

**AN ORDINANCE ADDING CHAPTER 121 TO THE CITY
OF FORT WAYNE, INDIANA, CODE OF ORDINANCES:
SEXUALLY ORIENTED BUSINESSES**

WHEREAS, the City of Fort Wayne ("City") is home to several businesses whose primary commercial activities involve the sale of written materials and videos displaying material of a sexual nature and/or live entertainment involving individuals who appear in a state of Semi-Nudity; and

WHEREAS, the Common Council of the City ("Common Council") is aware of convincing documented evidence that Sexually Oriented Businesses, as a category of establishments, have deleterious secondary effects such as increased crime and adverse effects on surrounding properties; and

WHEREAS, according to crime statistics from the City Police Department, Sexually Oriented Businesses are the subject of an exceptional number of police calls, with a sampling of eight (8) such Sexually Oriented Businesses revealing some form of police interaction 83% of the days of the year in 2016; and

WHEREAS, 68% of the police calls to the Sexually Oriented Businesses included among the sample occurred after 12:00 a.m.; and

WHEREAS, the most common reasons for police calls to Sexually Oriented Businesses include general disturbance, fighting, and battery; and

WHEREAS, based on the aforementioned statistics and further review of reports and case law from jurisdictions across the United States, the Common Council finds that Sexually Oriented Businesses are too often the site of fights, violence, robberies, unlawful sexual activities, illicit drug use, and other crimes; and

WHEREAS, Sexually Oriented Businesses require special supervision from the Police Department and other public safety agencies of the City in order to protect and preserve the health, safety, and welfare of the patrons of such businesses, the employees of such businesses, and the citizens of the City; and

WHEREAS, certain Sexually Oriented Businesses such as adult motels, adult novelty stores, stores primarily engaged in the sale of sexual devices, and escort services/sexual encounter services, offer products and services that are not inherently expressive or otherwise protected by the First Amendment, *see, e.g., Heideman v. South Salt Lake City*, 348 F.3d 1182, 1195 (10th Cir. 2003); *Sewell v. Georgia*, 233 S.E.2d 187 (Ga. 1977); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990), *overruled, in part, on other grounds*; and

WHEREAS, the City intends to regulate Sexually Oriented Businesses through a narrowly tailored ordinance that is specifically designed and intended to serve the government's substantial interest in preventing the negative secondary effects associated with Sexually Oriented Businesses; and

WHEREAS, the City's regulations shall be narrowly construed to accomplish this end; and

WHEREAS, the City recognizes its constitutional duty to interpret and construe its laws to comply with constitutional requirements as they are announced; and

WHEREAS, it is not the intent of this Ordinance to suppress any speech activities protected by the U.S. Constitution or the Indiana Constitution, but rather the intent is to further the content-neutral and substantial government interest of curbing the negative secondary effects of Sexually Oriented Businesses.

NOW, THEREFORE, BE IT ORDAINED by the Common Council of the City, that Chapter 121: Sexually Oriented Businesses is hereby added to the City of Fort Wayne, Indiana, Code of Ordinances as follows:

SECTION 1: There is hereby added to the City of Fort Wayne, Indiana, Code of Ordinances the following:

CHAPTER 121: SEXUALLY ORIENTED BUSINESSES

121.01 Purpose and Findings

121.02 Definitions

121.03 Hours of Operation

121.04 Prohibited Conduct

121.05 Scierter Requirement

121.06 Remedies

121.07 Severability

121.01 Purpose and Findings

(a) *Purpose.* The purpose of this Chapter is to promote the health, safety, and general welfare of the citizens of the City by establishing reasonable and uniform, content-neutral regulations on Sexually Oriented Businesses to prevent the negative secondary effects associated with such businesses. Nothing in this Chapter is designed or intended to limit or restrict the content or reasonable access to any communicative materials, including materials containing displays of a sexual nature. Similarly, this ordinance is neither designed nor intended to deny adults access to materials of a sexual nature which are protected by the First Amendment or to prevent distributors and exhibitors of materials and/or entertainment of a sexual nature from being able to reach their intended customer base. Nothing in this Chapter shall be construed to condone or legitimize the sale or distribution of obscene material.

(b) *Findings and Rationale.* Based on significant documented evidence of the adverse secondary effects of Sexually Oriented Businesses, including crime statistics from the City Police Department and the findings, interpretations, and narrowing constructions incorporated in the cases of *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *California v. LaRue*, 409 U.S. 109

(1972); *N.Y. State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); *Sewell v. Georgia*, 435 U.S. 982 (1978); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), overruled, in part, on other grounds; *City of Dallas v. Stanglin*, 490 U.S. 19 (1989); and

BBL, Inc. v. City of Angola, 2013 U.S. Dist. LEXIS 182091 (N.D. Ind. 2013); *BBL, Inc. v. City of Angola*, 809 F.3d 317 (7th Cir. 2015); *Uniontown Retail #36, LLC v. Bd. of Comm'rs of Jackson County*, 950 N.E.2d 332 (Ind. Ct. App. 2011); *Plaza Group Properties, LLC v. Spencer County Plan Comm'n*, 877 N.E. 2d 877 (Ind. Ct. App. 2007); *Foxxxy Ladyz Adult World, Inc. v. Village of Dix*, 779 F.3d 706 (7th Cir. 2015); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003); *Andy's Restaurant & Lounge, Inc. v. City of Gary*, 466 F.3d 550 (7th Cir. 2006); *Blue Canary Corp. v. City of Milwaukee*, 270 F.3d 1156 (7th Cir. 2001); *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999); *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003); *Metro Pony, LLC v. City of Metropolis*, 2012 U.S. Dist. LEXIS 55491 (S.D. Ill. 2012); *LLEH, Inc. v. Wichita County*, 289 F.3d 358 (5th Cir. 2002); *Ocello v. Koster*, 354 S.W.3d 187 (Mo. 2011); *East Brooks Books, Inc. v. Shelby County*, 588 F.3d 360 (6th Cir. 2009); *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291 (6th Cir. 2008); *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (11th Cir. 2007); *Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003); *Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007); *H&A Land Corp. v. City of Kennedale*, 480 F.3d 336 (5th Cir. 2007); *Tee & Bee, Inc. v. City of W. Allis*, 936 F.Supp. 1479 (E.D. Wisc. 1996); *84 Video/Newsstand, Inc. v. Sartini*, 455 Fed. Appx. 541 (6th Cir. 2011); *Déjà vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs.*, 411 F.3d 777 (6th Cir. 2005); *Richland Bookmart, Inc. v. Knox County*, 555 F.3d 512 (6th Cir. 2009); *Bigg Wolf Discount Video Movie Sales, Inc. v. Montgomery County*, 256 F. Supp. 2d 385 (D. Md. 2003); *Richland Bookmart v. Nichols*, 137 F.3d 435 (6th Cir. 1998); *Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663 (9th Cir. 1996); *City of New York v. Hommes*, 724 N.E.2d 368 (N.Y. 1999); *Taylor v. State*, 2002 Tex. App. LEXIS 5381 (Tex. Ct. App. 2002); *Fantasyland Video, Inc. v. County of San Diego*, 505 F.3d 996 (9th Cir. 2007); *U.S. v. Baston*, 818 F.3d 651 (11th Cir. 2016);

And based further upon reports concerning secondary effects occurring in and around Sexually Oriented Businesses, including, but not limited to: Jacqueline Reuben, Chris Serio-Chapman, Christopher Welsh, Richard Matens & Susan G. Sherman, *Correlates of Current Transactional Sex among a Sample of Female Exotic Dancers in Baltimore, MD* 88 J. Urban Health 342 (2011); Eric S. McCord & Richard Tewksbury, *Does the Presence of Sexually Oriented Businesses Relate to Increased Levels of Crime? An Examination Using Spatial Analyses*, 59 Crime & Delinquency 1108 (2012); *Adult Entertainment Businesses in Indianapolis: An Analysis*, Dep't of Metro. Dev., Div. of Planning, City of Indianapolis (February, 1984); Alan Weinstein & Richard D. McCleary, *Do 'Off-Site' Adult Businesses Have Secondary Effects? Legal Doctrine, Social Theory, and Empirical Evidence*, 31 L. and Policy 217 (2009); Richard D. McCleary, *Rural Hotspots: The Case of Adult Businesses*, 19 Crim. Justice Policy R. 153 (2008); Peter Malin, *An Analysis of the Effects of Sexually Oriented Businesses on the Surrounding Neighborhoods in Dallas, TX*, Report to Assistant City Attorney, City of Dallas

(April 1997); Hubert H. Humphrey, III, *Report of the Attorney General's Working Group On the Regulation of Sexually Oriented Businesses*, State of Minnesota (June 6, 1989); Kelly Holsopple, *Stripclubs According to Strippers: Exposing Workplace Sexual Violence*, Freedom and Justice Center for Prostitution Resources, Minneapolis, Minnesota (1998); and David Sherman, *Sexually Oriented Businesses: An Insider's View*, presented to the Michigan House Committee on Ethics and Constitutional Law (Jan. 12, 2000),

The Common Council finds:

- (1) Sexually Oriented Businesses, as a category of commercial establishments, are associated with a wide variety of negative secondary effects including, but not limited to, personal and property crimes, human trafficking, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation.
- (2) Each of the foregoing negative secondary effects constitutes a harm which the City has a substantial government interest in preventing and/or abating. This substantial government interest in preventing secondary effects is the City's rationale for this Chapter. The City's interest in regulation of Sexually Oriented Businesses extends to preventing future secondary effects of either current or future Sexually Oriented Businesses that may locate in the City. The cases and documentation cited above and relied on in support of this Chapter are reasonably believed to be relevant to said secondary effects.

121.02 Definitions

For purposes of this Chapter, the following terms shall have the following meanings:

"Adult Arcade" means a commercial establishment to which the public is permitted or invited that maintains booths or rooms smaller than 100 square feet, wherein image-producing devices are regularly maintained, and where a fee is charged to access the booths or rooms or to view the images displayed on the image-producing devices.

"Adult Bookstore" means a commercial establishment which, as one of its principal business activities, offers for sale or rental for any form of consideration any one or more of the following: books, magazines, periodicals, or other printed matter, photographs, films, motion pictures, video cassettes, compact discs, digital video discs, slides, or other visual representations which are characterized by their emphasis upon the display of Specified Sexual Activities or Specified Anatomical Areas. For purposes of this definition, a principal business activity exists where the commercial establishment meets any one or more of the following criteria:

- (a) At least 35% of the establishment's displayed merchandise consists of said items, or
- (b) At least 35% of the establishment's revenues derive from the sale or rental, for any form of consideration, of said items, or
- (c) The establishment maintains at least 35% of its Floor Space for the display, sale, and/or rental of said items (aisles and walkways used to access said

items, as well as cashier stations where said items are rented or sold, shall be included in Floor Space maintained for the display, sale, or rental of said items), or

- (d) The establishment maintains at least five hundred square feet (500 sq. ft.) of its Floor Space for the display, sale, and/or rental of said items (aisles and walkways used to access said items, as well as cashier stations where said items are rented or sold, shall be included in Floor Space maintained for the display, sale, or rental of said items), or
- (e) The establishment regularly offers for sale or rental at least five hundred (500) of said items, or
- (f) The establishment regularly makes said items available for sale or rental and holds itself out, in any medium, by using “adult”, “adults-only”, “XXX”, “sex”, “erotic”, “novelties”, or substantially similar language, as an establishment that caters to adult sexual interests.

“Adult Motion Picture Theater” means a commercial establishment to which the public is permitted or invited that maintains viewing rooms that are one hundred square feet (100 sq. ft.) or larger wherein films or videos characterized by their emphasis upon Specified Sexual Activities or Specified Anatomical Areas are regularly shown.

“Characterized by” means the essential nature or quality of a product or service referenced in this Chapter. No business shall be classified as a Sexually Oriented Business solely by virtue of showing, selling, or renting materials rated NC-17 or R by the Motion Picture Association of America.

“City” means the City of Fort Wayne.

“Employ, Employee, and Employment” describe and pertain to any person who works or engages in activity for pay on the premises of a Sexually Oriented Business, on a full time, part time, temporary, or contract basis, regardless of whether the person is denominated an employee, independent contractor, agent, lessee, or otherwise. The term “Employee” does not include a person on the Premises for repair or maintenance of the premises or for the delivery of goods to the Premises.

“Establish or Establishment” means and includes any of the following:

- (a) A commercial enterprise that qualifies as a Sexually Oriented Business,
- (b) The opening or commencement of any Sexually Oriented Business as a new business,
- (c) The conversion of an existing business, whether or not a Sexually Oriented Business, to any Sexually Oriented Business, or
- (d) The addition of any Sexually Oriented Business to any other existing Sexually Oriented Business.

“Floor Space” means the floor area inside an establishment that is visible or accessible to customers for any reason, excluding restrooms.

“Nudity or Nude Conduct” means the showing of the human male or female genitals, pubic area, vulva, or anus with less than a fully opaque covering of any part of the nipple and areola. For purposes of this Chapter, a fully opaque covering must be non-flesh colored, shall not consist of any substance that can be washed off the skin, such as

paint or make-up, and shall not simulate the appearance of the anatomical area behind it.

“Operator” means any person on the premises of a Sexually Oriented Business who manages, supervises, or controls the business or a portion thereof. A person may be found to be the Operator regardless of whether such person is an owner, part owner, or licensee of the business.

“Person” means an individual, proprietorship, partnership, corporation, association, or other legal entity.

“Premises” means the real property upon which a particular 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 Operator of the Sexually Oriented Business.

“Regularly” means the consistent and repeated doing of an act on an ongoing basis.

“Semi-Nude or Semi-Nudity” means the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel provided the areola is not exposed in whole or in part.

“Semi-Nude Lounge” means a nightclub, bar, juice bar, restaurant, bottle club, strip club, or similar establishment that regularly offers live Semi-Nude conduct, dancing, and/or entertainment. No establishment shall avoid classification as a Semi-Nude Lounge by offering Nude Conduct.

“Sexual Device” means a three-dimensional (3D) object designed for stimulation of the male or female human genitals, anus, buttocks, female breast, or for sadomasochistic use or abuse of oneself or others and shall include devices commonly known as dildos, vibrators, penis pumps, cock rings, anal beads, butt plugs, nipple clamps, and physical representations of the human genitals. Nothing in this definition shall be construed to include devices primarily intended for protection against sexually transmitted diseases or for preventing pregnancy.

“Sex Paraphernalia Store” means a commercial establishment:

- (a) Where more than 100 sexual devices are regularly made available for sale or rental;
- (b) Where sexual devices are regularly made available for sale or rental and the establishment regularly holds itself out, in any medium, by using “adult”, “adults-only”, “XXX”, “sex”, “erotic”, “novelties”, or substantially similar language, as an establishment that caters to adult sexual interests.

This definition shall not be construed to include any establishment located in a pharmacy or other establishment primarily dedicated to providing medical products.

“Sexually Oriented Business” means an Adult Arcade, Adult Bookstore, Adult Motion Picture Theater, Semi-Nude Lounge, or Sex Paraphernalia Store.

“Specified Anatomical Areas” means and includes:

- (a) Less than completely and opaquely covered: human genitals, pubic regions, buttocks, and female breasts below a point immediately above the top of the areola; and
- (b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

“Specified Sexual Activity” means any of the following:

- (a) Intercourse, oral copulation, masturbation, or sodomy; or
- (b) Excretory functions as part of or in connection with intercourse, oral copulation, masturbation, or sodomy.

121.03 Hours of Operation

No Sexually Oriented Business shall be or remain open for business between the hours of 12:00 a.m. and 7:00 a.m. on any day.

121.04 Prohibited Conduct

- (a) No customer or Employee of a Sexually Oriented Business or any other Person on the Premises of a Sexually Oriented Business shall knowingly or intentionally, in a Sexually Oriented Business, appear in a state of Nudity or engage in any Specified Sexual Activity.
- (b) No person shall knowingly or recklessly allow a person under the age of eighteen (18) years to be or remain on the Premises of a Sexually Oriented Business.
- (c) No Operator or owner of a Sexually Oriented Business shall violate the regulations in this Chapter or recklessly allow an Employee or any other Person to violate the regulations in this Chapter.

121.05 Remedies

The City's Law Department is hereby authorized to institute civil proceedings necessary for the enforcement of this Chapter to enjoin, prosecute, restrain, or correct any violations hereof. Any such proceedings shall be bought in the name of the City; provided, however, that nothing in this Chapter and no action taken hereunder shall be held to exclude any criminal or administrative proceedings that may be authorized by other provisions of the City Code or any other laws in force in the City, or to exempt anyone violating this Chapter from any liability which may be incurred.

121.06 Scienter Requirement

This Chapter does not impose strict liability. Unless a culpable mental state is otherwise specified herein, a showing of a reckless mental state is necessary to establish a violation of any provision of this Chapter. It shall be a defense to this Chapter that any person or Sexually Oriented Business to whom liability is imputed under this Chapter was powerless to prevent the act from which such liability derives.

121.07 Severability

This Chapter and each section and provision of this Chapter are separate and independent from all other provisions of this Chapter and, therefore, if any provision or provisions of this Chapter are held to be invalid or unenforceable, the remaining provisions and the application of such provisions to any person or circumstances other than those to which provisions have been held invalid, shall not be affected thereby.

SECTION 2. That the City is directed to take all action necessary and proper for the implementation of this Ordinance.

SECTION 3. Upon passage, and any and all necessary approval by the Mayor, this Ordinance shall become effective at 12:00 a.m. November 1, 2017.

Russ Jehl, Member of the Common Council

APPROVED AS TO FORM AND LEGALITY:

Joseph G. Bonahoom, City Council Attorney