

## **SAMPLE ORDINANCE ON SEXUALLY ORIENTED BUSINESS REGULATION**

*NOTE: This Sample Ordinance, because of its comprehensive nature, necessarily contains regulatory provisions that will not work in each jurisdiction. Courts have applied a myriad of nuances to the analysis of adult business restrictions, and each local ordinance requires jurisdiction-specific research and drafting. Wholesale adoption of any “model” ordinance is fraught with legal pitfalls; thus, a sample ordinance serves only as a starting point for the municipal practitioner. The provision of this Sample Ordinance is not to be construed as legal advice or as the formation of an attorney-client relationship.*

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WHEREAS, sexually oriented businesses require special supervision from the public safety agencies of the City in order to protect and preserve the health, safety, morals, and welfare of the patrons of such businesses as well as the citizens of the City; and

WHEREAS, the City Council finds that sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature; and

WHEREAS, the concern over sexually transmitted diseases is a legitimate health concern of the City which demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens; and

WHEREAS, licensing is a legitimate and reasonable means of accountability to ensure that operators of sexually oriented businesses comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation; and

WHEREAS, there is convincing documented evidence that sexually oriented businesses, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values; and

WHEREAS, it is recognized that sexually oriented businesses, due to their nature, have serious objectionable operational characteristics, particularly when they are located in close proximity to each other, thereby contributing to urban blight and downgrading the quality of life in the adjacent area; and

WHEREAS, the City Council desires to minimize and control these adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from increased crime; preserve the quality of life; preserve the property values and character of surrounding neighborhoods and deter the spread of urban blight; and

WHEREAS, the City Council has determined that locational criteria alone do not adequately protect the health, safety, and general welfare of the people of this City; and

WHEREAS, it is not the intent of this Ordinance to suppress any speech activities protected by the First Amendment, but to enact a content neutral ordinance which addresses the secondary effects of sexually oriented businesses; and

WHEREAS, it is not the intent of the City Council to condone or legitimize the distribution of obscene material, and the Council recognizes that state and federal law prohibits the distribution of obscene materials and expects and encourages state law enforcement officials to enforce state obscenity statutes against any such illegal activities in the City.

Pursuant to the authority granted by the Constitution and the legislature of the State of \_\_\_\_\_, be it enacted by the City Council of \_\_\_\_\_, \_\_\_\_\_ COUNTY, \_\_\_\_\_:

### **SECTION 1. Purpose and Findings.**

(1) Purpose: It is the purpose of this Ordinance to regulate sexually oriented businesses in order to promote the health, safety, morals, and general welfare of the citizens of the City, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of sexually oriented businesses within the City. The provisions of this

Ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this Ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this Ordinance to condone or legitimize the distribution of obscene material.

(2) Findings: Based on evidence concerning the adverse secondary effects of adult uses on the community presented in hearings and in reports made available to the Council, and on findings incorporated in the cases of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), *Young v. American Mini Theatres*, 426 U.S. 50 (1976), *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000), and on studies in other communities including, but not limited to, Phoenix, Arizona; Minneapolis, Minnesota; St. Paul, Minnesota; Houston, Texas; Indianapolis, Indiana; Amarillo, Texas; Garden Grove, California; Los Angeles, California; Whittier, California; Austin, Texas; Seattle, Washington; Oklahoma City, Oklahoma; Cleveland, Ohio; Beaumont, Texas; Dallas, Texas; Newport News, Virginia; Bellevue, Washington; New York, New York; and St. Croix County, Wisconsin; and also on findings from the Report of the Attorney General's Working Group On The Regulation Of Sexually Oriented Businesses (June 6, 1989, State of Minnesota), the Council finds:

(a) Sexually oriented businesses lend themselves to ancillary unlawful and unhealthy activities that are presently uncontrolled by the operators of the establishments. Further, there is presently no mechanism to make the owners of these establishments responsible for the activities that occur on their premises.

(b) Certain employees of sexually oriented businesses, defined in this Ordinance as adult theaters and adult cabarets, engage in higher incidence of certain types of illicit sexual behavior than employees of other establishments.

(c) Sexual acts, including masturbation, and oral and anal sex, occur at sexually oriented businesses, especially those which provide private or semi-private booths or cubicles for viewing films, videos, or live sex shows.

(d) Offering and providing such space encourages such activities, which creates unhealthy conditions.

(e) Persons frequent certain adult theaters, adult arcades, and other sexually oriented businesses for the purpose of engaging in sex within the premises of such sexually oriented businesses.

(f) At least 50 communicable diseases may be spread by activities occurring in sexually oriented businesses, including, but not limited to, syphilis, gonorrhea, human immunodeficiency virus infection (HIV-AIDS), genital herpes, hepatitis B, Non A, Non B amebiasis, salmonella infections and shigella infections.

(g) Since 1981 and to the present, there has been an increasing cumulative number of reported cases of AIDS (acquired immunodeficiency syndrome) caused by the human immunodeficiency virus (HIV) in the United States: 600 in 1982; 2,200 in 1983; 4,600 in 1984; 8,555 in 1985, and 253,448 through December 31, 1992.

(h) As of \_\_\_\_\_, 200\_\_, there have been \_\_\_\_\_ reported cases of AIDS in the State of \_\_\_\_\_.

(i) Since 1981 and to the present, there have been an increasing cumulative number of persons testing positive for the HIV antibody test in \_\_\_\_\_.

(j) The number of cases of early (less than one year) syphilis in the United States reported annually has risen, with 33,613 cases reported in 1982, and 45,200 through November, 1990.

(k) The number of cases of gonorrhea in the United States reported annually remains at a high level, with over one-half million cases being reported in 1990.

(l) In his report of October 22, 1986, the Surgeon General of the United States has advised the American public that AIDS and HIV infection may be transmitted through sexual contact, intravenous drug abuse, exposure to infected blood and blood components, and from an infected mother to her newborn.

(m) According to the best scientific evidence, AIDS and HIV infection, as well as syphilis and gonorrhea, are principally transmitted by sexual acts.

(n) Sanitary conditions in some sexually oriented businesses are unhealthy, in part, because the activities conducted there are unhealthy, and, in part, because of the unregulated nature of the activities and the failure of the owners and the operators of the facilities to self- regulate those activities and maintain those facilities.

(o) Numerous studies and reports have determined that semen is found in the areas of sexually oriented businesses where persons view "adult" oriented films.

(p) The findings noted in Subsections (a) through (o) raise substantial governmental concerns.

(q) Sexually oriented businesses have operational characteristics which should be reasonably regulated in order to protect those substantial governmental concerns.

(r) A reasonable licensing procedure is an appropriate mechanism to place the burden of that reasonable regulation on the owners and the operators of the sexually oriented businesses. Further, such a licensing procedure will place an incentive on the operators to see that the sexually oriented business is run in a manner consistent with the health, safety, and welfare of its patrons and employees, as well as the citizens of the City. It is appropriate to require reasonable assurances that the licensee is the actual operator of the sexually oriented business, fully in possession and control of the premises and activities occurring therein.

(s) Removal of doors on adult booths and requiring sufficient lighting on premises with adult booths advances a substantial governmental interest in curbing the illegal and unsanitary sexual activity occurring in adult theaters.

(t) Requiring licensees of sexually oriented businesses to keep information regarding current employees and certain past employees will help reduce the incidence of certain types of criminal behavior by facilitating the identification of potential witnesses or suspects and by preventing minors from working in such establishments.

(u) The disclosure of certain information by those persons ultimately responsible for the day-to-day operation and maintenance of the sexually oriented business, where such information is substantially related to the significant governmental interest in the operation of such uses, will aid in preventing the spread of sexually transmitted diseases.

(v) It is desirable in the prevention of the spread of communicable diseases to obtain a limited amount of information regarding certain employees who may engage in the conduct which this Ordinance is designed to prevent or who are likely to be witnesses to such conduct.

(w) The fact that an applicant for an adult use license has been convicted of a sexually related crime leads to the rational assumption that the applicant may engage in that conduct in contravention of this Ordinance.

(x) The barring of such individuals from the management of adult uses for a period of years serves as a deterrent to, and prevents conduct which leads to, the transmission of sexually transmitted diseases.

(y) The general welfare, health, morals, and safety of the citizens of the City will be promoted by the enactment of this Ordinance.

## **SECTION 2. Definitions.**

Words, terms and phrases in this Ordinance shall be defined as follows:

(a) *Adult Arcade* means any place to which the public is permitted or invited, wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are regularly maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by their emphasis upon matters exhibiting “specified sexual activities” or “specified anatomical areas.”

(b) *Adult Bookstore, Adult Novelty Store or Adult Video Store* means a commercial establishment which has as a significant or substantial portion of its stock-in-trade, or derives a significant or substantial portion of its revenues or devotes a significant or substantial portion of its interior business or advertising, or maintains a substantial section of its sales or display space for the sale or rental, for any form of consideration, of any one or more of the following:

(i) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, compact discs, slides, or other visual representations, which are characterized by their emphasis upon the exhibition or display of “specified sexual activities” or “specified anatomical areas;”

(ii) instruments, devices, or paraphernalia which are designed for use or marketed primarily for stimulation of human genital organs or for sadomasochistic use or abuse of the user or others.

(c) *Adult Cabaret* means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

(i) persons who appear semi-nude; or

(ii) live performances which are characterized by the exposure of “specified anatomical areas” or by “specified sexual activities;” or

(iii) films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the exhibition or display of “specified sexual activities” or “specified anatomical areas.”

(d) *Adult Motel* means a hotel, motel, or similar commercial establishment, which:

(i) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the exhibition or display

of “specified sexual activities” or “specified anatomical areas;” and has a sign visible from the public right-of-way which advertises the availability of this adult type of photographic reproductions; and either

(ii) offers a sleeping room for rent for a period of time that is less than ten (10) hours, or

(iii) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than ten (10) hours.

(e) *Adult Motion Picture Theater* means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of “specified sexual activities” or “specified anatomical areas.”

(f) *Adult Theater* means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or semi-nude, or live performances which are characterized by the exposure of “specified anatomical areas” or by “specified sexual activities.”

(g) *Distinguished or Characterized by an Emphasis Upon* means the dominant or principal theme of the object referenced. For instance, when the phrase refers to films “which are distinguished or characterized by an emphasis upon the exhibition or display of specified sexual activities or specified anatomical areas,” the films so described are those whose dominant or principal character and theme are the exhibition or display of “specified anatomical areas” or “specified sexual activities.”

(h) *Employee, Employ, and Employment* describe and pertain to any person who performs any service on the premises of a sexually oriented business on a full-time, part-time, or contract basis, regardless of whether the person is denominated as an employee, independent contractor, agent, or by another status. *Employee* does not include a person exclusively on the premises for repair or maintenance of the premises, or for the delivery of goods to the premises.

(i) *Enforcement Officer* shall mean the City Zoning Administrator or such person as may be designated by the City Council.

(j) *Escort* means a person who, for consideration, and for another person, agrees or offers: (i) to act as a companion, guide, or date, or (ii) to privately model lingerie, or (iii) to privately perform a striptease.

(k) *Escort Agency* means a person or business association that for a fee, tip, or other consideration, furnishes, offers to furnish, or advertises to furnish, escorts as one of its primary business purposes.

(l) *Establish or Establishment* means and includes any of the following:  
(i) the opening or commencement of any sexually oriented business as a new business;

- (ii) the conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;
- (iii) the addition of any sexually oriented business to any other existing sexually oriented business; or
- (iv) the relocation of any sexually oriented business.

(m) *Licensee* means a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual listed as an applicant on the application for a license; and in the case of an employee, a person in whose name a license has been issued authorizing employment in a sexually oriented business.

(n) *Nude, Nudity or a State of Nudity* means the showing of the human male or female genitals, pubic area, vulva, anus, or anal cleft with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

(o) *Operate or Cause to Be Operated* means to cause to function or to put or keep in a state of doing business. *Operator* means any person on the premises of a sexually oriented business who is authorized to exercise operational control of the business, or who causes to function or who puts or keeps in operation, the business. A person may be found to be operating or causing to be operated a sexually oriented business regardless of whether that person is an owner, part owner, or licensee of the business.

(p) *Person* means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(r) *Regularly Features or Regularly Shown* means a consistent or substantial course of conduct, such that the films or performances exhibited constitute a substantial portion of the films or performances offered as a part of the ongoing business of the sexually oriented business.

(r) *Semi-nude or in a Semi-nude Condition* means the showing of the female breast below a horizontal line across the top of the areola at its highest point or the showing of the male or female buttocks. This definition shall include the entire lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breast, exhibited by a dress, blouse, skirt, leotard, bathing suit, or other wearing apparel, provided the areola is not exposed in whole or in part.

(s) *Semi-nude Model Studio* means a commercial establishment which regularly features a person (or persons) who appears semi-nude and is provided to be observed, sketched, drawn, painted, sculptured, or photographed by other persons who pay money or any form of consideration, but shall not include a proprietary school licensed by the State of \_\_\_\_\_ or a college, junior college or university supported entirely or in part by public taxation; a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation.

(t) *Sexual Encounter Center* means a business or commercial establishment, that as one of its principal business purposes, offers for any form of consideration, a place where two or more persons may congregate, associate, or consort for the purpose of “specified sexual activities.” The definition of sexual encounter establishment or any sexually oriented businesses shall not include an establishment where a medical practitioner, psychologist, psychiatrist, or similar professional person licensed by the state engages in medically approved and recognized sexual therapy.

(u) *Sexually Oriented Business* means an adult arcade, adult bookstore, adult novelty store, adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, semi-nude model studio, or sexual encounter center.

(v) *Specified Anatomical Areas* means:

(i) the human male genitals in a discernibly turgid state, even if completely and opaquely covered; or

(ii) less than completely and opaquely covered human genitals, pubic region, buttocks, or a female breast below a point immediately above the top of the areola.

(w) *Specified Criminal Activity* means any of the following offenses:

(i) prostitution or promotion of prostitution; dissemination of obscenity; sale, distribution, or display of harmful material to a minor; sexual performance by a child; possession or distribution of child pornography; public lewdness; indecent exposure; indecency with a child; engaging in organized criminal activity relating to a sexually oriented business; sexual assault; molestation of a child; distribution of a controlled substance; or any similar offenses to those described above under the criminal or penal code of other states or countries;

(ii) for which:

(1) less than two (2) years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;

(2) less than five (5) years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

(3) less than five (5) years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or a combination of misdemeanor offenses occurring within any twenty-four (24) month period.

(iii) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or a person residing with the applicant.

(x) *Specified Sexual Activities* means any of the following:

(i) the fondling of another person’s genitals, pubic region, anus, or female breasts;

(ii) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, masturbation, or sodomy; or

(iii) excretory functions as part of, or in connection with, any of the activities set forth in (i) through (ii) above.

(y) *Substantial Enlargement* of a sexually oriented business means the increase in floor areas occupied by the business by more than twenty-five (25) percent, as the floor areas exist on the date this Ordinance takes effect.

(z) *Transfer of Ownership or Control* of a sexually oriented business means and includes any of the following:

- (i) the sale, lease, or sublease of the business;
- (ii) the transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or
- (iii) the establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

### **SECTION 3. Classification.**

Sexually oriented businesses are classified as follows:

- (1) adult arcades;
- (2) adult bookstores, adult novelty stores, or adult video stores;
- (3) adult cabarets;
- (4) adult motels;
- (5) adult motion picture theaters;
- (6) adult theaters;
- (7) escort agencies;
- (8) semi-nude model studios; and
- (9) sexual encounter centers.

### **SECTION 4. License Required.**

(1) It is unlawful:

(a) For any person to operate a sexually oriented business without a valid sexually oriented business license issued by the City pursuant to this Ordinance.

(b) For any person who operates a sexually oriented business to employ a person to work for the sexually oriented business who is not licensed as a sexually oriented business employee by the City pursuant to this Ordinance.

(c) For any person to obtain employment with a sexually oriented business without having secured a sexually oriented business employee license pursuant to this Ordinance.

(2) An application for a license must be made on a form provided by the City. All applicants must be qualified according to the provisions of this Ordinance.

(3) An applicant for a sexually oriented business license or a sexually oriented business employee license shall file with the Enforcement Officer a completed application made on a form prescribed and provided by the City Treasurer. An application shall be considered complete if it includes the information required in this Section. The applicant shall be qualified

according to the provisions of this Ordinance. The application shall be notarized. The application shall include the information called for in Subsections (a) through (f), and where applicable, Subsection (g), as follows:

- (a) The full true name and any other names used in the preceding five (5) years.
- (b) The current business address.
- (c) Either a set of fingerprints suitable for conducting necessary background checks pursuant to this Ordinance, or the applicant's Social Security Number, to be used for the same purpose.
- (d) If the application is for a sexually oriented business license, the name, business location, legal description, business mailing address and phone number of the proposed sexually oriented business.
- (e) Written proof of age, in the form of either (i) a copy of a birth certificate and current photo, (ii) a current driver's license with picture, or (iii) other picture identification document issued by a governmental agency.
- (f) The issuing jurisdiction and the effective dates of any license or permit held by the applicant relating to a sexually oriented business, and whether any such license or permit has been denied, revoked, or suspended, and if so, the reason or reasons therefor.
- (g) If the application is for a sexually oriented business license, the name and address of the statutory agent or other agent authorized to receive service of process.

The information provided pursuant to Subsections (a) through (g) shall be supplemented in writing by certified mail, return receipt requested, to the Enforcement Officer within ten (10) working days of a change of circumstances which would render the information originally submitted false or incomplete.

(4) The application for a sexually oriented business license shall be accompanied by a sketch or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared, but shall be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six (6) inches.

(5) If the person who wishes to operate a sexually oriented business is an individual, he or she shall sign the application for a license as applicant. If the person that wishes to operate a sexually oriented business is other than an individual (such as a corporation), each officer, director, general partner, or other person who will participate directly in decisions relating to management of the business shall sign the application for a license as the applicant. Each applicant must be qualified under Section 5, and each applicant shall be considered as a licensee if a license is granted.

(6) A person who possesses a valid business license is not exempt from the requirement of obtaining any required sexually oriented business license. A person who operates a sexually oriented business and possesses a business license shall comply with the requirements and provisions of this Ordinance, where applicable.

(7) The information provided by an applicant in connection with the application for a license under this Ordinance shall be maintained by the Enforcement Officer on a confidential basis, and may be disclosed only: (a) to other governmental agencies in connection with a law enforcement or public safety function, or (b) as may otherwise be required by law or a court order.

## **SECTION 5. Issuance of License.**

(1) Upon the filing of a completed application for a sexually oriented business license or a sexually oriented business employee license, the Enforcement Officer shall issue a Temporary License to the applicant, which Temporary License shall expire upon the final decision of the Enforcement Officer to deny or grant the license. Within twenty (20) days after the receipt of a completed application, the Enforcement Officer shall either issue a license or issue a written notice of intent to deny a license to the applicant. The Enforcement Officer shall approve the issuance of a license unless one or more of the following is found to be true:

(a) An applicant is less than eighteen (18) years of age.

(b) An applicant is delinquent in the payment to the City of taxes, fees, fines, or penalties assessed against or imposed upon the applicant in relation to a sexually oriented business.

(c) An applicant has failed to provide information as required by SECTION 4 for issuance of the license.

(d) An applicant has been convicted of a specified criminal activity. The fact that a conviction is being appealed shall have no effect under this Subsection. For the purpose of this Subsection, "conviction:"

(i) means a conviction or a guilty plea, and

(ii) includes a conviction of any business entity for which the applicant had, at the time of the offense leading to the conviction for a specified criminal activity, a management responsibility or a controlling interest.

(e) The license application fee required by this Ordinance has not been paid.

(f) An applicant has falsely answered a question or request for information on the application form.

(g) The proposed sexually oriented business is located in a zoning district other than a district in which sexually oriented businesses are allowed to operate under the \_\_\_\_\_ Zoning Ordinance, or is not in compliance with the location restrictions established for sexually oriented businesses in the appropriate zoning district(s).

(2) An applicant that is ineligible for a license due to Subsection (1)(d) of this Section may qualify for a sexually oriented business license only when the time period required by the applicable Subsection in SECTION 6-602(v) has elapsed.

(3) The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the number of the license issued to that applicant, the expiration date, and, if the license is for a sexually oriented business, the address of the sexually oriented business. A sexually oriented business employee license shall contain a photograph of the licensee. The sexually oriented business license shall be posted in a conspicuous place at or near the entrance

to the sexually oriented business so that it may be easily read at any time. A sexually oriented business employee shall keep the employee's license on his or her person or on the premises where the licensee is then working or performing, and shall produce such license for inspection upon request by a law enforcement officer or other authorized city official.

#### **SECTION 6. Fees.**

(1) The non-refundable initial license fee and annual renewal fee for a sexually oriented business license or a sexually oriented business employee license shall be set by the City Council at an amount determined to be sufficient to pay the cost of administering this program, subject to Subsection (2) herein.

(2) In no event shall the fees exceed two hundred fifty dollars (\$250.00) for the initial license and one hundred twenty five dollars (\$125.00) for the renewal fee for a sexually oriented business license. In no event shall the fees exceed one hundred dollars (\$100.00) for the initial license, and fifty dollars (\$50.00) for the renewal fee, for a sexually oriented business employee license.

#### **SECTION 7. Inspection.**

(1) For the purpose of ensuring compliance with this Ordinance, an applicant, operator or licensee shall permit law enforcement officers and any other federal, state, county or city agency in the performance of any function connected with the enforcement of this Ordinance, normally and regularly conducted by such agencies, to inspect, at any time the business is occupied or open for business, those portions of the premises of a sexually oriented business which patrons or customers are permitted to occupy.

(2) The provisions of this Section do not apply to areas of an adult motel which are currently being rented by a customer for use as a permanent or temporary habitation.

#### **SECTION 8. Expiration of License.**

(1) Each license shall expire one (1) year from the date of issuance and may be renewed only by making application as provided in SECTION 4. An application for renewal shall be made at least thirty (30) days before the expiration date, and when made less than thirty (30) days before the expiration date, the expiration of the license will not be affected.

(2) When the City denies renewal of a license, the applicant shall not be issued a license for one year from the date of denial. If, subsequent to the denial, the City finds that the basis for denial of the renewal license has been corrected or abated, the applicant shall be granted a license if at least ninety (90) days have elapsed since the date that the denial became final.

#### **SECTION 9. Suspension.**

The City shall issue a written intent to suspend a license for a period not to exceed thirty (30) days if it determines that a licensee or an employee of a licensee has:

- (a) violated or is not in compliance with any section of this Ordinance;
- (b) refused to allow an inspection of the sexually oriented business premises as authorized by this Ordinance.

**SECTION 10. Revocation.**

(1) The Enforcement Officer shall issue a written statement of intent to revoke a sexually oriented business license if a cause of suspension in SECTION 9 occurs and the license has been suspended within the preceding twelve (12) months.

(2) The Enforcement Officer shall issue a written statement of intent to revoke a sexually oriented business license if the Officer determines that:

(a) a licensee gave false or misleading information in the material submitted during the application process;

(b) a licensee has knowingly allowed possession, use, or sale of controlled substances on the premises;

(c) a licensee has knowingly allowed prostitution on the premises;

(d) a licensee knowingly operated the sexually oriented business during a period of time when the licensee's license was suspended;

(e) a licensee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, masturbation, or other sex act to occur in or on the licensed premises. This Subsection will not apply to an adult motel, unless the licensee knowingly allowed sexual activities to occur either (i) in exchange for money, or (ii) in a public place or within public view.

(3) The fact that a conviction is being appealed shall have no effect on the revocation of the license.

(4) When, after the notice and hearing procedure described in SECTION 11, the Enforcement Officer revokes a license, the revocation shall continue for one (1) year and the licensee shall not be issued a sexually oriented business license for one (1) year from the date revocation becomes effective, provided that, if the conditions of SECTION 11(2) are met, a Provisional License will be granted pursuant to that Section. If, subsequent to revocation, the Enforcement Officer finds that the basis for the revocation found in Subsections (2)(a) and (2)(d) of this Section has been corrected or abated, the applicant shall be granted a license if at least ninety (90) days have elapsed since the date the revocation became effective.

**SECTION 11. Hearing; License Denial, Suspension, Revocation; Appeal.**

(1) If the Enforcement Officer determines that facts exist for denial, suspension, or revocation of a license under this Ordinance, the Enforcement Officer shall notify the applicant or licensee (respondent) in writing of the intent to deny, suspend, or revoke the license, including the grounds therefor, by personal delivery, or by certified mail. The notification shall be directed to the most current business address on file with the Enforcement Officer. Within five (5) working days of receipt of such notice, the respondent may provide to the City Manager, in writing, a response that shall include a statement of reasons why the license or permit should not

be denied, suspended, or revoked. Within three (3) days of the receipt of respondent's written response, the City Manager shall notify respondent in writing of the hearing date on respondent's denial, suspension, or revocation proceeding.

Within ten (10) working days of the receipt of respondent's written response, the City Manager shall conduct a hearing at which respondent shall have the opportunity to be represented by counsel and present evidence and witnesses on his or her behalf. The City Manager shall issue a written opinion and decision within five (5) days of the hearing. If a response is not received by the City Manager in the time stated or, if after the hearing, the City Manager finds that grounds as specified in this Ordinance exist for denial, suspension, or revocation, then such denial, suspension, or revocation shall become final five (5) days after the City Manager sends, by certified mail, written notice that the license has been denied, suspended, or revoked. Such notice shall include a statement advising the applicant or licensee of the right to appeal such decision to a court of competent jurisdiction.

If the City Manager finds that no grounds exist for denial, suspension, or revocation of a license, then within five (5) days after the hearing, the City Manager shall withdraw the intent to deny, suspend, or revoke the license, and shall so notify the respondent in writing by certified mail of such action and shall contemporaneously issue the license.

(2) When a decision to deny, suspend, or revoke a license becomes final, the applicant or licensee (aggrieved party) whose application for a license has been denied, or whose license has been suspended or revoked, shall have the right to appeal such action to a court of competent jurisdiction. Upon the filing of any court action to appeal, challenge, restrain, or otherwise enjoin the City's enforcement of the denial, suspension, or revocation, the City shall immediately issue the aggrieved party a Provisional License. The Provisional License shall allow the aggrieved party to continue operation of the sexually oriented business or to continue employment as a sexually oriented business employee, as the case may be, and will expire upon the court's entry of a judgment on the aggrieved party's action to appeal, challenge, restrain, or otherwise enjoin the City's enforcement.

## **SECTION 12. Transfer of License.**

A licensee shall not transfer his or her license to another, nor shall a licensee operate a sexually oriented business under the authority of a license at any place other than the address designated in the application.

## **SECTION 13. Location of Sexually Oriented Businesses.**

(1) A person commits a misdemeanor if that person operates or causes to be operated a sexually oriented business in any zoning district other than \_\_\_\_\_, as defined and described in the \_\_\_\_\_ Zoning Code.

(2) A person commits an offense if the person operates or causes to be operated a sexually oriented business within \_\_\_\_\_ feet of:

(a) A church, synagogue, mosque, temple, or building which is used primarily for religious worship and related religious activities;

(b) A public or private educational facility including, but not limited to, child day care facilities, nursery schools, preschools, kindergartens, elementary schools, private schools, intermediate schools, junior high schools, middle schools, high schools, vocational schools, secondary schools, continuation schools, special education schools, junior colleges, and universities; school includes the school grounds, but does not include facilities used primarily for another purpose and only incidentally as a school;

(c) A boundary of a residential district as defined in the \_\_\_\_\_ Zoning Code;

(d) A public park or recreational area which has been designated for park or recreational activities including, but not limited to, a park, playground, nature trails, swimming pool, reservoir, athletic field, basketball or tennis courts, pedestrian/bicycle paths, wilderness areas, or other similar public land within the City which is under the control, operation, or management of the City park and recreation authorities;

(e) The property line of a lot devoted to a residential use as defined in the \_\_\_\_\_ Zoning Code;

(f) An entertainment business which is oriented primarily towards children or family entertainment; or

(g) Any premises licensed pursuant to the alcoholic beverage control regulations of the State.

(3) A person commits a misdemeanor if that person causes or permits the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business within \_\_\_\_\_ feet of another sexually oriented business.

(4) A person commits a misdemeanor if that person causes or permits the operation, establishment, or maintenance of more than one sexually oriented business in the same building, structure, or portion thereof, or the increase of floor area of any sexually oriented business in any building, structure, or portion thereof containing another sexually oriented business.

(5) For the purpose of Subsection (2) of this Section, measurement shall be made in a straight line, without regard to the intervening structures or objects, from the nearest portion of the building or structure used as the part of the premises where a sexually oriented business is conducted, to the nearest property line of the premises of a use listed in Subsection (2). The presence of a city, county or other political subdivision boundary shall be irrelevant for purposes of calculating and applying the distance requirements of this Section.

(6) For purposes of Subsection (3) of this Section, the distance between any two sexually oriented businesses shall be measured in a straight line, without regard to the intervening structures or objects or political boundaries, from the closest exterior wall of the structure in which each business is located.

(7) Any sexually oriented business lawfully operating on \_\_\_\_\_, 200\_\_, that is in violation of Subsection (1) through (6) of this Section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue for a period not to exceed one (1) year, unless

sooner terminated for any reason or voluntarily discontinued for a period of thirty (30) days or more. Such nonconforming uses shall not be increased, enlarged, extended, or altered except that the use may be changed to a conforming use. If two or more sexually oriented businesses are within \_\_\_\_\_ feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later established business(es) is/are nonconforming.

(8) A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually oriented business license, of a use listed in Subsection (2) of this Section within \_\_\_\_ feet of the sexually oriented business. This provision applies only to the renewal of a valid license, and does not apply when an application is made for a license after the applicant's previous license has expired or been revoked.

#### **SECTION 14. Regulations Pertaining to Exhibition of Sexually Explicit Films, Videos, or Live Entertainment in Viewing Rooms.**

(1) A person who operates or causes to be operated a sexually oriented business (other than an adult motel) which exhibits on the premises, in a viewing room of less than one hundred fifty (150) square feet of floor space, a film, video cassette, live entertainment, or other video reproduction which depicts specified sexual activities or specified anatomical areas, shall comply with the following requirements:

(a) Upon application for a sexually oriented license, the application shall be accompanied by a diagram of the premises showing a plan thereof specifying the location of one or more manager's stations and the location of all overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A manager's station may not exceed thirty- two (32) square feet of floor area. The diagram shall also designate the place at which the permit, if granted, will be conspicuously posted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however, each diagram should be oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six (6) inches. The City may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.

(b) The application shall be sworn to be true and correct by the applicant.

(c) No alteration in the configuration or location of a manager's station may be made without the prior approval of the City.

(d) It is the duty of the licensee of the premises to ensure that at least one licensed employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.

(e) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose, excluding restrooms. Restrooms may not contain video reproduction equipment. If the premises has two or more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view

of each area of the premises to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this Subsection must be by direct line of sight from the manager's station.

(f) It shall be the duty of the licensee to ensure that the view area specified in Subsection (e) remains unobstructed by any doors, curtains, partitions, walls, merchandise, display racks, or other materials and, at all times, to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted in the application filed pursuant to Subsection (a) of this Section.

(g) No viewing room may be occupied by more than one (1) person at any time.

(h) The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than five (5.0) foot-candles as measured at the floor level.

(i) It shall be the duty of the licensee to ensure that the illumination described above is maintained at all times that any patron is present in the premises.

(j) No licensee shall allow openings of any kind to exist between viewing rooms or booths.

(k) No person shall make or attempt to make an opening of any kind between viewing booths or rooms.

(l) The licensee shall, during each business day, regularly inspect the walls between the viewing booths to determine if any openings or holes exist.

(m) The licensee shall cause all floor coverings in viewing booths to be nonporous, easily cleanable surfaces, with no rugs or carpeting.

(n) The licensee shall cause all wall surfaces and ceiling surfaces in viewing booths to be constructed of, or permanently covered by, nonporous, easily cleanable material. No wood, plywood, composition board, or other porous material shall be used within forty-eight (48) inches of the floor.

(2) A person having a duty under Subsection (a) through (n) of Subsection (1) herein commits a misdemeanor if he or she knowingly fails to fulfill that duty.

## **SECTION 15. Additional Regulations for Escort Agencies.**

(1) An escort agency shall not employ any person under the age of eighteen (18) years.

(2) A person commits an offense if the person acts as an escort, or agrees to act as an escort, for any person under the age of eighteen (18) years.

## **SECTION 16. Additional Regulations Concerning Public Nudity.**

(1) It shall be a misdemeanor for a person who knowingly and intentionally, in a sexually oriented business, appears in a state of nudity or engages in specified sexual activities.

(2) It shall be a misdemeanor for a person who knowingly or intentionally, in a sexually oriented business, appears in a semi-nude condition unless the person is an employee

who, while semi-nude, shall be at least six (6) feet from any patron or customer and on a stage at least two (2) feet from the floor.

(3) It shall be a misdemeanor for an employee, while semi-nude in a sexually oriented business, to receive directly any pay or gratuity from any patron or customer, or for any patron or customer to pay or give any gratuity directly to any employee, while that employee is semi-nude in a sexually oriented business.

(4) It shall be a misdemeanor for an employee, while semi-nude, to knowingly and intentionally touch a customer or the clothing of a customer.

### **SECTION 17. Prohibition Against Children in a Sexually Oriented Business.**

A person commits a misdemeanor if the person knowingly allows a person under the age of eighteen (18) years on the premises of a sexually oriented business.

### **SECTION 18. Hours of Operation.**

No sexually oriented business, except for an adult motel, may remain open at any time between the hours of one o'clock (1:00) A.M. and eight o'clock (8:00) A.M. on weekdays and Saturdays, and one o'clock (1:00) A.M. and noon (12:00) P.M. on Sundays.

### **SECTION 19. Exemptions.**

It is a defense to prosecution under SECTION 16 that a person appearing in a state of nudity did so in a modeling class operated:

(a) by a proprietary school, licensed by the State of \_\_\_\_\_; a college, junior college, or university supported entirely or partly by taxation;

(b) by a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation; or

(c) in a structure:

(i) which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing; and

(ii) where, in order to participate in a class, a student must enroll at least three (3) days in advance of the class; and

(iii) where no more than one nude model is on the premises at any one time.

### **SECTION 20. Injunction.**

A person who operates or causes to be operated a sexually oriented business without a valid license or in violation of SECTION 12 of this Ordinance is subject to a suit for injunction as well as prosecution for criminal violations. Such violations shall be punishable by a fine of \$200.00 or thirty (30) days imprisonment. Each day a sexually oriented business so operates is a separate offense or violation.

## **SECTION 21. Severability.**

Each section and provision of this Ordinance are hereby declared to be independent divisions and subdivisions and, notwithstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provisions of said Ordinance, or the application thereof to any person or circumstance is held to be invalid, the remaining sections or provisions and the application of such sections and provisions to any person or circumstances other than those to which it is held invalid, shall not be affected thereby, and it is hereby declared that such sections and provisions would have been passed independently of such section or provision so known to be invalid.

## **SECTION 22. Conflicting Ordinances Repealed.**

All ordinances or parts of ordinances in conflict with the provisions of this Ordinance are hereby repealed.

## **SECTION 23. Effective Date.**

This Ordinance shall be enforced from and after \_\_\_\_\_, 200\_.

## **SEXUALLY ORIENTED BUSINESS REGULATION: EDITOR'S COMMENTARY**

### **Preliminary Note and Disclaimer**

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As noted, the Sample Ordinance, because of its comprehensive nature, necessarily contains regulatory provisions that will not work in each jurisdiction. Courts have applied a myriad of nuances to the analysis of adult business restrictions, and each local ordinance requires jurisdiction-specific research and drafting. The purpose of this Commentary is to provide the general legal basis for the provisions found in the sample ordinance. It is a brief outline of the law, not an exhaustive treatise.

The Sample Ordinance is a “time, place, and manner regulation.” As such, it is “content neutral” and focuses on the negative secondary consequences or harmful effects of sexually oriented businesses. For a full discussion of adult business regulations, please consult the author, Scott D. Bergthold, available at 480-922-9731 or [sbergthold@adultbusinesslaw.com](mailto:sbergthold@adultbusinesslaw.com).

### **Introduction**

There are five U.S. Supreme Court decisions which every practitioner should read before drafting a local ordinance regulating adult businesses: *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *FW/PBS, Inc.*

*v. City of Dallas*, 493 U.S. 215 (1990); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); and *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000).

In *Young*, the Supreme Court upheld the constitutionality of a Detroit zoning ordinance regulating the location of “adult” theatres by prohibiting them from locating within 1,000 feet of any two other regulated uses or within 500 feet of a residential area. A plurality of the Court found that the Detroit ordinance did not violate the First Amendment as an impermissible prior restraint, and that the ordinance served a substantial governmental interest.

In *Renton*, the Supreme Court again upheld the constitutionality of a city’s zoning ordinance against a First Amendment challenge. The challenged ordinance was designed to regulate adult uses by prohibiting them from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Because the ordinance did not prohibit these uses altogether, the Court analyzed the city’s ordinance as a form of time, place and manner regulation. “[C]ontent-neutral’ time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternate avenues of communication.” 475 U.S. at 47. This ordinance, the Court stated, was aimed at the secondary effects of adult uses, and not at the content of the films shown, and was clearly based on a substantial interest in preventing crime, protecting retail trade, and maintaining property values. The ordinance was also narrowly tailored to “affect only that category of theaters shown to produce the unwanted secondary effects.” *Id.* at 52. Further, the Court found that the ordinance allowed for reasonable alternative avenues of communication because it left 520 acres, or more than five percent of the entire land area of Renton, available for adult uses. “In our view, the First Amendment requires that *Renton* refrain from effectively denying Respondents a reasonable opportunity to open and operate an adult theater within the city.” *Id.* at 54.

The Sample Ordinance contains not only zoning regulations, but also licensing requirements, regulations dealing with “peep booths or arcades,” hours of operation restrictions, and other miscellaneous regulations directed at neutralizing the negative secondary effects of sexually oriented businesses. Subsequent cases to *Young* and *Renton* have analyzed these additional regulations, over and above zoning regulations, pursuant to the same time, place and manner analysis that is found in *Renton*. Using this analysis, these additional regulations have consistently been upheld against constitutional challenge.

## **Discussion**

The following is a review and discussion of important provisions found within the Sample Ordinance:

(1) **Legislative Findings.** The preamble and purpose sections of the Sample Ordinance are lengthy and detailed. Unlike other ordinances, courts frequently look at the purported purpose, legislative findings, and intent behind a sexually oriented business ordinance to determine whether it is indeed content neutral or if it is simply a pretext for attempting to eliminate or suppress adult uses. Therefore, the legislative body must make specific findings supporting the need for the ordinance and demonstrating that the ordinance is content neutral and

directed at the negative secondary effects of adult businesses rather than the sexually explicit nature of the materials or performances offered within.

A city must establish that its sexually oriented business zoning and licensing ordinances are reasonable, i.e., that there is a need for them. It may conduct studies regarding its own experience with sexually oriented businesses. Not every city has the resources to conduct its own studies. After *Renton*, it is not necessary for a city to conduct its own studies. It may rely on the experiences and studies of other cities. 475 U.S. at 50.

To determine whether an ordinance is reasonable, a court must look to the legislative record. There must be evidence in the record to support the ordinance. Fortunately, as the Sample Ordinance demonstrates, there is significant and sufficient evidence on which a legislature may rely to prove the reasonableness of an adult business ordinance like this one. Thus, a city council may obtain studies or reports conducted by other cities and rely on them in enacting the ordinance. Many such studies are available and may be obtained from planning directors of those cities, or from the CDC Law Library, located at [www.communitydefense.org/seffects.cfm](http://www.communitydefense.org/seffects.cfm).

*Renton* held that a city need not show that a particular sex business causes the identified harmful secondary consequences. There was no showing that any particular use in *Renton* caused the secondary consequences sought to be prevented. Again, a city or legislature may rely on the experiences of other communities.

(2) **Definitions.** The definitions used in this ordinance are generally adopted from *Young*, *Renton*, and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). Rather than to arbitrarily attempt to set a percentage of use such as floor area, stock and trade, or gross revenues to define a sexually oriented business, a more flexible approach has been approved by the Supreme Court. Language upheld by the Supreme Court in *Young* was: “a substantial or significant portion of its stock in trade;” in *Renton*, “distinguished or characterized by an emphasis on matter depicting, describing, or relating to [sex].” See also *People v. Superior Court*, 259 Cal.Rep. 740 (1989), “one of its principle business purposes.”

Challenges to time, place, and manner regulations are frequently made on grounds that the language in such laws is unconstitutionally vague. A majority of such challenges have been rejected. Because zoning must apply to property uses which by nature are dynamic and changeable, you cannot define regulated uses with absolutely scientific precision. The definitions used in the Sample Ordinance have been upheld against vagueness challenges, although practitioners should research the law in their own jurisdictions before implementing its provisions.

(3) **Licensing.** The Sample Ordinance provides for licensing of both the sexually oriented business and employees within. Licensing of the sexually oriented business is important to keep track of various adult uses regulated under the zoning provisions and also to help document the negative secondary effects of these uses. Licensing of both sexually oriented businesses and their employees is important to provide for accountability -- i.e., who is responsible for what takes place on the premises, who truly owns the establishment, and what is

the background of workers and employees. However, drafting an effective licensing scheme is a fairly complicated task and requires precise drafting to avoid constitutional infirmities.

The Supreme Court has stated that cities can have special licensing schemes for different kinds of speech activities: “Of course, the city may even have special licensing procedures for conduct commonly associated with expression.” *City of Lakewood v. Plain Deals Publishing Co.*, 486 U.S. 750, 760 (1988) (in the context of newsrack regulation).

Licensing schemes are routinely challenged on prior restraint grounds. In *FW/PBS*, the Court found that a licensing requirement was a prior restraint and that certain safeguards were necessary to avoid constitutional problems: (1) “the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained,” and (2) “there must be the possibility of prompt judicial review in the event that the license is erroneously denied.” 493 U.S. at 228.

A licensing scheme must establish clear guidelines limiting the discretion of the issuer to ensure that protected speech is not suppressed. Further, those guidelines and the information required from applicants must be reasonably related to the license’s purpose. See, for example, *Broadway Books, Inc. v. Roberts*, 642 F. Supp. 486 (E.D. Tenn. 1986); and *Kev, Inc. v. Kitsap, Co.*, 793 F.2d 1053 (9th Cir. 1986) (upholding licensing requirements); but see *Schultz v. City of Cumberland*, 2000 U.S. App. LEXIS 23773 (7th Cir. 2000) (upholding some disclosure requirements but invalidating others).

The plurality opinion in *FW/PBS* failed to define what is required to satisfy “prompt judicial review” under a content neutral licensing scheme of sexually oriented businesses. The Fourth, Sixth, and Ninth Circuits have held that a prompt judicial *determination* from a court of law must be assured, whereas the First, Fifth, Seventh, and Eleventh Circuits have held that for licensing ordinances, “prompt judicial review” means *access* to prompt judicial review. See *Jews for Jesus v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319 (1st Cir. 1993); *TK’s Video v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993); but see, *11126 Baltimore Boulevard, Inc. v. Prince George’s County*, 58 F.3d 988 (4th Cir. 1995); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995).

On June 19, 2000, the Supreme Court granted certiorari in a case that will likely answer the prompt judicial review question and resolve the split in the circuits. *City News & Novelty, Inc. v. City of Waukesha*, 231 Wis. 2d 93 (Wisc. Ct. App. 1999), *cert. granted*, 68 U.S.L.W. 3773 (June 19, 2000) (No. 99-1680).

(4) **Fees.** Licensing fees to cover the cost of issuing and enforcing regulations are permissible as long as the fee is “revenue neutral.” *Cox v. New Hampshire*, 312 U.S. 569 (1941). As long as the fee only recoups the government’s costs in providing a service and conducting any investigations, and is not a tax imposed on the exercise of a constitutional right, it is constitutional.

The amount of the various fees is determined on a city-by-city basis and needs to be related to the expenses (i.e., administrative costs, inspection expenses, law enforcement resources, etc.) incurred. But a city need not show precisely its costs of administration, *World*

*Wide Video, Inc. v. Tukwila*, 816 P.2d 18 (1991), and the burden is on the challenger to show that the fee is excessive. *Adult Ent. Ctr., Inc. v. Pierce Co.*, 788 P. 2d 1102, 1108 (1990).

(5) **Zoning.** The ordinance regulates the location of sexually oriented businesses by dispersing them from each other and from other sensitive uses (like residential area, parks, schools, and churches) and limiting them to one or more specified zoning districts. Scatter zoning was specifically approved of in *Renton*. *Young* employed both setbacks and dispersal features within commercial zones. 427 U.S. at 62.

“Cities may regulate adult theatres by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. ‘It is not our function to appraise the wisdom of [the city’s] decision to require adult theatres to be separated rather than concentrated in the same areas ... [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems’.” *Renton*, 475 U.S. at 52.

The zone (or zones) that a sexually oriented business is to be limited to, and the amount of distance between an adult business and other adult businesses or other sensitive uses, need to be determined by each individual community based on its size (both geographic and population), number of sexually oriented businesses presently existing, and the configuration of its present zoning scheme. The locational restrictions will be constitutional so long as they allow for “reasonable alternative avenues of communication.” *Id.* at 47.

Since *Renton*, various courts have upheld percentages below *Renton*’s five percent as reasonable. *See S & G News, Inc. v. City of Southgate*, 638 F. Supp. 1060 (E.D. Mich. 1986) (2.3 percent of the total land area of the County) and *Function Junction, Inc. v. City of Dayton Beach*, 507 F. Supp. 544, 552 (M.D. Fla. 1987) (“12 locations in Daytona Beach ... potentially could accommodate plaintiffs’ [adult use] lounges.”) In *Lakeland Lounge v. City of Jackson*, 973 F. 2d 1255 (1992), the Fifth Circuit found reasonable a City of Jackson ordinance which provided for four areas with eight to ten locations which were “available and suitable” -- approximately 1.2 percent of the City’s land mass.

(6) **Amortization.** One of the most important elements of “adult” use zoning ordinances is a requirement that all nonconforming uses come into compliance within a specified period of time. A majority of the states, and the U.S. Constitution, permit an ordinance to terminate pre-existing adult uses which conflict with the locational or other provisions of an adult use zoning ordinance. Over a relatively brief period of time, all nonconforming sexually oriented businesses are eliminated under such a requirement. In states which allow amortization, pre-existing adult use status does not guarantee a permanent right to continue such property use when it contravenes the requirements of an ordinance.

Amortization clauses are upheld if the time frame is reasonable. *See Hart Bookstores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979) (upheld ordinance providing a six-month amortization period for pre-existing, nonconforming adult uses); *Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153 (Wash.1978) (upheld ordinance providing a 90-day amortization period for pre-existing, nonconforming sex theaters); *Castner v. City of Oakland*, 180 Cal. Rptr. 682 (Cal. App. 1982) (upheld ordinance regulating adult entertainment activity providing a one-year amortization period under which owner can apply for up to a two-year extension); *City of Vallejo*

*v. Adult Books*, 213 Cal. Rptr. 143 (Cal. App. 1985) (upheld ordinance regulating adult bookstores and theaters providing a one-year amortization period under which owners could apply for an extra year if they could show extreme hardship); *Cook County v. Renaissance Arcade*, 522 N.E. 2d 73 (Ill. 1988) (upheld ordinance providing a six-month amortization period under which an additional six months is given to any business which applies), and *SDJ, Inc. v. City of Houston*, 636 F. Supp. 1359 (S.D. Tex. 1986), *aff'd*, 841 F.2d 107 (5th Cir. 1988) (upheld six-month amortization of sexually oriented businesses).

The amortization period provided for in the Sample Ordinance is one year. This one-year period can be shortened or lengthened depending on the case law in your jurisdiction and the factual situation existing in your community, i.e., how many nonconforming sex uses already exist, how much they have invested in their present location, and so on. Another common approach includes setting forth a specific period, with the option of an additional period if a hardship is demonstrated.

Amortization provisions contained in sexually oriented business zoning ordinances are constitutionally permissible so long as they are content neutral and satisfy the requirements of *Renton* and *Young*, being that they must be “reasonable” and not “arbitrary and capricious.” As noted, the state constitution must allow for amortization generally.

(7) **Arcade Areas.** The ordinance includes additional regulations pertaining to so-called “peep show” booths. Ordinances regulating the interior configuration of sexually oriented businesses, more particularly peep show booths, are routinely upheld against constitutional attack. However, it is essential that a city council have before it some evidence (not necessarily as to its own experience, but in peep show booths generally based on others’ experiences) of the sexual activities occurring within such booths. These reports should set forth information about sexual activity, such as anonymous sex between patrons using “glory holes,” masturbation, and other illicit activities. The Supreme Court described the activity which occurred within peep show booths in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 699 (1986): “The court reported evidence that such a booth was used for ‘masturbation, fondling, and fellatio by patrons on the premises of the store ...’”. With such evidence or documentation, the ordinance will rest upon a reasonable basis, and not be considered arbitrary or capricious.

The following cases have upheld interior configuration requirements substantially identical or similar to the Sample Ordinance language, which provides for open booths with direct line of sight from a manager’s station: *Wall Distributors, Inc. v. City of Newport News, Virginia*, 782 F. 2d 1165 (4th Cir. 1986); *Ellwest Stereo Theatres, Inc. v. Weiner*, 681 F. 2d 1243 (9th Cir. 1982); *Bamon Corp. v. City of Dayton*, 923 F.2d 470 (6th Cir. 1991).

(8) **Public Nudity.** In 1991, the Supreme Court settled the question of whether communities can ban public nude dancing in establishments not licensed to sell liquor, and without the added regulatory power of the 21st Amendment. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 115 L.Ed. 2d 504, the Supreme Court upheld the use of Indiana’s public indecency law to prohibit nudity in a public place, including an “adults only” sexually oriented business. The *Barnes* Court emphasized that the Indiana law was not aimed at the suppression of free expression, but was a content neutral prohibition of certain conduct: “The

perceived evil that Indiana seeks to address is not erotic dancing, but public nudity.” *Id.* at 514. The Court found that Indiana’s statute was not directed at nude dancing or its potential expressive elements; rather, the State sought to prohibit public nudity across the board.

In *City of Erie v. Pap’s A.M.*, 120 S. Ct. 1382 (2000), the Supreme Court reaffirmed its holding in *Barnes* and further concluded that attacks on the individual motives of legislators who voted for a nudity ban are constitutionally irrelevant: “As we have said before, however, this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive.” *Id.* at 1392-93. For a more complete discussion of the *Pap’s* case, please see “*City of Erie v. Pap’s A.M.* and the Future of Sexually Oriented Business Regulation,” by Scott D. Bergthold, MUNICIPAL LAWYER, Sept./Oct. 2000, pp. 6-9.

Section 16 of the Sample Ordinance prohibits total nudity in a sexually oriented business, pursuant to *Barnes* and *Pap’s*. It also requires that individuals appearing in a “semi-nude condition” must be at least six feet from any patron or customer and on a stage at least two feet from the floor, and that a semi-nude employee may not solicit or be paid a gratuity, or touch a patron. Similar regulations were approved in *KEV, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986), *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995), and *DLS, Inc. v. City of Chattanooga*, 123 F.3d 420 (6th Cir. 1997).

(9) **Hours of Operation.** The Sample Ordinance’s zoning provisions are “place” regulations. The licensing and interior configuration requirements are “manner” regulations. Section 18 is a “time” regulation. Numerous courts have upheld hours of operation restrictions on sexually oriented businesses as valid if they are narrowly tailored to advance a substantial government interest, such as the prevention of crime and disturbances during the overnight hours. *See e.g., Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123 (3d Cir. 1993); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986); *Ben Rich Trading, Inc. v. City of Vineland*, 126 F.3d 155 (3d Cir. 1997); *National Amusements v. Town of Dedham*, 43 F.3d 731 (1st Cir. 1995); *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999); *Lady Lingerie v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999); *L.J. Concepts, Inc. v. City of Phoenix*, No. 99-17270/17271 (9th Cir. 2000) (unpublished opinion).

However, a community should take care to avoid possible preemption problems for those sexually oriented businesses that hold liquor licenses and whose hours may already be controlled by state law. *See e.g., J.L. Spoons, Inc. v. City of Brunswick*, 49 F. Supp.2d 1032 (N.D. Ohio 1999) (determining that local closing hours are preempted by state law).

## Conclusion

This Commentary is not an exhaustive treatment of sexually oriented business and First Amendment law but rather, an overview to demonstrate support for the various provisions found within the Sample Ordinance. Since state and local laws vary, please consult with a local attorney before implementing the Sample Ordinance. For further details and assistance, please contact the Law Office of Scott D. Bergthold, P.L.L.C. at (480) 922-9731 or [sbergthold@adultbusinesslaw.com](mailto:sbergthold@adultbusinesslaw.com).