House
Legislative
Analysis
Section

House Office Building, 9 South
Lansing, Michigan 48909
Phone: 517/373-6466

REGULATE ADULT ENTERTAINMENT BUSINESSES

House Bill 5126 (Substitute H-2)
Sponsor: Rep. Janet Kukuk

House Bill 5128 (Substitute H-3)
Sponsor: Rep. Ken Bradstreet

House Bill 5129 (Substitute H-2)
Sponsor: Rep. Cameron Brown

House Bill 5130 (Substitute H-2)
Sponsor: Rep. Sue Tabor

First Analysis (2-22-00)
Committee: Constitutional Law and Ethics

THE APPARENT PROBLEM:

In spite of attempts to regulate or prohibit adult entertainment establishments such as adult book stores, theaters, peep shows, topless bars, and massage parlors, local communities report that they are still being outmaneuvered by those establishments that locate within their boundaries. Consequently, consideration is being given to a package of legislation to provide regulation. Among other provisions, the legislation (House Bills 4327, 4450, and 5124-5134) would require adult entertainment establishments to be licensed, regulate their location and operation, and provide penalties for violations. In addition, the bills would establish license fees, prohibit the operation of commercial facilities designed to facilitate sexual activity, restrict the display of sexually explicit materials and prohibit their dissemination to minors, and also ban minors from "sexually explicit" employment.

Of this package of bills, two -- one that would allow private citizens to recover reasonable attorney fees after prevailing in court actions to abate "public nuisances" at adult entertainment establishments, and another that would require that these businesses notify the Department of Consumer and Industry Services within a certain period when information on license applications changed and that they also be subject to inspections by the department and by law enforcement officials -- were reported from committee previously (see HLAS analysis of House Bills 5131 and 5134, dated 1-25-00). Four more bills from the package have now been reported from committee. Among other provisions, these latter bills would provide for the licensing of adult entertainment establishments and regulate their location and operation.

THE CONTENT OF THE BILLS:

House Bills 5126 and 5128-5130 would add a new article, Article 17a, to the Occupational Code (MCL 339.1753 et al.) to provide for the licensing of adult entertainment establishments, regulate the location and operation of these establishments, and provide penalties for violations, as follows:

House Bill 5126 specifies that a license issued under the provisions added by the package would not be transferable. In addition to other penalties that could be assessed under the code, it would be a misdemeanor, punishable by a fine of up to $500, imprisonment for up to six months, or both, to use or permit another to use a license by or on behalf of a person other than the licensee (or to attempt such use).

A license would have to contain the original or facsimile signature of the director of the department, and would state the name and address of the licensee, the date of issuance and the date of termination of the license. For an adult entertainment establishment, a

license would have to describe the nature of the business or enterprise, and specify the location of the premises. It would also include the name and address of a corporation's resident agent and its office.

Database of adult entertainment establishment licensees. The Department of Consumer and Industry Services (DCIS) would have to maintain an alphabetized or computerized database of adult entertainment establishments applicants and licensees. The database would contain each person's photograph, full name, alias or nickname, residential address, business address, Social Security and driver's license number. Applicants would have to provide a photograph and the required information for each person whose signature appeared on an application or on supporting documents submitted with an application for licensure. Each database would have to indicate the eligibility of an applicant as a licensee under the provisions of the act, and whether the signature of a person on an application precluded a license being issued based on that signature.

The department would submit names of applicants to the Federal Bureau of Investigation (FBI) and the U.S. Department of Justice for the purpose of criminal record checks.

Records obtained by the department in connection with licensing applications would be confidential and could not be made available for public inspection; however, records could be disclosed to law enforcement officials, in connection with an action brought under the code, or upon court order.

Location of adult entertainment establishments. A license issued under the code would authorize the licensee to operate an adult entertainment establishment only in the licensed premises. An applicant would have to document that the location of the place of business was in compliance with all applicable laws and ordinances. A change of location during the license period would be grounds for license revocation, and a new license application would be required. Operating an adult entertainment establishment by a licensee at a location other than the licensed premises would be a misdemeanor, punishable by a fine of up to $500, imprisonment for up to six months, or both (in addition to any other penalties that could be assessed under the code).

An adult entertainment establishment could not operate within 1,500 feet of a school, a house of religious worship, or a child care organization, as defined under the act which regulates child care organizations (MCL 722.111). In addition to any other penalties that could be assessed under the code, a violation of this provision would be a misdemeanor, punishable by a fine of $5,000.

House Bill 5128 would require applicants for licensure to appear personally before the director of the department to sign the application, provide his or her Social Security number, and certify to the truthfulness of the application under oath. This requirement would be satisfied for a business entity by the appearance of a corporation's director, a limited liability company's manager or member, or a general partner or member of a partnership or unincorporated association.

Under the bill, the department would be required to approve or deny a license within 60 days after receiving an application. If an applicant already held a valid adult entertainment establishment license, he or she could continue to operate while a new application was being reviewed.

Disqualification for criminal record. Convictions for certain crimes would result in disqualification for licensure, whether they occurred in this state or any other state or jurisdiction, as follows: A person could not be licensed to operate an adult entertainment establishment if he or she had been convicted of, or was in jail or prison for a conviction for, a misdemeanor involving certain listed offenses, or had been registered as a sex offender within the three years prior to the date of the application. Further, a license could not be issued to a person who had been convicted of, or was in jail or prison for, a conviction for a felony involving the listed offenses within the seven years prior to the date of the application. The listed offenses include crimes involving lewdness, prostitution, pandering or promoting prostitution, sexual assault or assault with intent to commit criminal sexual conduct, sexual misconduct, indecent exposure, incest, rape or criminal sexual conduct, or sodomy. Nor could a license be issued to a person whose license to operate an establishment had been revoked for a violation within the past two years, or who was an officer, director, etc. of an establishment whose license had been revoked within the previous two years. (See below.)

License suspension, revocation. Under Section 602 of the Occupational Code, violations of the act are punishable by license limitation, suspension, denial, or revocation, or by a civil fine, censure, or a requirement that restitution be made. House Bill 5129 specifies that

applicants for adult entertainment establishment licenses, or licensees, would be subject to those penalties for one or more of the following:

• An intentional misrepresentation or omission of any material fact that should have been filed in an application.

• Unauthorized transfer of a license or change in location;

• Failure to comply with the requirements of House Bills 5130 or 5131 regarding licensed massagists, massage establishments, and myomassologists.

• Conviction of the applicant or licensee for crimes listed above (lewdness, prostitution, etc.);

• Conviction of a partner, director, officer, principal owner, manager, procurer, or employee of the licensee for a crime (lewdness, prostitution, etc.) occurring on the licensed premises; or

• Conviction of a partner, director, officer, etc. for any of the listed crimes occurring off the premises, if the person was off the premises at the request or direction of the licensee for the purpose of furthering the business of the licensee.

A person licensed to operated a massage establishment would be subject to license suspension, revocation, etc. if convicted of a violation of House Bill 5130 (see below).

Misrepresentation, false information. In addition to other penalties assessed under the code, a person who intentionally misrepresented or omitted any material facts in information required to be filed under the legislation would be guilty of a misdemeanor, punishable by a fine of up to $1,000, imprisonment for up to 30 days, or both. A fact would be considered "material" if it could affect the department's decision to grant or deny a license.

Massage establishments; requirements. Under House Bill 5130, a massage establishment could not permit a massagist in its employ to "treat" a patron while either the massagist or the patron were undressed, or to "treat" the genitals of a patron. Further, a massage establishment could not be located on the premises of, or have an adjoining door to, an establishment that sells alcoholic beverages. Violations of these prohibitions (in addition to license suspension, revocation, etc.) would be punishable by a fine of up to $1,000, imprisonment for up to six months, or both.

Required records. A massage establishment would be required to maintain on the premises and keep current a record of all massagists in its employ, and of all massagists who had been employed after the effective date of the legislation. These records would be subject to inspection on demand by a peace officer or by the department. In addition to the penalties otherwise assessed under the code, a violation of this provision would be a misdemeanor, punishable by a fine of up to $1,000, imprisonment for up to six months, or both.

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.

BACKGROUND INFORMATION:

Although the adult entertainment industry generally claims protection for its activities under First Amendment freedom of speech provisions of the U.S. Constitution, the U.S. Supreme Court has ruled otherwise in the following cases:

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:

The House Fiscal Agency (HFA) reports that, under the provisions of House Bill 5126, the Department of Consumer and Industry Services (DCIS) would incur an increase in costs to maintain a database of adult entertainment establishment licensees and applicants. Costs would also be incurred by the bill's requirement that information be submitted to the Federal Bureau of Investigation and the Justice Department for record background checks. The HFA also estimates that House Bill 5128's provision, requiring that the director of the DCIS personally witness the signatures of license applications, would probably incur costs, especially when compared with alternative methods that might otherwise be employed. (2-16-00)

ARGUMENTS:

For:

In testimony presented to the House Constitutional Law and Ethics Committee, representatives of citizens groups -- including several former employees of adult entertainment establishments -- pointed out that this industry thrives in the seedy underworld, and that existing regulations are pointless, since the identities of the participants are concealed. Some former employees explained how the industry evades taxes and promotes prostitution. Although communities have attempted to control the problem through zoning regulations, many who testified pointed out that zoning laws do not control the problem; they only relocate it. In response, the bills are part of a package of legislation devised to control adult entertainment businesses and make their owners accountable to the communities where they are located. In addition to the bills that have been reported out of committee to date, House Bill 5125 would amend the State License Fee Act to establish license fees, House Bill 5133 would amend the Public Health Code to prohibit the operation of commercial facilities constructed for the purpose of facilitating sexual activity, House Bill 4327 would amend the act that prohibits the dissemination of sexually explicit materials to minors, and House Bill 4450 would create a new act to ban minors from "sexually explicit" employment. In addition, the bills would restrict activities such as "peep shows" and adult mini motion picture theaters: businesses would be prohibited from operating facilities with interior partitions or subdivisions that could be used for sexual activities, and any partitions that were used to watch videos would have to have at least one side open to an adjacent public area. The bills would also permit the Department of Community Health to inspect certain facilities. House Bills 5126 and 5128-5130, together with House Bills 5124 and 5127, form the core of this package. They would amend the Occupational Code to establish state-wide licensing of adult entertainment establishments and massagists, regulate the location and operation of these establishments, and provide penalties for violations. More importantly, under the bills, the prior records of employees with prior criminal records would have to be revealed, and anyone who had been convicted of a misdemeanor offense in the last three years, or of a felony offense in the last seven years, could not obtain a license.

Against:

In testimony before the House Constitutional Law and Ethics Committee, adult entertainment industry spokespersons expressed the industry's resentment of 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. According to the spokespersons who testified, most adult entertainment establishments are law-abiding businesses.

In testimony before the House committee, employees of these establishments also maintained that adult entertainment establishments employ thousands of state residents and add millions of dollars in taxes to state coffers. Those who testified before the House committee -- many of whom are single parents -- point out that their earnings enable them to support their families, purchase homes, and attend college. According to the testimony, a waitress at such an establishment can earn more than $1,000 per week. Those who testified remonstrated that the provisions of House Bills 5126 and 5128-5130 could put adult entertainment establishments out of business, and force their employees onto welfare.

Against:

Although some people find adult entertainment establishments distasteful, it is not the government's function to police citizens' morals. Furthermore, representatives from the industry testified before the House Committee that they intend to challenge the bills on constitutional grounds.

Response:

Although the First Amendment protection afforded adult entertainment businesses has made regulation difficult, much pornographic activity is not covered by this protection. In fact, the U.S. Supreme Court has ruled against the industry in several cases, as documented elsewhere in this analysis (see *Background Information*).

POSITIONS:

Representatives of the American Decency Association testified before the House Constitutional Law and Ethics Committee in support of the bills. (2-15-00)

The Marriage and Family Ministry, Diocese of Kalamazoo, supports the bills. (2-22-00)

The American Civil Liberties Union (ACLU) has no position on the bills. (2-22-00)

In addition to several adult entertainment employees, representatives of the following organizations testified before the committee in opposition to the bills (2-15-00):

• The Michigan Coalition of First Amendment Enterprises (a non-profit association of adult bookstore owners)

• The Association of Club Executives (ACE), a trade organization for adult entertainment facilities

• Triangle Foundation (the Lesbian Gay Foundation of Michigan)

The Department of Consumer and Industry Services (DCIS) does not support the bills. (2-22-00)

Analyst: R. Young

■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.