House
Legislative
Analysis
Section

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REGULATE ADULT ENTERTAINMENT BUSINESSES

House Bill 4327 (Substitute H-4)
Sponsor: Rep. Triette Reeves
First Committee: Criminal Law and Corrections
Second Committee: Constitutional Law and Ethics

House Bill 5124 (Substitute H-4)
Sponsor: Rep. Michael Bishop

House Bill 5125 (Substitute H-3)
Sponsor: Rep. Joanne Voorhees

House Bill 5127 (Substitute H-2)
Sponsor: Rep. Eileen DeHart

House Bill 5132 (Substitute H-4)
Sponsor: Rep. James Koetje

House Bill 5133 (Substitute H-1)
Sponsor: Rep. Laura M. Toy

House Bill 5469 as introduced
Sponsor: Rep. Dale Sheltrown

First Analysis (3-21-00)
Committee: Constitutional Law and Ethics

THE APPARENT PROBLEM:

In Michigan, the various acts that govern municipalities allow cities, villages, and townships to enact ordinances to regulate or prohibit public nudity within their boundaries. Specifically, the laws enable local units to regulate "adult entertainment establishments," such as adult book stores, theaters, peep shows, topless bars, massage parlors, and the like. These statutes were the culmination of years of controversy -- in Michigan and elsewhere -- regarding obscenity and public nudity. The state's criminal obscenity law was enacted in 1984, replacing a statute that the U.S. Supreme Court had found to be unconstitutionally vague and overly broad (*People* v. *Neumayer* [275 N.W.2d 230, 405 Mich. 341,1979]). Public Act 343 of 1984 codified the U.S. Supreme Court's guidelines in *Miller* v. *California*, 413 U.S. 15 (1973), in which the court held that the proper First Amendment standards to be applied by the states in determining whether particular material is obscene and subject to regulation are:

• "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;"

• "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and

• "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

The court also held that obscenity is to be determined by applying "contemporary community standards," not "national standards." (See *Background Information* for synopses of the above court cases.)

It was intended that Public Act 343 would be a comprehensive criminal obscenity statute that would give law enforcement agencies the tools needed to crack down on purveyors of obscenity. However, that act applied only to "obscene material," not to live performances, and therefore could not affect "adult entertainment establishments". In response to concerns on this issue, the legislature enacted Public Acts 175, 176, and 177 of 1991, which granted local units of government specific statutory authority to enact ordinances banning or regulating public nudity within their boundaries. Later, the definition of "public nudity" was extended, under Public Acts 313, 314, and 315 of 1994, to include "bottomless" as well as "topless" public appearances. In 1998, language was added to the liquor code, under Public Act 58 of 1998, to allow local governments more control in regulating topless entertainment. (The provisions apply only to counties with a population of 95,000 or less, and to establishments offering topless activity after January 1, 1998; those offering topless activity prior to that date were grandfathered in.) Nevertheless, many local communities have found that local zoning is ineffective at regulating adult entertainment establishments such as adult book stores, theaters, peep shows, topless bars, and massage parlors. Consequently, consideration is being given to a package of legislation to provide regulation. Of this package of bills, six have been reported from committee: House Bill 5126, 5128, and 5129 would add a new section, Section 17a, to the Occupational Code to require adult entertainment establishments, such as adult bookstores, adult motion picture theaters, adult mini-motion picture theaters, adult cabarets, and massage establishments, to be licensed, to regulate their location and operation, and to provide penalties for certain actions. House Bill 5130 would place restrictions on the activities of massage establishments, and on their locations. House Bill 5131 would establish additional licensing requirements on adult entertainment establishments, including the requirement that massage establishments be subject to inspections by the Department of Consumer and Industry Services. House Bill 5134 would allow private citizens to recover reasonable attorney fees after prevailing in court actions to abate "public nuisances" at adult entertainment establishments. *(*See HLAS analyses of House Bills 5126, 5128, 5129, and 5130, dated 2-22-00 and of House Bills 5131 and 5134, dated 1-25-00). Seven more bills from the package have now been reported from committee.

THE CONTENT OF THE BILLS:

House Bill 4327 would amend the act (MCL 722.671) that prohibits the dissemination of sexually explicit materials to minors. House Bills 5124, 5127, 5132 and 5469 would amend the Occupational Code (MCL 339.1751 et al.) to provide for the licensing of adult entertainment establishments and massagists, regulate the location and operation of these establishments, provide penalties for violations, and establish an appeal process for license denials and revocations. House Bill 5125 would amend the State License Fee Act (MCL 338.2226) to require license fees to be established. House Bill 5133 would amend the Public Health Code (MCL 333.15208) to prohibit the operation of commercial facilities constructed for the purpose of facilitating sexual activity.

[Note. The bills are part of a package of legislation to regulate adult entertainment businesses. Six other bills in the package have already been reported from committee. These bills would require adult entertainment establishments to be licensed, regulate their location and operation, and provide penalties for violations. In addition, the bills would allow courts to award attorney fees to private citizens when they prevailed in civil actions to abate "public nuisances" at adult entertainment establishments, require that these businesses notify the Department Consumer and Industry Services when information on license applications changed, and specify that they be subject to inspections by the department and by law enforcement officials.]

House Bill 4327

The bill would amend the act (MCL 722.671) that prohibits the dissemination or display of sexually explicit materials to minors. Currently, disseminating sexually explicit matter to a minor is a felony, punishable by imprisonment for up to two years, a fine of up to $10,000, or both. The bill would increase the penalty to four years imprisonment and a $20,000 fine, or both. The bill also would define "display" and "disseminate."

Display of Sexually Explicit Materials. House Bill 4327 would rewrite current provisions that prohibit knowingly permitting a minor to examine sexually explicit visual matter, and knowing or recklessly disregarding the risk that the person is a minor. The bill would prohibit a manager of a business enterprise that sold sexually explicit visual or verbal materials from displaying that material, knowing its nature, unless it is displayed in a restricted area. This would

mean that the sexually explicit visual or verbal material would have to be displayed in a manner that prevented public view of the lower two-thirds of the material's cover or exterior or displayed the material in a distinct or enclosed area prohibited to minors, or in an area separated from a public area by solid or nontransparent dividers sufficient to prevent minors' access. The bill would also specify that the provisions against distributing obscene matters to a minor and requiring that sexually explicit visual or verbal material be kept in a restricted area do not apply to radio or television broadcasters licensed by the Federal Communications Commission.

House Bill 5124

Licensure. The bill would add a new article, Article 17a, to the Occupational Code to license and regulate adult entertainment businesses. Under the bill, a person could not operate an adult entertainment establishment or engage in the occupation of "massagist" unless licensed to do so by the Department of Consumer and Industry Services (DCIS). An "adult entertainment establishment" would include any of the following:

• an adult bookstore, adult motion picture theater, adult mini-motion picture theater, adult cabaret, or massage establishment.

• a premises to which the public patrons or members were invited or admitted and which were so physically arranged as to provide booths, cubicles, rooms, compartments, or stalls separate from the common areas of the premises for the purpose of viewing adult-oriented motion pictures, or in which an entertainer provided adult entertainment to a member of the public, a patron, or a member for profit.

• an adult entertainment studio or any premises that was physically arranged and used as an adult entertainment studio, whether advertised or represented as an adult entertainment studio, exotic dance studio, encounter studio, sensitivity studio, model studio, escort service, escort, or any other term of like import.

House Bill 5124 would also define the following terms: adult cabaret, adult entertainment, adult mini-motion picture theater, adult motion picture theater, entertainment, massage establishment, massage therapist, massagist, partner, partnership, peace officer, principal owner, specific sexual activity, and treat.

Operation of an adult entertainment establishment without a license would be a misdemeanor, punishable by a fine of up to $10,000, imprisonment for up to six months, or both. The violation would apply if a person was "engaged in the management of an adult entertainment establishment", and to a principal owner, director, or officer of a corporation; a general partner or principal owner of a partnership; and a principal owner or manager of a limited liability company who was "engaging in, carrying on, or participating in the operation of" an adult entertainment establishment without a license.

The bill specifies that prima facie evidence of a violation would be established if the department certified that a diligent search of its records had failed to disclose the existence of a valid license for an adult entertainment establishment.

House Bill 5125

License Fees. The bill would amend the State License Fee Act (MCL 338.2226) to require the Department of Consumer and Industry Services to assess fees for an adult entertainment license based on the actual costs of processing and administering the regulation of these businesses. The department would be required to estimate the costs described above at the beginning of each year and could adjust the fee to cover all costs at the end of the year. The department would be barred from expending funds from the general fund to cover the administrative costs of regulating adult entertainment businesses.

House Bill 5127

Display of License. The bill would require adult entertainment establishment licensees to display their licenses in a conspicuous manner on the licensed premises. A violation of this provision would be a misdemeanor punishable by a fine of up to $1,000 (in addition to any other penalties that could be assessed under the code).

Requirements for Licensure. An applicant for a license to operate an adult entertainment establishment would have to submit, at the applicant's expense, a certified or sworn application. The application would have to include the full name of the applicant, including nicknames or aliases, his or her residential address, place of employment including its address and phone number, Social Security number, date of birth, driver license number, a recent (within 30 days of the application) photograph, federal employer's identification number, and the address of the premises for which the application is being made. The application would have to specifically identify who

would be responsible for the day-to-day management of the facility.

If the applicant was a corporation, limited liability company, or partnership or other unincorporated association, the application would have to include a copy of the applicable articles or certificate of incorporation, a certificate of authority to transact business in the state (if the applicant was an out-of-state entity), personal information as listed above and recent photographs of each director, officer, principal owner, manager, or partner, as applicable. Each director, officer, principal owner, manager, partner, or member, as applicable, would have to sign the application and each signature would have to be original and separately witnessed and notarized.

An adult entertainment establishment that exhibited motion pictures, videocassettes or other video reproductions, or live entertainment that displays "a specific sexual activity" in a viewing room of less than 150 square feet would have to meet additional requirements. First, the establishment would be required to include a diagram of the premises showing the layout or floor plan with the application. The diagram would have to specify where each manager station was located, the location of all overhead lighting, and those portions of the premises that are off-limits for patrons. The diagram would also have to indicate where the license, if granted, will be posted.

A professionally prepared diagram would not be required, but the diagram would have to be oriented to the north or to some designated street or object and drawn to a scale or with marked dimensions that would show the various dimensions of all areas of the interior with an accuracy of plus or minus six inches. The department could waive the diagram requirement where the licensee resubmitted a diagram that it had used previously and the licensee certified that configuration of the premises had not changed since its preparation.

Second, the bill would require that such establishments maintain at least one manager's station. A station could not exceed 32 square feet of floor space and the configuration or location of the manager's station could not be altered without the prior written approval of the department. The establishment would be required to ensure that at least one employee was on duty and situated in each station at all times while patrons are on the premises.

House Bill 5132

Restrictions on Adult Entertainment Establishments. Under House Bill 5132, an adult entertainment establishment would be prohibited from exhibiting, providing, or furnishing adult entertainment to a patron or customer during the following hours: before 10 a.m., Monday through Saturday; after 2 a.m., Tuesday through Sunday; on a legal holiday; and between 2 a.m. and 12 midnight on a Sunday or a legal holiday.

The bill would require that all persons engaged by an adult entertainment establishment to provide live adult entertainment or massage to its customer or patrons would be employees of the establishment. Further, an establishment could not engage independent contractors to provide live adult entertainment or massage to its customers or patrons.

An owner, manager, operator, procurer, or employee of an adult entertainment establishment could not knowingly admit or allow an individual under the age of 18 to remain on the premises.

Violations. In addition to any penalties assessed under the act, a violation of these provisions would be a misdemeanor, punishable by a $1,000 fine for the first offense, or $5,000 for a subsequent offense.

The bill specifies that it would be considered an affirmative defense to prosecution under these provisions if a person under the age of 18 had shown the accused identification that contained a photograph of the person and other information that would lead a reasonable person to believe the person was 18 years of age or older.

House Bill 5133

Limiting Use of Premises for High Risk Sexual Contact. The bill would amend the Public Health Code (MCL 333.15208) to prohibit the operation of commercial facilities that were designed to facilitate sexual activity. Under the bill, a person would be prohibited from constructing, using, designing, or operating a commercial facility (not including a hotel, motel, apartment complex, condominium, or rooming house) for the purpose of engaging in or permitting a person to engage in sexual activity that includes "high-risk sexual conduct" (defined to mean fellatio or anal intercourse, or vaginal intercourse with a person who engages in sexual acts for money).

The bill would prohibit a person from owning, operating, managing, renting, leasing, or exercising control over a commercial facility (not including a hotel, motel, etc.) that contains a booth, stall, or partitioned portion of a room, or an individual room, that is used for viewing a motion picture, videocassette or other video reproduction, or live entertainment and has a door, curtain or portal partition, unless all of the following are met:

• The facility contains one or more manager's stations as described in House Bill 5127, with employees on duty as required under that bill; and, further, that the facility's interior is configured in such a way that there is an unobstructed, direct line of sight view from the manager's station of every area of the facility where patrons are permitted, with the exception of restrooms.

• The restrooms of the facility do not contain any television, motion picture, or videocassette viewing equipment.

• Patrons are kept out of areas that are designated as off-limits for patrons.

• The booths, stalls, or partitioned portion of a room or individual rooms are limited to one person at a time.

• The facility is equipped with overhead lighting that bright enough to provide an illumination of 5 foot-candles as measured at floor level in all areas open to patrons and this level of illumination is maintained at all times while patrons are on the premises.

• There are no holes or openings of any kind between booths, stalls, or partitioned portions of a room or individual rooms, and the facility is inspected daily to determine if any holes or openings exist.

• The floor covering in booths, stalls, or partitioned portions of a room or individual rooms is nonporous and easy to clean, with no rugs or carpets, and wall surfaces and ceilings are also constructed of or covered by nonporous and easy to clean material.

• No wood, plywood, composition board or other porous building material is used within 48 inches of the floor of a booth, stall, or partitioned portion of a room or an individual room.

The Department of Community Health could adopt rules and regulations to administer the provisions of the bill. In exercising its powers under the bill, the department would be required to use the most recent instructions, opinions, and guidelines of the federal Centers for Disease Control related to the spread of infectious diseases. Any rules or regulations adopted by the department related to the spread of sexually related communicable disease would apply to this provision.

In order to ascertain the source of certain infections and reduce the spread of infection, the department or its authorized representative could inspect, and issue orders regarding, a facility that may be a site of high-risk sexual conduct. If the department determined that a "hazardous site" (a premises that is a site of high-risk sexual conduct) existed, it could notify the management, owner, or tenant of the facility, and issue a warning to remedy items listed in the notice. The person cited would have 10 days to request a hearing before a hearing officer appointed by the department for a final determination of whether the facility was a hazardous site. If the person did not request a hearing, or if the hearing officer determined that the facility is a hazardous site, the department would post a notice on the premises warning the public, and order the management to bring the facility into compliance with the bill. If the department determined that the facility had not been brought into compliance within 30 days, it could do one or more of the following:

• Declare the facility to be a "public nuisance" and order the abatement of the public nuisance. Such an order would be enforced by mandatory or prohibitory injunction in a court of competent jurisdiction.

• Secure a court order to close the facility until it complied with the bill.

• Take steps set forth under current law to abate a health or sanitation nuisance, including having the nuisance abated and assessing the owner for the expenses incurred.

The bill would allow the management, owner, or tenant to apply, with 30 days of the department's order, to a court for a new trial on the findings of fact made by the hearing officer and on any charges brought against the management, owner, or tenant.

House Bill 5469

The bill would amend Article 5 of the Occupational Code (MCL 339.523), entitled "Complaints, Hearings, Petitions", to establish an expedited appeal process for judicial review in the case of a denial of an application or the suspension, revocation, or limitation of a license for adult entertainment businesses regulated under Article 17a (which would be created under House Bill

5124). The bill would specify that a petition for judicial review regarding an order or final decision of the Department of Consumer and Industry Services or of a board would have to be in compliance with Chapter Six of the Administrative Procedures Act (MCL 24.301 to 24.306), except as specified in the bill.

Under House Bill 5469, if a license required under Article 17a were suspended, revoked, or restricted, or a license application was denied, the license holder or applicant could petition the circuit court for judicial review. The petition for review would have to be made within 21 days after the date that the notice of the final decision or order of the department was mailed. Filing a petition for judicial review would not act as a stay of enforcement of the department's action, though the department could grant, or the court could order, a stay upon appropriate terms.

The circuit court would have to schedule a hearing within 25 days after the petition was filed. The department would have to make the original or a certified copy of the entire record of proceedings available to the applicant or licensee within five days after the service of the petition, and also transmit the original or certified copy of the record to the court no later than ten days before the hearing. Hearings would be conducted without a jury and the review would be confined to the record. If requested by the parties, the court would have to hear oral arguments and receive written briefs. A decision would have to be issued not later than 20 days after the hearing date or not less than 50 days after the date the petition for judicial review had been filed, whichever was later. Finally, if both parties agreed, the bill's time limits could be waived.

Tie-bars. House Bills 5124-5132, which would amend the Occupational Code and the State License Fee Act, are all tie-barred to each other. None could take effect unless all were enacted. House Bills 4327, 5133, and 5469 are not tie-barred to the other bills.

BACKGROUND INFORMATION:

The following are synopses of relevant case law on First Amendment issues pertaining to adult entertainment establishments:

Schad v *Borough of Mount Ephraim* (452 U.S. 61 [1981]):

The appellant operated an adult bookstore located in the New Jersey borough's commercial district. The store contained licensed coin-operated devices that displayed adult films, but when it added such a mechanism that enabled customers to view live, usually nude, dancers, complaints were filed charging that the activity violated the borough's ordinance that generally prohibited live entertainment in a commercial zone. The appellants were convicted, the trial court having rejected their defense that First Amendment guarantees applied, since the case involved only a zoning ordinance under which live entertainment of any kind was not a permitted use in the borough. The Appellate Division of the New Jersey Superior Court affirmed the decision, and the New Jersey Supreme Court denied further review.

The U.S. Supreme Court reversed the convictions, holding that the Mount Ephraim ordinance prohibited "a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments." In addition, the court opined that "live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee". Although a local zoning ordinance may regulate certain activity and its location, the court held that the Mount Ephraim ordinance was overboard, and that "when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest".

Barnes v *Glen Theater, Inc.* (111 S.Ct. 2456 [1991]):

Establishments in South Bend, Indiana, that wished to provide totally nude dancing as entertainment, and individual dancers, sued to enjoin enforcement of Indiana's public indecency law, which required "that the dancers wear pasties and a G-string when they dance." The U.S. District Court for the Northern District of Indiana permanently enjoined enforcement, but the Court of Appeals for the Seventh Circuit reversed and remanded. The District Court then found that the nude dancing in question was not protected by the First Amendment. On appeal, the Court of Appeals ultimately reversed, finding that the statute was an improper infringement of the expressive activity protected by the First Amendment. The U.S. Supreme Court then granted *certiorari*.

In reversing the Court of Appeals and upholding the Indiana statute, the Supreme Court held that, although "nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment," the determination of "the level of protection to be afforded to such expressive conduct" and "whether the Indiana statute was an impermissible infringement of that protected activity" was at issue in this case. The court then turned to the four-part rule enunciated in *United*

States v *O'Brien* (391 U.S. 367 [1968]) for First Amendment scrutiny. In *O'Brien*, the court said that:

"...[It is clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

The *Barnes* court found that the Indiana law was justified despite its "incidental limitations on some expressive activity". The court opined that public indecency laws "reflect the moral disapproval of people appearing in the nude among strangers in public places" and that the Indiana law followed "a long line of earlier Indiana statutes banning all public nudity." The court found that the Indiana statute was "designed to protect morals and public order," which is within the traditional police powers of the states, and thus, "furthers a substantial government interest in protecting order and morality." Since the Indiana statute did not prohibit the dancing or its expression of an erotic message, but its being done in the nude, the court held that the governmental interest was not related to the suppression of free expression. Finally, since the governmental interest in this case was the prohibition of public nudity, and not expressive dancing, the court held that Indiana's "statutory prohibition is not a means to some greater end, but an end in itself," and hence, was no greater than what was essential to the furtherance of the governmental interest.

Miller v *California* (413 U.S. 15 [1973]):

Public Act 343 of 1984, Michigan's obscenity law, defined "obscene material" by codifying the U.S. Supreme Court's guidelines in *Miller* v *California*. In that case, the U.S. Supreme Court held that the proper First Amendment standards to be applied by the states in determining whether particular material is obscene and subject to regulation are:

• "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest";

• "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and

• "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

The court also held that obscenity is to be determined by applying "contemporary community standards," not "national standards."

Jott, Inc. v *Charter Township of Clinton* (224 Mich App 513):

A situation in Clinton Township led to a Michigan Court of Appeals decision in July, 1997. In *Jott, Inc.* v *Charter Township of Clinton* (224 Mich App 513), the Liquor Control Commission (LCC) had approved an entertainment permit in 1984 for a bar, which stated it would offer only "wholesome entertainment" and would not offer "any entertainment of a lewd, obscene, or immoral nature including, but not limited to topless performers". In 1992, however, the bar (which was in an industrial zoning district) decided to offer topless dancing but was prohibited from doing so by zoning ordinance 260 (which restricted certain "adult uses" to general business use zoning districts) and local ordinance 291-A (which prohibited "nudity", including topless entertainment, in liquor-licensed establishments).

The Court of Appeals stated, "The use of zoning and licensing ordinances to regulate exhibitions of 'adult entertainment' is widely recognized." The court affirmed the trial court's decision upholding the constitutionality of zoning ordinance 260, and reversed the trial court's decision that local ordinance 291-A was unconstitutional because the definition of "public nudity" was overboard. The Court of Appeals specified that zoning ordinance 260 was constitutional because it did not prohibit topless dancing but, "merely restricts the location of such forms of adult entertainment . . . to combat the secondary effects of adult uses on surrounding areas 'in order to insure that the surrounding areas will not experience deleterious blighting, or downgrading influences.'" The Court of Appeals severed the overbroad provisions in local ordinance 291-A and upheld the remainder. The court stated that the ordinance was constitutional because it did not forbid *all* public nudity, only public nudity in establishments that serve liquor. The court pointed out that the LCC's regulations explicitly recognize the authority of local governmental units to prohibit nudity, other than "bottomless nudity" (which is prohibited in all liquor-licensed establishments by LCC rule), in liquor-licensed establishments.

FISCAL IMPLICATIONS:

With regard to earlier versions of the package, the House Fiscal Agency has reported that, under the

provisions of House Bill 5124, the Department of Consumer and Industry Services (DCIS) would incur costs to administer the licensing requirements for adult entertainment establishments and massagists. House Bills 5125 and 5126 establish additional requirements for license fees, and specify that the DCIS must maintain a database of applicants and licensees. These provisions would increase both state revenue and costs by an indeterminate amount, depending on the number of license applications received.

The HFA also estimates that the Department of Community Health (DCH) would incur costs to enforce the provisions of House Bill 5133, which would require that the DCH adopt rules and regulations to administer provisions regulating the use of certain commercial facilities for purposes related to "high-risk sexual contact."

The HFA estimates that House Bills 4327, 4450, 5127, 5128, 5129, 5130, 5131, 5132, and 5134 would have no impact on state funds. (12-7-99)

ARGUMENTS:

For:

In spite of the fact that local communities have made it clear for many years that adult entertainment establishments aren't welcome near homes or schools, these operations continue to turn up in such areas. They accomplish this by using loopholes in local laws. As a result, many have concluded that local zoning is ineffective at regulating such businesses. Moreover, until stricter regulation is imposed by the state, cities, villages, and townships must initiate costly and protracted court actions to have them moved out. In fact, in written testimony presented to the House Constitutional Law and Ethics Committee, supporters of the bills express the opinion that some municipalities have eschewed anti-pornography ordinances because they fear litigation.

Recent examples indicate the problems communities have in regulating the adult entertainment industry: During the House committee hearing, committee members heard testimony from a Lansing Township representative who reported that an adult entertainment establishment wangled a permit from the township by applying for a permit to redesign a store's interior, in order to open as a "gift shop." The store is situated in a small shopping center in the township's "E" zone, under which businesses are restricted to local neighborhood-type enterprises such as grocery stores, flower shops, or gift shops. The shopping center is in a residential neighborhood, and faces an elementary school. According to a sign located between the street and the edge of the shopping center, the business sells lingerie. However, once this sign went up, local residents immediately recognized the business' name -- "Priscilla's" -- as an adult entertainment establishment, and complaints were registered with the township. The township and the store are now locked in a court battle over the issue in the Ingham County Circuit Court. Meanwhile, however, the store continues to sell its merchandise.

Even more recently, anti-pornography protestors from Brandon Township and nearby Ortonville picketed an adult store called "Ultimate Pleasures." The store, which carries "adult" videos and sexual paraphernalia, opened next to a children's dance studio in a small shopping center that houses, among other small establishments, a pet store and family restaurant. According to a recent news article (*The Oakland Press*, November 27, 1999), adjacent business owners say they were told a nail salon or "regular" video store was scheduled to open at the Ultimate Pleasures' location. The store's windows are covered with a dark film, so that the merchandise can't be seen by passers-by. No sign announces its presence, other than lettering on the door saying that customers must be 18 years of age and carry picture identification to enter. Nevertheless, according to the article, at least one teenage boy entered the store on a dare from his friends. (An elementary school is located behind the shopping center, and there is a high school a short distance away.)

For:

Local communities complain that, when an adult entertainment establishment opens in a neighborhood, the area becomes a magnet for prostitutes and criminals. In fact, the Organized Crime Unit of the Department of State Police's (DSP) Criminal Investigation Division (C.I.D.) has been assigned to investigate prostitution cases in adult entertainment establishments such as escort services, massage services, adult book and video stores, and topless bars. In testimony before the House Constitutional Law and Ethics Committee, a field representative from the DSP listed the following as some of the crimes the C.I.D. has found to be associated with these establishments during the past two years: prostitution and solicitation, drugs, money laundering, racketeering, pandering, harboring runaways, unregistered firearms, tax evasion, fugitives, and the spread of disease.

The DSP representative testified that the C.I.D. recently obtained a search warrant to investigate an adult bookstore in Lansing. During the investigation,

female employees admitted that they solicited males while working as "nude dancers" at the bookstore. The investigation also revealed that local escort services and adult bookstores are tied together by a "network" which operates throughout the state, and that all the businesses involved operate under assumed names and corporations, while posing as legitimate, adult entertainment, businesses. Drugs and a gun were also retrieved under the search warrant.

The DSP testimony listed 12 businesses that are, or have been, under investigation during the past two years. Of the 12, two have been shut down, and one of these is under investigation by the Federal Bureau of Investigation (FBI). At another establishment, a dancer was murdered. At yet another, the owner is currently in state prison. The DSP testimony also observed that prostitutes don't appear to be troubled by misdemeanor charges, since the money they make is much higher than that paid in other jobs they might qualify for.

Response:

In testimony before the House Constitutional Law and Ethics Committee, a representative of the Michigan Licensed Beverage Association (MLBA) stated that the provisions of the bills are unnecessary, since an adult entertainment establishment that sells liquor is currently regulated by the Liquor Control Commission (LCC), which conducts exhaustive background checks before issuing liquor licenses. (Other adult entertainment establishments refrain from serving alcohol in order to attract the under-21 crowd.)

Additionally, adult entertainment industry spokespersons report that the industry resents the fact that the bills would group together diverse establishments such as bars, massage parlors, adult bookstores, topless shows, and adult theaters under the definition "adult entertainment establishment." They maintain that these and other provisions constitute an attempt to "paint all entertainment establishments with the same brush," and that law-abiding establishments are obviously being tarnished with the poor reputation earned by a few facilities. It would be more reasonable, they suggest, to leave establishments engaged in illegal activities to the jurisdiction of the appropriate law enforcement agencies. According to entertainment establishment spokespersons, however, most adult entertainment establishments are law-abiding businesses.

Against:

Adult entertainment establishments employ thousands of state residents and add millions of dollars in taxes to state coffers. However, in spite of this benefit to the state economy and to the individuals employed by these businesses, and in spite to large number of people who attend these establishments or purchase their products, many of the provisions the package of bills seem aimed at putting these establishments out of business, according to testimony presented by representatives of the trade organization which represents adult entertainment facilities before the House Constitutional Law and Ethics Committee. Furthermore, House Bill 4327 would place restrictions on how sexually explicit materials could be displayed when minors are present. Attorneys for adult entertainment establishments point out that this could legally be construed as restricting other workers normally involved in everyday business operations -- janitorial staff or federal express couriers, for example -- should they be under 21 years of age.

Against:

Although some people find adult entertainment establishments distasteful, it is not the government's function to police citizens' morals. Moreover, in 1995, the legislature decided to leave the regulation of massage therapists and massage establishment to municipalities by repealing statutory provisions regarding regulation under the provisions of Public Act 104 of 1995. It is not clear that state regulation is the best way to address this issue.

Against:

It is likely that the package of bills will be challenged on constitutional grounds. For example, it could be asserted that they would violate free expression protected by the First Amendment.

Response:

The licensing regulations found in the package of bills have consistently been upheld against constitutional challenges. Two U.S. Supreme Court decisions control in this area: *Young* v. *American Mini Theatres, Inc.* (427 U.S.Ct. 2440 [1976]), and *Renton* v. *Playtime Theaters, Inc.* (475 U.S. 41 [1986]). In *Young*, the U.S. Supreme Court upheld the constitutionality of a Detroit zoning ordinance that prohibited an adult theatre from locating within 1,000 feet of any other such establishment, or within 500 feet of a residential area. The court noted the serious problems to which the ordinance was addressed and ruled that reasonable regulations of time, place and manner of protected speech, where necessary to further governmental interests, were permitted by the First Amendment.

In *Renton*, the court upheld a city ordinance regulating the location of adult motion picture theaters on the ground that it sought to regulate the "secondary effects" of the theaters, rather than the content of their speech. The court noted that the ordinance was a valid

governmental response to the serious problems created by adult theaters and satisfied the dictates of the First Amendment. Because the statute did not prohibit adult theaters altogether, the court insisted that the ordinance was "content-neutral" and was "justified with reference to the content of the regulated speech." Such ordinances are acceptable, according to the court, so long as they are designed to serve a substantial governmental interest and do not "unreasonably limit alternative avenues of communication." (Note: "Content-neutral" time, place and manner regulation, in that context, referred to the unwanted secondary effects, and not to the content, of the films.) Also, although the proposed legislation is related to licensing, and not zoning, the Supreme Court has also stated that states may have special licensing schemes for different kinds of speech activities. For example, in *Lakewood* v. *Plain Dealer Publishing Co.*, (486 U.S. 750 [1988]), the court asserted that cities could ". . . have special licensing procedures for conduct commonly associated with expression."

POSITIONS:

Representatives of the following organizations testified before the House Constitutional Law and Ethics Committee on the dates indicated in support of the bills:

• Lansing Township (11-29-99)

• The Community Defense Council, located in Phoenix, Arizona (12-8-99)

• The City of Royal Oak, Michigan (12-8-99)

• Right to Decency, Inc., an organization working to fight pornography and obscenity in local communities (12-8-99)

The Department of State Police (DSP) has no position on the bills. (11-29-99)

Representatives of the following organizations testified before the committee on the dates indicated in opposition to the bills:

• The Association of Club Executives (ACE), a trade organization for adult entertainment facilities. (11-29-99)

• The Michigan Licensed Beverage Association (MLBA) (11-29-99)

• The First Amendment Lawyers Association (12-8-99)

Analyst: R. Young/W. Flory

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.