

IN THE COUNTY COMMISSION OF RALEIGH COUNTY, WEST VIRGINIA

November 9, 2004

RE: AN ORDINANCE AMENDING THE PLANNING AND ZONING ORDINANCE FOR RALEIGH COUNTY, WEST VIRGINIA

It appearing to the County Commission of Raleigh County that Clayton Terry, representing the Raleigh County Planning and Zoning Commission, filed for a zoning amendment change to the **Sexual Oriented Business** Ordinance to the Raleigh County Zoning Ordinance, and a hearing thereon, was advertised as required by law, that a public hearing on said petition was duly held by the Planning and Zoning Commission on November 4, 2004, and that the Planning and Zoning Commission has filed with the County Commission a report recommending that the amendment be granted. NOW THEREFORE, BE IT ORDAINED BY THE COUNTY COMMISSION OF RALEIGH COUNTY THAT THE PLANNING AND ZONING ORDINANCE OF RALEIGH COUNTY, WEST VIRGINIA, BE AMENDED AS FOLLOWS:

Chapter 15 (Regulations for Sexual Oriented Business) is hereby amended and made a part of the Planning and Zoning Ordinance for Raleigh County, West Virginia, being more particularly described as follows:

SEXUALLY ORIENTED BUSINESSES

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 Raleigh County Commission 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 of the Constitution of the United States 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 Raleigh County Commission to condone or legitimize the distribution of obscene materials, and the Commission 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 County of Raleigh.

SEXUALLY ORIENTED BUSINESSES

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CHAPTER 15 --- SEXUALLY ORIENTED BUSINESS ORDINANCE

ARTICLE 15A Purpose and Intent

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 County of Raleigh, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of sexually oriented businesses within the County. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this ordinance to condone or legitimize the distribution of obscene materials.

ARTICLE 15B Definitions

Adult arcade - any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are 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 area".

Adult bookstore or adult video store - a commercial establishment which has as its principal business purpose the offering for sale or rental for any form of consideration any one or more 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 which depict or describe "specified sexual activities" or "specified anatomical area", or
- B. Instruments, devices, or paraphernalia that are designed for use in connection with "specified sexual activities".

Adult cabaret - a nightclub, bar, restaurant or similar commercial establishment that regularly features:

- A. Persons who appear in a state of 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 or other photographic reproductions that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and
- D. Persons who engage in lewd, lascivious or erotic dancing or performances that are intended for the sexual interests or titillation of an audience or customers.

Adult motel - a hotel, motel or similar commercial establishment that:

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.

Adult motion picture theater - a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides or similar photographic reproductions are regularly shown that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas".

Adult theater - a theater, concert hall, auditorium or similar commercial establishment that regularly features persons who appear in a state of nudity or live performances that are characterized by the exposure of "specified sexual activities" or "specified anatomical areas".

Director - The Raleigh County Planning and Zoning Commission.

Escort - a person who, for compensation, agrees or offers to act as a companion, guide or date for another person for the purpose of specified sexual activities, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.

Escort agency - 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 for the purpose of specified sexual activities.

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.

Licensed day care center - a facility licensed by the State of West Virginia situated within the County of Raleigh, that provides care, training, education, custody, treatment or supervision of 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.

Nude model studio - 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 who pay money or any form of consideration.

Nudity or a **state of nudity** - the appearance of a human bare buttock, anus, male genitals, female genitals or female breast with a fully opaque complete covering of the breast below a point immediately above the top of the areola or human male genitals in a discernibly turgid state even if completely and opaquely covered.

Person - an individual, proprietorship, partnership, corporation, association or other legal entity.

Semi-nude - a state of dress in which clothing covers no more than the human bare buttock, anus, male genitals, female genitals or female breast without a fully opaque complete covering of the breast below a point immediately above the top of the areola, or human male genitals in a discernibly turgid state even if completely and opaquely covered.

Sexual encounter center - a business or commercial enterprise that, as one of its principal business purposes, offers for any form of consideration, activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or is semi-nude.

Sexually oriented business - 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.

Specified anatomical areas - the male genitals in a state of sexual arousal and/or the vulva or more intimate parts of the female genitals.

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;
- 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.

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 exists on December 2, 1997.

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.

ARTICLE 15C Classification

Sexually oriented businesses are classified as follows:

- 1. Adult arcades;
- 2. Adult bookstores or adult video stores;
- 3. Adult cabarets;
- 4. Adult motels;
- 5. Adult motion picture theaters;
- 6. Adult theaters;
- 7. Escort agencies;

ARTICLE 15D Inspection

An owner or operator of a sexually oriented business shall permit representatives of the Police Department, Health Department, Zoning Department or other County or State departments or agencies to inspect the premises of the sexually oriented business for the purpose of insuring compliance with the law at any time it is occupied or open for business.

ARTICLE 15E Injunctive Relief or Such Other Legal Action as Necessary

- 1. The Director shall seek injunctive relief or such other legal relief as necessary against an owner or operator of a sexually oriented business if it determines that:
 - A. An owner or operator or an employee has knowingly allowed possession, use or sale of controlled substances on the premises;
 - B. An owner or operator or an employee has knowingly allowed prostitution on the premises;
 - C. An owner or operator or an employee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, masturbation or other sexual conduct to occur in or on the premises;
 - D. An owner or operator is delinquent in payment to the County or State for any taxes or fees past due; or
 - E. An owner or operator or employee of the sex oriented business knowingly allowed a person under eighteen (18) years of age to enter an establishment;
 - F. An owner or operator has violated or is not in compliance with any section of this ordinance;
 - G. An owner or operator has become impaired or intoxicated through the use of alcoholic beverages while on the sexually oriented business premises;
 - H. An owner or operator has refused to allow an inspection of the sexually oriented business premises as authorized by this ordinance.

2. An owner or operator may seek prompt judicial review of such administrative action in any Court of competent jurisdiction. The administrative action shall be promptly reviewed by the Court.

ARTICLE 15F Penalties

Any person who violates any provision of this ordinance shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty dollars not more than five hundred dollars.

ARTICLE 15G Locational Restrictions

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

1. The sexually oriented business may not be operated within 1,000 feet of:
 - A. A church, synagogue or regular place of religious worship;
 - B. A public or private elementary or secondary school;
 - C. A boundary of any rural or residential district;
 - D. A public park;
 - E. A licensed day-care center; or
 - F. Another sexually oriented business.
2. A sexually oriented business may not be operated in the same building, structure or portion thereof containing another sexually oriented business.
3. 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 or rural district, or residential lot or licensed day-care center.

ARTICLE 15H Non-conforming Uses

1. 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 uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If the non-conforming use is increased, enlarged, extended or altered, the business shall no longer be considered operating or existing at the time of adoption of this ordinance. If two or more sexually oriented businesses are within 1,000 feet of one another and otherwise in a permissible location, the sexually oriented business that was first established and continually operating at a particular location is the conforming use and the later established business(es) is non-conforming. Furthermore, the transfer of ownership of a sexually oriented business, previously operating and existing prior to December 2, 1997, shall no longer be considered operating or existing at the time of adoption of this ordinance.
2. A sexually oriented business lawfully operating as a conforming use is rendered non-conforming use by the location 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 or rural district within one thousand (1,000) feet of the sexually oriented business.

ARTICLE 15I Exterior Portions of Sexually Oriented Businesses

1. 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.
2. 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 depicting any specified sexual activity or state of nudity.

ARTICLE 15J Signage

1. Notwithstanding any other county ordinance, code or regulation to the contrary, it shall be unlawful for the owner or operator of any sexually oriented business or any other person to erect, construct or maintain any sign for the sexually oriented business other than the one (1) primary sign and one (1) secondary sign, as provided herein.
2. Primary signs shall have no more than two (2) display surfaces. Each such display surface shall:
 - A. Not contain any flashing lights;
 - B. Be a flat plane, rectangular in shape;
 - C. Not exceed seventy-five (75) square feet in area; and
 - D. Not exceed ten (10) feet in height or ten (10) feet in length.
3. Signs shall contain no photographs, silhouettes, drawings or pictorial representations depicting specified sexual activity or any state of nudity, and may contain only the name of the enterprise.
4. Secondary signs shall have only one (1) display surface. Such display surface shall:
 - A. Be a flat plane, rectangular in shape;
 - B. Not exceed twenty (20) square feet in area;
 - C. Not exceed five (5) feet in height and four (4) feet in width; and
 - D. Be affixed or attached to any wall or door of the enterprise.

ARTICLE 15K Persons Younger Than Eighteen Prohibited From Entry; Attendant Required

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 that the sexually oriented business is open for business.

ARTICLE 15L Exemptions

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 West Virginia, a college, junior college or university;
2. By a private college or university that maintains and operates education programs in which credits are transferable to a college, junior college or university;

ARTICLE 15M Notices

1. Any notice required or permitted to be given by the Director or any other County office, division, department or other agency under this ordinance to any applicant, operator or owner of an establishment 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 permit or transfer application that has been received by the Director 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.

2. 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.

ARTICLE 15N Severability

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.

ARTICLE 15O Conflicting Ordinances Repealed

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

ARTICLE 15P Effective Date

This ordinance shall be enforced from and after November 9, 2004.

John D. Humphrey, President

John L. Aliff, Commissioner

Pat Reed, Commissioner