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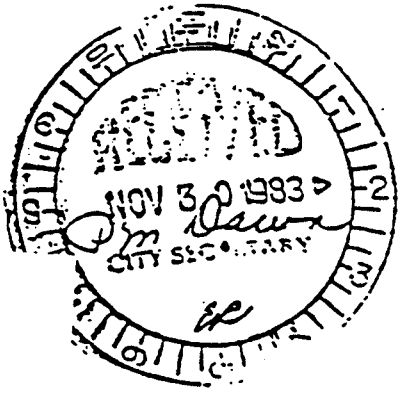
HOUSTON CITY COUNCIL

COMMITTEE ON THE PROPOSED REGULATION OF SEXUALLY ORIENTED BUSINESSES

LEGISLATIVE REPORT ON AN ORDINANCE AMENDING SECTION 28-73 OF THE CODE OF ORDINANCES OF THE CITY OF HOUSTON, TEXAS; PROVIDING FOR THE REGULATION OF SEXUALLY ORIENTED COMMERCIAL ENTERPRISES, ADULT BOOKSTORES, ADULT MOVIE THEATRES AND MASSAGE ESTABLISHMENTS; AND MAKING VARIOUS PROVISIONS AND FINDINGS RELATING TO THE SUBJECT



COMMITTEE ON THE PROPOSED REGULATION OF SEXUALLY ORIENTED BUSINESSES

LEGISLATIVE REPORT

INTRODUCTION

This Legislative Report has been prepared by the Committee on the Proposed Regulation of Sexually Oriented Businesses as a summary of the Committee's work in preparing the draft ordinance which has been submitted to the Houston City Council for consideration. This Report briefly sketches some of the most significant aspects of the history of the Committee, summarizes prior efforts at the regulation of sexually oriented businesses both in Houston and elsewhere, recapitulates the principal themes heard in the public testimony taken by the Committee, and offers a brief section-by-section analysis of the proposed ordinance.

This Report has not been drafted as a legal treatise on the regulation of sexually oriented businesses. Certainly considerable care was taken by the Committee to consult with the Legal Department at every step of the legislative process. Representatives of the Legal Department actually drafted the language of the ordinance pursuant to the directions of, and in consultation with, the Committee. However, the various legal issues raised during the Committee's deliberations are dealt with here from the layman's, not the lawyer's perspective, although it is the lawyer's perspective that undergirds the ordinance. The purpose of this Report is to explain to members of Council, and to the general public, what the Committee has recommended, and why, in the plainest possible language. For the same reason, this Report is not filled with footnotes, although all of the information is drawn from the materials and transcripts compiled by the Committee, and available as a matter of public record.

ORIGINS AND ESTABLISHMENT OF THE COMMITTEE.

On September 27, 1982, Mayor Kathryn J. Whitmire of the City of Houston announced the formation of a special committee of Council Members for the purpose of determining the need for an appropriate means of regulating sexually oriented businesses in Houston. This Council Committee on the Proposed Regulation of Sexually Oriented Businesses was composed of Council Members Dale M. Gorczynski, who represents District H, Council Member George Greanias, who represents District C, and Council Member Christi Hartung, who represents District G. Mayor Whitmire appointed Council Member Greanias to serve as chair of the Committee.

The Committee was formed by the Mayor in response to growing community concerns about the proliferation of sexually oriente

businesses in Houston. This concern had been summarized in a memorandum from Council Member Greanias to the Mayor on September 20, 1982:

> "Given its healthy economic climate and a legal environment that is, despite our identification with the Bible Belt, laissez faire on most sexual matters, Houston has long been an attractive environment for sexually oriented businesses. . . .
>
> "Since Houston is not zoned, these sexually oriented businesses are located anywhere and everywhere, oftentimes near residential areas, or near schools, churches, or public parks. Their locations are frequently marked by garish or enticing signage. The effect on the ability of neighborhoods and commercial areas to retain their identity after the opening of such businesses in the area has been extremely adverse. Moreover, the establishment of one such business in an area has often led to the opening of another, in a rather perverse example of synergy. Finally, there is a growing body of evidence to suggest that there are substantial links between at least some of these businesses and various forms of organized crime. . . ."

The memorandum from Council Member Greanias made clear that in his mind at least the issue was not one of morality, or of passing judgment on the lifestyle of any individual, but of reasonable land use controls versus the rights and privileges of the individual:

> "The importance of the city's ability to deal meaningfully with the issue of sexually oriented businesses should not be underestimated. To some it may seem a parochial question, relevant only to those who live in areas where sexually oriented businesses have located; to others it may appear just one more item on the agenda of those who are convinced that the city is in the terminal throes of sexual degradation on every front.
>
> "But the problem imposed by these sexually oriented businesses is much broader in its implications, and runs directly to the heart of our present policies on land use. Does our decision not to impose zoning carry with it the requirement that we not seek to moderate the influence of sexually oriented businesses on our neighborhoods, whatever the consequences for the stability and quality of those neighborhoods?

> Does our decision not to impose zoning tie our hands in dealing with the collateral criminal activity that apparently attaches to some of these operations?"

At the same time, the initial memorandum from Council Member Greanias to Mayor Whitmire underscored a problem for which the Committee was to show great concern during the course of its deliberations:

> "There is also another, equally important question: Does our desire to protect the freedom and privacy of the individual, and to permit that individual to pursue his or her life without inhibition, mean that we are proscribed from taking any actions that while not significantly infringing on those rights nevertheless sets a standard for the community as a whole?"

It was these questions that formed the heart of the Committee's inquiry during its one year of existence. The Committee believes that these questions have been successfully addressed in the proposed ordinance that has been presented to Council for its consideration.

OPERATION OF THE COMMITTEE

Methodology. The Committee conducted its work in several phases. The first phase, which was carried out in November and December of 1982, involved a series of public hearings in several parts of the city, as well as at City Hall. There were three regional hearings and one hearing in City Council Chambers. The first hearing was held at Spring Woods Senior High School on November 8, 1982. The second hearing was held at Berean Baptist Church on November 22, 1982. The third hearing was held at Bering Methodist Church on December 5, 1982. The fourth and final session in this first series of hearings was held in City Council Chambers on December 15, 1982. (During the course of these hearings, several comments were made about choosing churches as the sites for some of the hearings. The Committee chose these locations not because of their religious significance, but because they had a history of being used for community affairs, their locations were well known to the general public, and access to each such site was convenient from various places around the city.)

After the first set of hearings had been completed, the Committee went into executive sessions for a period of approximately three months, from late December of 1982 until the early part of April 1983. During that time, the Committee met with representatives of the Legal Department to review the testimony

gathered in the initial hearings, as well as to discuss the results of staff research on the subject. Among those participating in this work were Messrs. John Whittington, Robert Collins, Charles Williams, and Adam Silverman from the Legal Department of the City of Houston, Kent Speer, John Elsenhans and Michael McEachern from the office of Council Member George Greanias, Fred Harper from the office of Council Member Christin Hartung, and Nancy Brame from the office of Council Member Dale Gorczynski. Francis J. Coleman, Jr., City Attorney for the City of Houston, also participated in these conversations from time to time.

On May 6, 1983, the Committee published the results of its efforts: a draft of a proposed ordinance regulating sexually oriented businesses in the City of Houston. At the time that the Committee published its draft ordinance, further hearings were announced at which the Committee would solicit testimony on the ordinance as proposed. These hearings -- originally planned to be three in number -- were held on Wednesday, May 15, 1983, Wednesday, May 22, 1983, and Thursday, May 24, 1983, in City Council Chambers. A fourth hearing, not originally planned, was held on Thursday, June 16, 1983.

Based upon these further public hearings, the Committee then went back into executive session with its legal counsel and other staff to make further refinements in the ordinance. The changes made pursuant to the public comments are noted in the commentary on the specific ordinance provisions themselves.

An additional word is perhaps warranted on the decision of the Committee generally not to meet with individuals and groups apart from the public sessions. It was determined early on that an ordinance such as that being considered by the Committee, with its potential for controversy, should not be subject to private bargaining between individuals or businesses and members of the Committee behind closed doors. It was felt by all members of the Committee that it would be far more preferable to gather all testimony and evidence in a public forum, and then reflectively to consider the information without conferral with private parties. At the same time, the Committee felt that its executive deliberations were justified in encouraging the free flow of discussion of ideas and sensitive concepts, knowing that the entire work product would be subject to the public comment, review and debate inherent in the Committee's procedures and the processes of Council.

The Committee also felt it imperative not to become subject to demands for quick action at the price of working with deliberate speed towards its goals. It is for this reason that the original date scheduled for submission to Council of a draft

version of an ordinance was moved from January 25 to July 10 (This date was pushed back several more times, and for simila reasons, before the ordinance was finally submitted to Council. It was for this same reason that additional hearings wer scheduled during the second phase of the public sessions Likewise, the Committee decided to request that the propose ordinance be considered during the course of three readings, a contrasted with the normal procedure of suspending th three-reading practice and passing ordinances -- even thos oftentimes having major effects on the city -- on an emergenc basis in just one reading. Throughout its work, the goal of th Committee was to assure ample ventilation of all points of view the thoroughgoing examination of all of the very difficul questions involved, and as complete an understanding as possibl by all parties of the issues confronting the Committee and th solutions arrived at.

Analysis of Testimony. The hearings held by the Committe on the Proposed Regulation of Sexually Oriented Businesses wer among the most extensive ever held by any committee of th Houston City Council. The hearings were open to all persons wh wished to testify, and the Committee made no attempt to limit th type of remarks made to the Committee or to censor those remark in any way. (At this point it should be noted that the Committe also accepted written comments from anyone, regardless of whethe they testified in person. Such comments became part of th Committee's public record as a matter of course.) However, clear distinction should be drawn between the Committee's will ingness to permit full expression of diverse views -- a willing ness that is reflected in the transcript of the hearings -- an any wholesale incorporation of those remarks by the Committe into the ordinance proposed to Council. Indeed, a chief functio of the Committee was to evaluate the testimony, and to set asid those comments seen as not germane to the issues at hand or no dealing with problems, addressing instead those issues within th rightful purview of the city.

Thus, although there were a substantial number of witnesse expressing a fundamentalist opposition to what those witnesse deemed obscenity and pornography, the Committee chose -- and i fact made clear during the hearings -- to focus its efforts o land use issues rather than questions of pornography and ob scenity. Similarly, a number of witnesses made comments advers to the operation of gay bars. Again it was pointed out to thos witnesses that such establishments were not necessarily withi the working definition of a "sexually oriented business" (definition that was modified over time as the ordinance wa further refined) and therefore not a subject in themselves to b dealt with in the proposed ordinance. Finally, a number c witnesses made statements and proposals that would effectivel

ban all sexually oriented businesses, as that phrase is broadly defined. The Committee made it clear, both during the hearings and afterwards, that it was not the intention of the Committee to propose any ordinance that would be subject to a successful court challenge because it either directly or indirectly (or for that matter inadvertently) eliminated the opportunities for such businesses to exist in the City of Houston.

With these comments by way of preface, it is useful to review briefly the principal points made during the hearings and later relied upon by the Committee in the drafting of the proposed ordinance. Further comments on the use of the testimony in the development of the various ordinance provisions can be found in the section by section analysis of the ordinance that concludes this Report.

The first point made by many witnesses that seemed of merit to the Committee was that sexually oriented businesses, while a nuisance and not necessarily representative of the desires or activities of a majority of Houstonians, nonetheless have a right to exist. The rights of individuals were a theme in the testimony of a number of the witnesses. The willingness of Houstonians to "live and let live" was reinforced in the findings of a Houston attitudes survey conducted by Dr. Steven Klineberg, of Rice University, along with others. Briefly put, that study concluded that Houstonians were loath to support restrictions on personal behavior. Among those witnesses whose testimony was seen as most helpful by the Committee, the majority of such witnesses were generally solicitous of individual and minority rights, not anxious to impose any community standard of conduct on unwilling individuals, and concerned with merely striking an appropriate balance between the needs of the community at large and the rights of individuals to do as they please.

The second point made by many of the witnesses to whose testimony the Committee repeatedly referred during its deliberations was that while these businesses might have the right to exist, protection of their rights could be consistent with effective regulatory restrictions that would minimize the adverse consequences of those businesses to adjacent areas and activities. These witnesses -- many of them individuals who had direct personal experience of these businesses in their neighborhoods, or representatives of civic organizations that had had many dealings with the problems created by such businesses -- stated that while the businesses might have a right to exist, steps could be taken that, while not unduly restrictive of their operations, would offer some assistance to those neighbors and businesses surrounding the sexually oriented business. For instance, one gentleman living on West Alabama next to an adult bookstore, while agreeing that such businesses would probably

continue to exist and that he was resigned to that fact, also cited a series of untoward incidents occurring on or near his property that were directly related to that adult bookstore. His position seemed to be that while Council might not be able to rid him of the business, it might nonetheless take steps to ameliorate the worst effects of that enterprise.

The third point made by many of the witnesses who proved most helpful to the Committee in providing guidance for the drafting of the ordinance was that among the most important negative effects of these businesses were the adverse consequences on neighborhood protection and enhancement, and the consequent adverse effect on property values. A number of neighborhood representatives and civic club participants recounted numerous instances of problems that had been created by these businesses for neighborhoods which were trying to preserve a neighborhood fabric. Several real estate brokers with substantial experience in areas affected by sexually oriented businesses offered documented instances in which property values had been affected by the establishment of sexually oriented businesses, as well as information of a more general nature as to the effect of these businesses on the course of neighborhood development. In expert testimony by Dr. Andrew Rudnick of the Rice Center, given before the full Council, this "cause and effect" syndrome was again attested to. It seemed to be a consensus among both the lay and expert witnesses that in neighborhood areas and areas of quality commercial development, the establishment of sexually oriented businesses had a detrimental effect on property values, at least in part because they were perceived adversely to affect the quality of life -- including among other things such issues as suitability for family activities and stability of the neighborhood environment -- of the area.

The fourth point made by the witnesses whose testimony was most commonly relied upon by the Committee was that among the most significant problems created by the businesses were the ancillary activities caused by the clustering of businesses, as in the case of street prostitution in the lower Westheimer area, and the problem of exterior appearance. Even where businesses could not be forced to relocate because of apparent preemptions in state law, most witnesses stated that reasonable controls on signage and exterior appearance were required. The intrusiveness of the signage and exterior features into the consciousness of the community was repeatedly cited. It was also noted that although adults might train themselves to ignore such signage, it would be hard if not impossible to demand the same self-discipline from children. That children would be likely attracted to such advertising (which in at least one case even featured popular cartoon characters) was perceived as a significant problem in the expert testimony of one psychiatrist,

who cited information discussing the relations between exposure to such signage and psychological problems those children might subsequently experience.

The fifth point developed in the testimony and regarded as significant by the Committee was that sexually oriented businesses are likely contributory factors to criminal activities that are encouraged as ancillary to these enterprises. This link between these businesses and related problems of criminal activity was affirmed by the Chief of Police and other representatives of the Police Department, as well as by non-expert witnesses with long personal experience of living in areas where sexually oriented businesses are located. To the Committee, this issue of criminal activity occurring in the area of sexually oriented businesses was not a central problem, but rather a concurrent question of somewhat lesser significance than the land use issues. At the same time, however, the Committee felt that the testimony justified the conclusion that the criminal activity that does tend to occur in the vicinity of sexually oriented businesses, particularly where those businesses have clustered, has an adverse effect on property values. This adverse effect makes such activities a secondary concern, even though the principal focus of the Committee and the ordinance is on land use matters.

The sixth point brought out in the testimony -- particularly the testimony of city employees engaged in enforcing current statutes regulating such businesses, as well as private individuals who have sought legal recourse against such businesses -- was the difficulty of achieving reasonable enforcement of the law. Part of this enforcement problem centers on the relatively limited arsenal of remedies available to home-rule cities under Texas law in such circumstances. Some of the problem has been alleviated by cooperative efforts between cities and counties, as is the case in Houston, where Harris County cooperates with the city by bringing suits whenever requested to accompany a city suit, thus bringing into play the padlock power of the county -- a power the city lacks. However, another part of the problem is that existing laws and ordinances are structured in such a way as to make it difficult to sustain an action against even an offender clearly in violation of the law. For example, if an injunction for abatement of a nuisance is brought against the owner of a particular sexually oriented business -- such as an adult modeling studio -- it is quite possible that by the time the suit is actually brought to trial the ownership of the business has been transferred. The case is then thrown into limbo because the appropriate party or parties is (or are) no longer "joined" in the suit. The lawsuit stalls while the business continues in operation.

Another point which the Committee thought relevant to it deliberations regarded those businesses which are thought t enjoy special protection under the First Amendment. This issu was perhaps one of the most difficult that the Committee faced Despite whatever personal preference the members of the Committe might have had, the clear mandate of the Committee was to prepar an ordinance that was as legally defensible as possible. Afte considerable deliberation, the Committee accepted the contention of those lawyers who argued that to lump First Amendment and al other businesses into one indistinguishable category for purpose of regulation would probably be unwise and cause the ordinance t be submitted to substantial challenges. This is not to say tha the arguments of the lawyers are unquestionably correct. Nor i it to say that following the recommendations of these lawyer represents what the Committee believes to be wise public policy But what the Committee did was to remember continuously it principal charge, and to set aside its personal preferences an opinions in favor of proposing an ordinance with a maximu likelihood of being upheld in court.

While a variety of other issues and problems were raised i testimony taken before the Committee, the foregoing points seeme to members of the Committee to be the most significant and worth of attention. The manner in which this testimony was translate into proposals for legislative action will become clear in th Section by Section Analysis that follows below.

PRIOR HOUSTON ATTEMPTS TO REGULATE

Early Efforts. The proposed ordinance does not represen the first attempt by the City of Houston to regulate sexuall oriented businesses. As stated in HOUSTON: A HISTORY, b David G. McComb:

> "In 1840 a city ordinance provided a fine of not les than $50 and a jail term of ten to thirty days for any woma committing lewd actions or exhibiting herself in a publi place in a style 'not usual for respectable females. Brothels within the city limits could not be located close than two squares to a family residence. A supplementar ordinance in 1841 required a $20 bond for a 'female of il fame' found in a public place after 8:00 p.m. in order t ensure good behavior. Although perhaps not a prostitute one of the most notorious female characters from the perio was Pamela Mann, an expert at firearms, knives, horseba riding, and profanity. She appeared in court at variou times charged with counterfeiting, forgery, fornicatior larceny, and assault. According to William Ransom Hogar she ran the Mansion House Hotel in such fashion tha 'Mrs. Mann and her 'girls' achieved a satisfying succes

providing Houston with female companionship of a 'robust and none too virtuous nature.'"

Universal Amusement. A more recent and perhaps more relevant attempt to regulate sexually oriented businesses in Houston occurred in 1977, with the passage of Ordinances 28-65 and 36-14. Ordinance 28-65 amended a prior ordinance to make it "unlawful for any person to operate or cause to be operated an adult commercial establishment within two thousand (2000) feet of a Church, school or other educational or charitable institution." Under this ordinance, an "adult commercial establishment" was defined as "any business or enterprise having as a substantial or significant portion of its stock in trade or activity the sale, distribution, lending, rental, exhibition, or other viewing of material depicting sexual conduct or specified anatomical areas for consideration." Ordinance 36-14 made it unlawful to operate within two thousand (2,000) feet of a church, school or other educational or charitable institution any motion picture theatre "which exhibits a film that explicitly depicts ... contact between any part of the genitals of one person and the genitals, mouth or anus of another person; ... contact between a person's mouth, anus, or genitals and the mouth, anus, or genitals of an animal or fowl; ... manipulation of a person's genitals; ... defecation; or ... urination." Both ordinances required all businesses coming under the ambit of the law to bring themselves into compliance within thirty (30) days of passage of the ordinances. (A third ordinance, not as significant, dealt with a redefinition of "public amusement park" and "places of public entertainment and amusement.")

The 1977 ordinances were successfully challenged in a 1977 case styled Universal Amusement Co., v. Hofheinz. In an opinion handed down October 5, 1977, Judge Ross N. Sterling granted the request of plaintiffs for declaratory and injunctive relief. At the conclusion of the trial, the Court orally declared the ordinances unconstitutional on their face, permanently enjoined their enforcement against plaintiffs, and severed plaintiffs' claims for punitive damages and attorneys' fees.

For purposes of considering the ordinance now being proposed by the Committee, it is instructive to consider the grounds on which the 1977 ordinances were struck down as unconstitutional by the Court. Although at least one of the attorneys appearing before the Committee during its second session of hearings alleged that no ordinance could be fashioned that would meet the objections made by the Court, the Committee is of the opinion that it is indeed possible to draft such an ordinance.

In summary, Judge Sterling held the ordinances unconstitutional on grounds of vagueness, stating that this alone would be

sufficient grounds to void the ordinance on grounds of unconstitutionality. However, he went on to say that in his opinion there were other constitutional defects, namely that the ordinances were violative of the First and Fourteenth Amendments to the Constitution by abridging the freedoms of speech and press guaranteed therein, that they denied the plaintiffs the equal protection of the laws as guaranteed by the Fourteenth Amendment, and that they denied plaintiffs due process of law as guaranteed by the Fifth and Fourteenth Amendments.

Vagueness. The Court found that the challenged ordinances violated basic tenets of constitutional law. It cited the general rule that whenever a penal statute is involved -- as was the case here, since a fine of up to $200 was to be imposed for violations of ordinance 28-65 -- the terms of that statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties" and that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

However, the Court was quick to point out that even more than the usual rule requiring exactness in the drafting of a penal statute was involved in the case at hand. The ordinances in question were not only penal, but also restricted the exercise of First Amendment rights. While the Court did not hold that no such restrictions on First Amendment rights could ever be successfully enacted, it did state emphatically that in such instances even stricter standards than those required of ordinary penal statutes would be called for.

The plaintiffs in Universal Amusement claimed that the ordinances under examination failed both the general test of strictness required of any penal statute, not to mention the stricter standard applied when a law restricting First Amendment rights are in question. With this argument the Court agreed. Especially troublesome was the lack of any definitions whatsoever for such words as "Church," "school," or "other educational or charitable institution." Similarly, the works "substantial" and "significant" as used to modify "portion of its stock in trade or activity" was found by the Court to be "hopelessly vague." As the Court pointed out:

> "Any theater which ever exhibited 'X or R' movies might be covered from time to time depending on the meaning of the words 'substantial' and 'significant.'"

The Court noted that one of the asserted purposes of the ordinances was the protection of children, but held that this

to live in a particular section of town so that a watchful eye could be kept on them. To paraphrase The Mikado, the legislative remedy should fit the problem. Another possible way of looking at it is that the cure should not be worse than the disease.

In Universal Amusement the Court found that there was not just overbreadth, but "substantial overbreadth." The Court seemed to be of the opinion that the attempt to regulate businesses which dealt in material depicting "sexual conduct" or "specified anatomical areas" failed the overbreadth test because it raised the distinct possibility that the ordinances would "deter those who normally deal with such materials from exercising their right to sell or exhibit them because (1) what they sell or exhibit might fall within the scope of the ordinance, and (2) their dealings with such material might result in the branding of their businesses as "adult commercial establishments." In the opinion of the Court, the ordinances being challenged had the potential to effectively prohibit all theatres from showing "R" rated movies and medical bookstores from selling books on anatomy or physiology which depicted nudity or partial nudity. Coupled with the fact that the ordinances as written were not in the opinion of the Court subject to narrowing by state law decisions, the ordinances were found to be consequently overbroad and therefore constitutionally infirm.

Protected Speech. The ordinances that were the subject of the lawsuit in Universal Amusement attempted to regulate to some extent activities normally considered as under the ambit of the First Amendment. Therefore one of the issues was whether the ordinances abridged freedom of speech in any unwarranted fashion. The Court noted that there could be regulation of such speech. But, the Court stated, such regulation must be reasonable. In the case of the ordinances at issue, the Court held that the administrative officials charged with enforcement of the ordinances were left free to exercise what the Court characterized as "virtually unfettered discretion." For instance, under the ordinances it was left to a policeman to determine what was a "church" or "school." Such breadth of discretion was found by the Court to be unacceptable in ordinances which proposed to regulate what were considered First Amendment activities.

This concern for protected speech was heightened by the fact that as a practical matter the ordinances did not merely limit the time and place and manner where the activities at issue could be engaged in. Instead, in application the ordinances banned all such activities from the City of Houston, at least as far as the Court could see under its review of the facts. Under such circumstances, the Court stated, it was impossible to say that these particular ordinances represented a reasonable restraint on the First Amendment activities at issue.

Equal Protection. The Court in Universal Amusement also stated that while a city can treat different classes of people in different ways, the difference in treatment must be based on some rationale directly connected with the appropriate exercise of municipal power for accepted purposes. The question in the particular case was whether the city, in treating the businesses at issue differently than other businesses, was doing so for reasons that were grounded in acceptable public policy consistently applied. The Court also noted that of some importance would be whether the state had already enacted legislation to deal with the public policy issues stated as the grounds for the ordinances.

In Universal Amusement, the Court found that the purported purpose of protecting children and permitting them to be raised in a suitable atmosphere, while perhaps worthwhile, did not call for the expansive ordinances that had been attempted. Moreover, the Court noted that there were already a substantial number of laws on the books at the state level dealing with the problem of protecting children from such activities. The Court distinguished the Detroit ordinance, on which Houston had relied, by noting that one of the primary purposes of that ordinance was to preserve the quality of urban life. Given these facts, the Court seemed to believe that the City of Houston had gone too far in its ordinances, given the goals it was seeking to accomplish.

Due Process. The final issues dealt with by the Court in Universal Amusement was that of denial of due process. The Court found that while some exercise of municipal authority in this area might be justified, the ordinances at issue went far beyond what was permissible and in effect deprived persons of their property without adequate reason or compensation. First, the ordinances effectively banned such businesses from the city even though it purportedly only limited their ability to locate in certain areas. Second, the ordinances were drafted in such a way that even if a business could find an acceptable location, the business would forever be in jeopardy of losing its authority to operate if a church or school moved within the prohibited distance.

Summary. In reviewing the decision of Universal Amusement for purposes of its work in drafting an ordinance proposal, the Committee kept several points in mind with regard to the foregoing discussion. First, businesses that are argued as under the ambit of the First Amendment enjoy special protection. But even the Court in Universal Amusement seemed to indicate that such protection is not absolute and that reasonable regulation is permissible. Therefore, the Committee took special care in all matters of regulation affecting First Amendment businesses to exercise what the Committee deemed prudence and restraint,

Fifth, the Committee has provided in the ordinance for several avenues of recourse for any party that believes himself aggrieved by administration of the ordinance. At the same time, however, the ordinance has throughout been designed to limit the discretion of the administrative officers in charge of the ordinance to minimize the possibilities for such abuses of discretion that would require redress.

Sixth and finally, the Committee has spent considerable time reviewing computerized maps to give reasonable assurance that while the ordinance may be restrictive in absolute terms of locations available to sexually oriented businesses, it is not prohibitory in what it seeks to accomplish. After reviewing a series of maps developed in accordance with the distance formulas set forth in the ordinance, the Committee feels that there is reasonable evidence to support the conclusion that such is indeed the case.

REMEDIES ADOPTED BY OTHER CITIES

Houston is not the only American city to have had to deal with the problem of sexually oriented businesses. Other municipalities such as Detroit, Boston, Chicago, Dallas, Los Angeles, and Santa Maria, California, as well as regional governments such as Fairfax County, Virginia, have also grappled with the issue. Although Houston is unique as compared to these other governments with respect to the zoning issue, there are nonetheless lessons that can be drawn from comparing the experience of other municipalities to our own.

Detroit. The efforts of the city of Detroit to regulate sexually oriented businesses found their roots in attempts made in 1962 to combat the skid-row effects occurring in certain neighborhoods. Ultimately, the city in 1976 amended the anti-skid row ordinance developed out of that earlier effort to cover sexually oriented businesses. These new regulations were upheld by the United States Supreme Court. The key elements of this ordinance provided the following:

(1) Sexually oriented businesses were explicitly defined;

(2) Sexually oriented businesses were prohibited within five hundred feet (500') of an area zoned residential;

(3) Sexually oriented businesses were prohibited from locating within one thousand feet (1000') of any two other regulated sexually oriented businesses; and

mixed into the general run of office buildings and retail and wholesale operations. Substantial residential housing or residential activities were not part of the fabric of the neighborhood.

The decision to create a Combat Zone proved advantageous to the city of Boston for a number of reasons. First, the creation of a single such zone where all businesses were treated alike avoided any charges that the Boston regulatory scheme violated the equal protection provisions of the Fourteenth Amendment. Second, by creating a particular zone where such businesses could be established without question, the City avoided the sometimes difficult issues involved in trying to define what would or would not be considered a "sexually oriented business." Finally, the city was under this scheme able to avoid the difficulties and confusions that can sometimes be attendant upon any system involving licensing. In addition, the Boston approach entailed lower administrative costs, gave the city firm control over the growth of the sexually oriented businesses industry, and provided city officials with a controlled environment -- essentially a laboratory -- in which to investigate the effects of sexually oriented businesses on their surrounding environment. It is interesting to note that while the Boston plan has met with reasonable success, it has not been copied by any other American city.

While the Committee was urged to consider the combat zone concept for Houston, the proposal was discarded at a rather early point in the deliberations. The principal reason for rejecting the concept was the geographical difference between Boston and Houston. Boston proper is a city of fairly limited land area. Houston currently contains approximately 560 square miles. While a single combat zone might work in Boston, given its limited size, the Committee concluded that a defensive combat zone approach in Houston would require at least several such areas throughout the city. Otherwise, those located at a distance from the single combat zone might argue that their right of access to sexually oriented businesses had been wrongfully limited. The other problem, of course, would be that of locating sites for these multiple combat zones. Although several witnesses advocated this approach to the Committee, no witness was ready to volunteer his or her area as a candidate for such a zone -- in itself eloquent testimony to the perception of the effect of these businesses on their surrounding areas, a perception that expert witnesses would show appears to translate into adverse consequences for property values.

Chicago. In 1977, the city of Chicago amended its municipal to include new regulations on adult-use businesses. The icago ordinance generally followed the Detroit legislation. he basic strategy of the regulatory scheme could be broken into three parts: first, there was a strong effort to define the rpose and intent of the ordinance; second, there was a good eal of effort put into defining sexually oriented businesses; and third, there was substantial time spent to carefully define e type of regulation and enforcement being adopted.

The Chicago ordinance also had some features not found in e Detroit ordinance. First, registration standards were imposed hat required nine types of responses, mostly concerning owner- ship. Certain restrictions, though vaguely defined, were placed exterior displays. On this particular point, the ordinance ovided that "no adult use shall be conducted in any manner that permits the observation of any material depicting, describing or lating to 'specified sexual activities' or 'specific anatomical eas' from any public way or from any property not registered as an adult use." This provision was under the ordinance applicable to "any display decoration, sign, show window, or store opening." nally, fines of not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00) were imposed for each offense with the provision that in the case of a continuing offense day during which the offense continued could be counted as a separate case.

Dallas. The city of Dallas adopted an ordinance regulating sexually oriented businesses in 1977. Interestingly, while Dallas is a zoned city, this regulatory ordinance was not made rt of the zoning ordinance, but rather was incorporated into e general municipal code. The Dallas ordinance, like that in Chicago, was closely modelled on the Detroit law.

Under the Dallas ordinance, the distance requirement between sexually oriented businesses and areas zoned residential was one thousand feet (1000'). This distance was measured as a straight ne from property line to property line of the two conflicting structures without regard to intervening structures. It is instructive to note that this one thousand foot (1000') re- striction was struck down due to lack of evidence as to the deteriorating effects sustained by neighborhoods as a result of the interposition of sexually oriented businesses.

Los Angeles. In 1978, the city of Los Angeles imposed a thirty (30) day moratorium on the establishment of new sexually oriented businesses in order to provide an opportunity for the c to draft a new and comprehensive ordinance regulating the i try. (It is not clear whether such a moratorium would be p missible under recent antitrust decisions involving the

liability of municipalities for violation of the Sherman Act.) The city then used its Planning Department to study the effects of sexually oriented businesses on their surrounding environments. The conclusion of this study was that regulation of sexually oriented businesses was necessary to "prevent the continued erosion of the character of the affected neighborhoods."

The drafting of the Los Angeles ordinance followed the basic pattern established in the wake of the successful effort by the city of Detroit. What businesses were "sexually oriented" was meticulously defined and the activities of those businesses were likewise carefully delineated. Similar care was taken in the definition of the city's regulatory authority and with respect to the fines imposed for violations of the ordinance. An additional section provided for severability of the ordinance, thus allowing the ordinance to stand even if a particular section failed a judicial test.

At this writing, our best information indicates that the Los Angeles ordinance has withstood any challenges and remains intact as originally passed. Again, a key element in the success of the ordinance was the careful development of information on the nature of the problem being addressed, thoughtful efforts to delineate as clearly as possible the intent and operation of the ordinance, and a strong rational tie between the problems being addressed and the regulatory scheme.

Fairfax County, Virginia. The ordinance adopted in Fairfax County, Virginia, for the regulation of sexually oriented businesses again follows the general pattern successfully established by the city of Detroit. However, in the area of issuance of permits, the Fairfax County ordinance is much more detailed.

Specifically, the Fairfax County ordinance gives the chief of police jurisdiction over the application process. In exercising this responsibility, the chief of police receives assistance from the Inspection Services Division, the Fire and Rescue Services, the Director of Health, and the Zoning Enforcement Division. The annual fee for renewal of the license is Two Thousand Dollars ($2,000.00); this annual renewal fee is in addition to a business license tax. The applicant must also complete a comprehensive application form dealing with the type of business, location and ownership. With respect to ownership, in-depth information is requested, and checks are made on the criminal records or prior questionable activities of the applicant.

Additionally, permit fees are required from massage technicians. These permits specify fees, term of the permit and health

requirements. Again, the application is comprehensive and delves into the applicant's background and history, and is accompanied by fingerprints. The ordinance also goes further than the Detroit law in setting minimum standards for sexually oriented businesses with regard to structure and general hygiene, the display of permits, and the establishment of a right of entry for relevant government inspection agents.

Santa Maria, California. The ordinance enacted by Santa Maria, California, is interesting in that it provides a regulatory scheme whereby sexually oriented businesses are divided into different classes, as follows:

> "Class A" sexually oriented businesses are those which provide entertainment in conjunction with the operation of an eating place.
>
> "Class B" sexually oriented businesses are those which provide entertainment in conjunction with a business whose principal activity is the serving of alcoholic beverages.
>
> "Class C" sexually oriented businesses are those where entertainment is offered in conjunction with either of the business activities described as "Class A" or "Class B," but where the exhibition of the human body is involved.

Under this regulatory scheme, "Class A" businesses are the most lightly regulated, "Class B" businesses more so, and "Class C" businesses most of all. "Class C" businesses must deposit with the Director of Finance a refundable deposit of five hundred dollars ($500.00). This deposit would be used to pay the costs of additional city services such as police and fire assistance. This particular legislation was probably less referred to by the Committee than any other statutory scheme because its purposes seemed on the face of the ordinance to differ notably from the purposes of the ordinance proposed for Houston.

SECTION-BY-SECTION SUMMARY OF ORDINANCE

Legislative Findings. The legislative findings sections of the ordinance has been drafted to summarize as concisely but as completely as possible the underlying reasons why an ordinance is needed, and why the ordinance has been structured in its present form. This Report is also incorporated by reference into the Legislative Findings.

The city bases its right to regulate sexually oriented commercial enterprises on its general police powers -- the right

to pass legislation to assure public safety, health, morals and other related goals. The city also bases its right to regulate as proposed in this ordinance under specific grants of authority from the state, including Art. 1175, §22 (authorizing regulation by municipalities of places of public amusement), Art. 1175, §23 (authorizing licensing by municipalities of businesses susceptible to the police power), Art. 1175, §24 (authorizing municipal regulation of billboards and other exterior signage), Art. 1175, §34 (authorizing municipalities to exercise the general police power), and Art. 2372w (authorizing municipalities to regulate businesses whose principal activity is the offering of services intended to provide sexual stimulation or sexual gratification).

The Committee has proposed that Council exercise the foregoing powers on the basis of its findings generated through the hearings held by the Committee and Council between November 4, 1982 and October 25, 1983. These findings have already been discussed at some length in the foregoing subsection titled "Analysis of Testimony." The Legislative Findings section of the ordinance briefly summarizes those findings.

Article I: Definitions. The definitions included under Article I have been carefully crafted to conform with the Committee's intention to regulate as effectively as possible, without infringing on federal constitutional guarantees, areas preempted by state legislation or the operation of legitimate businesses. Although most of the definitions are by their nature self-evident, comments on some of the definitions are warranted to underscore the balance which the Committee constantly sought between effective regulation on the one hand and, on the other, the limits placed on municipal action by federal constitutional guarantees and state law.

"Enterprise," for example, refers only to those establishments whose major business involves products or services intended to provide sexual stimulation or gratification. Inclusion of the word "major" is intended to exempt out such businesses as convenience stores which sell "Playboy" or "Playgirl" or other similar such magazines as a relatively small part of their overall operation. In addition, specific exemptions are granted to several categories of businesses. Adult bookstores, adult movie theatres and businesses licensed to sell alcoholic beverages are exempted because of apparent preemption by state law; massage parlors are omitted because they are covered by another city ordinance. (It should be noted, however, that although the foregoing businesses are not defined as "enterprises," and therefore not subject to the locational and permit requirements of the ordinance, they still are subject to specified provisions of the ordinance.) Businesses licensed by the state, such as those employing

psychologists or physicians are also exempted, as are businesses whose major activity is the selling of clothes.

The definitions in Article I also offer good examples of the consistency in reasoning which the Committee sought to achieve in its work. For instance, it has already been noted that a major theme in the testimony heard by the Committee concerned the deleterious effects of sexually oriented businesses on children, and the consequent problems caused for neighborhood stability and the quality of life, as reflected in property values. For this reason, schools were placed within the category of protected establishments near which such sexually oriented businesses cannot be located. (It was this same general line of reasoning -- namely, the need to protect areas frequented by children and used for family oriented activities -- that led to including churches among the protected activity categories.) However, it was also concluded by the Committee that at some point a person, even though still in school, matures to the point where the city can no longer reasonably claim the right to protect him or her from such businesses. While the age at which maturity may be achieved by different individuals may vary, it was concluded by the Committee that a reasonable cutoff age as a general rule would be seventeen (17), coinciding with earliest usual age of graduation from secondary school. For this reason the definition of "school" (Article I, Section V) is limited "to public and private schools used for primary or secondary education."

Another problem the Committee faced in drafting the ordinance proposal was to minimize opportunities for circumvention of the ordinance. Concern was expressed by all members of the Committee and by the Legal Department, that some sexually oriented businesses, eager to escape the locational restrictions placed upon them, might start showing movies and argue that they were in fact "Adult Movie Theaters" protected by state law and not subject to municipal restrictions on location. The Committee has sought to deal with problems of this sort by careful drafting, as in the definition of "Adult Movie Theatre", which specifically requires that such theatres have tiers or rows of seats facing a screen or projection area, making it clear that simply setting up a projector and a screen will not make a modeling studio a movie theater under the ordinance.

Article II. Permit Required. Article II of the ordinance establishes that all sexually oriented commercial enterprises within the Houston city limits must obtain a license from the Director of Finance and Administration before they can operate.

Article III. Permit Applications. The requirements which must be fulfilled before a permit may be granted to a sexually oriented commercial enterprise are set out in Article III. The

list of information to be supplied, which shall be submitted to the Director of Finance and Administration, was taken for the most part from the present ordinance 28-73. This was decided by the Committee on the basis of issues raised during the hearings. For instance, a number of witnesses cited the problems inherent in tracking down the person ultimately responsible for a partnership or corporation; hence, the Committee has recommended a series of ownership disclosures which, while not onerous to the business enterprise, will provide information adequate for reasonable enforcement of the ordinance should its provisions subsequently be violated. The application requirements also call for submission of relevant state-issued documents pertaining to the authorization of the enterprise to do business within the State of Texas. The application form shall also include a written declaration that all information contained in the application is true and correct, and that the applicant is in conformity with all provisions of the ordinance; violation of these provisions will be grounds for suspension or revocation of the permit.

Article IV. Permit Fee. The ordinance establishes a permit fee of $350.00 for each permit application. The amount of this fee was based on testimony by William R. Brown, Director of Finance and Administration, which fixed the cost of processing each such application at within Ten Dollars ($10.00) of the $350.00 figure later adopted by the Committee. Since the $350.00 represents the cost to the city of actually processing the application, regardless of whether the permit is approved or disapproved, the fee is payable at the time the permit is requested and shall be nonrefundable. The permit shall be good for one year from the date of issuance, and shall be renewable annually; the $350.00 fee for each renewal of the permit represents the costs of each year's review of the permit application and the ongoing costs of administering the regulations established by the ordinance, including the costs of enforcement through inspections of the establishments by city personnel.

It should also be noted that just prior to submission of the proposed ordinance to Council, a general review of all fees and charges of the City of Houston was undertaken. This general review, which will generate the most reliable direct and indirect cost data in the city's history, may produce a different figure for the processing of the permit. If so, an adjustment (most likely upward) will have to be made in the permit fee. At the time of this writing, however, the $350.00 figure still represents the best estimate of the actual cost of processing the application and administering the regulations proposed under the ordinance.

Article V. Issuance or Denial of a Permit. Assuming the submitted application conforms to the requirements of the ordinance, the Director of Finance and Administration must within twenty (20) days issue a permit to the applicant. Although there are several grounds on which an application for a permit will be denied -- the failure to supply all of the required information, for example, or the giving of information that is knowingly false, fraudulent or untruthful -- the most important of these reasons focuses on certain distance requirements that must be met in the location of sexually oriented commercial enterprises. (Again, exempted from these locational restrictions are adult movie theaters, adult bookstores, businesses selling alcoholic beverages, and massage parlors.) Specifically, the ordinance would require that all subject businesses be located not less than 750 feet from a church or school (both terms being defined in the ordinance) and not less than 1,000 feet from each other. (In the event two such businesses are closer to each other than 1,000 feet, then Article VI, Section B provides that a permit shall be issued to the applicant "having the longer period of enterprise ownership at the same location for which a permit is sought.")

A third distance requirement set out in Article V has been characterized as the "residential concentration" test. A circle with a 1,000 foot radius is drawn around the location of the proposed business. If within the circle thereby determined seventy-five percent (75%) or more of the tracts are residential (that is, if seventy-five percent (75%) or more of the tracts were coded as residential, in the city's Metrocom computer), then the business could not locate there. Conversely, however, should land use in the area become more commercial, such that the percentage dropped below seventy-five percent (75%), the business might under a new permit application be granted the right to operate at the formerly unacceptable location.

These distance requirements are good examples of the Committee's efforts to analyze the information preserved during the public hearings, to distill from that information the real nature of the problems to be addressed and to then develop solutions logically and consistently related to the actual problems. For example, while many who testified acknowledged the right of such businesses to exist, and while many of these same witnesses expressed solicitude for the rights of those who might want to avail themselves of the goods or services offered by such businesses, the same witnesses also expressed strong concern about balancing these considerations against the effects such businesses might have on children and the fabric of the family unit, as well as property values and the quality of urban life. In reviewing the testimony, the Committee concluded that this concern was justified -- particularly in light of some of the

expert testimony offered -- and hence created the 750 foot rule with respect to churches and schools which were viewed as centers for family oriented activities.

A second set of problems brought out in the hearings is the detrimental effect that the clustering of such businesses can have on a surrounding area. Testimony from the Chief of Police, as well as information supplied by residents of areas where concentrations of such businesses are unusually high, repeated the point that the clustering of such businesses exacerbate the problems they create by developing an atmosphere in which a "secondary market" of illicit activities -- both sexual and otherwise -- are encouraged. Although most witnesses agreed that the location of such businesses could not be restricted in such a way as to effectively eliminate them altogether, most witnesses -- including the Chief of Police -- stated that in their view a "separation" or "nonclustering" provision would alleviate some of the problems normally associated with the operation of such businesses. In reviewing this testimony, and in considering the experience of cities such as Detroit, the Committee concurred with the judgment of the witnesses and therefore included a requirement regarding spacing of the businesses from each other.

A third set of problems identified during the hearings was the difficulties created when these businesses locate in areas that are primarily residential in character. These problems are aggravated in Houston because of the lack of zoning laws; in the absence of any ordinance, only deed-restricted developments are allowed some measure of protection and even that degree of protection stops at the border of the deed restricted area. Most witnesses who testified on this point before the Committee acknowledged that there was little likelihood that zoning would be imposed in Houston. At the same time, however, many of these same witnesses indicated their belief that reliance on deed restrictions as the sole method of protection was woefully inadequate, particularly since so many of the areas most severely affected by the problem of sexually oriented businesses were ones in which deed restrictions had irrevocably lapsed, or in which such restrictions had never existed at all.

In reviewing the testimony on this point, the Committee concluded that there were sound policy reasons for the city to provide greater protection for areas of high residential concentration from the adverse consequences of too many sexually oriented businesses. Concern for children and family-related activities already cited above with respect to the distance requirement from church and schools was likewise a factor here. Concern was also felt for the need to maintain some degree of stability in residential areas so as to provide at least a measure of corresponding stability in the property tax base.

Finally, concern was expressed that the protections afforded deed restricted areas, however minimal, ought to be extended by providing singular (if not the same) protection to any area with a high concentration of residential usage. (Although the Committee considered extending the same sorts of proections to areas less residential in character, it was not thought that the same policy considerations applied with equal force as areas became "less residential.")

In evaluating these distance requirements, the Committee also remained sensitive to concerns that were raised during the hearings by opponents of the ordinance. For instance, at least one of the lawyers representing some of the businesses that will be affected by the ordinance argued that the "residential concentration" test was tantamount to zoning. After careful consideration the Committee respectfully disagreed. To the Committee, there is a great deal of difference between an ordinance creating a zoning commission which then proceeds to establish use categories for entire areas of the city and an ordinance which merely requires that if the market, operating freely, has resulted in an area that is "predominantly residential" in character, then certain businesses cannot locate within a fixed distance of that area. In the first instance, the city dictates land usage and only a change by the city in the ordinance fixing such usage will permit deviation from that rule. In the second instance, the city merely provides that in the event usage in a particular area should through operation of the free market develop along certain lines, then certain restrictions will be involved. Conversely, should the market dictate a change in overall usage of an area (as in a case where an area formerly predominantly residential became commercial), then the city restrictions would be lifted. The difference might best be characterized as that between active and passive -- or "reflective" -- land management.

The Committee also took quite seriously the concerns expressed during the hearings by some representatives of the affected businesses that determining whether a proposed location would conform with the ordinance would prove unduly burdensome and costly. However, the Committee believes that introduction of the Metrocom computerized mapping system into city government effectively answers this concern. As stated in testimony offered before the Committee by Ken Strange, the Metrocom administrator, it will be possible, for a minimal charge which reflects the actual cost of computer and clerical time, to determine in advance -- and within just a few hours -- whether a particular proposed site is permissible for a sexually oriented business. Under the circumstances, the Committee concluded that the "residential concentration" test was not only a suitable remedy for some of the problems adduced during the hearings, but also that

the test would not place an undue or unfair burden on the businesses to be regulated.

A brief comment should be made with respect to the appeals process established to provide recourse from permit denials by the Director of Finance and Administration. While an initial appeal hearing before the Director is provided for in the ordinance, the Committee felt that given the nature of the issues involved, and the desire to assume that the ordinance in both theory and practice did not operate to abuse individual rights, an appeal to Council should also be provided. This has been done in Article V, Section E.

Article VI. Existing Enterprises. The method of transition from the present situation to that under the new ordinance, and specifically the treatment of previously existing businesses under the new ordinance was the subject of considerable thought by the Committee. The results of that lengthy consideration of the transition problems are embodied in Article VI.

Section A of Article VI provides the timetable under which businesses must conform with the ordinance. For this purpose the ordinance divides the City into four quadrants; compliance with the terms and conditions of the ordinance are phased through use of these quadrants. Section B provides that where two subject businesses are within 1,000 feet of each other, that business having the longer period of ownership at the same location shall receive the permit, while the business with the lesser ownership period at the same location shall be denied a permit. In the opinion of the Committee, this approach seemed the fairest way to treat the difficult problem of dealing fairly with businesses too close together to comply with the ordinance, without abandoning entirely the attempt to enforce the ordinance against existing businesses. The Committee chose to remain consistent with this "prior in time, prior in right" approach by providing that where a subject business is closer than 750 feet to a church or school that business will not be required to abandon the location if it can be shown that the period of enterprise ownership at the same location exceeds the length of time the church or school has been located at that site.

Sections C and D of Article VI deal with the difficult issue of grandfathering versus amortization of existing businesses. The Committee decisions with respect to the issues raised by this question again exemplify the careful attempt to base legislative action on the relevant information gathered during the hearing process as well as the desire of the Committee to offer the maximum possible protection to individual interests while also dealing effectively with the need for action testified to in the hearings.

During the hearings, it became evident to the Committee that the problems created by sexually oriented businesses had been allowed to persist for so long that merely addressing the problem "from here on out" would not be adequate. Prospective legislation would do little or nothing to alleviate the current serious problem caused by businesses already existing. The Committee therefore concluded that existing businesses should come under the ordinance; for this reason the Committee rejected grandfathering of existing businesses and determined that amortization would be the appropriate approach. At the same time, however, the Committee recognized that even if existing businesses were to be brought under the ordinance, this could not be done in a way that would ignore the investments that had been made in the businesses (and therefore prima facie unconstitutionally deprive persons of their property without just compensation,). The Committee understood -- and if it had not, it certainly would have after having been drilled on the point numerous times by representatives of the Legal Department -- that even under an amortization approach the amortization period could not be so short as to effectively deprive the owners of the subject businesses of their property interests without just compensation.

Sensitivity to the need for an adequate amortization period was frustrated, however, by the lack of evidence in the hearing record on which the Committee could base its decision as to what constitutes an appropriate amortization period. No member of the affected industries, nor owners or representatives of affected individual businesses, appeared before the Committee for purposes of offering testimony on this point. (One owner of an adult bookstore did suggest, by written correspondence to the Committee, that the amortization period be extended to ten (10) years; however, the Committee believed that this suggestion was unrealistic. Certainly the recommendation was not supported by any factual data.)

In the absence of such testimony, the Committee found itself in a difficult position. While the Committee admittedly wished to legislate the shortest possible period within which subject businesses must come under the ordinance or, alternatively, abandon their present locations, the members did not want to impose a time limit that, based on actual numbers, was unfair. The problem, however, was that the numbers were not available because the relevant affected businesses had chosen not to supply them to the Committee. (The Committee briefly considered using the subpoena powers available to Council under the Charter when considering such legislative matters, but decided against doing so for reasons explained below.)

In the end, the Committee devised ordinance provisions -- Sections C and D of Article VI -- which deal with this dilemma in an effective, fair and practical way. Section C of Article VI provides that if an existing business cannot qualify for a permit under the ordinance, then that business shall terminate its operations at that particular location within six months after the business receives notice from the Director of Finance and Administration of its ineligibility for a permit. However, should any business so notified believe that six months will be insufficient for the business to recoup the investment represented by the enterprise, then the owner or owners of that business shall have the right to petition the Director of Finance and Administration for an extension, which can be as long as the Director determines appropriate based on the evidence presented.

The Committee believes this approach adequately answers the dilemma presented by the lack of factual testimony in the record as to the earning capacity of these businesses. The provisions set forth a reasonable minimum time period for compliance that speaks to the Committee's desire for speedy implementation of the ordinance. At the same time, businesses which believe six months is too short, can, if they choose, come forward with books and records supporting their contention that they are entitled to a longer amortization period -- indeed, to as long an amortization period as they can prove. Should the Director of Finance and Administration refuse to grant such an extension despite the evidence submitted or should the extension be less than that reasonably justified, the decision could be appealed to the Council under Article V, Section E. And if that appeal failed it is the Committee's understanding that the applicant may have standing to appeal the Director's decision to the state district courts as an arbitrary and capricious exercise of discretionary authority under those doctrines relating to taking of property.

The Committee believes that this approach is fairer and more feasible than fixing a longer period of amortization effective with respect to all businesses. Moreover, this approach avoids the need to subpoena books and records from business owners unwilling or at least hesitant to divulge financial information in order to develop an amortization period grounded in a hearing record. Instead, the decision is left to each individual business and its owner as to whether that particular owner wishes to divulge business data in order to secure an extension of the six month time limit. This assures the business owner maximum privacy should he or she so desire, while also allowing the city to achieve its goal of speedy compliance with the ordinance in order to deal as effectively as possible with a serious existing problem.

Article VII. Revocation of Permit. The Committee in hearing testimony became concerned not just about the circumstances under which the initial permit would be granted, but also about the means by which a permit could be revoked should a business fall out of compliance with the ordinance during the term of the permit. For this reason, the Committee requested the drafting of provisions that dealt with the principal problems testified to during the hearings as to the operation of these businesses. These common problems can be classified as follows:

Minors as Employees. A number of witnesses before the Committee expressed concern, particularly with regard to adult modeling studios, as to the actual age of some persons employed on the premises. Article VII, Section A(1) provides that a permit shall be revoked if persons under the age of seventeen (17) are found to be employees of a subject enterprise. Seventeen years of age was selected to comply with relevant state law. A companion provision, Article XI, prohibits the entry upon the premises of such businesses of anyone younger than seventeen, and requires each affected business to provide an attendant to assure compliance with this prohibition.

Exterior Appearance and Signage. Although a majority of the witnesses appearing before the Committee felt that the control of the exterior appearance and signage of such businesses would help deal with the negative effect of such businesses on neighborhood stability and property values, most also stated concern that such provisions, if enacted, would not be heeded seriously by the businesses in question. In considering these arguments, the Committee concluded that effective enforcement of these provisions was a necessity. The Committee therefore provided that violation of these provisions will result in loss of the permit to do business.

Recurring or Chronic Criminal Activity. A consistent theme in the testimony before the Committee, whether offered by experts, citizens with specially significant experience with sexually oriented businesses or members of the general public, was the problem of associated crime taking place in these establishments without action being taken by the city or any other suitable authority against such establishments. Once again, many witnesses stated that while they understood the need to accept the right of such businesses to exist, they believed there was a need to provide sanctions against those businesses

which operate outside the law or which permit (either deliberately or by acts of omission) unlawful activities to take place on their premises. Article VII, Section A(3) addresses this problem raised during the hearings by providing that whenever three or more persons are adjudged guilty in a trial court of committing certain criminal acts (as specified in Chapter 21, Chapter 43, Section 22.011, or Section 22.021 of the Texas Penal Code) on the premises of such a business, the permit of that business will be revoked if it can be shown that the owner or operator of the business either knew of the activities and did not seek to prevent them, or else failed to take adequate steps to become aware of the activity.

The Committee believes that the concept of three or more persons being found guilty in a trial court serving as the triggering mechanism for this position is both fair and effective. Requiring actual convictions deals with the concern expressed by some during the hearings that such a provision, if triggered only by a certain number of arrests, would encourage police harassment of such establishments. The sensible alternative appeared to require judicial action on the arrest. At the same time, however, members of the Committee were keenly aware that the pace of the judicial process makes it unlikely that in any one-year period three or more persons would be arrested, tried and have their cases heard at all levels of appeal. Given these realities, Article VII, Section A(3) represents a compromise in which judicial action is required, but completion of the appeals process is not. Moreover, should a particular business owner feel that this revocation mechanism is being used improperly against him because of some defect in the adjudications relied upon, this issue can be raised independently in the appeal on the revocation where the Director can then make a determination on the merits of the argument separate from the criminal process.

False, Fraudulent or Untruthful Permit Information. One of the most significant difficulties reported to the Committee during its hearings by those agencies currently charged with enforcement of existing laws against those businesses proposed to be covered by the ordinance is the lack of accurate and complete data. In many instances according to testimony this lack of information is due to the businesses themselves, which engage in practices ranging from legally complex schemes of corporate ownership that

obscure true authority and control to outright falsehoods and fraudulent misrepresentations with respect to the operations of a business. It is of course impossible to divert those who are determined to undertake such actions from doing so. But the Committee concluded that a major gap in enforcement would be created if the giving of false, fraudulent or untruthful information on the application form were not provided for; this is the reason for, and purpose of Article VII, Section A(4).

As a concluding comment, the Committee would point out that all of the revocation provisions are subject to the same appeals process provided for elsewhere throughout the ordinance. (These appeals provisions are set out in detail in Article V, Sections C through E.) This appeals process would include an appeal to Council. The Committee is also of the opinion that in the event Council were to uphold the revocation of a permit by the Director of Finance and Administration, that decision would be subject to appeal to a state district court.

Article IX. Other Permit Provisions. Article IX includes a member of miscellaneous but important provisions. Section A requires posting of the permit on the premises of the business authorized by that permit. The permit must be posted in an "open and conspicuous" place to assure ease of enforcement by public officials. (Open and conspicuous posting of the permit also benefits the business, since it allows for a check of the permit's existence with a minimum of disruption to normal business operations.)

Section B makes all permits issued under the ordinance good only for the location for which the permit was originally issued; in addition, permits are not assignable or transferable. This latter provision was adopted by the Committee in response to the problem cited during the hearing of "rolling over" ownership of a business. The propensity of such businesses when under scrutiny (as during a court case brought by the city for prohibited activities) to change ownership and thereby continue to do business while avoiding further legal action (because the new owner has not been named as a defendant in the city suit) is dealt with by making any such change of ownership grounds for termination of the permit. Section C of Article IX makes it unlawful to counterfeit, forge, change, deface or alter a permit in any way.

Articles IX and X. Restrictions on Exterior Appearance and Signage. Article IX which covers all sexually oriented businesses, as well as adult bookstores, adult movie theatres, and massage establishments, sets restrictions regarding the external

appearance of all such businesses. (With respect to businesses selling alcohol, only signage and not exterior appearance is regulated.) First, no such business can allow its goods or services to be visible from any point outside the establishment. Second, the ordinance forbids the use of flashing lights or pictorial representations on the exterior of such businesses; words can be used to a limited extent as noted below in the discussion of Article X. Third, the ordinance requires that all such businesses be painted a single achromatic color -- that is to say, some shade of grey. Exceptions to this requirement are permitted where the business is located in a commercial multi-unit center where the entire center is painted the same color, or where the color scheme employed is part of an overall architectural system or pattern. (A similar exception is provided for any unpainted portions of the exterior.) The ordinance provides that all subject businesses will come into conformity with these provisions of the ordinance within six months of the effective date of the ordinance.

Article X regulates the signage of all sexually oriented businesses, including adult bookstores, adult movie theatres, and massage establishments; businesses licensed to sell alcoholic beverages also are subject to the signage provisions. The ordinance allows two types of signs to be displayed. The first type -- a "primary sign" -- may contain only the name of the establishment and a generic phrase, selected from phrases specified in the ordinance, describing the nature of the establishment. The letters on a "primary sign" must be uniform and must be of a solid color. The background on the sign also must be of a solid color. Additionally, "primary signs" must not contain any pictorial representations or flashing lights, must be rectangular, must not exceed 75 square feet in area, and must not exceed 10 feet in height and 10 feet in length.

The second type of sign is the "secondary sign." A "secondary sign," while smaller than a "primary sign," has fewer restrictions placed on it. "Secondary signs" are regulated only to the extent that they must be attached to a wall or door of an establishment, must be rectangular, must not exceed 20 square feet in area and must not exceed 5 feet in height and 4 feet in length.

Non-conforming signs must be removed or made to conform within six months of the effective date of the ordinance. Extensions of the six month period can be granted by the Director of the Department of Finance and Administration if it can be proved that more time is needed to recoupment the investment in the non-conforming sign. Approval of the request for extension cannot be withheld if the request is adequately supported by financial records. The procedure for securing such an extension

is virtually identical to the procedure set out in Art ..., Sections D through E, concerning requests for extensions of the six month amortization period for non-conforming existing enterprises.

The Committee adopted these provisions regarding exterior appearance and signage after hearing considerable testimony, both from expert witnesses and members of the lay public, regarding the problems caused by the exterior appearance and signage of the businesses. Again, the majority of witnesses admitted the right of such businesses to exist, and a number of witnesses pointed out what they believed to be the state-imposed limitations on the city's ability to regulate the location of certain kinds of these businesses, such as adult movie theaters and adult bookstores. However, it was also pointed out to the Committee by a number of witnesses that despite these concessions, action should still be taken to minimize the adverse effect of these businesses on their surrounding neighborhoods.

The Committee found in hearing testimony that these adverse effects take several forms. First, a number of experts in Houston real estate testified that the businesses adversely affect the value of adjoining and neighboring property. Specific examples of this phenomena were cited to the Committee during its hearings. (Similar testimony was offered during the additional hearing held before the entire Council.) Second, the Committee received lay testimony regarding the effects of the exterior appearance of such businesses on children. A number of parents expressed concern over the consequences to their own children and children of others because of exposure to the language and signage, including pictorial representations, used by these businesses. This testimony from lay persons was corroborated by expert statements regarding the adverse effects of such signage and exterior decoration upon children.

These two considerations -- the effect of the businesses on the value of neighboring properties and on children -- seemed to the Committee to be part of the more general problem of preseving a reasonable level of quality of life in Houston, a problem of paramount importance if the city is to maintain a stable community environment where property values are maintained (an essential element in any consideration of municipal finances, for example) and further investment is encouraged. There was considerable testimony, for instance, to the effect that the current situation along lower Westheimer is impeding economic redevelopment of the area. The sexually oriented businesses clustered in that area are apparently able to pay extraordinarily high monthly rents -- much higher than non-sexually oriented businesses can afford. The result has been the "shutting out" of non-sexually oriented businesses, which could survive

economically except for the artificially high rents. (In addition, there was considerable testimony as to how the atmosphere created by the clustering of such busineese made it difficult for non-sexually oriented businesses to attract sufficient clientele to be successful.) This inability to attract "seed businesses" has in turn made it difficult to encourage other larger-scale quality development in the area. It has also discouraged those who wish to reside in the area and thereby continue the mixed-development plan of land use that has historically made the Montrose a unique community.

In response to these problems, the Committee did not propose steps that would ban sexually oriented businesses altogether. Instead, the remedies proposed would limit the concentration of such businesses and their obtrusiveness even where allowed to locate; it is the intention thereby to create an economic situation in which other types of businesses might also be encouraged to locate in an area, thereby achieving a more balanced urban mix. Where the particular type of business could not be regulated as to its location -- as in the case of adult bookstores or adult movie theatres, thanks to the apparent preemption of any city action because of state law -- the Committee recommended the next most effective and available action: namely, to make the businesses as unobtrusive as possible, and to minimize the negative impact of the businesses on their surrounding areas through controls on signage and exterior appearance.

There were those who argued to the Committee that the signage of sexaully oriented businesses is no more alluring than that associated with other outdoor advertising. Other witnesses contended that even the garish external appearance of these businesses was no worse than might be found in conjunction with other non-sexually oriented businesses. Based on all of the testimony, however, the Committee concluded that the qualitative difference between the signage and exterior appearance regulated under this ordinance and other signage and exterior businesses themselves. Based on the testimony, it is the opinion of the Committee that sexually oriented businesses have adverse effects on their surrounding neighborhoods unlike any negative effects that could be shown by strip shopping centers in general, convenience stores or other commercial establishments. As the Committee reads the testimony of those witnesses deemed most credible, a clear case is made that sexually oriented businesses, because of their unique adverse consequences on the surrounding neighborhoods, require regulation in whatever way reasonable possible to minimize those adverse consequences.

It is also the Committee's finding that based both on the testimony and the experience of other city's, the single most

effective action to be taken with respect to sexually oriented businesses is to restrict their location. However, locational restrictions by themselves are not enough; where the law allows, these should be coupled with restrictions on external signage and appearance to minimize the obtrusiveness of the sexually oriented business wherever located. Where thanks to state law the city's right to regulate location has been preempted, the need to strictly regulate exterior signage and appearance becomes even more critical as almost the only meaningful tool left in the municipal arsenal to deal with the problems posed by sexually oriented businesses for the quality of Houston life.

Article XI. Age Restrictions on Entry. A recurrent theme in the testimony before the Committee was the effect of these businesses upon children, which in turn would affect the quality of life in Houston. One of the specific problems considered by the Committee in this regard was the entry by minors onto the premises of such businesses. The Committee felt that barring persons under the age of seventeen from entry onto the premises of a sexually oriented business -- which in this instance would include an adult movie theatre, adult bookstore or massage esablishment -- was a reasonable response to this concern. Section B of Article XI, placing an affirmative duty on the establiment to enforce this provision seemed to the Committee to be the simplest, most reasonable means of attaining enforcement of this article, particularly as the alternative would be a large number of roving inspectors, the cost of which would most likely be borne by the establishments through the permit fee.

Article XII. Restrictions on Employment of Minors. In addition to concern about the presence of minors in sexually oriented businesses as customers, the Committee also received testimony indicating that minors might be employed in some of these businesses, particularly the adult modeling studios. For this reason, the Committee felt it necessary to include a specific prohibition against the employment of persons under the age of seventeen in sexually oriented businesses -- again including adult movie theatres, adult bookstores and massage establishments.

Article XIII. Priority of Right. One issue raised during the Committee's deliberations was whether a sexually oriented enterprise, once lawfully permitted, could lose its permit if a school or church were to be established within 750 feet of the enterprise, or if seventy-five per cent of the tracts of land within the calculated circular area were to become residential in accordance with the terms and conditions of Article V, Section B(3). After substantial deliberation, the Committee concluded that the "prior in time, prior in right" doctrine should be consistently applied. A church or school which

knowingly chose its location despite the prior existence of a sexually oriented commercial enterprise, were not deemed by the Committee to occupy the same status as those schools, churches and residential areas which existed prior to the establishment of the sexually oriented business in question. However, the Committee did provide that this right to continued existence would terminate with the expiration without timely renewal or revocation of the permit.

Article XIV. Effect on Massage Establishments. The City of Houston already has one ordinance governing massage establishments -- Chapter 27 of the Houston Code of Ordinances. The provisions of this ordinance are not intended to supplant that Chapter; but instead are designed to complement its provisions. If a conflict should be deemed to exist between Chapter 27 and this new ordinance, however, the provisions of the new ordiance will govern.

Articles XV - XIX. Additional Provisions. Articles XV through XIX are additional provisions deemed necessary by the Committee for a complete and effective ordinance. Article XV sets the rules regarding notices under the ordinance; all such notices must be sent in writing and will be considered as having been delivered there days after their delivery to the U.S. Mails. Article XVI makes violations of the ordinance a Class C misdemeanor; each day a violation continues is deemed for purposes of the ordinance as a separate offense. Article XVII establishes the authority of the Director of Finance and Aministration, or his duly appointed subordinantes, to enforce the ordinance, if necessary by lawful entry by means of a search warrant onto the premises of the business in question. Article XVIII empowers the City Attorney to file suit to enforce this ordinance. Article XIX provides that if any provision of the ordinance should for any reason be held invalid, the remainder of the ordinance shall continue in full force and effect.

CONCLUSION

The Committee has attempted to show in this Report that the new ordinance regulating sexually oriented businesses is not a "knee jerk" response to public complaints about such establishments. Rather the ordinance is the cumulation of over one year's work during which time citizen input was received, specific problems were identified, various remedies were considered, and legal contours were set. The Committee candidly acknowledges that a more restrictive ordinance was envisioned in the early days of the project, as reflected by the draft initially propagated by the Committee. However, such a restrictive ordinance could not be sanctioned if the Committee were to adhere

to its goal of striking a careful balance between the rights of those persons who do not wish to be exposed to sexually oriented businesses and the rights of those persons who wish to operate or patronize such establishments. The Committee earnestly believes that the current proposed ordinance achieves that goal, and that the ordinance proposed to Council represents the furthest legally defensible extent to which the city can go in the regulation of sexually oriented businesses.