

ORDINANCE NO. 070109

**TOWN OF BLACK BROOK**

**SEXUALLY ORIENTED BUSINESS ORDINANCE**

AN ORDINANCE DISPERSING SEXUALLY ORIENTED BUSINESSES AND LIMITING THEIR LOCATION WITHIN THE TOWNSHIP; PRESCRIBING DEFINITIONS OF SEXUALLY ORIENTED BUSINESSES; PROVIDING FOR LICENSING AND REGULATION OF SEXUALLY ORIENTED BUSINESSES AND EMPLOYEES; AND PROVIDING FOR ADDITIONAL MISCELLANEOUS REGULATIONS FOR SEXUALLY ORIENTED BUSINESSES.

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

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

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

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

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

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

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

WHEREAS, it is not the intent of the Town Board to condone or legitimize the distribution of obscene material, and the Town Board recognizes that state and federal law prohibits the distribution of obscene materials and expects and encourages state law

enforcement officials to enforce state obscenity statutes against any such illegal activities in the Town of Black Brook.

Pursuant to the authority granted by the Constitution and the legislature of the State of Wisconsin, BE IT ENACTED BY THE TOWN BOARD OF THE TOWN OF BLACK BROOK, POLK COUNTY, WISCONSIN:

- (1) INTENT. It is the intent of this ordinance to regulate sexually oriented businesses and related activities to promote the health, safety, and general welfare of the citizens of the Town of Black Brook, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of sexually oriented businesses within the Town of Black Brook. 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.
  
- (2) FINDINGS. Based on evidence concerning the adverse secondary effects of adult uses on the community in reports made available to the Town Board, and on the holdings and findings in the cases of City of Erie v. Pap's A.M., 120 S.Ct. 1382 (2000); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, 426 U.S. 50, (1976); and Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); City of Newport, KY v. Iacobucci, 479 U.S. 92 (1986); United States v. O'Brien, 391 U.S. 367 (1968); Ben's Bar v. Village of Somerset, 316 F. 3d 702 (7<sup>th</sup> Cir. 2003); Schultz v. City of Cumberland, 228 F.3d 831 (7<sup>th</sup> Cir. 2000); DLS, Inc. v. City of Chattanooga, 107 F 3d 403 (6<sup>th</sup> Cir. 1997); Kev, Inc. v. Kitsap County, 793 F. 2d 1053 (9<sup>th</sup> Cir. 1986); Hang On, Inc. v. City of Arlington, 65 F. 3d 1248 (5<sup>th</sup> Cir. 1995); East of the River Enterprises II v. City of Hudson, 2000 Wis. App. Lexis 734 (Ct. App. Aug. 1, 2000); and Urmanski v. Town of Bradley, 2000 WI App. 141, 613 N.W.2d 905 (Ct. App. 2000), as well as studies conducted in other cities, including, but not limited to, Phoenix, Arizona; Minneapolis, Minnesota; Houston, Texas; Garden Grove, California; Los Angeles, California; Whittier, California; Austin, Texas; Seattle, Washington; Oklahoma City, Oklahoma; Cleveland, Ohio; Beaumont, Texas; and Ellicottville, New York; and findings reported in the Final Report of the Attorney General's Commission on Pornography (1986), the Report of the Attorney General's Workshop Of Sexually Oriented Businesses (June 6, 1989, State of Minnesota), and statistics obtained from the U. S. Department of Health and Human Services, Centers for Disease Control and Prevention, the Town Board finds that:
  - (a) Crime statistics show that all types of crimes, especially sex-related crimes, occur with more frequency in neighborhoods where sexually oriented businesses are located.

- (b) Studies of the relationship between sexually oriented businesses and neighborhood property values have found a negative impact on both residential and commercial property values.
  - (c) Sexually oriented businesses may contribute to an increased public health risk through the spread of sexually transmitted diseases.
  - (d) There is an increase in the potential for infiltration by organized crime for the purpose of unlawful conduct.
  - (e) The consumption of alcoholic beverages on the premises of a Sexually oriented business exacerbates the deleterious secondary effects of such businesses on the community.
- (3) DEFINITIONS. In this section the following terms shall have the following meanings:
- (a) Adult arcade means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas."
  - (b) Adult bookstore or adult video store means a commercial establishment that, as one of its principal business purposes, offers for sale or rental for any form of consideration any one or more of the following:
    - (1) books, magazines, periodicals or other printed matter, or photographs, films, motion picture, video cassettes or video reproductions, slides, or other visual representations that depict or describe "specified sexual activities" or "specified anatomical areas"; or
    - (2) instruments, devices, or paraphernalia that are designed for use in connection with "specified sexual activities."

A commercial establishment may have other principal business purposes that do not involve the offering for sale or rental of material depicting or describing "specified sexual activities" or "specified anatomical areas" and still be categorized as an "adult bookstore" or "adult video store" so long as one of its principal business purposes is the offering for sale or rental for consideration the specified materials that depict or describe "specified sexual activities" or "specified anatomical areas." A principal business purpose need not be a primary use of an establishment so long as it is a significant use based upon the visible inventory or commercial activity of the establishment.

- (c) Adult cabaret means a nightclub, dance hall, bar restaurant, or similar commercial establishment that regularly features:
- (1) persons who appear in a state of nudity or semi-nudity; or
  - (2) live performances that are characterized by "specified sexual activities"; or
  - (3) films, motion pictures, video cassettes, slides, or other photographic reproductions that are characterized by the depiction or description of "specified sexual activities" or "nudity" or "specified anatomical areas".
- (d) Adult motel means a hotel, motel or similar commercial establishment which:
- (1) Offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions, which are characterized by the depiction of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right of way which advertises the availability of this adult type of photographic reproductions; or
  - (2) Offers a sleeping room for rent for a period of time that is less than ten (10) hours; or
  - (3) Allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than ten (10) hours.
- (e) Adult motion picture theater means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."
- (f) Adult theater means a theater, concert hall, auditorium, or similar commercial establishment that regularly features persons who appear, in person, in a state of nudity or semi-nudity, and/or live performances that are characterized by the "exposure of specified anatomical areas" or by "specified sexual activities."
- (g) Breast means a portion of the human female mammary gland (commonly referred to as the female breast) including the nipple and the areola (the darker colored area of the breast surrounding the nipple).

- (h) Buttocks means the area at the rear of the human body referred to as the glutaesus maximus.
- (i) Employee means a person who performs any service on the premises of a sexually oriented business on a full time, part time, contract basis, or independent basis, whether or not the person is denominated an employee, independent contractor, agent, or otherwise, and whether or not the said person is paid a salary, wage, or other compensation by the operator of said business. "Employee" does not include a person exclusively on the premises for repair or maintenance of the premises or equipment on the premises, or for the delivery of goods to the premises, nor does "employee" include a person exclusively on the premises as a patron or customer.
- (j) Entertainer means
  - (1) any person who appears in a state of nudity or semi-nudity in a sexually oriented business; or
  - (2) any person who engages in live performances that are characterized by "specific sexual activities."
- (k) Escort means a person who, for consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.
- (l) Escort agency means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes for a fee, tip, or other consideration.
- (m) Establishment means and includes any of the following:
  - (1) the opening or commencement of any sexually oriented business as a new business;
  - (2) the conversion of an existing business, whether or not a sexually oriented business to any sexually oriented business;
  - (3) the additions of any sexually oriented business to any other existing sexually oriented business; or
  - (4) the relocation of any sexually oriented business; or
  - (5) a sexually oriented business or premises on which the sexually oriented business is located.

- (n) Licensed day-care center means a facility licensed by the State of Wisconsin, under sec. 48.65, Stats. whether situated within the Town or not, that provides care, training, education, custody, treatment or supervision for more than four (4) 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 profit or charges for the services it offers.
- (o) Nudity or state of nudity means the appearance of the human bare anus, anal cleft or cleavage, pubic area, male genitals, female breast, genitals, or vulva, with less than a fully opaque covering.
- (p) Operator means the person on the premises who is responsible for the control and management of the sexually oriented business.
- (q) Person means an individual, proprietorship, partnership, corporation, association, or other legal entity.
- (r) Premises means the real property upon which the sexually oriented business is located, and all appurtenance thereto and buildings thereon, including, but not limited to, the sexually oriented business, the grounds, private walkways, and parking lots and/or parking garages adjacent thereto, under the ownership, control or supervision of the owner or operator of the business.
- (s) Regularly means recurring on a basis which is frequently, customarily or typically.
- (t) Semi-nude or semi-nudity means the exposure of a bare anus, anal cleft or cleavage or the female breast with less than a complete and opaque covering.
- (u) Sexual encounter center means a business or commercial enterprise that, as one of its principal business purposes, offers for any form of consideration:
  - (1) physical contact in the form of wrestling or tumbling between persons of the opposite sex; or
  - (2) 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 semi-nudity.
- (v) Sexually oriented business means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, or sexual encounter center.

(w) Specified anatomical areas means:

- (1) the human male genitals in a discernibly turgid state, even if fully and opaquely covered;
- (2) less than completely and opaquely covered human anus, anal cleft or cleavage, genitals, pubic region, or female breast.

(x) Specified sexual activity means:

- (1) the fondling or other erotic touching of human genitals, pubic regions, buttocks, anus, or female breasts, whether covered or uncovered;
- (2) sex acts, actual or simulated, including intercourse, oral copulation, or sodomy;
- (3) masturbation, actual or simulated, or;
- (4) excretory functions as part of or in connection with any of the activities set forth in (1) through (3) above.

(4) LOCATION RESTRICTIONS.

(a) The sexually oriented business may not be operated within (whether the following are located in or outside of the Town):

- (1) 500 feet of a church, chapel, synagogue, or regular place of religious worship;
- (2) 500 feet of a school; public or private preschool, elementary, middle or high school; or youth recreational center, or library;
- (3) 500 feet of a licensed day-care center, clinic or hospital;
- (4) 500 feet of a public park;
- (5) 500 feet of any residential district;
- (6) 500 feet of any licensed bar or tavern;
- (7) 500 feet of another sexually oriented business;

(b) A sexually oriented business may not be operated in the same building, structure, or portion thereof, containing another sexually oriented business.

(c) For the purpose of this ordinance, measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest

portion of the building or structure used as a part of the premises where a sexually oriented business is conducted, to the nearest property line or boundary of a property listed in Section 5(A).

(5) REGULATION OF SEXUALLY ORIENTED BUSINESSES.

- (a) No person, employee, entertainer or patron shall be permitted to have any physical contact with any entertainer on the premises during any performance. All performances shall only occur on a stage, or on a table that is elevated at least eighteen (18) inches above the immediate floor level and, to prevent actual physical contact between and entertainer and any other person, employee or patron, shall not be less than 5 feet from any area occupied by any patron. Patrons shall not have any physical contact with, and shall not be less than 5 feet from, any entertainer during the payment of a tip or gratuity.
- (b) The sale, use, or consumption of alcoholic beverages on the premises of a sexually oriented business is prohibited.
- (c) It shall be unlawful to allow a person who is younger than eighteen (18) years of age to enter or be on the premises of a sexually oriented business at any time the sexually oriented business is open for business.
- (d) It shall be the duty of the operator of each sexually oriented business to ensure that an attendant is stationed at each public entrance to the sexually oriented business at all times during such sexually oriented businesses' regular business hours. It shall be the duty of the attendant to prohibit any person under the age of eighteen (18) years from entering the sexually oriented business. It shall be presumed that an attendant knew a person was under the age of eighteen (18) unless such attendant asked for and was furnished:
  - (1) a valid operator's, commercial operator's, or chauffeur's driver's license; or
  - (2) personal identification card issued by the State of Wisconsin reflecting that such person is eighteen (18) years of age or older.
- (e) No person shall cause another to commit a violation of this ordinance, nor shall any person permit such violation to occur on any premises under his/her control, tenancy, management or ownership.
- (f) Hours of Operation. No sexually oriented business regulated by this section may remain open between the hours of 2:00 a.m. and 8:00 a.m., except on Saturday and Sunday, when the closing hours shall be between 2:30 a.m. and 8:00 a.m.



- (g) Signs posted. All premises governed by this Section shall be required to post signs provided by the Town of Black Brook, which states:

By Town of Black Brook Ordinance: The use or consumption of alcoholic beverages on these premises is prohibited. No person shall be permitted to have any physical contact with any entertainer. No person shall be less than 5 feet from any entertainer, including during the payment of tips. Violators may be subject to a fine of not less than \$100 and not more than \$500 per violation.

- (h) Doors. Each entryway to a sexually oriented business featuring live entertainment shall through use of a vestibule, screening, or double doors, and with window coverings, eliminate any direct line of sight from the public street area to any entertainer on the premises.
- (i) The interior of a sexually oriented business shall not be visible by any means from another premise which is not a sexually oriented business.

(6) EXEMPTIONS. The provisions of this ordinance do not apply to the following establishments: theaters, performing arts centers, civic centers, and dinner theaters where live dance, ballet, music and dramatic performances of serious artistic merit are offered on a regular basis; and in which the predominant business or attraction is not the offering of entertainment which is intended for the sexual interests or titillation of customers; and where the establishment is not distinguished by an emphasis on or the advertising or promotion of nude or semi-nude performances. While expressive live nudity may occur within these establishments, this ordinance seeks only to minimize and prevent the secondary effects of sexually oriented businesses on the community. Negative secondary effects have not been associated with these establishments.

(7) PENALTIES.

- (a) Violation of the use provisions of Section 5 is declared to be a public nuisance per se, which shall be abated by the Town Attorney by way of civil abatement procedures.
- (b) Any person, partnership, or corporation who violates any of the provisions of Section 6 of this ordinance shall be subject to a forfeiture of not less than \$100, and not more than \$500 per violation. A separate offense and violation shall be deemed committed on each day on which a violation occurs or continues. In addition, violation of this ordinance constitutes sufficient grounds for suspending, revoking or non-renewing an alcohol beverage license under Sec. 125.12, Stats.

(8) SEVERABILITY. If any section, subsection, sentence, clause, phrase, word or provision of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, whether for substantive, procedural, or any other reason, such portion shall be deemed a separate, distinct and independent

provision, and such holdings shall not affect the validity of the remaining portions of this ordinance. Specifically, "Section 4. Location Restrictions" and "Section 5. Regulation of Sexually Oriented Businesses" should be considered separate, distinct and independent provisions, so that if either section is held invalid or unconstitutional for any reason, the other sections will remain valid and enforceable.

- (9) **INCLUSION IN THE CODE AND EFFECTIVE DATE.** It is the intention of the Town Board and it is hereby provided that the provisions of this ordinance shall be made part of the Municipal Code; and that the sections of this ordinance be renumbered or relettered to accomplish such intention; and that the word "ordinance" may be changed to "section," "article," or other appropriate designation. This ordinance shall be in force and effect from and after its passage and publication or posting.

Dated this 16 day of July, 2009.

BY: Charles Barney  
Charles Barney, Town Chairman

ATTEST: Sally Pickard  
Sally Pickard, Town Clerk

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