

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' REPLY BRIEF AND APPENDIX

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INTRODUCTION

This brief is submitted for the limited purpose of replying to Respondent's brief, dated March 6, 2006. To the extent that any argument set forth in Respondent's brief is not specifically addressed in this reply brief, such omission should not be considered in agreement or concession of the validity of said argument, but rather as only reflecting Appellants' position that the argument is dealt with adequately in Appellants' original brief.

FACTS

In the statement of facts set forth in its brief, Respondent asserts the following:

“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. [Citation omitted.] 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 ‘FL Smut & Porno’), surreptitiously open for business the very next day. [Citation omitted.] Preceding the Wheelers’ purchase, the county had shut down the prior business which it occupied the property for operating with a non-compliant septic system. [Citations omitted.] The Wheelers did not remedy the septic issues before opening for business. [Citation omitted.]

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. [Citation omitted] 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. [Citation omitted.] The District Court ordered the Morrison County Sheriff to intervene and shut down LF Smut & Porno until it complied with the septic requirements. [Citation omitted.] 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 operate (and never has lawfully operated) regardless of the outcome of this appeal (footnote omitted).” Respondent’s brief pp. 6-7.

The foregoing characterization is both misleading and exaggerated. To being with, it should be noted that what failed in the old septic system was not the entirety of the system but the drain field. This is reflected in the report contained in Respondent's Appendix at R.7, in an entry dated September 22, 1999, as follows:

"After county learned that [former owner] Freeman was attempting to repair the existing drain field, a letter from Kirsten Hoesse, Director for Morrison County Public Health and Roger Kuklok, Morrison County Planning and Zoning, were sent to Freeman. The letter stated that if the repair work failed, Freeman would be required to cut off the drain field, remove pumps from the lift station and pump the holding tanks with pumping receipts submitted to public health on a monthly basis (emphasis supplied)."

This fact was confirmed in the supplemental affidavit of Mark Kedrowski, a person licensed to repair and maintain septic systems in the Morrison County area, who submitted an affidavit to the trial court, pointing out that, as the person who maintained and inspected the system, what failed was the drain field, and that the holding tanks, after three years of being out of operation, were completely full, with no evidence of spillage or leakage (Reply Appendix at RA.6-RA.7).

Secondly, contrary to the impression set forth in Respondent's brief, Appellants did not simply open the business making use of a failed septic system. Quite to the contrary, Appellant submitted an uncontradicted affidavit that he consulted at least two experts on the septic system, was advised that the easiest way to assure that the septic system did not cause a problem would be to pump the five 1,500- gallon holding tanks as soon as they approached being full, that he had been advised that at least two other businesses in Morrison County were operating by pumping holding tanks, and that he retained a service to do so. (See Reply Appendix at RA.2-RA.3, RA.4-RA.5).

Thirdly, it is clear that Minn. R. Chapter 780, specifically permits disposal by the pumping

of holding tanks. With respect to Minn. R. Chap. 7080, the key provision is Sec. 7080.0170, Subp. 1A, which provides, "Final treatment and disposal of all sewage tank effluent shall be by discharge into the soil treatment system."

However, Sec. 7080.0172 specifically provides for "alternative systems" of sewage disposal. Under Subp. 3A specifically approves disposal by holding tanks, if approved by the permitting authority "with a monitoring and disposal contract signed by the owner and a licensed pumper."

Subp. E specifically requires the holding tanks be located "in an area readily accessible to the pump truck under all weather conditions," and Paragraph F requires the owner to maintain a contract "for disposal and treatment of the septage with a pumper, municipality, or firm establishment for that purpose."

Subp. G requires holding tanks to have an alarm device identifying when the holding tank is at 75 percent capacity.

As already noted above, it is undisputed that Appellants contracted with a licensed pumper who was regularly pumping the system and that the holding tanks were equipped with an alarm system (Respondent's Appendix at RA.2, RA.4-RA.5). Furthermore, in reaching the stipulated injunction filed on July 16, 2004, the county expressly agreed that Appellants could use holding tanks. The injunction provided in pertinent part:

"2. The county agrees to allow the use of holding tanks, provided they are properly certified by a licensed designer as required by the 7080 rules.

3. In accordance with the 7080 rules, Defendants must submit an appropriate design for the county's consideration. In the even Defendants are dissatisfied with the review by the county, the Defendants would be entitled to appeal any such decision or determination to the Morrison County Board of Adjustments.

4. The county will consider the septic issue separate from the adult use issue.” Appellants’ Appendix at A.1268.

Thus, to the extent that Appellants engaged in any unlawful conduct with respect to the septic system in opening for business in October of 2003, such conduct consisted not of using a condemned septic system, but rather simply not having had the design of the tanks which were being properly pumped by a licensed company, approved by the county prior to opening.¹

In his January 27, 2004, correspondence to Appellant Gordon Wheeler, Sr., County Zoning Administrator Roger Kuklok stated that, in order to comply with county requirements, Appellants were required to submit the following information:

- “1. The anticipated use of the facility, which must include all food and beverage service.
2. An estimated or measured flow based on the use described in item # 1 above.
3. If the design involves the use of any existing components, an affidavit from a licensed designer or installer confirming that these components are in compliance with 7080.”

In point of fact, Appellant repeatedly did exactly that. Appellants submitted months earlier, a design from Mike Altrichter, a licensed designer, setting forth with particularity the design, the anticipated use, and the elements required for compliance with 7080. See Reply Appendix at RA.10-RA.15.

One additional fact should be noted in addition to those set forth in the original brief, which

¹Even this concern was de minimis, since the design of the tanks in question was one with which the county had been familiar for years. Indeed, as already noted above, when the drain field system failed, the county specifically authorized shutting off the pumps from the holding tank to the drain field and pumping the tanks on a regular basis. See Respondent’s Appendix at R.7.

was that, in response to request for admissions, the county admitted that since Appellants' establishment open for business in 1982, there had not been a single incident of an arrest for prostitution, a sex crime of any nature, or a controlled substance crime of any nature on the premises.
RA.21.

ARGUMENT

I. NOTHING ABOUT THE FACT THAT THE PREMISES REMAIN SUBJECT TO AN INJUNCTION ON THE SEPTIC SYSTEM DEPRIVES APPELLANTS' APPEAL OR RIPENESS.

Before addressing the merits of Appellants' appeal, Respondent asserts that since Appellants remain subject to an injunction related to the septic system "there is nothing for the adult use ordinance to regulate, making this appeal premature." Appellants' Brief at pp. 8-9. There are several obvious answers to this argument.

Most obvious among them is the fact that Appellants appear in this Court, not as Plaintiffs below having affirmatively sought out relief from the adult use ordinance; rather, Appellants appear in this Court having been Defendants below, in an action brought by Respondent to enjoin an operation in violation of the adult use ordinance. If the fact that an injunction on the septic system exists makes a challenge to the adult use ordinance not ripe for consideration, the same factors make an injunction to enjoin operations of an establishment in violation of the adult use ordinance equally lacking in ripeness. As a result, should this Court determine that the existence of the injunction with respect to the septic system precludes the operation of any business on the premises and therefore makes any challenge to the adult use regulations premature, it should reverse the injunction prohibiting the violation of the adult use ordinance, until such time as the septic system issues are

resolved.²

Indeed, not only did Respondent fail to assert in the District Court the position it is now asserting on appeal,³ Respondent absolutely stipulated exactly to the contrary. As already noted above, part of the stipulation and order as it related to the septic system was that the county would “consider the septic issue separate from the adult use issue.” Appellants’ Appendix at A.1263. Because of that stipulation, the county went forward in the trial court seeking its injunction against the continued adult use, notwithstanding the injunction as it related to the septic system, and it did not object to Appellants’ raising their constitutional defense to that action for injunction. Respondent should not be heard to assert a contrary position now.

Moreover, even assuming that Respondent’s argument were procedurally proper, it is substantively meritless. Respondent relies primarily on the United States Supreme Court’s decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), in which the Court held that an action brought against the Planning Commission seeking damages for a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution was not ripe for consideration, when the Plaintiff had failed to exhaust state court administrative and judicial remedies that might have granted him the same relief. The court stated:

²Obviously, such a resolution would not serve judicial economy, since it would require the entire adult use issue to be tried over again for the second time after relatively minor differences in the septic system are resolved.

³Compare *Theile v. Stitch*, 425 N.W. 2d 580, 582 (Minn. 1988), holding an appellate court should not consider on appeal arguments not raised in the trial court below.

“[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.” *Id.* at 186.

Judged by this standard, the lack of merit in Respondent’s ripeness argument is readily apparent. Clearly, the County of Morrison “has reached a final decision regarding the application” of its adult entertainment zoning ordinance to Appellants’ establishment. It clearly reached that final decision when it commenced a lawsuit seeking to enjoin Appellants’ operation permanently for violating the ordinance. The interposition of a constitutional defense to an action premised on that final administration decision is plainly not barred by the *Williamson County* decision.

Neither is Respondent’s position supported by *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983). In that case, the Court relied upon its earlier decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), in which the Court held that the question of ripeness turns on “the fitness of the issues for judicial decision” and “the hardship to the parties of withholding court consideration.” 387 U.S. at 149, 87 S. Ct. at 1515. Again, judged by these standards, Appellants’ challenge is plainly ripe for consideration. Plainly, the constitutional questions raised herein, such as the validity of the evidentiary predicate for the ordinance, and whether the ordinance has the effect of restricting constitutionally protected speech, are plainly fit for judicial consideration. Absolutely no purpose will be served by either party for delaying that decision to determine the relatively inconsequential question of whether the county properly withheld

approval of the design of the septic tanks.⁴

Also directly undermining Respondent's position is *DHL Associates, Inc. v. O'Gorman*, 199 F. 3d 50 (1st Cir. 1999). In that case, the court rejected the claim that a Plaintiff's challenge to an adult entertainment zoning ordinance was not ripe for consideration, since the town had not yet commenced an enforcement action. In rejecting this claim, the court stated:

"In situations similar to the present one, prospective enforcement of an ordinance has been found sufficient to generate a live case [Citation omitted.] When a constitutional claim is at issue, a Plaintiff need not 'await the consummation of the threatened injury to obtain preventive relief.' [Citation omitted.]

In this case, it is clear that *D.H.L.* is subject to a real and immediate threat of enforcement of Tyngsdorrough's zoning ordinance and therefore its claims are ripe for our consideration. [Citations omitted.]" *Id.* at 54.

If the threat of enforcement of a zoning ordinance in the future is sufficient to present a claim that is ripe for consideration, then certainly where, as here, the county has actually commenced such a claim and secured an injunction against violating that ordinance, the claims are every bit as ripe for consideration.

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

In their original brief, Appellants pointed out that the location in which they open for business was a lawful use under the county's old adult entertainment zoning ordinance, and that the

⁴In this regard, it should be noted that the Court in *Pacific Gas and Electric* specifically rejected the notion that question of whether state waste disposal regulations were preempted by the Atomic Energy Act was not ripe for review, on the theory that even if the law were invalid, other factors not redressed would prevent the formation of new nuclear power plants. See *Pacific Gas and Electric Co.*, 461 U.S. at 202, n. 15, 103 S. Ct. at 1721, n. 15.

only zoning consideration which prevented them from opening was the interim ordinance enacted on December 11, 2001, and extended on November 26, 2002, prohibiting new adult uses anywhere in the county, which ordinance was held unconstitutional by the District Court and from which Appellants have not filed a notice of review. See Appellants' Appendix at A.1266, A.1271. As a result, Appellants were entitled to lawful non-conforming use status if their business opened prior to the effective date of a new ordinance which prohibited adult uses at that location. Compare *Hooper v. City of St. Paul*, 353 N.W. 2d 138 (Minn. 1984).

Appellants argued that, contrary to the District Court's ruling, that the mere fact that they did not secure county approval for the design of the holding tanks which they were pumping, prior to opening for business, no more precludes lawful non-conforming use status than did the failure of the land owner in *Hooper* to obtain a building permit for the construction of his non-conforming use precluded the lawfulness of that use.

Respondent advances two contrary arguments, both of which are clearly meritless.

First of all, Respondent argues that, unlike the failure to obtain a building permit, as was the case in *Hooper*, failure to obtain county approval for sewage treatment is something which goes directly to zoning and land use planning, relying upon such decisions as *City of Lake Elmo v. Metropolitan Council*, 685 N.W. 2d 1 (Minn. 2004); *City of New Brighton v. Metropolitan Council*, 306 Minn. 425, 237 N.W. 2d 620 (1975); *Hill v. Right County Board of Adjustments*, 2005 W.L. 3159775 (Minn. App. 2005); and *Mendota Heights Associates v. Friel*, 414 N.W. 2d 480 (Minn. App. 1987).

Respondent is clearly comparing apples with oranges. In all of the cases relied upon by

Respondent what was at issue was the extension of or access to an urban sewer system. That is clearly a land use planning decision, since it plainly determines the nature and density of future development. See the discussion in *City of Lake Elmo*, supra, 685 N.W. 2d at 6.

By contrast, the sewer issue in the instant case involves no such land use planning considerations. The issue here is not whether Appellants' establishment will be connected to an urban sewage system and the land use planning consequences thereof; rather, the question is whether Appellants obtained proper county approval for a private sewage system, which would have been there, regardless of the use to which the land was put. Moreover, as already noted above, the issue was whether the county had approved the design of holding tanks, the pumping of which it had already approved under the prior owner. See Respondent's Appendix at R.7.

As a result, what is at issue in this case is much more akin to the failure to obtain a building permit as in *Hooper* than it is to a violation of any zoning or land use planning law.⁵

Secondly, Respondent argues that Appellants could not acquire lawful non-conforming use status, since their use of the premises with an unapproved sewer system qualifies as a public nuisance, relying upon such cases as *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623 (D. R. I. 1990); *Union County v. Hoffman*, 512 N.W. 2d 168 (S.D. 1994); and *Moore v. Weeks*, 85 S.W. 3d 709 (Mo.

⁵As such, Appellants' situation is plainly distinguishable from the other cases relied upon by Respondent, *State v. Reinke*, 702 N.W. 2d 308 (Minn. App. 2005), and *State v. Lee*, 584 N.W. 2d 11 (Minn. App. 1998), which involved failure to obtain conditional use permits. Conditional use permits are clearly zoning requirements, which preclude the land use from being lawfully non-conforming. By contrast, a building permit, and the failure to obtain approval for the pumping of the tanks in this case are plainly totally unrelated to zoning or land use planning issues.

App. W.D. 2002), all of which held that offending sewer systems created public nuisances.⁶

However, all of those cases involved failed drain field systems, resulting in the leakage of raw sewage into ditches or into public water ways, obviously created a public health hazard. Nothing remotely approaching such conduct occurred in this case. There is absolutely no evidence in the record below that Appellants ever attempted to use the failed drain field system, or that raw sewage ever leaked anywhere. Quite to the contrary, the undisputed evidence in the record below is that, prior to opening for business, Appellant Gordon Wheeler, Sr., consulted two experts in the sewage disposal business, was advised that pumping the holding tanks was an acceptable solution to the sewage problem, and arranged to have the tanks pumped. The only law violation, if any there were at all, was his failure to obtain prior county approval as to the design of the tanks, in a situation in which county officials were in fact fully aware of the design and had already approved the pumping of the tanks as a temporary solution when the old drain field system failed. See Respondent's Appendix at R.7, Reply Appendix at RA.2, RA.4-RA.5, RA.7.

Indeed, in *Friends of the Sakonnet v. Dutra*, supra, 738 F. Supp. 623, 637, 638 (D.R.I. 1990), part of the injunction against the nuisance in that case was to order the Defendants to do exactly the

⁶Respondent also misleadingly cites to *Wolf v. Village of Brice, Ohio*, 37 F. Supp. 2d 1021 (S.D. Ohio 1999), and *Booghier v. Wolfe*, 587 N.W. 2d 375 (Ohio App. 3rd Dist. 1990), determining that adult use businesses were nuisances not entitled to non-conforming use status. However, what happened in both of these cases is that the uses were closed as independent public nuisances, under red light abatement statutes, and during the period of their closure, new zoning ordinances were adopted. Since the businesses were not lawfully open at the time the new ordinances were adopted, no grandfather status was obtained. By contrast, Appellants' business was fully open and operational at the time the new ordinance was adopted. The only violation of law was, at worst, a technical violation of the sewer law unrelated to land use or zoning, at the time. These cases are totally inapplicable.

what Appellants voluntarily did in the instant case. The court ordered:

“The Defendant shall pump or otherwise remove sewage as needed from the holding tanks installed in March 1990 on the property of Q.L.C.R.I., Inc., in the Surewood Village Development in the town of Portsmouth, Rhode Island. The sewage thus pumped is to be transported to appropriate disposal facilities. Such pumping must prevent discharge of the pollutants into the Sakonnet River or the backing up of sewage in the sewer lines leading to the holding tanks.”

Consequently, none of the cases cited by Respondent remotely support the proposition that Appellants’ responsible conduct in consulting sewer experts, and contracting for the pumping of holding tanks, even without prior county approval, remotely constituted a public nuisance which would otherwise deprive them of lawful non-conforming use status.

III. THE ADULT USE ORDINANCE VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. THE ORDINANCE WAS ENACTED WITH AN INADEQUATE FACTUAL PREDICATE.

In its attempt to defend that the evidentiary basis for the enactment of the ordinance, Respondent’s brief is more interesting for what it fails to say than it is for what it says. Nowhere in Respondent’s brief does Respondent dispute the essential arguments with respect to the adequacy of the evidentiary support for the present ordinance including the following:

Respondent does not dispute that, unlike *Renton* and its progeny,⁷ the present case does not

⁷At p. 23, n. 4 of its brief, Respondent castigates the undersigned for failing to cite *City of Elko v. Abed*, 677 N.W. 2d 455 (Minn. App. 2004), in its argument with respect to the adequacy of the factual predicate, notwithstanding the fact that the undersigned was counsel for Appellant in that case. The reason that case was not cited with respect to the adequacy of the factual predicate is that it is irrelevant thereto. Like *Renton*, *City of Elko* involved the initial enactment of an adult entertainment regulation in a situation in which there were no pre-existing adult uses. It did not involve, as does the instant case, the amendment of a long-existing ordinance in the presence of a long pre-existing adult use.

involve the initial adoption of an adult entertainment ordinance in a municipality in which there were no pre-existing adult uses. By contrast, the instant case involves a situation in which at least one adult use existed since 1982, the County Board adopted a zoning ordinance regulating the location of adult uses in 1995, and what is at issue is the amendment of that ordinance to alter the distance requirements some eight years later in 2003.

Secondly, Respondent does not dispute that but for those amendments, increasing the separation distance from liquor establishments and creating, for the first time, a separation requirement from individual dwelling units, as opposed to residentially zoned property. Appellants' location would be an absolutely lawful use.

Thirdly, Respondent does not dispute the fact that absolutely none of the evidence considered by the County Board of Commissioners, from whatever source derived, even remotely addresses the need for or efficacy of those changes in the separation requirements. Nor does Respondent dispute that the only factual circumstance concerning adult businesses that changed between 1995 and 2003 was the fact that in November of 2001, Appellant Gordon Wheeler, Sr., wrote a letter to the County Board of Commissioners stating that he intended to open up a second adult use within Morrison County at a location permitted under the existing regulations, that the new establishment would be called "Little Falls Smut & Porno," and that the new location by April of 2002. See Appellants' Appendix at A.38. It is further undisputed that, within two weeks of the receipt of that letter, the county enacted the ordinance held unconstitutional in the District Court, prohibiting adult uses anywhere in the county pending a so-called "study."

Conspicuously absent from Respondent's brief is any explanation as to how this combination

of events permits any conclusion that the 2003 amendments to the distance requirements of the ordinance had their basis in a desire to prevent adverse secondary effects, rather than in a content-based attempt to prevent Appellants from fulfilling their stated intention to locate an adult use elsewhere in the county.

The only case cited by Respondent which even remotely addresses the issues raised in the appeal in the instant case is *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F. 3d 471 (5th Cir. 2002).⁸ That case provides little support for the position advanced by Respondent in this case. *Baby Dolls* involved a 1986 ordinance restricting the location of sexually oriented businesses, and defining “specified sexual activities” and “specified anatomical areas” to require actual nudity. In order to avoid having to relocate, many of the establishments changed the dancers’ attire to include bikini bottoms and flesh-colored pasties over the areolae of the female breast, so as not to comply with the definition of “specified sexual activities” or “specified anatomical areas.” In 1993, the city responded to this conduct by enacting amendments to the ordinance which would effectively bring the Plaintiffs within the purview of the zoning regulations, notwithstanding their use of bikini bottoms and flesh-colored pasties. In the first series of challenges to these ordinances, both the District Court of the Northern District of Texas and the Fifth Circuit held the amendments to violate the First Amendment. See *MD II Entm’t Inc. v. City of Dallas*, 535 F. Supp. 1394 (N.D. Tex. 1995), aff’d, 85 F. 3d 624 (5th Cir. 1996). In invalidating these amendments, the District Court held that

⁸It should be noted that *Baby Dolls* predated, by a few days, the decision of the United States Supreme Court in *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 122 S. Ct. 728 (2002), and thus the Fifth Circuit did not have the benefit of the standards established in that case when *Baby Dolls* was decided.

“no evidence indicat[ed] that the drafters of the 1993 amendments relied upon any studies indicating [the amendments’] necessity or effectiveness,” and that “no evidence indicates that the requirement that dancers wear bikini tops instead of pasties will reduce deleterious secondary effects.” 935 F. Supp. at 1397, 1398.

In response to these decisions, the city considered numerous studies of adverse secondary effects, including 1983, 1986, 1991 and 1997 studies, by the City of Houston, and 1994 and 1997 studies conducted in Dallas by the Malin Group. While the Dallas studies concluded that areas containing sexually-oriented businesses had a higher sex-related crime rate than the city average and five to ten times higher than in the control areas, none of the studies addressed whether a change in attire from pasties to bikini tops would impact these deleterious secondary effects. 295 F. 3d at 476.

Notwithstanding this failure, Fifth Circuit upheld the enactment of essentially the identical ordinances which it had invalidated in *MD II*. The court stated:

“[S]ex crime arrests were three to five times more frequent in the study area. While the Malin Study is careful not to attribute this disparity entirely to SOBs, it did find a correlation between SOBs - specifically, their hours of operation and the type of people which SOBs attract - and higher crime rates.

These findings are ‘reasonably believed to be relevant to the problem that [C]ity addresses.’ [Citation omitted.] The city relied upon specific evidence showing, *inter alia*, higher crime rates in the vicinity of SOBs. The City’s attempt to deal with that reality had been continually frustrated in the past, most recently by ‘exploitation of the loop hole in the city code that permitted such businesses to avoid the location restrictions by obtaining dance hall licensed pursuant to Chapter 14, which was not originally designed to regulate such businesses.’ [Citation omitted.]

[T]he Ordinance is a comprehensive amendment to Chapter 14 and 41A to carry out the City’s original intent in combating secondary effects associated with [SOBs]’ [Citation omitted.] ‘[T]he evidence does not connect the wearing of bikini tops to the reduction of secondary effects,’ [Citation omitted.]; but, in the light of the data considered by the City and other steps taken by it prior to enacting the ordinance, it

was not necessary to make that connection. Instead, it was reasonable for the city to conclude that establishments featuring performers in attire more revealing than bikini tops pose the same types of problems associated with SOBs.” *Id.* at 481-482.

This case is plainly distinguishable on several grounds:

First of all, given the fact that the city made absolutely no attempt to study the substantive amendments made, namely the increase in distance from alcohol-serving establishments and the requirement of separation from individual dwelling units, this case is far more like *MD II*, than it is *Baby Dolls*.

Secondly, unlike *Baby Dolls*, the amendments made here were not made to close a definitional “loophole,” which frustrated the original intent of the ordinance.⁹ By contrast, the amendment in the instant case involves major substantive changes to the ordinance, in markedly increasing one separation requirement and creating an entirely new separation requirement. Clearly, this requires significantly more evidence than the “loophole closing” involved in *Baby Dolls*.

Finally, it should be noted that at least one court, in a far more persuasive opinion than *Baby Dolls*, has reached exactly the opposite conclusion as it relates to regulation of bikini-clad dancers. See *R.V.S., L.L.C. v. City of Rockford*, 361 F. 3d 402 (7th Cir. 2004).

B. APPELLANTS HAVE SUCCEEDED IN CASTING DIRECT DOUBT UPON THE VALIDITY OF THE COUNTY’S EVIDENCE IN ENACTING THE ORDINANCE.

In its brief, Respondent concedes that, under *Alameda Books*, 535 U.S. 425, 122 S. Ct. 1728, 1736 (2002), even where a municipality has made a sufficient factual showing otherwise to justify

⁹Indeed it is clear that one of the more persuasive elements in *Baby Dolls*, was a pre-amendment study within the City of Dallas itself in 1997, showing that SOBs continued to have adverse secondary effects. Nothing remotely resembling such evidence is present here.

an 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 it succeeds in doing either, the burden of proof shifts back to the municipality to supplement the record with evidence supporting the ordinance.

In its original brief, Appellants argued that they clearly met the burden-shifting standard in the trial court below, both by challenging the legitimacy of the evidence relied upon the county and by presenting significant contrary evidence. Respondent’s arguments to the contrary are plainly unpersuasive.

First of all, Respondent argues that because the record shows a significant number of police calls to Appellants’ establishment, including calls relating to prostitution and the use of an under age performer, secondary effects have been demonstrated. Apart from the obviously misleading part of this argument,¹⁰ the argument ignores the fundamental question as set forth in the Bryant, Paul & Linz paper, to-wit: “Compared to What?” See Appellants’ Appendix at A.787. Obviously, any commercial use of real property will generate more crime than will vacant land. Moreover, any alcohol-serving use will generate more crime than a use that does not serve alcohol. The question is therefore not whether Appellants’ use generated any law enforcement activity at all; obviously it

¹⁰As noted in the original brief, law enforcement officers themselves found the reports of prostitution and an under age performer to be totally unfounded. See Appellants’ Appendix at A.1018-A.1019. Also note the fact that the county itself, in response to request for admissions, conceded that, directly contrary to its supposed findings” in enacting he ordinance, its experience with the one adult entertainment use in the county was that, over a period of 20 years, there had never been a single arrest on the premises for prostitution, any sex crime, or any controlled substance offense. See Reply Appendix at RA.21.

did. Rather, the pertinent question is does Appellants' use, which features adult entertainment, generates more law enforcement problems than do comparable uses which do not feature such entertainment. As noted in the original brief, the undisputed evidence at trial was that, as far as a demand for law enforcement services was concerned, not only did Appellants' use not generate more calls for police services than comparable establishments without such entertainment, in some areas, it generates significantly fewer. Respondent's argument plainly ignores the "Compared to What?" factor.

Secondly, Respondent characterizes Appellants' argument as a mere "clash of experts." Moreover, Respondent tendered no evidence whatsoever to refute the methodological challenges made by Bryant, Paul & Linz to the studies offered by the county. Nor did it dispute the fact that methodologically sound studies elsewhere have reached an absolutely contrary conclusion, nor did it dispute the fact that no peer-reviewed methodologically sound study anywhere in the United States has supported the county's conclusion.

All of these facts plainly indicate that direct doubt has been cast and that the burden of proof should have been shifted.

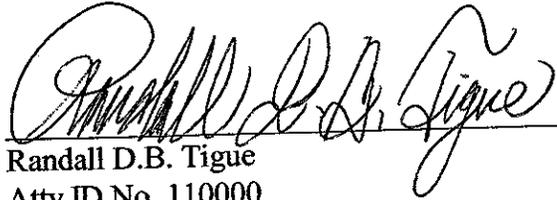
CONCLUSION

For all of the foregoing reasons, as well as those advanced in Appellants' original brief, the

relief sought in Appellants' original brief should be, in all respects, granted.

Respectfully submitted

RANDALL TIGUE LAW OFFICE, P.A.

A handwritten signature in black ink, appearing to read "Randall D.B. Tigue", is written over a horizontal line.

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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).