

ORDINANCES

Texas City Attorneys Association Completes "Retail-Only Adult Business Harmful Effects" Study

by Mick McKamie, Wayne Olson, and Scott Houston

Most people recognize that sexually oriented businesses (SOBs) have negative effects on their surrounding area. That's what justifies municipal regulation in the first place. However, several Texas cities have realized the hard way that traditional studies on the negative effects of on-premise sexually oriented businesses may not be sufficient to justify their regulations of other types of SOBs.

Encore Videos, Inc. (Encore) is an adult video store in San Antonio, Texas. Encore sells and rents sexually explicit videos for off-premises-only viewing. In 1995, the City enacted an ordinance that defined "sexually oriented businesses" as those with 20 percent or more of the inventory or floor space devoted to sexually explicit material, and prohibited SOBs from operating within 1,000 feet of each other, a residential area, a school, a public park, or a place of worship. Encore lost its lease on its original location in 1996, and moved to a new location that was within 1,000 feet of a residential area. Encore never obtained a certificate of occupancy for its new location, and filed suit against the City, challenging the ordinance under the First Amendment.

The City answered with a motion for summary judgment, alleging that its ordinance was a valid "time, place, and manner regulation" under *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 433-34 (2002) and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986). In support of the motion, the City cited three studies —a 1989 Seattle study, a 1986 Austin study, and a 1991 Garden Grove study —to show that off-premises-only adult bookstores produce adverse secondary effects. The trial court granted the motion, finding that the ordinance was narrowly tailored to serve the City's substantial interest in preventing adverse secondary effects on property values. Encore appealed to the U.S. Court of Appeals for the Fifth Circuit, arguing that, while a municipality could rely on the experiences of other cities in enacting a "time, place, and manner regulation, the evidence relied upon [had to] be reasonably relevant to the problem that the city addresses." *See Encore Videos, Inc. v. City of San Antonio*, 330 F. 3d 288 (5th Cir. 2003). The Fifth Circuit reversed and remanded, holding that the three studies were insufficient because they did not differentiate between subcategories of adult bookstores, and did not specifically address off-premises-only establishments.

Shortly after handing down the *Encore* decision, the Fifth Circuit decided *N.W. Enterprises, Inc. v. City of Houston*, 352 F. 3d 162 (5th Cir. 2003), where the court held that content-neutrality depends on whether the "predominate concern" of the ordinance is to address secondary effects, as opposed to banning content. The opinion noted that a city could justify an ordinance based on evidence, adduced at trial, that was developed prior to the ordinance's enactment. Meanwhile, the City of Kennedale was involved in a similar case in North Texas. In that case, the City successfully presented, at trial, testimonial evidence of negative secondary effects caused by off-premises-only establishments, in conformance with the ruling in *N.W. Enterprises*.

During and after the time that these Texas cases were being litigated, Mick McKamie and Wayne Olson, the attorneys who represented San Antonio and Kennedale, respectively, approached the Texas City Attorneys Association (TCAA) with the idea of commissioning a study that any city could use as evidence of the negative effects of off-premises-only SOBs. The TCAA Board of Directors agreed, and commissioned a study with the goal of determining the extent to which retail-only sexually oriented businesses, with no on-premises entertainment, cause harmful effects in relation to surrounding property values and crime rates.

The study was funded by TCAA and various cities, and is divided into two parts: (1) a survey of Texas real estate appraisers; and (2) a study of crime-related secondary effects in the City of San Antonio, including a review of other crime-related studies. Part one of the study was authored by Connie B. Cooper, FAICP, and Eric Damian Kelly, PhD., FAICP. Part two was authored by Richard McCleary, Ph.D. The results of the study indicate that property values and ambient crime rates are negatively affected by the presence of retail-only adult businesses. The full document is available online at the TCAA website at http://www.texascityattorneys.org (click on the link on the homepage or go to http://www.texascityattorneys.org/pdf/StudyofSecondaryEffectsCrime_Final.pdf).

The following Texas cities provided financial support: Alvarado, Arlington, Austin, Baytown, Benbrook, Boerne, Bowie, Burleson, Comanche, Conroe, Coppell, Corinth, Denton, Fort Worth, Frisco, Garland, Grand Prairie, Harker Heights, Houston, Kennedale, Kerrville, Kilgore, Killeen, Lake Worth, Livingston, Mansfield, Midland, New Braunfels, Ovilla, River Oaks, Rockport, Southlake, and Sugarland. Due to the sup-

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4. Brief of the Government Finance Officers Association, National Governors Association, National League of Cities, National Conference of State Legislatures, National Association of Counties, Council of State Governments, U.S. Conference of Mayors, International Municipal Lawyers Association, and International City/County Management Association as *Amici Curiae* Supporting Petitioners, 2007 WL 2115436 (U.S.) (hereinafter, the "State and Local Amicus Brief").
5. The State and Local Amicus Brief argued that "a decision to invalidate Kentucky's tax scheme would force state treasuries to absorb billions of dollars in transition costs, a large-scale financial disruption that is manifestly unfair given the reasonableness of the States' reliance on the validity of a ubiquitous tax policy." The Brief also pointed out more specifically the serious costs of retroactive impacts involving tax refunds and prospective losses of future tax collections. *Id.* at 4.
6. Davis v. Dept. of Revenue of the Fin. and Admin. Cabinet, 197 S.W.3d 557 (Ky. Ct. App. 2006).
7. Davis v. Revenue Cabinet, Commonwealth of Ky., No. 03CI03282, 2004 WL 5358776 (Ky. Cir. Ct. Aug. 30, 2004).
8. In general, the "market participant" exception allows governments engaged in economic activity within a market to engage in discriminatory behavior as would other competitors. *See Davis*, 128 S.Ct. 1801, 1809 (2008) (citing *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 208 (1983) "[W]hen a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause").
9. 128 S.Ct. at 1808.
10. Justice Kennedy's dissent pointed out that "discrimination against out-of-state bonds is the whole purpose of the law in question." *Id.* at 1827. The State and Local Amicus Brief argued that the Kentucky tax exemption "treat[ed] all private businesses exactly the same; and it concern[ed] an activity—borrowing money—that is a traditional and core governmental function. It therefore [did] not discriminate against interstate commerce." State and Local Brief at 15-16. The Brief further argued that the tax costs to the States from a ruling against Kentucky would be "wholly inequitable." *Id.* at 9.
11.127 S.Ct. 1786 (2007).
12. 511 U.S. 383 (1994).
13. 127 S.Ct. at 1790.
14. *Id.* at 1789.
15.128 S.Ct. 1801, 1813 (2008).
16. *Id.* at 1808 (inside quotes and citations omitted).
17. *Id.* (inside quotes and citations omitted).
18. *A Huge Victory for Muni Bonds After Several Months of Tough News*, CALIF. MUNICIPAL BOND ADVISOR at 1 (June 2008). The "tough news" referred to by the title related to market disruptions associated with the credit crisis.
19. *Id.* The Court's decision cited, repeatedly, an *amicus* brief filed on behalf of the National Federation of Municipal Analysts (NFMA), a group that includes significant numbers of mutual fund analysts among its members.
20. 128 S.Ct. at 1810.
21. *Id.* (citations and footnotes omitted.)
22. *Id.* at 1811 (citations and footnotes omitted).
23. *Id.* at 1810-11 (citations and footnotes omitted).
24. 104 U.S. 592 (1882).
25. 128 S.Ct. 1801, 1811 (2008) (citations and footnotes omitted).
26. For example, Chief Justice Roberts concurred in the decision based only on *United Haulers*, finding no need to proceed with the alternative "market participant" analysis. *Id.* at 1821.
27. *Id.* at 1812, 1814 (citations and footnotes omitted).
28. *Id.* at 1815.
29. *Id.* at 1817 (citations and footnotes omitted).
30. *Id.* This rationale fails to take into account two additional significant market segments for tax-exempt securities issued by smaller jurisdictions. Those are (1) individual investors, whose importance has been emphasized by the Securities and Exchange Commission repeatedly over the years, and (2) the lease-purchase private placement market, involving banks and corporate investors. The lease-purchase market is a substantial, hidden market about which scant data exist. Nevertheless, large quantities of local government securities issued by smaller issuers are sold in that market on a continuous basis. Another important development appears to be in the offing: The dual rating scales of the major rating agencies have been challenged by numerous State and local governmental securities issuers. Single-rating scales, in which corporate and municipal securities are rated based upon common criteria, appear to be emerging. Such a development should lead to significant upgrades in the ratings of State and local securities, and correspondingly, should make securities of smaller issuers more readily salable in the general municipal securities market.
31. *Id.* at 1830. **ML**

CORRECTION:
In the last issue of the *Municipal Lawyer*, the name of the Joseph I. Mulligan, Jr. Distinguished Public Service Award recipient on page 2 should have read Susan Emery McGannon.

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I am so proud to serve as your President/Queen! There is not a finer group of attorneys anywhere. You all are hard-working and dedicated public servants, and you unselfishly share your wealth of knowledge with your fellow colleagues every day. For this, and for all the things you do for our citizens, I thank you. **ML**

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port of these Texas cities, the TCAA has made the study available for free to any city that would like to use it. TCAA hopes that the study will be of benefit to any city that faces similar court challenges.

Mick McKamie is the City Attorney for the City of Boerne, Texas. He also practices trial law and represents governmental entities as a significant portion of his practice. He is a graduate of the University of Texas, Texas Tech School of Law, and holds a Masters degree in Public Administration from Texas Tech. His e-mail is Mick@McKamieLaw.com. Wayne Olson is in private practice in the area of municipal and public law, with an emphasis in real estate development and land use law (primarily in the areas of zoning, planning, and development matters). He serves as the City Attorney for several cities in the North Texas area. Wayne graduated from Southern Methodist University with a B.B.A. degree in real estate, and holds his law degree from the University of Texas School of Law. He can be reached at Wolson@toase.com. Scott Houston is the General Counsel for the Texas City Attorneys Association (TCAA), an affiliate organization of the Texas Municipal League (TML), with a membership of over 400 attorneys. Scott is also the director of legal services for TML, and can be reached at SHouston@tml.org. **ML**