



# City of Chula Vista

## Staff Report

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**File#:** 14-0272, **Item#:** 9.

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### CONSIDERATION OF AMENDING CHAPTER 9.13 OF THE CHULA VISTA MUNICIPAL CODE RELATED TO THE REGULATION OF SEXUALLY ORIENTED BUSINESSES

ORDINANCE OF THE CITY OF CHULA VISTA AMENDING CHAPTER 9.13 OF THE CHULA VISTA MUNICIPAL CODE REGULATING THE LICENSING AND OPERATIONAL STANDARDS FOR SEXUALLY ORIENTED BUSINESSES (FIRST READING)

#### **RECOMMENDED ACTION**

Council conduct the public hearing and place the ordinance on first reading.

#### **SUMMARY**

The existing provisions of the Chula Vista Municipal Code (CVMC), specifically Chapter 9.13, pertaining to the licensing and regulation of sexually oriented businesses were updated in November 2012 and are in need of some clean up and enhancement in order to reduce and/or preclude undesirable secondary effects including, but not limited to, increased crime, blighting influences in the community, decrease in property values, and the spread of sexually transmitted diseases. Accordingly, staff and its legal consultant have again reviewed the legal issues relating to the regulation of adult businesses, particularly as these proposed regulations protect public health, safety, and welfare. As a result of this research and review process, the proposed ordinance provides the requisite balance between the City's interests in protecting the public safety, health, and welfare and the constitutional protection afforded to adult businesses. Moreover, the proposed ordinance provides the evidentiary and factual foundation required to reasonably conclude that adult business can create potentially serious and deleterious secondary effects in the Chula Vista community, and therefore, the City's adult business regulations should be revised.

#### **ENVIRONMENTAL REVIEW**

The Development Services Director has reviewed the proposed activity for compliance with the California Environmental Quality Act (CEQA) and has determined that the proposed activity is not a "Project" as defined under section 15378 of the State CEQA Guidelines because the adoption of this ordinance, will not result in a physical change to the environment; therefore, pursuant to Section 15060(c)(3) of the State CEQA Guidelines the proposed activity is not subject to CEQA. Notwithstanding the foregoing, the Development Services Director has further determined that there is also no possibility that the proposed activity will have a significant effect on the environment; therefore, pursuant to Section 15061(b)(3) of the State CEQA Guidelines the activity is exempt from the provisions of CEQA.

#### **BOARD/COMMISSION RECOMMENDATION**

Not Applicable

#### **DISCUSSION**

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The City of Chula Vista originally adopted Live Entertainment Licensing and Regulations in Chapter 9.13 of the Chula Vista Municipal Code in 1980 with some minor modifications over the years. Then, in November 2012 the City adopted a comprehensive revision of the City's existing regulations for sexually oriented uses/adult uses and addressed both licensing/permitting provisions and operating standards for adult facilities. This ordinance (a copy of which is found at Attachment 1) adds some additional operating standards relating to inspection, live adult entertainment, arcade booths, etc. The purpose and intent of the proposed amendments to the Chula Vista Municipal Code are to:

(1) mitigate and reduce the judicially recognized potential adverse secondary effects of adult businesses including, but not limited to, crime, the prevention of blight in neighborhoods, and the increased spread of sexually transmitted diseases;

(2) protect quality of life and neighborhoods in the City, the City's retail and commercial trade, and local property values, and minimize the potential for nuisances related to the operation of adult businesses;

(3) protect the peace, welfare and privacy of persons who own, operate and/or patronize adult businesses; and

(4) minimize the potential for nuisance related to the operation of adult businesses.

To achieve these desired goals, the proposed ordinance establishes reasonable time, place, and manner restrictions on the adult businesses in the City of Chula Vista.

**A. Legal Basis/Constitutional Constraints.**

Adult businesses, such as adult bookstores, adult videos stores, and adult cabarets, engage in activities recognized as protected speech under the First Amendment of the United States Constitution. For example, nude dancing has been found by the U.S. Supreme Court to be on the outer margins of protected activity. (See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).) As providers of protected First Amendment speech, the courts have uniformly ruled that these types of adult businesses cannot be prohibited. Adult businesses can, however, be regulated. Traditional constitutional analysis divides the range of speech regulations into two main categories: (1) content based; and (2) content neutral (*i.e.*, regulations not based on content but rather imposing reasonable time, place, and manner restrictions). Content-based regulation is specifically aimed at the speech's content, and any such content based regulation carries with it a very high burden to find such legally adequate mandating that the public entity show it has a compelling interest in its regulation. In contrast, content neutral regulations are aimed at protecting governmental interests unrelated to the content of speech, such as traffic or noise regulation applied to all types of commercial uses for purposes of furthering the public health, safety and welfare.

The United States Supreme Court in the *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), addressing Renton, Washington's adult use ordinance, held that whether a time, place, and manner regulation is content neutral is to be determined by looking at the regulation's purposes, *i.e.* is the purpose the reduction of secondary effects versus the suppression of the offensive or unpopular speech. A city may adopt regulations to curb the deleterious secondary effects of adult uses, but suppression of the speech is impermissible. A content neutral time, place, and manner

regulation must serve a substantial government interest and be reasonably tailored to preclude secondary effects. Courts have also recognized that a city's interest in protecting the quality of life and finding creative solutions to address adult uses deleterious secondary effects must be accorded the highest respect. *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002).

The proposed ordinance is content neutral under the *Renton* standard because it is designed to further the City's purposes and goals in limiting and preventing the deleterious secondary effects associated with adult businesses. The extensive findings set forth in the proposed ordinance fully support the regulations therein. In *SDJ. Inc. v. City of Houston*, 837 F.2d 1274 (5th Cir. 1988), *cert. denied* 480 U.S. (1989), the court remarked on the importance of findings: "Insisting on findings reduces the risk that a purported effort to regulate effect is a mask for regulation of content. That is, evidence of a legitimate purpose is supported by proof that secondary effects actually exist and are the result of the business subject to the regulation...."

As a result of the First Amendment protection afforded to various adult businesses (adult bookstores, video stores and live entertainment), conditions cannot simply be imposed upon an adult facility in an effort to preclude the facility's operation. Conditions must be predicated on the reduction of the secondary effects. These adverse secondary effects include: urban blight; increased crime; decreased property values; diminished retail trade; prostitution; the spread of sexually transmitted diseases; and illegal drug transactions. It is important to note that the purpose of the proposed ordinances is not to prohibit or otherwise regulate child pornography or obscenity because such material is not now, nor has it ever been, granted constitutional protection. Furthermore, local regulation of obscene material has been preempted by state and federal law. Rather, the intent of the proposed ordinance is to address the adverse secondary effects that are caused by adult businesses.

Case law also recognizes that a community can plan ahead and put in place operational standards prior to the entry of an adult facility into the community. The United States Supreme Court held that it is not necessary for a city to conduct its own studies regarding the presence of negative secondary side effects associated with adult businesses. *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). The Court specifically determined that cities may reasonably rely on the experiences and studies of other cities in concluding that adult businesses create the aforementioned negative secondary side effects.

The supporting materials provided as exhibits to this staff report, as well as input from City staff, the city attorney, and the city's special counsel, contributed to crafting these additional recommended operational requirements found in the proposed ordinance which we believe are a constitutional, narrowly tailored means of controlling potential secondary effects of adult use businesses. On file at the City Clerk's office is the set of the exhibits in support of this ordinance. (A list of those exhibits is attached to this staff report as Attachment 2.) Included among the exhibits are the cases referred to in the ordinance, the studies of other cities relating to the secondary effects of adult uses, and other supporting documentation. We have also included a number of materials relating to testimony from current and former dancers and other employees of adult use businesses or persons affiliated with the adult business industry, which support the need for the recommended operational requirements. (A summary of a portion of these studies is attached to this staff report as Attachment 3.) In addition, Chula Vista Chief of Police David Bejarano has provided testimony on the secondary impacts related

to sexually oriented businesses. Chief Bejarano's testimony is provided as Attachment 4. Chief Bejarano, during his tenure with the San Diego Police Department, served a detective investigating unlawful activities in sexually oriented businesses, served as the Vice Commander and was responsible for detectives conducting such investigations, and, as Chief of Police, was responsible for the licensing of sexually oriented businesses within the City of San Diego. (A copy of his curriculum vitae ("CV") is attached to this staff report as Attachment 5.)

## **B. Permitting and Operational Standards.**

The operational requirements contained in the ordinance are designed to reduce/eliminate the negative secondary effects from sexually oriented businesses and include:

- (1) Provision for inspection;
- (2) Adult Live Entertainment Regulations include visibility to manager;
- (3) Precluding direct touching between patrons and performers of live adult entertainment establishments;
- (4) No doors on arcade booths; and
- (5) Other arcade booth regulations.

Each of these operational criteria is designed to address concerns regarding prostitution, drug transactions and illicit sexual activity. In light of the extensive existing case law, it is warranted that operating provisions should be added or enhanced to reduce and/or preclude secondary effects. It is important to note that experiences in other cities have demonstrated that potential adverse secondary effects generated by adult use businesses cannot be adequately addressed by locational restrictions alone. See Exhibits. For example, the cities of La Habra, Anaheim and Arcadia have extensive experience with adult facilities focused on totally nude "juice bars." Nude "juice bars" are adult facilities that feature totally nude dancers without the provision of alcoholic beverages. These types of facilities are not regulated by the *Alcoholic Beverage Control Department*, which further mandates the need for the City's operational standards. Nude juice bars require carefully tailored regulations to reduce the adverse secondary effects that such facilities bring to a community.

At many totally nude clubs, the establishments also offer "off-stage" performances commonly known as "lap," "couch" or "table" dancers. This type of conduct typically consists of direct physical touching and/or the provision of "specified sexual activities" or the simulation of "specified sexual activities" for a fee after the dancers conclude a main stage performance. At clubs in La Habra and Anaheim, it has been typical for performers wearing only g-string bikinis to straddle the laps of male patrons, writhing and rubbing their bikini-covered breasts on patrons' chests while rubbing and fondling the patrons' genitals over their clothing. As more fully discussed below, the proposed ordinance precludes this type of extreme "off-stage" activity, along with its companion noted secondary effects of prostitution and/or illegal drug transactions.

### **1. Arcade Booths/Individual Viewing Areas.**

The interior configuration of adult businesses, specifically those that include video viewing booths, is an important area for regulation. This is because in many communities, these booths have become a common site for illicit sexual activity. Ordinances requiring the interiors of video viewing booths to be

visible from the room in which they are located are routinely upheld. Similarly ordinances that require booths to be sufficiently lighted are also constitutionally sound.

As arcade booths and/or closed individual viewing areas are a magnet for illicit sex, the use of either is conducive to the spread of communicable diseases found to be of danger to persons frequenting such premises and to the public health. The public health of all people in the City must be protected by the establishment of standards for such premises to eliminate the possibility of infection of contagious diseases. Of specific danger is the sexually transmitted disease AIDS currently found to be irreversible and fatal. The incidence of this disease is found to occur in discernable population groups, and the risk factors for obtaining or spreading the disease are associated with high-risk sexual conduct with multiple partners. The commercial premises, or parts thereof, which place persons at risk of infection from this disease, due to their design and use for high-risk sexual conduct, are necessarily subject to regulation and standards for the prevention of the spread of this disease and for the protection of public health, safety and welfare. The City Council is asked to take legislative notice of the facts recited in *Berg v. Health and Hosp. Corp. of Marion County, Ind.*, 865 F.2d 797, 799 (7th Cir. 1989), allowing the removal of doors on booths as a valid response to a legitimate concern about multiple sexual encounters that facilitated the spread of AIDS.

The City Council is also asked to take notice of statistics provided by the County of San Diego Health and Human Services Agency and the County of Orange Health Care Agency. These various studies are found in the Exhibits on File in Support of this Ordinance. The City Council also is asked to take legislative notice of the findings set forth in the 1986 Attorney General's Report on Pornography in support of the ordinances including, but not limited to, its recommendation that local governments ban certain features of peep show booth that facilitate sexual encounters. (See Exhibits, Vols. III and IV.)

## **2. Live Entertainment.**

Adult businesses providing live entertainment have been subject to regulations uniquely tailored to reduce/eliminate their companion secondary effects. The experiences of other cities have demonstrated that establishments allowing touching and physical contact between performers and patrons have high instances of illicit sexual activity or narcotics transactions occurring on the premises. In an effort to reduce these secondary effects, cities have passed, and courts have uniformly upheld, ordinances imposing performer-patron distance restrictions and no touching provisions. (See *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998); *Gammoh v. City of La Habra*, 395 F.3d 1114 (9th Cir. 2005), *amended* 402 F.3d 875, *cert. denied* 126 S.Ct. 374.)

As to "couch," "lap," "table" or similar one on one private "dances," courts have held that those types of so called lap dances are not expressive activity and a city may regulate this conduct. (See *Tily B., Inc. v. City of Newport Beach*, 69 Cal.App. 4th 1 (1998); *Colacurcio v. City of Kent*, 163 F. 3d 545 (9th Cir. 1998), *cert. denied* 529 U.S. 1053 (2000); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986). The proposed ordinance prohibits this type of off-stage performances by requiring all adult live performances be confined to a fixed main stage and requiring that patrons and performers be six (6) feet apart. The operating standards found in the proposed ordinance for live entertainment have been approved by case law and most recently validated in the 2005 published Ninth Circuit case of *Gammoh v. City of La Habra*, 395 F.3d 1114 (9th Cir. 2005), *amended* 402 F.3d 875, *cert. denied* 126 S.Ct. 374.

### **DECISION-MAKER CONFLICT**

Staff has reviewed the decision contemplated by this action and has determined that it is not site specific and consequently, the 500-foot rule found in California Code of Regulations section 18704.2 (a)(1) is not applicable to this decision. Staff is not independently aware, nor has staff been informed by any City Councilmember, of any other fact that may constitute a basis for a decision maker conflict of interest in this matter.

### **LINK TO STRATEGIC GOALS**

The City's Strategic Plan has five major goals: Operational Excellence, Economic Vitality, Healthy Community, Strong and Secure Neighborhoods and a Connected Community. Amending Chapter 9.13 pursuant to the subject ordinance supports the Strong and Secure Neighborhoods goal as it allows constitutionally protected activity in legally appropriate areas of the City while protecting the rights of the citizens and businesses throughout the City

### **CURRENT YEAR FISCAL IMPACT**

There is no current year fiscal impact.

### **ONGOING FISCAL IMPACT**

The on-going fiscal impacts cannot be determined at this time because it is not yet clear how many applicants there will be or the extent of any enforcement activity that will be required under this ordinance.

### **ATTACHMENTS**

1. Proposed Ordinance
2. List of Exhibits (On File in the City Clerk's Office)
3. Summary of Exhibits
4. Chief of Police David Bejarano's Testimony
5. Chula Vista Police Chief David Bejarano CV

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