

## **A SAMPLE ORDINANCE REGULATING SEXUALLY ORIENTED BUSINESSES**

**PREPARED BY:**

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**NOTICE:** The regulation of sexually oriented businesses implicates rights guaranteed under the First Amendment to the United States Constitution, and may implicate rights guaranteed under various provisions of state constitutions. While federal constitutional guarantees have been carefully considered in drafting this generic model, state constitutional guarantees have not. Moreover, certain procedural mechanisms codified in state law may affect the validity of certain provisions herein. Therefore, the American Family Association Center for Law & Policy strongly advises that government officials consult with experienced legal counsel at all stages of the enactment process. **THIS IS A MODEL ONLY; IT MUST BE TAILORED TO FIT THE REQUIREMENTS OF STATE LAW AND THE NEEDS OF THE LOCAL COMMUNITY.**

Citations to cases and other authorities have been included for ease of reference. They should not be included in the legislative enactment.

## **MODEL SEXUALLY ORIENTED BUSINESS ORDINANCE**

### **PREAMBLE**

**WHEREAS**, sexually oriented businesses require special supervision in order to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the citizens of

the communities where they locate, 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 that 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 means of accountability to ensure that operators of sexually oriented businesses comply with reasonable regulations, and to ensure that operators do not 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

proximity to each other, thereby contributing to urban blight and downgrading the quality of life in the adjacent area; and

**WHEREAS**, the City Council wants to prevent 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**, 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 that addresses the secondary effects of sexually oriented businesses as well as the health problems associated with such businesses; and

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

**WHEREAS**, ORC Ann. §§ 503.51-503.59 grant authority to political subdivisions to enact laws regulating sexually oriented businesses.

**SECTION I. Purpose and Findings.**<sup>1</sup>

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<sup>1</sup> The United States Supreme Court has held that non-obscene, sexually explicit materials and entertainment are protected by the First Amendment. Notwithstanding, the Court has stated that government may regulate sexually oriented businesses in order to eliminate or

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control the adverse secondary effects caused by these businesses. These adverse secondary effects include, but are not limited to, crime, sexually transmitted diseases, urban blight, declining property values, and lower quality of life. Enactment of legislation regulating sexually oriented businesses must be supported by factual findings of adverse secondary effects made by the enacting body.

(A) Purpose. It is the purpose of this ordinance to regulate sexually oriented businesses and related activities 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.<sup>2</sup> Neither is it the intent nor effect of this ordinance to condone or legitimize the distribution of obscene materials.

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<sup>2</sup> Courts normally review content-based restrictions on speech under “strict scrutiny” review, and require government to show a “compelling state interest” for the restriction. However, the Supreme Court has stated that, because restrictions on sexually explicit speech are justified without reference to the content of the regulated speech, the proper level of review is whether the regulation is narrowly tailored to a substantial government interest. See *City of Renton v. Playtime Theaters*, 475 U.S. 41, 48 (1986); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Here, the substantial government interest is combating adverse secondary effects. If the ordinance targeted the speech itself, the test would be strict scrutiny, a burden almost impossible to meet.

(B) Findings.<sup>3</sup> Based on evidence concerning the adverse secondary effects of adult uses on the community presented in hearings and in reports made available to the City Council, and on findings incorporated in the cases of *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, (1986); *Iacobucci v. City of Newport, Ky*, 479 U.S. 92 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *California v. LaRue*, 409 U.S. 109 (1972); *United States v. O'Brien*, 391 U.S. 367 (1968); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir.1997); *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); *South Florida Free Beaches, Inc. v. City of Miami*, 734 F.2d 608 (11th Cir.1984); and *N.W. Enterprises v. City of Houston*, 27 F.Supp. 2d 754 (S.D. Tex.1998)), as well as studies conducted in other cities including, but not limited to, Phoenix, Arizona; Minneapolis, Minnesota; Houston, Texas; Indianapolis, Indiana; Amarillo, Texas; Garden Grove, California; Los Angeles, California; Whittier, California; Austin, Texas; Seattle, Washington; Oklahoma City, Oklahoma; Cleveland, Ohio; and Beaumont, Texas; and findings reported in the Final

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<sup>3</sup> Findings may be supported by studies conducted by other cities, by the city's own study, or by findings of a court. See, e.g., *SOB, Inc. v. County of Benton*, 2003 U.S. App. LEXIS 1054 at \*13-18 (8th Cir. 2003). Nevertheless, it is important that the enacting body state the findings *on the record*, and note that the purpose of the ordinance is to combat such adverse secondary effects. See, e.g., *Lakeland Lounge v. Jackson*, 973 F.2d 1255, 1259 (5<sup>th</sup> Cir. 1992)(where (1) the drafters of the ordinance did rely upon studies of secondary effects, (2) a majority of the council members did receive some information about the secondary effects during an open hearing of the planning board, and (3) nothing in the record otherwise suggests impermissible motives on the part of the councilmembers, the language of the preamble shows the city council's awareness of the studies upon which the planning staff relied when framing the ordinance and reflects that a reasonable legislature with constitutional motives

Report of the Attorney General's Commission on Pornography (1986), the Report of the Attorney General's Working Group On the Regulation Of Sexually Oriented Businesses (June 6, 1989, State of Minnesota), and statistics obtained from the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, the City Council finds that:

(1) 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 owners of these establishments responsible for the activities that occur on their premises.

(2) Crime statistics show that all types of crimes, especially sex-related crimes, occur with more frequency in neighborhoods where sexually oriented businesses are located. See, e.g., Studies of the cities of Phoenix, Arizona; Indianapolis, Indiana; and Austin, Texas.

(3) 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. See, e.g., *California v. LaRue*, 409 U.S.

109, 111 (1972); See also Final Report of the Attorney General's Commission on Pornography (1986) at 377.

(4) Offering and providing such booths and/or cubicles encourages such activities, which creates unhealthy conditions. See, e.g., Final Report of the Attorney General's Commission on Pornography (1986) at 376-77.

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could have enacted the ordinance”).

(5) 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. See, e.g., *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 698 (1986); see also Final Report of the Attorney General's Commission on Pornography (1986) at 376-77.

(6) 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. See, e.g., Study of Fort Meyers, Florida.

(7) As of June, 2001, the total number of reported cases of AIDS in the United States caused by the immunodeficiency virus (HIV) was 793,025. See, e.g., Statistics of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention at [www.cdc.gov](http://www.cdc.gov).

(8) As of \_\_\_\_\_, 199\_\_\_\_, there have been \_\_\_\_\_ reported cases of AIDS in the State of \_\_\_\_\_.

(9) The total number of cases of genital chlamydia trachomatis infections in the United States reported in 2000 was 702,093, a 6% increase over the year 1999. See, e.g., Statistics of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention at [www.cdc.gov](http://www.cdc.gov).

(10) The total number of cases of early (less than one year) syphilis in the United States reported during the twelve year period 1996-2000 was 212,672. See, e.g., Statistics of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention at [www.cdc.gov](http://www.cdc.gov).

(11) The number of cases of gonorrhea in the United States reported annually remains at a high level, with a total of 1,730,911 cases reported during the period 1996-2000. See, e.g. Statistics of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention at [www.cdc.gov](http://www.cdc.gov).

(12) The surgeon general of the United States in his report of October 22, 1986, advised the American public that AIDS and HIV infection may be transmitted through sexual contact, intravenous drug use, exposure to infected blood and blood components, and from an infected mother to her newborn.

(13) According to the best scientific evidence available, AIDS and HIV infection, as well as syphilis and gonorrhea, are principally transmitted by sexual acts. See, e.g. Findings of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention at [www.cdc.gov](http://www.cdc.gov).

(14) 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 operators of the facilities to self-regulate those activities and maintain those facilities. See, e.g., Final Report of the Attorney General's Commission on Pornography (1986) at 377.

(15) Numerous studies and reports have determined that bodily fluids, including semen and urine, are found in the areas of sexually oriented businesses where persons view "adult" oriented films. See, e.g., Final Report of the Attorney General's Commission on Pornography (1986) at 377.

(16) Nude dancing in adult establishments encourages prostitution, increases sexual assaults, and attracts other criminal activity. See, e.g., *Barnes v. Glen Theatre*, 501 U.S. 560, 583 (1991).

(17) Nude dancing in adult establishments increases the likelihood of drug-dealing and drug use. See, e.g., *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1056 (9th Cir.1986).

(18) Alcohol consumption in adult establishments increases the likelihood of crime, illegal drug use, and illegal sexual activity, and encourages undesirable behavior that is not in the interest of the public health, safety, and welfare. See, e.g., *Artistic Entertainment, Inc. v. City of Warner Robins*, 223 F.3d 1306, 1309 (11<sup>th</sup> Cir.2000); *Sammy's Ltd. v. City of Mobile*, 140 F.3d 993, 996 (11<sup>th</sup> Cir.1998), *cert. denied*, 529 U.S. 1052, 146 L. Ed. 2d 459, 120 S. Ct. 1553 (2000).

(19) The findings noted in paragraphs numbered (1) through (18) raise substantial governmental concerns.

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

(21) A reasonable licensing procedure is an appropriate mechanism to place the burden of that reasonable regulation on the owners and operators of sexually oriented businesses. Further, such licensing procedure will place a heretofore non-existent incentive on 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.

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

(23) 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 and criminal activity.

(24) It is desirable, in the prevention of crime and the spread of communicable diseases, to obtain a limited amount of information regarding certain employees who may engage in the conduct this ordinance is designed to prevent, or who are likely to be witnesses to such activity.

(25) The fact that an applicant for a sexually oriented business license has been convicted of a sex-related crime leads to the rational assumption that the applicant may engage in that conduct in contravention to this ordinance.

(26) The barring of such individuals from operation or employment in sexually oriented businesses for a period of five (5) years for a previous felony conviction serves as a deterrent to further criminal conduct, and prevents conduct which leads to the transmission of sexually transmitted diseases.

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

(28) When more than one sexually oriented business use occupies the same location or business address, the secondary effects caused by such businesses are increased. Secondary effects are eliminated or controlled to a greater degree when only a single sexually oriented business use is allowed to occupy the same location.

**SECTION II. Definitions.**

(1) 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, videos, or other image-producing devices are 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 the depicting or describing of "specified sexual activities" or "specified anatomical areas."

(2) ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment that, as one of its principal business purposes, offers for sale or rental for any form of consideration any one or more of the following:

(A) books, magazines, periodicals or other printed matter, or photographs, films, motion picture, video cassettes or video reproductions, slides, or other visual representations that depict or describe "specified sexual activities" or "specified anatomical areas;" or

(B) instruments, devices, or paraphernalia that are designed for use in connection with "specified sexual activities."

A principal business purpose exists if materials offered for sale or rental depicting or describing "specified sexual activities" or "specified anatomical areas" generate 20% or more of the business's income, or account for 20% or more of inventory, or occupy 20% or more of total

floor space. A commercial establishment may have other principal business purposes that do not involve the offering for sale or rental of material depicting or describing "specified sexual activities" or "specified anatomical areas" and still be categorized as ADULT BOOKSTORE or ADULT VIDEO STORE. Such other business purposes will not serve to exempt such commercial establishments from being categorized as an ADULT BOOKSTORE or ADULT VIDEO STORE so long as one of its principal business purposes is the offering for sale or rental for consideration the specified materials that depict or describe "specified sexual activities" or "specified anatomical areas."

(3) ADULT CABARET means a nightclub, bar, restaurant, café, or similar commercial establishment that regularly, commonly, habitually, or consistently features:

- (A) persons who appear in a state of nudity or semi-nudity; or
- (B) live performances that are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or
- (C) films, motion pictures, video cassettes, slides, photographic reproductions, or other image producing devices that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; or
- (D) persons who engage in "exotic" or erotic dancing or performances that are intended for the sexual interests or titillation of an audience or customers.

(4) ADULT MOTEL means a hotel, motel or similar commercial establishment that:

- (A) offers accommodation to the public for any form of consideration and provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions that are characterized by

the depiction or description of "specified sexual activities" or "specified anatomical areas;" and has a sign visible from the public right of way that advertises the availability of this adult type of photographic reproductions; or

(B) offers a sleeping room for rent for a period of time that is less than twenty-four (24) hours; or

(C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than twenty-four (24) hours.

(5) 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, commonly, habitually, or consistently shown that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(6) ADULT THEATER means a theater, concert hall, auditorium, or similar commercial establishment that regularly, commonly, habitually, or consistently features persons who appear, in person, in a state of nudity and/or semi-nudity, and/or live performances that are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities." (7) DIRECTOR means the chief of police and such employee(s) of the police department as he may designate to perform the duties of the director under this ordinance.

(8) EMPLOYEE means a person who performs any service on the premises of a sexually oriented business on a full time, part time, contract basis, or independent basis, whether or not the person is denominated an employee, independent contractor, agent, or otherwise, and whether or not the said person is paid a salary, wage, or other compensation by the operator of said business. "Employee" does not include a person

exclusively on the premises for repair or maintenance of the premises or equipment on the premises, or for the delivery of goods to the premises, nor does “employee” include a person exclusively on the premises as a patron or customer.

(9) ESCORT means a person who, for consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.

(10) ESCORT AGENCY means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes for a fee, tip, or other consideration.

(11) ESTABLISHMENT means and includes any of the following:

(A) the opening or commencement of any sexually oriented business as a new business;

(B) the conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;

(C) the additions of any sexually oriented business to any other existing sexually oriented business; or

(D) the relocation of any sexually oriented business; or

(E) a sexually oriented business or premises on which the sexually oriented business is located.

(12) LICENSED DAY-CARE CENTER means a facility licensed by the State of \_\_\_\_\_, whether situated within the city or not, that provides care, training, education, custody, treatment or supervision for more than twelve (12) children under fourteen (14) years of age, where such children are not related by blood, marriage or adoption to the owner or operator of the facility, for less than twenty-four (24) hours a

day, regardless of whether or not the facility is operated for a profit or charges for the services it offers.

(13) LICENSEE means a person in whose name a license has been issued, as well as the individual listed as an applicant on the application for a license.

(14) LIVE THEATRICAL PERFORMANCE means a play, skit, opera, ballet, concert, comedy, or musical drama.

(15) NUDE MODEL STUDIO means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons for consideration.

(16) NUDITY or a STATE OF NUDITY means the appearance of a human bare buttock, anus, anal cleft or cleavage, pubic area, male genitals, female genitals, or vulva, with less than a fully opaque covering; or a female breast with less than a fully opaque covering of any part of the areola; or human male genitals in a discernibly turgid state even if completely and opaquely covered.

(17) PERSON means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(18) PREMISES means the real property upon which the sexually oriented business is located, and all appurtenances thereto and buildings thereon, including, but not limited to, the sexually oriented business, the grounds, private walkways, and parking lots and/or parking garages adjacent thereto, under the ownership, control, or supervision of the licensee, as described in the application for a business license pursuant to Section IV of this ordinance;

(19) SEMI-NUDE OR SEMI-NUDITY means the appearance of the female breast below a horizontal line across the top of the areola at its highest point. 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.

(20) SEXUAL ENCOUNTER CENTER means a business or commercial enterprise that, as one of its principal business purposes, offers for any form of consideration:

(A) physical contact in the form of wrestling or tumbling between persons of the opposite sex; or

(B) activities between persons of the opposite sex and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nudity.

A principal business purpose exists if the services offered are intended to generate business income.

(21) SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center.

(22) SPECIFIED ANATOMICAL AREAS means:

(A) the human male genitals in a discernibly turgid state, even if fully and opaquely covered;

(B) 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.

(23) SPECIFIED CRIMINAL ACTIVITY means any of the following offenses:

(A) 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; sexual assault; molestation of a child; or any similar sex-related offenses to those described above under the criminal or penal code of this state, other states, or other countries.

(B) 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 imposed for the conviction, whichever is the later date, if the conviction is of a felony offense;

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

(C) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant.

(24) SPECIFIED SEXUAL ACTIVITIES means and includes any of the following:

(A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts, whether covered or uncovered;

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

(C) masturbation, actual or simulated; or

(D) excretory functions as part of or in connection with any of the activities set forth in (A) through (C) above.

(25) 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 existed on \_\_\_\_\_, 200\_\_.

(26) TRANSFER OF OWNERSHIP OR CONTROL of a sexually oriented business means and includes any of the following:

(A) the sale, lease, or sublease of the business;

(B) the transfer of securities that form a controlling interest in the business, whether by sale, exchange, or similar means; or

(C) the establishment of a trust, gift, or other similar legal device that 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 III. Classification.**

Sexually oriented business uses are classified as either non-live entertainment, or live entertainment, as follows:

- (1) Non-live entertainment shall include:
  - (a) adult arcades; or
  - (b) adult bookstores or adult video stores; or
  - (c) adult motels; or
  - (d) adult motion picture theaters.
- (2) Live entertainment shall include:
  - (a) adult theaters; or
  - (b) adult cabarets; or
  - (c) escort agencies; or
  - (d) nude model studios; or
  - (e) sexual encounter centers.

**SECTION IV. License Required.**<sup>4</sup>

(A) It shall be unlawful:

(1) For any person to operate a sexually oriented business without a valid sexually oriented business operator’s license (“operator’s license”) issued by the Director pursuant to this ordinance; or

(2) For any person who operates a sexually oriented business to employ a person to work and/or perform services on the premises of the sexually

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<sup>4</sup>The Sixth Circuit Court of Appeals has effectively declared licensing schemes unconstitutional in Ohio because of inadequate procedural safeguards. See *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs.*, 2003 U.S. App. LEXIS 7720 at \*17-20 (6<sup>th</sup> Cir. 2003). Unless and until this decision is overturned, or the Ohio legislature enacts legislation correcting the procedural defects, no licensing requirement should be included as part of SOB regulation.

oriented business, if such employee is not in possession of a valid sexually oriented business employee license (“employee license”) issued to such employee by the Director pursuant to this ordinance; or

(3) For any person to obtain employment with a sexually oriented business if such person is not in possession of a valid sexually oriented business employee license issued to such person by the Director pursuant to this ordinance.

(4) It shall be a defense to subsections (2) and (3) of this Section if the employment is of limited duration and for the sole purpose of repair and/or maintenance of machinery, equipment, or the premises.

Violation of any provision within this Subsection shall constitute a misdemeanor.

(B) An application for a sexually oriented business operator’s license must be made on a form provided by the City. The application must be accompanied by a sketch or a 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 must 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 inches. Prior to issuance of an operator’s license, the premises must be inspected by the health department, building department, and zoning department. Prior inspection by the health department and building department shall be required only when the provisions set forth in Sections XIX and/or XVIII are applicable. (*See Schultz v. City of Cumberland*, 26 F.Supp. 2d 1128, 1144 (W.D.Wisc.1998)).

(C) An application for a sexually oriented business employee license must be made on a form provided by the City.

(D) All applicants for a license must be qualified according to the provisions of this ordinance. The application may request, and the applicant shall provide, such information reasonably necessary (including fingerprints) to enable the City to determine whether the applicant meets the qualifications established under this ordinance. The applicant has an affirmative duty to supplement an application with new information received subsequent to the date the application was deemed completed.

(E) If a person who wishes to own or operate a sexually oriented business is an individual, he must sign the application for an operator's license as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each individual who has a ten (10%) percent or greater interest in the business must sign the application for an operator's license as applicant. If a corporation is listed as owner of a sexually oriented business or as the entity that wishes to operate such a business, all corporate officers and directors must sign the application for an operator's license as applicant.

(F) Applications for an operator's license, whether original or renewal, must be made to the Director by the intended operator of the enterprise. Applications must be submitted to the office of the Director or the Director's designee during regular working hours. Application forms shall be supplied by the Director. The following information shall be provided on the application form:

- (1) The name, street address (and mailing address if different) of the applicant(s);
- (2) The applicant's Social Security number and/or his/her state or

federally issued tax identification number;<sup>5</sup>

(3) The name under which the establishment is to be operated and a general description of the services to be provided;

(a) If the applicant intends to operate the sexually oriented business under a name other than that of the applicant; he or she must state 1) the sexually oriented business's fictitious name and 2) submit the required registration documents;

(4) Whether the applicant has been convicted, or is awaiting trial on pending charges, of a "specified criminal activity" as defined in Section II, subsection (23), and, if so, the "specified criminal activity" involved, the date, place, and jurisdiction of each;

(5) Whether the applicant has had a previous license under this ordinance or other similar sexually oriented business ordinance from another city or county denied, suspended or revoked, including the name and location of the sexually oriented business for which the business license was denied, suspended or revoked, as well as the date of the denial, suspension or revocation, and whether the applicant is or has been a partner in a partnership or an officer, director or principal stockholder of a

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<sup>5</sup> There is a conflict among the courts on the question whether social security numbers may be required. *Compare Brownell v. City of Rochester*, 190 F. Supp. 2d 472, 506 (W.D.N.Y. 2001) ("Social Security numbers are one of the most commonly used means of verifying persons' identities today, and I also uphold that requirement."), with *Schultz v. City of Cumberland*, 228 F.3d 831, 852 (7th Cir. 2000) ("we invalidate the required production of a . . . Social Security number" because the information is "redundant and unnecessary" for the city's stated purposes).

corporation that is or was licensed under a sexually oriented business ordinance whose business license has previously been denied, suspended or revoked, including the name and location of the sexually oriented business for which the business license was denied, suspended or revoked as well as the date of denial, suspension or revocation;

(6) Whether the applicant holds any other licenses under this ordinance or other similar sexually oriented business ordinance from another city or county and, if so, the names and locations of such other licensed businesses;

(7) The single classification of license, as found in Section III, for which the applicant is filing;

(8) The telephone number of the establishment;

(9) The address and legal description of the tract of land on which the establishment is to be located;

(10) If the establishment is in operation, the date on which the owner(s) acquired the establishment for which the business license is sought, and the date on which the establishment began operations as a sexually oriented business at the location for which the business license is sought;

(11) If the establishment is not in operation, the expected startup date (which shall be expressed in number of days from the date of issuance of the business license). If the expected startup date is to be more than ten (10) days following the date of issuance of the business license, then a detailed explanation of the construction, repair or remodeling work or other cause of the expected delay and a statement of the owner's time schedule and plan for accomplishing the same;

(12) If an applicant wishes to operate a sexually oriented business, other than an adult motel, which shall exhibit on the premises, in a viewing room or

booth of less than one hundred fifty (150) square feet of floor space, films, video cassettes, other video reproductions, or live entertainment which depict specified sexual activities or specified anatomical areas, then the applicant shall comply with the application requirements set forth in Section XIX hereunder.

(G) Each application for an operator's license shall be accompanied by the following:

- (1) Payment of the application fee in full;
- (2) If the establishment is a [State of \_\_\_\_\_] corporation, a certified copy of the articles of incorporation, together with all amendments thereto;
- (3) If the establishment is a foreign corporation, a certified copy of the certificate of authority to transact business in this state, together with all amendments thereto;
- (4) If the establishment is a limited partnership formed under the laws of the State of \_\_\_\_\_, a certified copy of the certificate of limited partnership, together with all amendments thereto;
- (5) If the establishment is a foreign limited partnership, a certified copy of the certificate of limited partnership and the qualification documents, together with all amendments thereto;
- (6) Proof of the current fee ownership of the tract of land on which the establishment is to be situated in the form of a copy of the recorded deed;
- (7) If the persons identified as the fee owner(s) of the tract of land in item (6) is not also the owner of the sexually oriented business, then the lease, purchase contract, purchase option contract, lease option contract or other document(s) evidencing the legally enforceable right of the owner(s) or proposed owner(s) of the

sexually oriented business to have or obtain the use and possession of the tract or portion thereof that is to be used for the sexually oriented business;

(8) A current certificate and straight-line drawing prepared within thirty (30) days prior to application by a registered land surveyor depicting the property lines and the structures containing any existing sexually oriented businesses within 1,500 feet of the property to be certified; and the property lines of any established religious institution/synagogue, school, public park or recreation area within 1,500 feet of the property to be certified. For purposes of this Section, a use shall be considered existing or established if it is in existence at the time an application is submitted;

(9) Any of items (2) through (8) above shall not be required for a renewal application if the applicant states that the documents previously furnished to the Director with the original application or previous renewals thereof remain correct and current.

(H) Applications for an employee license to work and/or perform services in a sexually oriented business, whether original or renewal, must be made to the Director by the person to whom the employee license shall issue. Each application for an employee license shall be accompanied by payment of the application fee in full. Application forms shall be supplied by the Director. Applications must be submitted to the office of the Director or the Director's designee during regular working hours. Each applicant shall be required to give the following information on the application form:

- (1) The applicant's given name, and any other names by which the applicant is or has been known, including "stage" names and/or aliases;
- (2) Age, and date and place of birth;
- (3) Height, weight, hair color, and eye color;

- (4) Present residence address and telephone number;
- (5) Present business address and telephone number;
- (6) Date, issuing state, and number of photo driver's license, or other state issued identification card information;
- (7) Social Security Number; and
- (8) Proof that the individual is at least eighteen (18) years old.

The personal information provided in this subsection shall be confidential, and shall not be disclosed to the public except to the extent required by state or federal law. (See *N.W. Enterprises v. City of Houston*, 27 F.Supp. 2d 754, 842-43 (S.D. Tex.1998); *Schultz v. City of Cumberland*, 26 F.Supp 2d 1128 (W.D.Wisc.1998)).

(l) Attached to the application form for any license under this ordinance shall be the following:

(1) A color photograph of the applicant clearly showing the applicant's face, and the applicant's fingerprints on a form provided by the police department. Any fees for the photographs and fingerprints shall be paid by the applicant.

(2) A statement detailing the license history of the applicant for the five (5) years immediately preceding the date of the filing of the application, including whether such applicant, in this or any other city, county, state, or country, has ever had any license, permit, or authorization to do business denied, revoked, or suspended, or had any professional or vocational license or permit denied, revoked, or suspended. In the event of any such denial, revocation, or suspension, state the name(s) under which the license was sought and/or issued, the name(s) of the issuing or denying jurisdiction, and describe in full the reason(s) for the denial, revocation, or suspension.

A copy of any order of denial, revocation, or suspension shall be attached to the application.

(3) A statement whether the applicant has, within the past five (5) years, been convicted, or is awaiting trial on pending charges, of a “specified criminal activity” as defined in Section II, subsection (23) and, if so, the “specified criminal activity” involved, the date, place and jurisdiction of each. (See *N.W. Enterprises v. City of Houston*, 27 F.Supp. 2d 754, 841 (S.D. Tex.1998)).

(J) Every application for a license under this ordinance shall contain a statement under oath that:

(1) The applicant has personal knowledge of the information contained in the application, and that the information contained therein and furnished therewith is true and correct; and,

(2) The applicant has read the provisions of this article.

(K) A separate application and operator’s license shall be required for each sexually oriented business classification as set forth in Section III.

(L) The fact that a person possesses other types of state or city permits and/or licenses does not exempt him/her from the requirement of obtaining a sexually oriented business operator or employee license.

**SECTION V. Issuance of License.**

(A) Upon the filing of an application for a sexually oriented business employee license, the Director shall issue a temporary license to said applicant. The application shall then be referred to the appropriate city departments for investigation to be made on the information contained in the application. The application process shall be completed within thirty (30) days from the date of the completed application.

After the investigation, the Director shall issue an employee license, unless it is determined by a preponderance of the evidence that one or more of the following findings is true:

(1) The applicant has failed to provide the information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form;

(2) The applicant is under the age of eighteen (18) years;

(3) The applicant has been convicted of a “specified criminal activity” as defined in Section II, subsection (23) of this ordinance;

(4) The sexually oriented business employee license is to be used for employment in a business prohibited by local or state law, statute, rule, or regulation, or prohibited by a particular provision of this ordinance; or

(5) The applicant has had a sexually oriented business employee license revoked by the City within two (2) years of the date of the current application.

If the sexually oriented business employee license is denied, the temporary license previously issued is immediately rendered null and void. Denial, suspension, or revocation of a license issued pursuant to this subsection shall be subject to appeal as forth in subsection (I) of this Section.

(B) A license issued pursuant to subsection (A) of this Section, if granted, shall state on its face the name of the person to whom it is granted, the expiration date, and the address of the sexually oriented business. While engaged in employment or performing services on the sexually oriented business premises, an employee shall, at all times, possess the license in such manner as to be available for immediate inspection upon lawful request.

(C) A license issued pursuant to subsection (A) of this Section shall be subject to annual renewal upon the written application of the applicant and a finding by the Director that the applicant has not been convicted of any “specified criminal activity” as defined in this ordinance, or committed any act during the existence of the previous license which would be grounds to deny the initial license application. The decision whether to renew a license shall be made within thirty (30) days of the completed application. The renewal of a license shall be subject to the fee as set forth in Section VI. Non-renewal of a license shall be subject to appeal as set forth in subsection (I) of this Section.

(D) If application is made for a sexually oriented business operator’s license, the Director shall approve or deny issuance of the license within thirty (30) days of receipt of the completed application. The Director shall issue a license to an applicant unless it is determined by a preponderance of the evidence that one or more of the following findings is true:

(1) An applicant has failed to provide the information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form;

(2) An applicant is under the age of eighteen (18) years;

(3) An applicant has been denied a license by the City to operate a sexually oriented business within the preceding twelve (12) months, or whose license to operate a sexually oriented business has been revoked within the preceding twelve (12) months;

(4) An applicant is overdue in payment to the City for taxes, fees, fines, or penalties assessed against or imposed upon him/her in relation to the sexually

oriented business for which license is sought, or the property on which the sexually oriented business is located or will be located;

(5) An applicant has been convicted of a “specified criminal activity” as defined in Section II, subsection (23);

(6) The premises to be used for the sexually oriented business have not been approved by the health department, building department, and zoning department as being in compliance with applicable laws and ordinances, if such approval is required under other sections of this ordinance;

(7) The license fee required under this ordinance has not been paid;

(8) An applicant of the proposed establishment is in violation of or is not in compliance with one or more of the provisions of this ordinance.

(E) A license issued pursuant to subsection (D) of this Section, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, the address of the sexually oriented business, and the Section III classification for which the license is issued. The 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.

(F) If so required under other sections of this ordinance, the health department, building department, and zoning department shall complete their certification that the premises are in compliance or not in compliance within twenty (20) days of receipt of the completed application by the Director. The certification shall be promptly presented to the Director. Failure of an appropriate department to timely certify its inspection shall not be grounds for refusing to issue a license within the mandatory time period prescribed in subsection D. (*See Nightclubs, Inc., v. City of*

*Paducah*, 2000 WL 122184 at 5 (6<sup>th</sup> Cir.2000); *Baby Tam v. City of Las Vegas*, 199 F.3d 1111, 1114-15 (9<sup>th</sup> Cir.2000)). In the event the Director fails to render a decision on the application within the time specified herein, the operator shall be permitted to commence operation of the business. *Redner v. Dean*, 29 F.3d 1495, 1500-01 (11<sup>th</sup> Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995).

(G) A sexually oriented business license shall issue for only one classification, as set forth in Section III.

(H) In the event that the Director determines that an applicant is not eligible for a sexually oriented operator's license, the applicant shall be given notice in writing of the reasons for the denial within thirty (30) days of the receipt of the completed application by the Director, provided that the applicant may request, in writing at any time before the notice is issued, that such period be extended for an additional period of not more than ten (10) days in order to make modifications necessary to comply with this ordinance.

(I) An applicant may appeal<sup>6</sup> the decision of the Director regarding a denial to the City Council by filing a written notice of appeal with the city secretary within ten (10) days after service of notice upon the applicant of the Director's decision. The notice of appeal shall be accompanied by a memorandum or other writing setting out fully the grounds for such appeal and all arguments in support thereof. The Director may, within fifteen (15) days of service upon him of the applicant's memorandum, submit a responsive memorandum to the City Council.

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<sup>6</sup> Appeal of a denial is provided by ORC § 503.57.

The City Council shall hear any appeal of a denial of a permit or renewal permit at a public hearing and render a decision within thirty days of receiving the notice of appeal. Notice of the public hearing shall appear in at least one newspaper of general circulation in the township, including the time, date, and place of the hearing, once a week for two weeks immediately preceding the hearings, as required by ORC § 503.52. The applicant shall have the opportunity to present information, evidence, and testimony to the City Council during such hearing.<sup>7</sup> After reviewing the record on appeal, the City Council shall vote either to uphold or overrule the Director's decision.

The *status quo* immediately prior to denial of the license shall be maintained during the pendency of the appeal. (See *Nightclubs, Inc., v. City of Paducah*, 2000 WL 122184 at 6 (6<sup>th</sup> Cir.2000). Judicial review of a denial by the Director and City Council may be made pursuant to Section XI of this ordinance. The *status quo* shall continue to be maintained during the pendency of judicial review.

(J) A license issued pursuant to subsection (D) of this Section shall be subject to annual renewal upon the written application of the applicant and a finding by the Director that the applicant has not been convicted of any "specified criminal activity" as defined in this ordinance, or committed any act during the existence of the previous license which would be grounds to deny the initial license application. The decision whether to renew a license shall be made within thirty (30) days of the completed application. The renewal of a license shall be subject to the fee as set forth in Section VI.

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<sup>7</sup> Quasi-judicial proceedings are appealable to the court of common pleas pursuant to ORC § 2506.01. The procedural requirements set forth in § 2506.01 must be followed precisely in order to ensure that the constitutional requirement of prompt judicial review is satisfied.

## **SECTION VI. Fees.**

The annual fee for a sexually oriented business operator's license, whether new or renewal, is Five Hundred (\$500.00) Dollars. The annual fee for a sexually oriented business employee license, whether new or renewal, is Fifty (\$50.00) Dollars. These fees are to be used to pay for the cost of the administration and enforcement of this ordinance.

## **SECTION VII. Inspection.**

(A) The City shall regularly inspect the premises of the sexually oriented business in order to ensure compliance with the provisions of this ordinance. An applicant or licensee shall permit representatives of the Police Department and/or Health Department to inspect the premises at any time the establishment is open for business. Such inspection shall be limited to visual assessment of the activities conducted in areas to which patrons have access or are allowed access; to requests for inspection of the licenses required under this ordinance; and to requests for identification of those individuals who reasonably appear to be under the age of 18. (See *New York v. Burger*, 482 U.S. 691, 702-03, 711-12 (1987); *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs.*, 2003 U.S. App. LEXIS 7720 at \*29-36 (6<sup>th</sup> Cir. 2003) (holding that inspections must be "carefully limited in time, place, and scope" in order to withstand constitutional scrutiny)).

(B) A person who operates a sexually oriented business or his agent or employee commits a misdemeanor if he/she refuses to promptly permit such lawful inspection of the premises.

## **SECTION VIII. Expiration of License; Denial of Renewal.**

(A) Each license shall expire one year from the date of issuance and may be renewed only by making application as provided in Section IV. Application for renewal should be made at least thirty (30) days before the expiration date. When application is made less than thirty (30) days before the expiration date, the expiration of the license will not be affected.

(B) When the Director denies renewal of a license, the applicant shall not be issued a license for one year from the date of denial. Notwithstanding the provisions of this section, in the event a licensee appeals the non-renewal of a license, the *status quo* immediately prior to non-renewal shall be maintained throughout the pendency of the appeal, up to and including judicial review on the merits as set forth in Section XI.

#### **SECTION IX. Suspension.**

The Director shall suspend a license for a period not to exceed thirty (30) days if he determines that licensee or an employee of licensee has:

- (1) violated or is not in compliance with any section of this ordinance;
- (2) operated or performed services in a sexually oriented business while intoxicated by the use of alcoholic beverages or controlled substances;
- (3) refused to allow prompt inspection of the sexually oriented business premises as authorized by this ordinance;
- (4) with knowledge, permitted gambling by any person on the sexually oriented business premises.

A licensee may appeal the revocation of a license to the City Council in accordance with the procedure set forth in Section V(I). Notwithstanding any other provisions of this section, in the event a licensee appeals the suspension of a license, the status quo immediately prior to suspension shall be maintained throughout the

pendency of the appeal, up to and including judicial review on the merits as set forth in Section XI.<sup>8</sup> (See *Nightclubs, Inc., v. City of Paducah*, 2000 WL 122184 at 5 (6<sup>th</sup> Cir.2000); *4805 Convoy, Inc., v. City of San Diego*, 183 F.3d 1108, 1114 (9<sup>th</sup> Cir.1999)).

## **SECTION X. Revocation.**

(A) The Director shall revoke a license if a cause of suspension in Section IX occurs and the license has been suspended within the proceeding twelve (12) months.

(B) The Director shall revoke a license if he determines that:

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

(2) a licensee was convicted of a “specified criminal activity” on a charge that was pending prior to the issuance of the license;

(3) a licensee has, with knowledge, permitted the possession, use, or sale of controlled substances on the premises;

(4) a licensee has, with knowledge, permitted the sale, use, or consumption of alcoholic beverages on the premises;

(5) a licensee has, with knowledge, permitted prostitution on the premises;

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<sup>8</sup> With respect to suspension of a license, maintaining the *status quo* pending appeal is necessary only when prompt judicial review of a suspension is unavailable under state law.

(6) a licensee has, with knowledge, operated the sexually oriented business during a period of time when the licensee's license was suspended;

(7) a licensee has, with knowledge, permitted any act of sexual intercourse, sodomy, oral copulation, masturbation, or other sexual conduct to occur in or on the licensed premises;

(8) a licensee is delinquent in payment to the City or State for any taxes, fees, fines, or penalties relating to the sexually oriented business or the premises thereon;

(9) a licensee has, with knowledge, permitted a person under eighteen (18) years of age to enter or remain in the establishment; or

(10) a licensee has attempted to sell his business license, or has sold, assigned, or transferred ownership or control of the sexually oriented business to a non-licensee of the establishment;

(11) A licensee has, with knowledge, permitted a person or persons to engage in specified sexual activities on the premises of the sexually oriented business.<sup>9</sup>

(C) When the Director revokes a license, the revocation shall continue for one (1) year, and the licensee shall not be issued a license for one (1) year from the date

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<sup>9</sup> In *Schultz v. City of Cumberland*, 228 F.3d 831 (7<sup>th</sup> Cir. 2000), the Seventh Circuit held that a ban on erotic touching *combined* with a ban on nudity was an overbroad restriction on expressive speech. Relying on *Schultz*, a district court in New York held that a ban on erotic touching was unconstitutional. See *Brownell v. City of Rochester*, 190 F. Supp 2d 472 (W.D.N.Y. 2001). If these courts are in your circuit, add the following clause: "This subsection shall not apply to the erotic touching of one's own genitals, pubic region, buttocks, anus, or breasts, whether covered or uncovered, by an employee-entertainer during the course of a live performance."

revocation became effective. A licensee may appeal the revocation of a license to the City Council in accordance with the procedure set forth in Section V(I). Notwithstanding any other provisions of this section, in the event the licensee appeals the revocation of a license, the status quo immediately prior to revocation shall be maintained throughout the pendency of the appeal, up to and including judicial review on the merits as set forth in Section XI.<sup>10</sup> (See *Nightclubs, Inc., v. City of Paducah*, 2000 WL 122184 at 5 (6<sup>th</sup> Cir.2000); *4805 Convoy, Inc., v. City of San Diego*, 183 F.3d 1108, 1114 (9<sup>th</sup> Cir.1999)).

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<sup>10</sup> With respect to revocation of a license, maintaining the *status quo* pending appeal is necessary only when prompt judicial review of a revocation is unavailable under state law.



seeking judicial review of the City's administrative action, the City shall transmit the record of the administrative action to the court no later than five (5) business days after receipt of said summons, and shall answer the complaint no later than ten (10) days after receipt of the summons. In addition, the City shall submit its response brief within fourteen (14) days of receipt of the petitioner's brief. The administrative action shall then be promptly reviewed by the court. (*See Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 641 (4<sup>th</sup> Cir.1999)).

**SECTION XII. No Transfer of License.**

(A) A licensee shall not transfer his/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 and set forth in the operator's license.

(B) An operator's license shall not be transferable from one location to another. (*See, e.g., Peterson v. South Salt Lake City*, 987 P.2d 57, 60 (Utah.1999)).

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of applicable state law and/or state court procedure is imperative in order to ensure that this section comports with the laws of the state in which the ordinance is enacted. Moreover, failure to safeguard "prompt judicial review" will make the ordinance especially vulnerable to constitutional attack. Thus, this section must be carefully tailored to your state's procedures regarding judicial review of administrative actions, and such procedure *must* provide an opportunity for judicial review. Finally, be aware that the federal circuits are split on what exactly satisfies the requirement of "prompt judicial review."

**SECTION XIII. Location Restrictions.**<sup>13</sup>

Sexually oriented businesses shall be permitted in any commercial district provided that:

(A) the sexually oriented business may not be operated within:

(1) 1,500<sup>14</sup> feet of a church, synagogue, mosque, temple or building which is used primarily for religious worship and related religious activities;

(2) 1,500 feet of 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,

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<sup>13</sup> Locational restrictions may be maintained in either of two ways: one, a distance requirement like the one set forth here, or “clustering,” that is, requiring sexually oriented businesses to locate only in a specified zone.

<sup>14</sup> While sexually oriented businesses can be regulated, they cannot be banned through an overly burdensome zoning scheme. The Supreme Court requires that zoning schemes “allow for reasonable alternative avenues of communication.” See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62-63 (1976) (upholding 1,000 foot distance requirement). Ordinarily, a land use study must be conducted to determine whether a proposed zoning scheme is constitutionally permissible, *i.e.*, whether there are a sufficient number of alternative sites based upon the distance or clustering requirements. For example, a 1,500 foot distance requirement may not allow for enough alternative sites, while a 1,000 or 750 foot distance requirement may. Zoning schemes are particularly vulnerable to constitutional attack when no land use study has been conducted.

special education school, junior colleges, and universities; school includes the school ground, but does not include the facilities used primarily for another purpose and only incidentally as a school;

(3) 1,500 feet of 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, skating rink, pedestrian/bicycle paths, wilderness areas, or other similar public land within the village which is under the control, operation, or management of the village park and recreation authorities;

(4) 1,500 feet of the property line of a lot zoned for residential use and devoted to a residential use as defined in the zoning code; or

(5) 1,500 feet of another sexually oriented business.

(B) A sexually oriented business may not be operated in the same building, structure, or portion thereof, containing another sexually oriented business that is classified in accordance with Section III.

(C) For the purpose of this ordinance, measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a sexually oriented business is conducted, to the nearest property line of the premises of a church, synagogue, regular place of worship, or public or private elementary or secondary school, or to the nearest boundary of an affected public park, residential district, or residential lot, or licensed day care center.

(D) For purposes of subsection (C) of this section, the distance between any two sexually oriented business uses shall be measured in a straight line, without regard

to intervening structures or objects, from the closest exterior wall of the structure in which each business is located.

**SECTION XIV. Non-Conforming Uses; Amortization.**<sup>15</sup>

(A) Any business lawfully operating on the effective date of this ordinance that is in violation of the locational or structural configuration requirements of this ordinance shall be deemed a non-conforming use. The non-conforming use will be permitted to continue for a period not to exceed two years, unless sooner terminated for any reason or voluntarily discontinued for a period of thirty (30) days or more. Such non-conforming 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 1,500 feet of one another and otherwise in a permissible location, the sexually oriented business that was first established and continually operated at a particular location is the conforming use and the later-established business(es) is non-conforming.

(B) A sexually oriented business lawfully operating as a conforming use is not rendered a non-conforming use by the location, subsequent to the grant or renewal of the sexually oriented business license, of a church, synagogue, or regular place of religious worship, public or private elementary or secondary school, licensed day-care center, public park, or residential district within 1,500 feet of the sexually oriented business. This provision applies only to the renewal of a valid business license, and does not apply when an application for a business license is submitted after an operator's license has expired or has been revoked.

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<sup>15</sup> Amortization of existing businesses is not permitted in some states; in other states it is closely circumscribed. Please review the laws of your state to determine whether

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amortization is permitted and, if so, to what extent.

**SECTION XV. Additional Regulations for Adult Motels.**

(A) Evidence that a sleeping room in a hotel, motel, or a similar commercial enterprise has been rented and vacated two or more times in a period of time that is less than ten (10) hours creates a rebuttable presumption that the enterprise is an adult motel as that term is defined in this chapter.

(B) It is unlawful if a person, as the person in control of a sleeping room in a hotel, motel, or similar commercial enterprise that does not have a sexually oriented business license, rents or subrents a sleeping room to a person and, within ten (10) hours from the time the room is rented, he rents or subrents the same sleeping room again.

(C) For purposes of subsection (B) of this section, the terms "rent" or "subrent" mean the act of permitting a room to be occupied for any form of consideration.

(D) Violation of subsection (B) of this Section shall constitute a misdemeanor.

**SECTION XVI. Additional Regulations For Escort Agencies.**

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

(B) 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 18 years.

(C) Violation of this Section shall constitute a misdemeanor.

**SECTION XVII. Additional Regulations For Nude Model Studios**

(A) A nude model studio shall not employ any person under the age of 18 years.

(B) A person under the age of 18 years commits a misdemeanor<sup>16</sup> if the person

appears semi-nude or in a state of nudity in or on the premises of a nude model studio.

It is a defense to prosecution under this subsection if the person under 18 years was in a restroom not open to the public view or visible by any other person.

(C) A person commits a misdemeanor if the person appears in a state of nudity, or with knowledge, allows another to appear in a state of nudity in an area of a nude model studio premises which can be viewed from the public right of way.

(D) A nude model studio shall not place or permit a bed, sofa, or mattress in any room on the premises, except that a sofa may be placed in a reception room open to the public.

### **SECTION XVIII. Additional Regulations Concerning Public Nudity**<sup>17</sup>

(A) It shall be a misdemeanor for a person who, with knowledge and intent, appears in person in a nude or semi-nude condition in a sexually oriented business, unless the person is an employee who, while nude or semi-nude, is at least ten (10) feet from any patron or customer, and on a stage raised at least two (2) feet from the floor. (See, e.g., *Colacurcio v. City of Kent*, 163 F.3d 545, 553-54 (9<sup>th</sup> Cir.1998) (upholding 10 foot distance requirement); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 413 (6<sup>th</sup> Cir.1997) (in upholding a six-foot distance requirement, the court stated that “it is not for us to say that a seven-foot zone or a five-foot zone would strike a better balance”).

(B) It shall be a misdemeanor for an employee, while nude or semi-nude, to solicit any pay or gratuity from any patron or customer on the sexually oriented business premises, or for any patron or customer to pay or give any gratuity to any employee, while said employee is nude or semi-nude on the sexually oriented business premises.

(C) It shall be a misdemeanor for an employee, while nude or semi-nude, to touch a patron or the clothing of a patron, or for a patron to touch a nude or semi-nude employee or the clothing of a nude or semi-nude employee, while the employee is on the sexually oriented business premises.

**SECTION XIX. Regulations Pertaining to Exhibition of Sexually Explicit Films and**

**Videos.**

(A) 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, or other video reproduction, that depicts specified sexual activities or specified anatomical areas, shall comply with the following requirements:

(1) Upon application for a sexually oriented business 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 business license will be conspicuously posted, if granted. 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 Director 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 said diagram was prepared.

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

(3) No alteration in the configuration or location of a manager's station may be made without the prior approval of the Director or his designee.

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

(5) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of the entire 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 the entire 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.

(6) It shall be the duty of the operator, and it shall also be the duty of any agents and employees present in the premises, to ensure that the view area specified in subsection (5) of this section remains unobstructed at all times. No doors, walls, partitions, curtains, merchandise, display racks, or other object(s) shall obstruct from view of the manager's station any portion of the premises to which patrons have

access. It shall be the duty of the operator, and it shall also be the duty of any agents and employees present in the premises, to ensure that no patron is permitted access to any area of the premises that has been designated as an area in which patrons will not be permitted, as designated in the application filed pursuant to subsection (1) of this section.

(7) 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-candle as measured at the floor level.

(8) It shall be the duty of the operator, and it shall also be the duty of any agents and employees present in the premises, to ensure that the illumination described above is maintained at all times that any patron is present in the premises.

(9) No viewing room or booth may be occupied by more than one person at any time.

(10) No opening of any kind shall exist between viewing rooms or booths.

(11) It shall be the duty of the operator, and it shall also be the duty of any agents and employees present in the premises, to ensure that no more than one person at a time occupies a viewing booths or rooms, and to ensure that no person attempts to make an opening of any kind between the viewing booths or rooms.

(12) The operator of the sexually oriented business shall, each business day, inspect the walls between the viewing booths to determine if any openings or holes exist.

(13) The operator of the sexually oriented business shall cause all floor coverings in viewing booths to be nonporous, easily cleanable surfaces, with no rugs or carpeting.

(14) The operator of the sexually oriented business 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.

(B) A person having a duty under Subsections (1) through (14) of this Section commits a misdemeanor if he/she, with knowledge, fails to fulfill that duty.

**SECTION XX. Exterior Portions of Sexually Oriented Businesses.**

(A) It shall be unlawful for an owner or operator of a sexually oriented business to allow the merchandise or activities of the establishment to be visible from a point outside the establishment.

(B) It shall be unlawful for the owner or operator of a sexually oriented business to allow the exterior portion of the sexually oriented business to have flashing lights, or any words, lettering, photographs, silhouettes, drawings, or pictorial representations of any manner except to the extent permitted by the provisions of this ordinance.

(C) It shall be unlawful for the owner or operator of a sexually oriented business to allow exterior portions of the establishment to be painted any color other



(D) Each letter forming a word on a primary sign shall be of solid color, and each such letter shall be the same print-type, size and color. The background behind such lettering on the display surface of a primary sign shall be of a uniform and solid color.

(E) Secondary signs shall have only one (1) display surface. Such display surface shall:

- (1) be a flat plane, rectangular in shape;
- (2) not exceed twenty (20) square feet in area;
- (3) not exceed five (5) feet in height and four (4) feet in width; and
- (4) be affixed or attached to any wall or door of the enterprise.

(F) The provisions of item (1) of subsection (B) and subsection (C) and (D) shall also apply to secondary signs.

(G) Violation of any provision of this Section shall constitute a misdemeanor.

**SECTION XXII. Sale, Use, or Consumption of Alcoholic Beverages Prohibited.**<sup>18</sup>

(A) The sale, use, or consumption of alcoholic beverages on the premises of a sexually oriented business is prohibited.

(B) Any violation of this Section shall constitute a misdemeanor.

**SECTION XXIII. Persons Younger Than Eighteen Prohibited From Entry; Attendant Required.**

(A) It shall be unlawful to allow a person who is younger than eighteen (18) years of age to enter or be on the premises of a sexually oriented business at any time the sexually oriented business is open for business.

(B) It shall be the duty of the operator of each sexually oriented business to ensure that an attendant is stationed at each public entrance to the sexually oriented business at all times during such sexually oriented business's regular business hours. It shall be the duty of the attendant to prohibit any person under the age of eighteen (18) years from entering the sexually oriented business. It shall be presumed that an attendant knew a person was under the age of eighteen (18) unless such attendant asked for and was furnished:

(1) a valid operator's, commercial operator's, or chauffeur's driver's license; or

(2) a valid personal identification certificate issued by the State of \_\_\_\_\_ reflecting that such person is eighteen (18) years of age or older.

(C) Violation of this Section shall constitute a misdemeanor.

#### **SECTION XXIV. Massages or Baths Administered by Person of Opposite Sex.**

It shall be unlawful for any sexually oriented business, regardless of whether in a public or private facility, to operate as a massage salon, massage parlor or any similar type business where any physical contact with the recipient of such services is provided by a person of the opposite sex. Violation of this Section shall constitute a misdemeanor.

#### **SECTION XXV. Hours of Operation**

No sexually oriented business, except for an adult motel, may remain open at any time between the hours of ten o'clock (10:00) P.M. and eleven o'clock (11:00) A.M. on weekdays and Saturdays. No sexually oriented business shall open for business or

remain open for business on Sunday or any legal holiday recognized by the State of \_\_\_\_\_.

**SECTION XXVI. Exemptions.**

(A) It is a defense to prosecution under this ordinance that a person appearing in a state of nudity did so in a modeling class operated:

- (1) by a proprietary school, licensed by the State of \_\_\_\_\_, a college, junior college, or university supported entirely or partly by taxation;
- (2) by a private college or university that maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation.

(B) Notwithstanding any other provision in this ordinance, movies rated G, PG, PG-13, or R, by the Motion Picture Association of America (MPAA), or live theatrical performances with serious artistic, social, or political value, that depict or describe specified anatomical areas or specified sexual activities, are expressly exempted from regulation under this ordinance. (See *Schultz v. City of Cumberland*, 26 F.Supp. 2d 1128, 1144 (W.D.Wisc.1998)).

**SECTION XXVII. Notices.**

(A) Any notice required or permitted to be given by the Director or any other city office, division, department or other agency under this ordinance to any applicant, operator or owner of a sexually oriented business may be given either by personal delivery or by certified United States mail, postage prepaid, return receipt requested, addressed to the most recent address as specified in the application for the license, or any notice of address change that has been received by the Director. Notices mailed as above shall be deemed given upon their deposit in the United States mail. In the event

that any notice given by mail is returned by the postal service, the Director or his designee shall cause it to be posted at the principal entrance to the establishment.

(B) Any notice required or permitted to be given to the Director by any person under this ordinance shall not be deemed given until and unless it is received in the office of the Director.

(C) It shall be the duty of each owner who is designated on the license application and each operator to furnish notice to the Director in writing of any change of residence or mailing address.

**SECTION XXVIII. Injunction.**

A person who operates or causes to be operated a sexually oriented business without a valid operator's license, or in violation of Section XIII of this ordinance, is subject to a suit for injunction as well as prosecution for criminal violations. Each day a sexually oriented business so operates is a separate offense or violation.

**SECTION XXIX. Separability.**

If any section, subsection, or clause of this ordinance shall be deemed to be unconstitutional or otherwise invalid, the validity of the remaining sections, subsections, and clauses shall not be affected thereby.

**SECTION XXX. Conflicting Ordinances Repealed.**

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

**SECTION XXXI. Effective Date.**

This ordinance shall be enforced from and after \_\_\_\_\_.