
Regulating The Location Of Sexually Oriented Businesses

PLANNING AND ZONING FOR PUBLIC OFFICIALS AND LAWYERS

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PRESENTATION BY PETER G. SMITH

JOE GORFIDA, JR.
NICHOLS, JACKSON, DILLARD, HAGER & SMITH, L.L.P.
1800 LINCOLN PLAZA
500 N. AKARD STREET
DALLAS, TEXAS 75201
(214) 965-9900
(214) 965-0010 FAX
EMAIL: JGORFIDA@NJDHS.COM

INTRODUCTION

Over the past 10 years the courts have decided many cases that have addressed the issue of a municipality's ability to regulate the location of sexually oriented businesses. As municipalities began to implement ordinances that regulated the location of sexually oriented business, operators of sexually oriented businesses challenged the validity of many of these ordinances imposed by municipalities. The cases that have been argued before the Supreme Court have primarily addressed the concerns with businesses that provide on-site entertainment. From these cases we have learned that municipalities have the authority to regulate the location of these "adult uses" through zoning. However, one of the remaining challenges that municipalities face is the ability to create an ordinance that defines the ever-changing category of what constitutes a sexually oriented business. Additionally, simply having a public hearing on the adoption of an ordinance that regulates sexually oriented businesses can generate a great deal of controversy and tends to evoke a lot of emotional responses both from citizens and council members. This paper will focus on the different categories of sexually oriented businesses and a municipality's ability to regulate such uses. The goal is to present a manageable road map with practical guidelines to assist a municipality in the regulation of sexually oriented businesses.

WHAT ARE WE TRYING TO REGULATE?

As a starting point, we must first consider what type of adult oriented communication is protected. In the cases that have reached the Supreme Court, many decisions have not addressed the different categories of sexually oriented businesses that are found in many municipalities but instead have focused on the businesses that provide

live on-site entertainment or the showing of sexually oriented movies. However, it is from these cases that we begin to understand the test that the courts will apply to a municipal ordinance that regulates the many different categories of sexually oriented businesses. Speech may not be regulated by the government unless a valid, content-neutral restriction is utilized. If a restriction is based on the content, then the regulation requires a review based on strict scrutiny. Under a strict scrutiny challenge, the burden is on the municipality to prove that the ordinance is narrowly-tailored that furthers a compelling governmental interest. *Johnson v. California*, 125 S.Ct. 1141, 1146 (2005). While this test may be simple in theory, it becomes difficult in practice if we don't know what type of sexually oriented business a municipality is attempting to regulate. A successful ordinance will be one that defines the different types of sexually oriented businesses as opposed to an ordinance that attempts to define sexually oriented businesses with one broad definition. In a study by *Kelly and Cooper*¹ on adult uses, several categories to distinguish adult uses are offered. These different types of adult uses have been included in many municipal ordinances. The uses include:

Bookstore, newsstand, video store or combination. These types of establishments had less than half of their business that focused on sexually oriented material. These percentages were determined either from the inventory, gross sales, or floor area.

Sex shop. This term applies to any establishment meeting any of the following tests:

- Offering for sale or rent items from any two of the following categories; sexually oriented books and videos; lingerie; leather goods marketed or presented in a context to suggest that they are to be used in bondage or other sexual activities; or

¹ Kelly and Cooper, *Adult Use Study: Part 4, Summary, Findings AND Recommendations*, prepared for Kansas City, Missouri, April 1998. Also published in a report by the American Planning Association: Kelly and Cooper, 2000.

- Offering for sale sexually oriented toys and novelties; or
- Where more than fifty percent of the business involves sexually oriented books and videos; or
- Advertising or holding itself out in any forum as “XXX,” “adult,” “sex” or otherwise as a sexually-oriented business. This definition of “sex shop” is intended to exclude mainstream lingerie stores and department stores with lingerie departments, as well as large book and video stores which may carry very large quantities of adult materials, as well as other titles.

Video viewing booths. Also called “peep shows”, these are often operated as an accessory to a bookstore or movie theater, this is clearly a separate, definable land use.

Adult motion picture theaters. Involve on premise entertainment but is distinct from adult cabarets, both of which are considered as “adult entertainment” establishments in many communities. For land use purposes, establishments with live entertainment typically have a somewhat more significant impact on surrounding neighborhoods than do movie theaters.

Adult cabaret. An establishment featuring sexually oriented live entertainment.

It is important for a municipal ordinance to clearly define the types of uses that the municipality is attempting to regulate. Many of the ordinances that the courts found to be unconstitutional were a result of poorly drafted ordinances that failed to clearly define adult uses. It is impossible to regulate an adult use without defining it and difficult to distinguish one adult use from another without addressing the contents of the material for sale or the type of on-site entertainment that is provided.

YOU CAN'T REGULATE ME. I SELL CAKES!!

Of the uses listed above, it is clear that those uses which state a "substantial portion of their business" is derived from the sale of sexually oriented merchandise are sexually oriented businesses. For example we know that a business which advertises as XXX is clearly an adult use as well as a bookstore or movie theater that advertises the same. However, the trend today has been for many businesses to include a mix of sexually oriented materials or products with other types of non-adult products. For example, a local municipality issued a certificate of occupancy to a business alleging to be a bakery. However, the types of cakes sold contained graphic adult pictures and messages as well as a substantial portion of the products sold in the store, which claimed to be "novelties only", were clearly devices used for sexual stimulation. Another municipality had a business that operated as a lingerie store; however the majority of the merchandise sold consisted of adult sexual devices, lotions and some lingerie as well as devices to be used for the purpose of bondage or other sexual acts. A federal court in Pennsylvania had no difficulty in ruling for a community that prosecuted the operator of a lingerie modeling studio. The operator has obtained a zoning permit to operate as a "retail clothing store". However, upon investigation after numerous complaints, the investigators observed customers purchasing lingerie, after the lingerie was purchased, models wore the purchased lingerie. In wearing of the lingerie, many of the models had exposed their breasts, buttocks, and pubic region. It was clear from the record of the Zoning Hearing Board that the purpose of the establishment was to attract males to observe females in a state of nudity and that the selling of lingerie was only secondary to

the main purpose of the establishment. *Miller v. Richland*. 2001 U.S. Dist. LEXIS 19137 (E.D. Pa. 2001).

In these examples the operators never applied for a sexually oriented business license and the businesses were located in a retail zoning district. While a municipality does not have the ability to prohibit such business from operating in all zoning districts, a municipality does have the authority to regulate the location of such businesses. However, for the municipality to be successful in regulating the location of sexually oriented businesses it is important to have a well drafted ordinance that clearly defines what it is that the municipality desires to regulate. Adult operators seem to spend as much time studying how a municipality defines the term “sexually oriented business” or “adult use” as well as studying the regulations themselves and seeking ways to operate sexually oriented businesses without some of the related regulatory burdens. Thus, workable definitions are essential to a successful regulatory scheme.²

CONTENT NEUTRAL, TIME, PLACE AND MANNER RESTRICTIONS

The Supreme Court has long held that regulations enacted for the purpose of restraining speech on the basis of content presumptively violate the First Amendment. However, content-neutral time, place and manner restrictions are acceptable as long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. *City of Renton v. Playtime theatres, Inc.* 475 U.S. 41 (1986) and reaffirmed in *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728 (U.S. 2002). The basic constitutional principles used in evaluating the constitutionality of regulations affecting First Amendment protected activity were set out

² *St. Louis County, Missouri v. B.A.P., Inc.* 25 S.W.3d 629 (Mo. Ct. App. 200)

by the Supreme Court of the United States in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557(1980). The Court set forth a four-part test which stated as follows:

(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial government interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. *Id. at 100.*

If the ordinance is not in violation of the First Amendment doctrine under one of the four prongs of the *Central Hudson* test, then it is analyzed as a time, place, and manner restriction under the test set forth in *United States v. O'Brien*, 391 U.S. 367(1968). Under the *O'Brien* test, the regulation is justified despite its impact on First Amendment interests if (1) the regulation is within the power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of speech; and (4) the incidental restrictions on free speech are no greater than are essential to further the interest. *Id.*, 391 U.S. at 88.

ALLOWING ADULT USES MEANS PROMOTING OBSCINITY?

The first part of the *O'Brien* test involves determining what speech is lawful. Commercial speech involving unlawful activity is not protected by the First Amendment. Obscene material lacks First Amendment protection. The Supreme Court in *Miller v. California* developed the test for obscenity. This test holds that a work is obscene if:

- (1) the average person, applying contemporary standards, would find that the work, taken as a whole, appeals to the prurient interest;
- (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and
- (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.*, 413 U.S. at 15.

Although it is clear that obscene material lacks First Amendment protection, it may not be clear what is obscene. Section 43.21 of the Texas Penal Code defines obscene as material or a performance that: (A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex; (B) depicts or describes: (i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or (ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals is in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs and (2) taken as a whole, lacks serious literary, artistic, political, and scientific value. Also, sections 43.21 and 43.23(c)(1) of the Penal Code makes it an offense for a person, knowing content and character of an obscene device, defined to include a dildo, to promote such device or to possess such device with intent to promote. The statute does not criminalize the use of obscene devices, nor mere possession of such devices without intent to promote them, but does criminalize promotion of and possession of such devices with intent to promote,

when the purpose is for sexual stimulation and gratification. This Statute has been upheld in numerous cases including *Yorko v. State* (Cr.App. 1985) 690 S.W.2d 260.

The Texas Penal Code definition of what is obscene has been upheld in numerous cases and law enforcement has been successful at targeting businesses that sell material that are considered to be obscene. However, it is important to remember that permitting a sexual oriented business by right within your municipality does not permit the business to engage in the sale of obscene material. Many council members and planning commissioners assume that allowing a sexually oriented business will also bring with it those businesses that push the limits on what is considered to be lawful and unlawful material, therefore it is important to educate local official on the obscenity laws and to have your local law enforcement conduct periodic inspections on sexually oriented businesses to ensure compliance with the State obscenity laws.

FIFTH CIRCUIT APPROACH

The Fifth Circuit Court of Appeals has adopted a three-part inquiry for content neutral time, place and manner restrictions. The Court stated a content-neutral time, place and manner restriction must (1) be justified without reference to the content of the regulated speech; (2) be narrowly tailored to serve a significant or substantial governmental interest; and (3) preserve ample alternative means of communication. *TK's video Inc. v. Denton County, Texas*, 24 F.3d 705, 707 (5th Cir. 1994), citing *City of Renton*, 475 U.S. at 46-48. In *City of Renton*, the Court stated that time, place and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of

communication. In *Renton*, a Suit was brought challenging the constitutionality of a zoning ordinance which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school. The challengers of the ordinance had purchased two theaters within a proscribed area, intending to exhibit adult films, and sought declaratory and injunctive relief against enforcement of the ordinance. No adult uses existed in the city at the time the ordinance was proposed, but the city planning committee had held public hearings and reviewed the experience of other cities. The Supreme Court, Justice Rehnquist, held that the ordinance was a valid governmental response to the serious problems created by adult theaters and satisfied the dictates of the First Amendment. The Court went on to say that the *Renton* ordinance is narrowly tailored to affect only the category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proves fatal to the regulations in other First Amendment cases before the Court. *Id* at 52.

SECONDARY EFFECTS

Under the first prong of the test stated in *Renton*, a municipal ordinance's restrictions may be justified by reference to the "effects attending" the regulated speech. *TK's Video*, 24 F. 3d at 707. What *Renton* taught us was that the municipality must produce some evidence of adverse secondary effects produced by adult entertainment in order to justify a challenged enactment using the secondary effect doctrine. *Renton* also instructs us that a municipality must present sufficient evidence to demonstrate a "link

between the regulation and the asserted governmental interest under a reasonable belief standard”.³

A municipality can not simply state that the justification for the ordinance is to attenuate the secondary effects associated with sexually oriented businesses. A municipality “may establish a substantial interest in the regulation by compiling a record with evidence that it may be reasonably believed to be relevant to the problem that the city addresses.” *SDJ, Inc. v. City of Houston*, 837 F. 2d 1268, 1274 (5th Cir. 1988). A court does not inquire “whether the regulator subjectively believed or was motivated by other concerns, but rather whether an objective lawmaker could have so concluded, supported by an actual basis for the conclusion.” *SDJ, Inc.* 837 F. 2d at 1274. A municipality does not have to conduct their own test and can rely on the test of other cities as long as whatever the evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. *Renton* 475 U.S. at 51-52.

Some of the findings that have been included in ordinances adopted by Cities include:

- There is the potential for the location of a sexually oriented business in the City of X and such businesses require special supervision from the public safety agencies to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the citizens of the City.
- The City Council of the City of X finds that sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of the casual nature; and

³ Regulation of Lawful, Adult oriented Businesses Chapter 11 Section 62.9

- The concern over sexually transmitted diseases is a legitimate health concern of the City which demands reasonable regulations of sexually oriented businesses to protect the health and well being of the citizens.
- Licensing is a legitimate and reasonable means of accountability to ensure the operators of sexually oriented businesses comply with the reasonable regulations and to ensure that the operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation.
- 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 down grading of property value.
- It is recognized that sexually oriented businesses, due to their nature, have serious objectionable characteristics, particularly when they are located in close proximity to each other, thereby contributing to urban and rural blight and down grading the quality of life in the adjacent areas.
- The City Council desires to minimize and control these adverse effects and thereby protect the health, safety and welfare of the citizens; 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.
- It is not the intent of the City Council to suppress any speech activities protected by the First Amendment to the United States Constitution, but to enact a content/neutral ordinance that addresses the secondary effects of sexually oriented businesses.

- It is no the intent of the City Council to condone or legitimize the promotion of obscene material.
- The City Council of the City of X recognizes that applicable state law prohibits the promotion and sale of obscene materials, and the City expects and encourages state law enforcement officials to enforce state obscenity statutes against any such illegal activities.
- The Texas legislature has authorized municipalities to enact licensing regulations for sexually oriented businesses pursuant to Texas Local Government Code Chapter 243.
- The Planning and Zoning Commission and the City Council received a report and heard testimony from staff and the City's planning consultant and attorneys at such public hearings regarding the secondary effects of such businesses, including increase crime, prostitution, drug use and other illegal activities.
- The following studies and reports regarding the adverse secondary side effects associated with sexually oriented businesses were placed on file with the City Secretary.
- Such studies differentiate between the secondary effects of sexually oriented businesses that provide on-site entertainment and those that are retail facilities that sell goods intended for off-site consumption.

WHAT ABOUT THE CORNER BOOK STORE?

From the Supreme Court decisions we have learned that outright bans on live entertainment are considered unconstitutional. And *Renton* held that alternative avenues

of access to protected communication must be available.⁴ Cities may regulate adult theaters by dispersing them 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 theaters 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." *American Mini Theatres*, 427 U.S., at 71, 96 S.Ct., at 2453.

Many of the studies that have been done by local governments to show "secondary effects" have focused primarily on establishments that are adult movie theaters or establishments that provide live entertainment. Few studies have focused specifically on secondary effects associated with the types of establishments that sell video, books and magazines. Additionally, many newsstands often have a separate rack or a back room that carries a significant amount of hard-core material. Even some major bookstores and video stores carry some type of soft-core material videos. Often these videos are sold under the label as instructional or massage videos. Given this, it is important to have an ordinance that makes a distinction between a retail outlet that sells little if any adult material and a retail outlet that has a substantial portion of their stock as adult material. What a municipality wants to avoid is having a vague definition that would lump a retail store, such as Barnes and Noble, into the same classification as retail store dedicated to adult books, magazines and videos. The challenge that a municipality faces is whether the same distance requirements and zoning restrictions that have traditionally been placed on live entertainment can also be placed on retail shops that sell videos, books or magazines for off premise enjoyment. What we know from the court cases previously discussed is that an outright ban on these types of retail establishments

⁴ 475 U.S. 61, 101

would be contrary to the finds discussed previously in *Young* and *Renton*. Therefore, it is important for a municipality to include in their findings, when adopting an ordinance that regulates retail establishments that sell a substantial portion of sexually oriented merchandise to be used off-site, justifications that address secondary effects associated with such businesses. Many municipalities will place greater distance separations on those establishments that provide live entertainment than those selling sexually oriented merchandise to be used off-site.

ON-SITE VS. OFF-SITE VIEWING

Zoning regulations restricting the location of adult entertainment businesses are considered time, place and manner regulations if a municipality does not ban them entirely and the restrictions are designed to combat the undesirable secondary effects of such businesses rather than to restrict the content of their speech. Relevant harmful secondary effects include crime, promotion of prostitution, reduction of economic activity and lowered property values. *Encore Video, Inc. v. City of San Antonio* 330 F. 3d 288 at 291. In *Encore Video*, the City of San Antonio's ordinance which prohibited sexually oriented businesses within 1000 feet of residential was challenged. Encore Video was a sexually oriented retail store that provided adult videos for sale for off-premise viewing only. Customers were not permitted to view videos on site. The San Antonio ordinance at issue defined "sexually oriented business" broadly. The regulations applied not only to establishments at which individuals could view sexually explicit materials on site, but also to establishments that do not permit on-site viewing. Additionally, the ordinance applied to any bookstore, novelty store, or video store that

devotes over 20% of its inventory or floor space to sexually explicit materials. The City relied on three studies that addressed the secondary effects of adult businesses. However, the studies relied on did not address the secondary effects of a retail establishment that sold adult videos for off premise viewing only. The Court stated that “given the expansive reach of the ordinance in the instant case, we must require at least some substantial evidence of the secondary effects of establishments that sell adult products solely for off-site use. Otherwise, even ordinary bookstores and video stores with adult sections could be subjected to regulation that restricts their First Amendment rights without evidence that they cause secondary effects. *Id.* 295. The Court found that the ordinance violated the First Amendment when applied to a store which provides videos for off-premise viewing only because it failed to make a distinction between the secondary effects for on-site and off-site viewing as well as an overbroad definition of “sexually oriented business”.

CONCLUSION

It is clear that the Court in *Renton* did not overrule the opinion in *SDJ, Inc. v. City of Houston*, however the opinion was clear in that a city needs to have an ordinance that is narrowly tailored and makes a distinction between on-site and off-site viewing as well as a definition of a retail establishment that sells sexually oriented materials as a substantial portion of their business. Having a broad definition of sexual oriented business to include all retail establishments that sell any or a small percentage of sexually related materials will not survive a First Amendment challenge. When a municipality adopts an ordinance regulating sexually oriented businesses, it is important to have a hearing that includes a discussion of the secondary effects of having such businesses in

certain zoning districts. Those findings should be contained in the record of the planning and zoning and the city council. "A City's interest in attempting to preserve the quality of urban life is one that must be accorded high respect" *Young v. Am. Mini Theatres*, 427 U.S. 50 at 71.

“SAMPLE ORDINANCE”

ORDINANCE NO _____

AN ORDINANCE OF THE CITY OF THE COLONY, TEXAS AMENDING THE CODE OF ORDINANCES BY REPEALING ARTICLE IV “SEXUALLY ORIENTED BUSINESSES” OF CHAPTER 4 OF THE CODE OF ORDINANCES AND REPLACING WITH A NEW ARTICLE IV “SEXUALLY ORIENTED BUSINESSES” TO PROVIDE LICENSING REQUIREMENTS FOR SEXUALLY ORIENTED BUSINESSES AND EMPLOYEES OF SEXUALLY ORIENTED BUSINESSES; PROVIDING DEFINITIONS; PROVIDING CRITERIA FOR DETERMINING ELIGIBILITY; DEFINING OFFENSES; PROVIDING PROCEDURES FOR APPLICATION, REVIEW, APPROVAL AND REVOCATION OF LICENSES; PROVIDING A SAVINGS CLAUSE; SEVERABILITY CLAUSE; PROVIDING A REPEALING CLAUSE; PROVIDING A PENALTY CLAUSE ; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, there is the potential for the location of a sexually oriented business in the City of The Colony and such businesses require special supervision from the public safety agencies to protect and preserve the health, safety and welfare of the patrons of such businesses as well as the citizens of the City; and

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

WHEREAS, the concern over sexually transmitted diseases is a legitimate health concern of the City which demands reasonable regulations of sexually oriented businesses 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 the reasonable regulations and to ensure that the 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 down grading of property value; 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 and rural blight and down grading the quality of life in the adjacent areas; and

WHEREAS, the City Council of the City of The Colony desires to minimize and control these adverse effects and thereby protect the health, safety and welfare of the citizens; 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 to the United States Constitution, but to enact a content/neutral ordinance that addresses the secondary effects of sexually oriented businesses; and

WHEREAS, it is not the intent of the City Council of the City of The Colony to condone or legitimize the promotion of obscene material; and

WHEREAS, the City Council of the City of The Colony recognizes that applicable state law prohibits the promotion of obscene materials, and the City Council expects and encourages state law enforcement officials to enforce state obscenity statutes against any such illegal activities in both the City of The Colony; and

WHEREAS, the Texas Legislature has authorized municipalities to enact licensing regulations for sexually oriented businesses pursuant to Texas Local Government Code Chapter 243;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF THE COLONY, TEXAS:

Section 1. That Chapter 4, Article IV "Sexually Oriented Businesses" is hereby repealed in its entirety and replaced with a new Article IV "Sexually oriented Businesses" which shall read as follows:

"ARTICLE IV. SEXUALLY ORIENTED BUSINESSES

Sec. 4-61. Purpose and Intent.

(a) It is the purpose of this Article to regulate sexually oriented businesses to promote the health, safety, morale, and general welfare of the citizens of the City, and to establish reasonable and uniform regulations to prevent the concentration of sexually oriented businesses within the City. The provisions of this Article have neither purpose nor the effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is neither the intent nor effect of this Article 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.

(b) It is the intent of the City Council of the City of The Colony, Texas, that the location regulations of Section 4-68 of this Article are promulgated pursuant to Chapter 243 of the Texas Local Government Code.

Sec. 4-62. Definitions.

In this article:

- (a) *Applicant* means the owner of a sexually oriented business, where an application for a license for a sexually oriented business has been filed, or an entertainer or manager of a sexually oriented business, where an application for an entertainer or manager of a sexually oriented business has been filed.
- (b) *Entertainer* means a person paid to provide entertainment to customers at a sexually oriented business; entertainment may consist of dancing, singing, modeling, acting, other forms of performing, or individual conversations with customers whereby the entertainer is paid any form of remuneration directly or indirectly for such conversations.
- (c) *Manager* means a person designated by the owner or operator of a sexually oriented business to be responsible for the operation of such business at a particular location at a particular time, when the owner, proprietor, or other principal in the business is present, such person may be considered the manager.
- (d) *Operator* means any person operating, conducting or maintaining a business regulated under this subchapter.
- (e) *Owner* means the individual owner of an establishment, or if the owner is a corporation, partnership or limited liability company, the term shall include all general partners, any limited partner with a financial interest of ten percent (10%) or more, all corporate officers and directors, and any shareholder or member with a financial interest of ten percent (10%) or more.
- (f) *Sexually oriented Business* means any business, other than a business excluded under subsection (1) that constitutes one of the following uses, as defined in Appendix A of this Code: sexually oriented entertainment business, sexually oriented cabaret; sexually oriented media outlet; sexually oriented motion picture theater; sexually oriented retail establishment, or sexually oriented theater. "Sexually oriented business" is an inclusive term used to describe collectively a group of land uses for purposes of defining use regulations and development standards made applicable to such uses by the City's zoning regulations.

- (1) The definition of "sexually oriented business" expressly excludes the following types of businesses, which are elsewhere defined in this Article, and which uses are prohibited in all zoning districts: sexually oriented encounter parlor; sexually oriented entertaining studio; sexually oriented motel; sexually oriented video viewing booth; bath house; and body painting shop.
 - (2) For purposes of this section, any business that holds itself out to be a sexually oriented business through advertising or other public declarations shall be deemed to be a sexually oriented business.
- (g) *Specified Criminal Act* means any sexual offense, rape, statutory rape or other sexually related offense or as defined by criminal statutes in other states or by federal laws addressing similar or related offenses; or an offense as defined in Chapter 43 of the Texas Penal Code; or an offense involving controlled substances, illegal drugs or narcotics, or gambling as defined in federal or state laws in any of the states.
- (h) *Specified Sexual Activities* means any of the following acts of intended sexual arousal or excitement:
- (1) Sexual conduct including, but not limited to, actual or simulated acts of sexual intercourse, masturbation, oral copulation or sodomy;
 - (2) Fondling or other intentional touching of a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female;
 - (3) Sadomasochistic acts; or
 - (4) Acts involving animals or latent objects.

Sec. 4-63. License required for sexually oriented business.

(a) It shall be unlawful for any person to operate or maintain a sexually oriented business in the City unless the owner, operator or lessee thereof has obtained a sexually oriented business license from the City, or to operate such business after such license has expired or has been revoked or suspended by the City.

(b) It is unlawful for any entertainer, server, employee, manager, operator or owner to knowingly perform any work, service or entertainment directly related to the operation of an unlicensed sexually oriented business.

(c) The failure to post a sexually oriented business license in the manner required herein shall be prima facie evidence that such business has not obtained such a license. In addition, it shall be prima facie evidence that any entertainer, employee, manager or owner who performs any business, service or entertainment in a sexually

oriented business in which a sexually oriented business license is not posted in the manner required herein had knowledge that such business is not licensed.

(d) Any sexually oriented business shall be deemed to have consented to periodic entry into and inspection of the business premises by appropriate City officials and inspection by those officials of only those business records necessary for the limited purpose of determining whether such business enterprise is in compliance with this section. This entry and inspection shall take place during hours when such business is open to the public, provided, however, that the owner may request a different time for inspection.

(e) A separate license is required for each sexually oriented business. A sexually oriented business license shall be issued only for the one sexually oriented business use listed on the application. Any change in the type of sexually oriented business use shall invalidate the sexually oriented business license and require the license to obtain a new license for the change in use. The establishment or maintenance of more than one sexually oriented business in the same building, structure or portion thereof is prohibited.

(f) All sexually oriented business licenses shall be issued for a period of one year, subject to annual renewal.

(g) The sexually oriented business license and all manager and entertainer licenses shall state that the license is not transferable to other persons or entities and the calendar year and month for which it is issued.

Sec. 4-64. License Application and Fees.

(a) Sexually oriented business license.

All persons desiring to secure a license to operate a sexually oriented business shall make a verified application with the Planning and Development Director. All applications shall be submitted in the name of the person who owns the sexually oriented business. The application shall be signed by the applicant. If the applicant is a corporation, the application shall be signed by its president. If the applicant is a partnership, the application shall be signed by a partner. If the applicant is a limited liability company, the application shall be signed by a member. In all other instances where the owner is not an individual, the application shall be signed by an authorized representative of the owner. The Planning and Development Director may require proof of authorization before accepting an application. All applications shall be submitted on a form supplied by the Planning and Development Director and shall require all of the following information:

(1) The name, any aliases, mailing address for receipt of notices, home telephone number, occupation, date and place of birth and social security number of the applicant.

- (2) The tax identification number and registered agent if the owner is required to have a tax identification number or registered agent.
- (3) The name of the sexually oriented business, a description of the type of sexually oriented business to be operated on the licensed premises, and the name of the owner of the premises where the sexually oriented business will be located.
- (4) The names, social security numbers and dates of birth of all partners, if the applicant is a partnership or limited liability partnership, and if the applicant is a corporation or limited liability company, the same information for all stockholders or members who own more than a ten percent (10%) interest in the company.
- (5) A statement from the applicant whether the applicant and each person required to be identified in the application pursuant to this section, in previously operating in this or another city, county or state, has had a sexually oriented business license of any type revoked or suspended, and if so, the reason for the suspension of revocation and the business activity subject to the suspension of revocation.
- (6) A statement from the applicant and each person required to be identified in the application pursuant to in this section that each such person has not been convicted of, or released from confinement for conviction of, or received an order of deferred adjudication on, any felony, whichever event is later, within five (5) years immediately preceding the application, or has not been convicted of, nor received an order of deferred adjudication on, a misdemeanor or municipal ordinance violation, or released from confinement for conviction of a misdemeanor or municipal ordinance violation, whichever event is later, within two (2) years immediately preceding the application, where such felony, misdemeanor or municipal ordinance violation constitutes a Specified Criminal Act.
- (7) A statement signed under oath that the applicant has personal knowledge of the information contained in the application and that the information contained therein is true and correct and that the applicant has read the provisions of The Colony Code of Ordinances regulating sexually oriented businesses. Failure to provide the information and documentation required herein shall constitute an incomplete application and shall not be processed by the City. The Planning and Development Director shall notify the applicant whether or not the application is complete within five (5) working days of the date the application is received by the Planning and Development Director. In the event the Planning and Development Director has determined that the application is

incomplete, the notification to the applicant shall include a written explanation of the reason(s) why the application is incomplete.

(b) Manager or entertainer license.

All persons desiring to secure a license to be a manager or entertainer in a sexually oriented business shall make a verified application with the Planning and Development Director. All applications shall be submitted in the name of the person proposing to be a manager or entertainer. All applications shall be submitted on a form supplied by the Planning and Development Director and shall require all of the following information.

- (1) The applicant's name, any aliases, mailing address for receipt of notices, home telephone number, date and place of birth, social security number, and, in the case of entertainers, any stage names or nicknames used in entertaining.
- (2) The name and address of each sexually oriented business where the applicant intends to work as a manager or entertainer.
- (3) A statement from the applicant that the applicant has not been convicted of, or released from confinement for conviction of, or received an order for deferred adjudication on, any felony, whichever event is later, within five (5) years immediately preceding the application, or has not been convicted of, nor received an order of deferred adjudication on, a misdemeanor or ordinance violation, or released from confinement for conviction of a misdemeanor or ordinance violation, whichever event is later, within two (2) years immediately preceding the application, where such felony, misdemeanor or ordinance violation constitutes a Specified Criminal Act as defined herein.
- (4) The applicant shall present to the Planning and Development Director documentation that the applicant has attained the age of eighteen (18) years at the time the application is submitted. Any of the following shall be accepted as documentation of age:
 - (a) A motor vehicle operator's license issued by any state, bearing the applicant's photograph and date of birth;
 - (b) A state-issued identification card bearing the applicant's photograph and date of birth;
 - (c) An official and valid passport issued by the United States of America; or
 - (d) An immigration card issued by the United States of

America; Failure to provide the information required herein shall constitute an incomplete application and shall not be processed by the City. The Planning and Development Director shall notify the applicant whether or not the application is complete within five

(5) working days of the date the application was received by the Planning and Development Director, in the event the Planning and Development Director has determined that the application is incomplete, the notification to the applicant shall include a written explanation of the reason(s) why the application is incomplete.

(c) Fees.

The annual non-refundable fee for a sexually oriented business license is five hundred dollars (\$500.00) and shall be submitted with the application for a license. In the event a license is not issued after an application is submitted, or if a license is revoked after it is issued, no part of the five hundred dollars (\$500.00) fee shall be refunded.

(d) Application processing.

Upon receipt of an application for a sexually oriented business, manager, or entertainer license, the Planning and Development Director shall immediately transmit one copy of the application to the Chief of Police and the Fire Chief for investigation of the applicant. It shall be the duty of the Chief of Police to investigate such application to determine whether the information contained in the application is accurate and whether the application meets the requirements herein regarding the absence of Specified Criminal Acts. It shall be the duty of the Fire Chief to determine whether the structure where the sexually oriented business will be conducted complies with the requirements and meets the standards of the applicable fire code. The Police Chief and the Fire Chief shall report the results of their investigation to the Planning and Development Director not later than ten (10) working days from the date the application is deemed complete by the Planning and Development Director shall investigate and determine whether the application meets the health, zoning, building code, and property maintenance ordinances of the City. The Planning and Development Director shall approve or disapprove the application based upon his own investigation and the reports of the Police Chief and the Fire Chief within thirty (30) days from the date the application is deemed complete by the Director, in accordance with the criteria in Section 4-64 of this Article. The Director shall approve the issuance of a license only if the appropriate license fee has been paid, the applicant is qualified and all the applicable requirements set forth herein are met. The applicant shall be notified in writing of the Director's decision within five (5) working days thereof.

(e) Renewal of license.

- (1) A license issued under this Article may be renewed by making application to the Planning and Development Director on application forms provided for that purpose. Licenses shall expire on the last day of the calendar month during which the license was issued or renewed during the previous year. Renewal applications for such licenses shall be submitted no earlier than thirty (30) days prior to the expiration of the license.
- (2) Upon timely application thereof, a license issued under the provisions of this subchapter shall be renewed by issuance of a new license upon demonstration that the criteria for issuance of the original license have been met at the time the application is submitted for renewal.

(f) Appeal of license decision.

The applicant may appeal an unfavorable decision of the Planning and Development Director by filing a written petition with the City Secretary requesting a hearing on the denial of the application within ten (10) calendar days of the date the applicant receives notification of the Director's decision. The City Council shall serve as the appeals board for licenses issued under this Article. The appeal shall be scheduled within twenty (20) days of the date the petition is received in the office of the City Secretary. The City Secretary shall give written notice to the applicant of the time and place for the hearing on the applicant's appeal at least ten (10) days prior to the scheduled date of hearing.

(g) Decision.

The City Council shall issue a decision with findings within ten (10) calendar days after any hearing held in accordance with this section in accordance with the criteria in Section 4-64. The minutes of the Council meeting shall show the action taken on the application, and if the license is granted, the Council shall direct the Planning and Development Director to issue the proper license.

(h) Pending Board of Adjustment proceeding.

If the applicant has filed an appeal with the Zoning Board of Adjustment to contest any standard governing a sexually oriented business established by this Article, the Council may defer action on the license application pending resolution of the appeal by the Board, but shall take up the matter at the first regular meeting of the Council following the Board's decision.

(i) Notification of decision.

If an application for a license is disapproved, the applicant shall be immediately notified by registered or certified mail to the applicant's last known mailing address and the letter of notification shall state the basis for such disapproval. Any applicant

aggrieved by the disapproval of a license application may seek judicial review in the appropriate court.

- (j) Judicial review.

An applicant may seek judicial review of the denial of a license by appealing the decision of the Director to the State District Court.

Sec. 4-65. Criteria for Sexually oriented Business Licenses.

(a) No license for a sexually oriented business shall be issued if one or more of the following conditions exist:

- (1) The premises for which an application for a sexually oriented business has been made does not meet the requirement of the Zoning Ordinance,
- (2) The applicant knowingly failed to supply all of the information requested on the application;
- (3) The applicant knowingly gave materially false, fraudulent or untruthful information on the application;
- (4) The applicant's proposed business premises does not comply with or meet the requirements of the applicable health, zoning, building code, fire and property maintenance ordinances of the City, provided, that upon a showing that the premises meets said requirements and that the applicant is otherwise qualified, the application shall be eligible for reconsideration.
- (5) The applicant has been convicted, released from incarceration for conviction or has received an order or deferred adjudication on any Specified Criminal Act during the time period set forth herein; or
- (6) The applicant has had a sexually oriented business license or comparable license revoked or suspended in this or any other city during the past five (5) years.

(b) No license for a manager's or entertainer's license in a sexually oriented business shall be issued if one or more of the following conditions exist:

- (1) The applicant has been convicted, released from incarceration for conviction or received an order of deferred adjudication on any Specified Criminal Act during the time period set forth herein;
- (2) The applicant knowingly failed to provide all of the information required on the application;
- (3) The applicant knowingly gave materially false, fraudulent or untruthful information on the application; or

- (4) The applicant has had a manager, server or entertainer license revoked or suspended in this or any other jurisdiction during the past five (5) years.

Sec. 4-66. Standards of Conduct.

It shall be unlawful for any sexually oriented business, or any manager, server, entertainer or employer thereof, or any patron of any sexually oriented business, while on or about the premises of the business, to knowingly fail to adhere to the following standards of conduct, as applicable.

- (a) Establishment license.

Any sexually oriented business shall post the license issued under this subchapter in a conspicuous, easily viewable location, at eye level, in the portion of the business that is frequented by its customers and that is well lighted.

- (b) Identification cards.

Each manager issued a license under this subchapter for employment in a sexually oriented business shall, at all times when on duty and acting as manager, have in his or her possession a valid identification card issued by the City, bearing the permit number, the employee's physical description and a photograph of such employee. Such identification cards shall be laminated to prevent alteration. A card containing the same information shall be retained for ready inspection on the premise of the sexually oriented business for each entertainer who is licensed under this subchapter for employment in the business.

- (c) Age restriction.

No person under the age of eighteen (18) years shall be permitted on the premises of any sexually oriented business.

- (d) Exterior observation.

The premises of all sexually oriented businesses will be so constructed as to ensure that the interior of the premises is not observable from the exterior of the building. In addition, all windows will be covered to prevent viewing of the interior of the building from the outside and all doorways not constructed with an anteroom or foyer will be covered so as to prevent observation of the interior of the premises from the exterior of the building.

- (e) Exterior display.

No sexually oriented business will be conducted in any manner that permits the observation of live performers engaged in an erotic depiction or dance or any material or

persons depicting, describing or relating to Specified Sexual Activities or Specified Anatomical Areas from any exterior source by display, decoration, sign, show window or other opening.

- (f) Specified Criminal Acts and Specified Sexual Activities prohibited.

No manager, employee, server, entertainer or patron of a sexually oriented business shall engage in any Specified Criminal Act or any Specified Sexual Activity on the premises of the business.

- (g) Standards for sexually oriented entertainment.

A sexually oriented business offering sexually oriented entertainment shall comply with the following standards:

- (1) All sexually oriented entertainment shall take place in accordance with section 10D of the Zoning Ordinance.
- (2) The sexually oriented business shall assure that no person other than a licensed entertainer may occupy a stage constructed for purposes of providing sexually oriented entertainment during the course of any performance.
- (3) Tips for entertainment shall be collected in containers that are accessible to customers and not located on the stage.

- (h) Standards for entertainers.

An entertainer licensed under this subchapter for employment in a sexually oriented business shall observe the following standards:

- (1) The entertainer shall carry out his or her performance only in a theater or open space of at least 600 square feet and on a stage constructed in accordance with section 4-69 of this Article.
- (2) The entertainer shall cooperate with the owner or manager of the sexually oriented business to assure that no person other than an entertainer occupies the stage during the course of a performance.
- (3) The entertainer shall collect tips from patrons only in the manner provided for in subsection (g).

Sec. 4-67. Enforcement for violation of licensing requirements; violations classified.

(a) When the Planning and Development Director has information that there has been a violation of any provision of this subchapter by a licensee or at a licensed premises, or any of the conditions required for the issuance of a license have changed, or

that anything on the application for the license may have been untrue or incomplete, then the Planning and Development Director shall schedule a hearing before the City Council in accordance with the provisions of this section.

(b) Where a hearing is required under this section, the date for the hearing shall be set after no less than ten (10) calendar days' written notice to the owner(s), licensee, or any persons filing a complaint with the Planning and Development Director. The hearing shall be to make findings of fact in the matter.

- (1) Notice of such hearing shall be in writing, and shall set forth the reason for the hearing or the complaint against the licensee, and shall be served upon the licensee in person or by registered or certified mail to the address listed in the license application. If the Planning and Development Director is not able to serve notice upon the licensee in person, and any notice sent by mail is returned by the postal service, the Police Chief shall cause such notice to be posted at the principle entrance of the sexually oriented business, and such posting shall be valid means of service.
- (2) An applicant, licensee, or complainant shall have full right to be represented by counsel and to produce witnesses and other evidence, and to pose questions to all witnesses who appear against him. Oral evidence shall be taken only upon oath or affirmation. All proceedings in such hearing shall be recorded and transcribed as required by law. The Council may receive evidence relevant to the issues from the applicant or licensee or from other sources.
- (3) The City Council shall issue findings of fact and an order wherein the City Council may dismiss the complaint, or suspend or revoke a license previously issued, or renew or refuse to renew a license previously issued. The City Council's order shall be served upon the applicant, licensee or all protesters in person or by registered or certified mail to the applicant's, licensee's or protestor's last known address. If the Planning and Development Director is not able to serve such order upon the licensee, or applicant, in the manner stated in this subsection, the Police Chief shall cause such order to be posted at the principal entrance of the regulated use, and such posting shall be a valid means of service.

(c) Until a decision has been reached by the City Council in the proceedings under this section, the license of the sexually oriented business, manager or entertainer shall remain in effect.

(d) Any license holder aggrieved by the decision of the City Council to suspend or revoke such license under the provisions of this section may seek judicial review in a manner provided by law.

(e) A violation of this section shall be a Class A misdemeanor and shall be subject to such penalties as are provided under Texas law.

Section 2. It is unlawful for any person to violate any provision of this ordinance, and any person violating or failing to comply with any provision hereof shall be fined, upon conviction, in an amount not more than two thousand dollars (\$2,000.00), and a separate offense shall be deemed committed each day during or on which a violation occurs or continues.

Section 3. All ordinances of the City of The Colony in conflict with the provisions of this ordinance shall be, and the same are hereby, repealed; provided, however, that all other provisions of said ordinances not in conflict herewith shall remain in full force and effect.

Section 4. The sections, paragraphs, sentences, phrases, clauses and words of this ordinance are severable, and if any section, paragraph, sentence, phrase, clause or word in this ordinance or application thereof to any person or circumstance is held invalid or unconstitutional by a Court of competent jurisdiction, such holding shall not affect the validity of the remaining portions of this ordinance, and the City Council hereby declares that it would have passed such remaining portions of this ordinance despite such invalidity, which remaining portions shall remain in full force and effect.

Section 5. This ordinance shall become effective from and after its adoption and publication as provided by law.

PASSED AND APPROVED by the City Council of the City of The Colony, Texas this the ____ day of _____, 2005.