment research, the city council expressed concerns with the secondary effects of adult theaters, not with the actual content of the films. *Id.* Accordingly, the Court found the ordinance content neutral.

Courts consistently have followed *Renton* by upholding ordinances which regulate, but do not prohibit, adult use business, regardless of motive behind the ordinance. *Ambassador Books & Video, Inc. v. City of Little Rock,* 20 F.3d 858, 863 (8th Cir. 1994) (merely because the ordinance pertains to only a particular category of businesses – those sexually oriented – does not make it content based); *Holmberg v. City of Ramsey,* 12 F.3d 140, 143 (8th Cir. 1993) (upholding ordinance requiring operator to relocate business because too close to protected use); *Nightclub Management v. City of Cannon Falls,* 95 F. Supp. 2d 1027, 1042 (D. Minn. 2000) (regulations of nude dancing establishments clearly permissible regardless of motive spurring research of regulation); *City of Elko,* 677 N.W.2d at 461 (ordinance creating licensure procedure for nude dancing upheld as content neutral).

Morrison County's adult use ordinance, as amended, does not prohibit adult use establishments. Rather, it merely requires set backs from residential homes, daycares, libraries and liquor stores. In fact, the increased footage required between adult use businesses and liquor stores now conforms to existing setback requirements for distances between adult use establishments and other entities, such as residences or daycares. Here, like *Renton*, the distance restrictions serve the County's pursuit of its zoning interests without regulating, i.e. prohibiting, content.

B. Morrison County's Adult Use Ordinance serves substantial government interests.

The second *Renton* test requires the ordinance further a substantial government interest. It is this portion of the *Renton* analysis which spurs the most litigation. The Supreme Court has held that municipalities have "greater experience with and understanding of the secondary effects that follow certain protected speech than will the courts." *Alameda Books, Inc.*, 535 U.S. at 442; *see also City of Erie*, 529 U.S. at 297-298 (Erie's city council members had firsthand knowledge of the city's activities and therefore, could make better expert judgments about secondary effects).

In *Renton*, the court held a municipality's interest in combating negative secondary effects of adult use businesses constitutes a legitimate government interest. *Renton,* 475 U.S. at 51; *see also City of Erie*, 529 U.S. at 279 (ordinance furthered the government's interest of regulating public nudity so as to combat negative secondary effects). When researching secondary effects, municipalities may reasonably rely on studies conducted in other cities. *Renton,* 475 U.S. at 51-52; *City of Erie,* 529 U.S. at 277.

i. Morrison County's adult use ordinance furthers a substantial governmental interest

The Board stated, in its October 21, 2003 resolution, it intended to combat the secondary effects of sexually oriented businesses by passing the adult use

ordinance. *Appellants' App.* at A51-57. The Board consulted numerous studies and references prior to the amendments' adaptation, including studies from within the State of Minnesota. *Appellants' App.* at A58, A75-A1123 (Minnesota Attorney General 1989), A124-A125, A449-A455 (Spokane, Washington), A128-129 (Chicago, Illinois 2001), A131-A203 (Amarillo, Texas 1977), A204-A356 (Garden Grove, California 1991), A357-A444 (Newport News, Virginia 1996, which includes studies from St. Paul, Minnesota, Indianapolis, Indiana and Phoenix, Arizona), A444-448 (New York 1994), A456-A548(Whittier, California 1999) and A551-A706 (report from American Planning Association).

As mentioned above, a Minnesota Attorney General's Task Force prepared one of the studies relied upon. It discusses at length the negative effects of sexually oriented businesses within cities and counties. The Attorney General's report includes several reports from within the State of Minnesota, for example, Minneapolis (1980) and St. Paul (1978), as well as outside of the State. *Id.* at A75 (*Minnesota Attorney General, Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (1989)* 5-10). The Minnesota Attorney General's recommendations were in response to the growing concerns of Minnesota citizens about the impact of sexually oriented businesses on the quality of their lives. *Id. (Report of the Attorney General* at 1). In fact, the following specific recommendations were made:

> [t]o reduce the adverse effects of sexually oriented businesses. Communities should adopt zoning regulations which set distance requirements between sexually oriented businesses and sensitive uses, including but not limited to residential areas, schools, child care facilities, churches and parks . . . and liquor establishments.

Id. (Report of the Attorney General at 5). This synopsis summarizes only one of the many studies analyzed by the Board – all of which conclude adult use businesses generate adverse secondary effects.

In addition to these studies, the Board held a series of meetings regarding adult use businesses, including taking public comments. *Appellants' App.* at A47:8. The Board, in its Findings of Fact and Resolution, discusses how it conducted pre-enactment research and concluded adult use businesses require special supervision because those businesses often encourage casual sexual liaisons, unlawful activities, prostitution, and drug use and, oftentimes, create a deleterious effect on businesses and residences. *Id.* at A13-A19, A51-A58.

The Board here went above and beyond. Caselaw only requires a board act upon "reasonable belief" and does not require compilation of scientific evidence. *Renton,* 475 U.S. at 51-52. This 'reasonable belief' standard does not require a city to prove its ordinance will successfully lower crime with empirical data. *Alameda Books*, 535 U.S. at 439.

In fact, the United States Supreme Court has recognized a well established link between adult uses and negative secondary impacts. Accordingly, the Court

consistently has upheld reliance on studies. *Renton,* 475 U.S. at 53-54; *see also City of Erie,* 529 U.S. at 296 (reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects); *SOB, Inc. v. County of Benton,* 317 F.3d 856, 861-862 (8th Cir. 2003) (county had sufficient bases for concluding ordinance furthered governmental interest in combating harmful effects); *For the People Theatres of N.Y., Inc. v. City of New York,* 20 A.D.3d 1 (N.Y. 2005) (city not required to do additional studies to justify amendments to existing ordinance). The Supreme Court has gone so far as to assert "that common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." *New York State Liquor Authority v. Bellanca,* 452 U.S. 714, 718 (1981).

LF Smut & Porno did not take issue with the studies before enactment of the adult use amendments, even though Appellants admitted knowing about the County's debate regarding adult use businesses. Reviewing courts look at the information the county relied upon at the time it passed the ordinance in determining reasonableness. *City of Ramsey v. Holmberg,* 548 N.W.2d 302, 306 (Minn. App. 1996), *review den'd* (Minn. Aug. 6, 1996). Based on the information looked at by the County when it enacted the *Resolution of the Adult Use Ordinance* dated October 21, 2003, the Ordinance addressed decreasing the secondary effects of adult use businesses and, thus, served a substantial government interest.

ii. The Board does not bear the additional burden of reestablishing the validity of its conclusions to the Court.

LF Smut & Porno argues the County has the burden to re-justify its reasons for the ordinance, merely because they have challenged the ordinance's constitutionality. It is mistaken. To the contrary, this Court, as well as others, have specifically rejected this argument. *SOB, Inc.,* 317 F.3d at 864 (cities DO NOT have to re-substantiate its previous findings that adult use ordinances further substantial governmental interest by likely decreasing secondary effects); *Baby Dolls Topless Saloons, Inc. v. City of Dallas,* 295 F.3d 471, 481 (5th Cir. 2002) (city not required to demonstrate with empirical data its ordinance will not successfully lower crime); *City of Elko,* 677 N.W.2d at 463 (*Alameda Books* does not establish a new evidentiary standard). Interestingly, this Court, in *City of Elko,* stated "appellants argue that the Supreme Court's recent decision in *Almeda Books* heightened the *Renton* standard . . . [w]e disagree."[4] *Id.* Finding otherwise would result in a "never ending merry-go-round of burden shifting." *Elko,* 677 N.W.2d at 464-465.

LF Smut & Porno relies upon *Peek-a-Boo Lounge of Bradenton v. Manatee County, Florida,* 337 F.3d 1251 (11th Cir. 2003) to argue otherwise. LF Smut &

[4] Interestingly, even though Appellants' counsel participated in the *Elko* case and knows full well this Court's holding, Appellants argue the opposite. Appellants rely on an Illinois case, an Iowa federal district court case and a Texas federal district court case which has been overruled to support their theory even though Minnesota and the federal district courts in Minnesota clearly state otherwise.

Porno asks for a different burden of proof for those municipalities which already have existing adult use businesses within their borders – a specific, localized evidentiary record. Courts, including the *Peek-a-Boo* court, refuse to do so. *Peek-a-Boo,* 337 F.3d at 1267; *SOB, Inc.,* 317 F.3d at 864 (cities DO NOT have to re-substantiate their previous findings that adult use ordinances further substantial governmental interest by likely decreasing secondary effects); *City of Elko,* 677 N.W.2d at 463 (held *Alameda Books* does not establish a new evidentiary standard); *Kismet Investors, Inc. v. County of Benton*, 617 N.W.2d 85, 94 (Minn. App. 2000). Rather, the law merely requires municipalities to conduct "some" pre-enactment research which reasonably relates to the ordinance. *Renton,* 475 U.S. at 51-52; *Alameda Books,* 535 U.S. at 1729-1730. Morrison County met its burden by holding public hearings and analyzing numerous well-recognized studies.

iii. Looking Fine Smut & Porno does not sufficiently cast direct doubt on the County's reasons

LF Smut & Porno further alleges "when a municipality has made a facially sufficient factual showing to otherwise justify the ordinance, the adult entertainment establishment . . . 'may cast 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.'" *Appellants' Br.* at 32.

Alameda Books does not hold municipalities to a higher evidentiary standard; but it does appear to shift the burden of proof back upon the municipality if the challengers of the ordinance cast direct doubt on the ordinance's rationale. *Alameda Books,* 535 U.S. at 439, 451 (actual and convincing evidence required). The trial court determines whether sufficient "actual and convincing" evidence exists. *Id.* Here, the district court correctly determined LF Smut & Porno did not raise sufficient facts "casting doubt" on the studies. *Appellants' App.* at A1283-A1285.

Appellants submitted police records which do not support their claim. *Id.* at A1106-A1283. To the contrary, the records support the County's findings by revealing a regular stream of calls to police from the one existing adult use business in Morrison County. These calls include *trespass of unwanted persons* (A1069, A1080, A1097), *assault* (A1075, A1085, A1102), *disorderly conduct* (A1070, A1072, A1076, A1079,A1081, A1083, A1084, A1089, A1095, A1096, A1098, A1099, A1100), *theft* (A1073, A1078, A1091, A1103), *burglary* (A1071, A1074), *prostitution* (A1086), *solicitation of prostitution* (A1086), *use of minors in performances* (A1101) and *lewd acts* (A1077). This type of evidence represents the exact type of adverse effects the County intended to address.

In addition to police records, LF Smut & Porno retained an expert to criticize the studies the County relied upon. Interestingly, LF Smut & Porno chose

not to criticize the County's studies at the time of enactment, even though Appellants knew about the County's research. *Appellants' App.* at A715. Regardless, Appellants' expert represents one person's general opinion about these studies. *Id.* at A725-A748. Appellants' expert does not localize his findings specifically to Morrison County. *Id.* at A723, A748. To the contrary, Appellants' expert merely states Morrison County relied upon studies with flawed methodology.

The County, on the other hand, compiled these relevant studies over the course of two years, including a study by Minnesota Attorney General. Numerous, well-educated individuals – each an expert in their field – conducted these studies. *G.M. Enterprises v. Town of St. Joseph,* 350 F.3d 631, 640 (7th Cir. 2003). Accordingly, relying on these studies which relate to the effects of adult uses, is reasonable. *Renton,* 475 U.S. at 51-52; *Holmberg II,* 548 N.W.2d at 306 (quoting *ILQ Investments Inc. v. City of Rochester,* 25 F.3d 1413, 1418 (8th Cir. 1994). Submission of only one expert's opinion adverse to the established findings of the various experts' opinions set forth in the studies, along with review of police reports which show illegal and lewd behavior occurs at these establishments, does not cast direct doubt on the County's findings.

C. <u>Morrison County's Adult Use Ordinance allows for reasonable alternatives.</u>

Finally, under the *Renton* standard, the ordinance must allow for reasonable alternative avenues of communication. The ordinance in *Renton* did not ban adult theaters entirely, but merely placed set-back requirements from residential zones, churches, parks, and schools. *Id.* at 46; *see also Young v. Amer. Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding Detroit ordinances prohibiting operation of any adult movie theater, bookstore, or similar establishments within 1000 feet of any other establishment, or within 500 feet of a residential area). Similarly, the Morrison County Board of Commissioners did not completely ban adult use businesses, but merely placed set-back requirements on such establishments.[5]

A determination of whether reasonable alternative avenues of communication exist depends on the "physical and legal availability of alternative sites within the municipality's borders." *Renton,* 475 U.S. at 54 (5% of land available); *MJ Entertainment Enterprises, Inc. v. The City of Mount Vernon,* 328 F.

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[5] Specifically, the previous adult use ordinance allowed adult use in commercial and shoreland commercial districts, subject to a 1320 foot set back from a "residential district," licensed daycare center, school, public park or playground or religious institutions. *Appellants' App.* at A36. The previous ordinance also prohibited adult use businesses from locating within 200 feet of any building licensed to sell alcoholic beverages. Morrison County's new adult use ordinance kept the setback distance the same, with the exception of distance from liquor stores, but expanded the scope of types of buildings by changing residential district to any residential dwelling unit. The County also increased the previous 200 feet from liquor establishments to 1320 feet.

Supp. 2d 480, 484 (S.D.N.Y. 2004) (context specific test needed in each case to review if available number of sites adequate).

Courts, on a case by case basis, find reasonable alternatives exist when sufficient land area exists for adult businesses. *Renton,* 475 U.S. at 53. Whether other businesses already occupy the sites or additional work needs to be done on the sites is irrelevant. *Id.; see also Hickerson v. New York,* 146 F.3d 99, 106 (2d Cir. 1998) (even land already occupied by commercial or manufacturing facilities or undeveloped land not for sale or lease qualifies as a reasonable alternative). The Constitution neither mandates a minimum percentage of available land for speech or a minimum number of sites. Rather, the Constitution merely requires zoning schemes, which regulate speech, to provide reasonable opportunity to disseminate the speech. *MJ Entertainment Enterprises,* 328 F. Supp. 2d at 485.

Accordingly, courts uphold even those zoning ordinances which result in less than one percent of land available for adult businesses. *See Allno Enterprises, Inc. v. Baltimore Co., MD,* 10 Fed.Appx. 197, 201-02 (4th Cir. 2001) (upholding ordinance that leaves only .16% of the total acres in the county available); *Z.J. Gifts D-4, L.L.C. v. City of Littleton,* 311 F.3d 1220, 1240 (10th Cir. 2002), *overruled, in part, on other grounds, City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004) (upholding ordinance that leaves "just under" one percent of the city's land available); *North Ave. Novelties, Inc. v. City of Chicago,*

88 F.3d 441, 445 (7th Cir. 1996) (upholding ordinance that leaves "less than one percent" of the land within the city limits); *D.H.L. Associates, Inc. v. O'Gorman*, 6 F. Supp. 2d 70 (D. Mass. 1998) (upholding ordinance despite fact that less than one-tenth of one percent of the land in the town available), *aff'd.* 199 F.3d 50 (1st Cir. 1999).

At an evidentiary hearing, the County introduced into evidence a county map showing available locations for adult use in Morrison County. *Respondent's App.* at R29. Charles Forss ("Forss"), a land use planner for the County, testified the County compiled the map from a geographical information system (GIS) which records various information, including zoning districts, address data for county residents, land use records and public roads. *Appellants' App.* at A1286. Forss then inputted into his GIS search the set back requirements and generated the map. *Respondent's App.* at R29.

Forss testified 547 acres of commercial property appeared available in the County, of which 354 acres (64 percent of commercial land) appeared available for adult use. *Id.* at A1286. This acreage translates into 236 available sites. *Id.* Clearly, these 236 available sites provide LF Smut & Porno with ample opportunity to operate its business. *See generally, Alexander,* 928 F.2d at 283-284 (First Amendment does not require a city from providing an actual site and 120 sites available suffices); *Kismet,* 617 N.W.2d at 96 (100 available sites sufficient);

DI MA Corp. v. City of St. Cloud, 562 N.W.2d 312, 321-322 (Minn. App. 1997) (fifteen sites sufficient to meet reasonableness requirement).

LF Smut & Porno's only witness - Gordon Wheeler – testified about alternative sites. Mr. Wheeler testified to what he saw, as available, when driving in his car. Again, Wheeler likely defines "reasonable alternative" in a business sense, rather than a legal sense, and likely discounted properties already occupied or which need additional work. Caselaw prohibits such analysis and categorizes those as available sites, even if occupied. Wheeler also conceded the GIS system is more accurate than his odometer or distance binoculars, "if done right." He acknowledged he never went to the Assessor's office to verify his opinions regarding residential or commercial property. Under the circumstances, the district court understandably gave his testimony little weight.

LF Smut & Porno attempts to skew the numbers by disregarding sites and focusing on percentage of land available. In doing so, LF Smut & Porno calculates available acres against the total county land acreage rather than the commercial land. Courts have held no bright line rule exists. As a result, courts consider a variety of factors on a case by case basis, including the land use character of the municipality and its planning practices. *Renton*, 475 U.S. at 51; *MJ Entertainment Enterprises, Inc.*, 328 F. Supp. 2d at 487 (S.D.N.Y. 2004).

Without a bright line rule, courts oftentimes rely on other cases to evaluate the reasonableness of a municipality. Precedent limits review of alternative sites to developable land or commercially zoned land. *Alexander,* 928 F.2d at 283 (new ordinance constitutional where adult theaters have access to at least 6.6% of commercial land); *Ambassador Books & Video v. City of Little Rock*, 20 F.3d 858, 864 (8th Cir. 1994) (6.75% of the areas in which adult businesses could locate); *City of Crystal v. Fantasy House,* 569 N.W.2d 225, 230 (Minn. App. 1997) (15% of commercial area in which adult use business could locate). For example, in *City of Crystal*, this Court, in dicta, discussed how looking at the available acreage as a percentage of total city acres was not appropriate since the City of Crystal only had 6% of its acres zoned commercial. *City of Crystal*, 569 N.W.2d at 231.

The County identified 64% of commercial land available for relocation of LF Smut & Porno, thereby satisfying the third prong of the standard identified in *Renton. See generally, Renton,* 475 U.S. 41, 47 (1986). As a result, the Morrison County Adult Use Ordinance provides reasonable alternative avenues for non-compliant adult use businesses within Morrison County's commercial zoning areas.

CONCLUSION

For the foregoing reasons, the City respectfully requests this Court affirm the District Court and dismiss this appeal.

IVERSON REUVERS

Dated: March 6, 2006

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).