House
Legislative
Analysis
Section

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REGULATE ADULT ENTERTAINMENT BUSINESSES

House Bill 5131 as introduced
Sponsor: Rep. Charles LaSata

House Bill 5134 (Substitute H-1)
Sponsor: Rep. Gloria Schermesser

First Analysis (1-25-00)
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, local communities report that they are still being outmaneuvered by adult entertainment establishments that locate within their boundaries.

It has been suggested that these businesses be further restricted, and 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. Two bills from this package -- 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 also be subject to inspections by the department and by law enforcement officials – have been reported from committee.

THE CONTENT OF THE BILLS:

House Bill 5131 would amend Article 17 of the Occupational Code (MCL 339.1766), concerning the licensing of myomassologists, or persons who perform muscle massage, to require that adult entertainment establishments notify the Department of Consumer and Industry Services (DCIS) within a certain period of time when information on license applications change, and that the establishments be subject to inspections by the department and by law enforcement officials. House Bill 5134 would amend the Revised Judicature Act (MCL 600.3805) to allow private citizens to recover reasonable attorney fees after prevailing in court actions to abate "public nuisances" at these establishments.

Note. The bills are part of a package of legislation that would regulate adult entertainment businesses: House Bills 5124, 5126-5130, and 5132 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, and provide penalties for violations. House Bill 5125 would amend the State License Fee Act (MCL 338.2226) to establish license fees. 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. House Bill 5134 would amend the Revised Judicature Act (MCL 600.3805) to allow a court to award attorney fees to a private citizen who prevails in a civil action to abate a public nuisance. In addition, House Bill 4327 would amend the act (MCL 722.671) that prohibits the dissemination of sexually explicit materials to minors to restrict the display of sexually explicit materials, and House Bill 4450 would create a new act to ban minors from "sexually explicit" employment.

Adult entertainment establishments. Under House Bill 5131, the following prohibitions and requirements would apply:

• An establishment would be required to notify the DCIS in writing within 10 days if any of the information in its license application changed. If the change were one that would disclose an applicant's identity -- information that would be required in an application under the provisions of Section 1759 of House Bill 5127 -- then the applicant would have to include the full name, including nicknames or aliases, address, place of employment, date of birth, Social Security and driver license numbers, and a recent photograph of the person. In addition to other penalties under the code, a violation of this provision would be a misdemeanor, punishable by a fine of $1,000.

• The premises of a massage establishment would be subject to periodic inspection, upon reasonable notice, by the Department of Community Health for the prevention of the spread of communicable diseases, and to inspection by law enforcement officials.

Application. House Bill 5131 specifies that the legislation would apply to all businesses and enterprises subject to the legislation, whether in existence prior to, on, or after the effective date of the legislation. Further, issuance of a license under the legislation would not be a defense to a civil or criminal action, other than an action for a licensing violation.

Attorney fees for public nuisance abatement. Under the Revised Judicature Act (MCL 600.3805), the attorney general, a prosecuting attorney, or any citizen may bring an action to abate a public nuisance ("any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons . . ."). House Bill 5134 would amend the act to specify that a private citizen who prevailed in a court action to abate a nuisance involving an adult entertainment establishment that called for licensing under the provisions of the Occupation Code could be awarded reasonable attorney fees as part of the costs of maintaining the action.

Tie-bars. House Bill 5134 is tie-barred to House Bill 5124. House Bill 5131 is tie-barred to House Bills 5124-5130 and House Bill 5132. (Note. House Bills 5124-5132, which would amend the Occupational Code and the State License Fee Act, are all tie-barred to each other. None can take effect unless all are enacted. However, only House Bills 5131 and 5134 have been reported out of the House committee.)

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:

The House Fiscal Agency (HFA) estimates that House Bills 5131 and 5134 would have no impact on state funds. (1-20-00)

ARGUMENTS:

For:

The bills are part of a package of legislation devised to regulate adult entertainment businesses. House Bills 5124 and 5126-5130 and 5132 would amend the Occupational Code to provide for the licensing of adult entertainment establishments and massagists, regulate the location and operation of these establishments, and provide penalties for violations. 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. In addition, House Bill 4327 would amend the act that prohibits the dissemination of sexually explicit materials to minors to restrict the display of sexually explicit materials, and House Bill 4450 would create a new act to ban minors from "sexually explicit" employment.

Response:

The provisions of the bills would make little sense unless other bills in the package are enacted. For example, the licensing requirements for adult entertainment establishments and massagists are to be established under House Bill 5127. Therefore, House Bill 5131, which would amend the Occupational Code to establish additional licensing requirements on adult entertainment establishments, could have no effect until House Bill 5127 is enacted. Moreover, House Bills 5124-5132 are each tie-barred to each other. None can take effect unless all are enacted.

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.

Against:

Local communities already have the legal weapons to deal with troublesome pornography businesses through zoning ordinances. In fact, several local governments have successfully overcome the problem, as recently reported (*Detroit News, January 6, 2000*):

• The City of Royal Oak required massage parlors to be licensed, thus identifying both owners and employees. Consequently, when it became apparent that one massage parlor was being used as a front for prostitution, the city was able to have it closed down by moving directly against the participants.

• In Brandon Township, parents picketed and raised funds to purchase a store that sold pornographic materials. The store has closed during the purchase negotiations.

• Other communities have forced stores selling pornographic material to remove it from open shelves.

Through zoning and effective police work, these communities have shown that problems involving businesses that are public nuisances can be handled at a local level.

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:

The following businesses and associations submitted written testimony indicating support for the bills:

• The Michigan Decency Action Council (1-10-00)

• The Michigan Association of Counties (MAC) (11-24-99)

• The Michigan Municipal League (12-7-99)

• The Michigan Townships Association (12-6-99)

• The Michigan Family Forum (1-6-00)

• The Diocese of Kalamazoo/Marriage and Family Ministry (12-3-99)

• Macomb Township (11-29-99)

• Immanuel Lutheran Church and School, Macomb, Michigan (11-28-99)

• Citizens for Traditional Values (12-6-99)

• Kalamazoo Coalition for the Protection of Children & Families (12-3-99)

• right to decency, inc. (1-12-00)

• Charter Township of Ypsilanti (12-7-99)

• Edison Neighborhood Association in Kalamazoo (1-12-00)

• American Decency Association (1-12-00)

• The National Organization Against Lewd Activities (1-12-00)

The Prosecuting Attorneys Association of Michigan supports the bills. (1-24-00)

The Department of Consumer and Industry Services does not support House Bill 5131. (1-24-00)

DeLux Monogramming and Screen Printing, Inc. submitted written testimony indicating opposition to the bills. (1-12-00)

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.