



City of Chula Vista

Staff Report

File#: 14-0273, **Item#:** 23.

CONSIDERATION OF AMENDING TITLE 19 OF THE CHULA VISTA MUNICIPAL CODE RELATED TO LOCATIONAL AND ZONING PROVISIONS FOR REGULATION OF SEXUALLY ORIENTED BUSINESSES

ORDINANCE OF THE CITY OF CHULA VISTA AMENDING TITLE 19 OF THE CHULA VISTA MUNICIPAL CODE REGULATING PLANNING AND ZONING (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 (Municipal Code) pertaining to the locational regulations of sexually oriented businesses are in need of updating and should be enhanced to reduce and/or preclude undesirable secondary effects. Accordingly, staff and its legal consultant have completed a thorough review of the various specific plans and various zoning restrictions at play in the City as to sexually oriented businesses. 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 sexually oriented businesses. Moreover, the proposed ordinance provides the evidentiary and factual foundation required to reasonably conclude that sexually oriented business can create potentially serious and deleterious secondary effects in the Chula Vista community, and therefore, the City's sexually oriented business regulations should be updated. This ordinance is constitutionally sound as it provides a reasonable range of potential sites.

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 forgoing, 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

The Planning Commission has reviewed the proposed ordinance and recommends the Ordinance be adopted.

DISCUSSION

The City of Chula Vista initially adopted zoning and locational regulations found in Title 19 of the Municipal Code in 1980. Since then, there have been minor modifications to the Title and the City has adopted a number of Specific Plan amendments governing zoning within specified areas in Chula Vista. The proposed Ordinance is a comprehensive review of the City's existing regulations for sexually oriented uses/adult uses and addresses the locational and zoning provisions. A copy of the proposed Ordinance is attached as Attachment 1. The purpose and intent of the proposed amendments to the Municipal Code are to:

(1) mitigate and reduce the judicially recognized potential adverse secondary effects of sexually oriented 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 sexually oriented businesses;

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

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

A. Legal Basis/Constitutional Constraints.

Sexually oriented 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 sexually oriented businesses cannot be prohibited. Sexually oriented 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 sexually oriented businesses, 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 sexually oriented businesses' 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 sexually oriented 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...."

The supporting materials provided as exhibits to this staff report, as well as input from City staff, the city attorney, the city's special counsel along with input from professional planner Lloyd Zola of Metis Environmental Group, contributed to crafting the recommended requirements found in the proposed ordinance which are a constitutional, narrowly tailored means of controlling potential secondary effects of sexually oriented 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 sexually oriented, and other supporting documentation. We have also included a number of materials relating to testimony from current and former dancers and other employees of sexually oriented businesses or persons affiliated with the sexually oriented business industry, which support the need for this ordinance. 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 as 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.

D. Zoning and Locational Regulations.

Zoning and locational criteria are a legitimate and reasonable means of regulating sexually oriented businesses. There are two generally accepted approaches to regulating the location of sexually oriented businesses - (1) the "dispersal" method and (2) the "concentration" method. With the dispersal method adult uses are buffered a set distance from various sensitive land uses (*i.e.*, parks, schools, residential zones) and from other adult uses. With the concentration method adult uses are all located in one area such as what is known as the "combat zone" in Boston. The City has selected the dispersal method.

Potential Sites; Reasonable Range of Alternative Sites

There is no "mathematical formula" or set "litmus test" established by the courts to determine the number of sites that must be available for sexually oriented businesses. The issue is examined on a

File#: 14-0273, Item#: 23.

case by case basis, looking at the particular land use and demographic characteristics of the community.

Chula Vista is a community with a population estimated at 243,916 (as of 2010, U. S. Department of Commerce). The general plan and zoning map designate all parcels of land within the City for some type of use - such as residential, industrial, or commercial. There are 5 general land use categories identified in the Chula Vista General Plan including residential, commercial, industrial, mixed use, and public/quasi-public and open space. Based on land use categories set forth in City's General Plan, the composition of land uses in the City is as follows:

a.	Residential*	32%
b.	Commercial**	2%
c.	Industrial	4%
d.	Public, Quasi-Public, Open Space, Streets, Freeways, and Utilities Rights of Way	61%
e.	Special Planning Areas	1%

* Includes Mixed Use Residential and Transit Focus Areas

** Includes Mixed Use Commercial

As the above table illustrates, only 6% of land within Chula Vista is available for potential commercial or industrial land use.

The Ninth Circuit in *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993) set out established criteria for determining whether sites are actually available in the "relevant commercial market" by examining if:

- There is a genuine possibility that the site is potentially available. In other words, is it reasonable "to believe that [the site] would ever become available to any commercial enterprise?"
- If the sites are in manufacturing zones, are they reasonably accessible to the general public.
- If the sites are in manufacturing zones, do they have proper infrastructure such as sidewalks, road and lighting.
- If the sites are in manufacturing zones, can they serve a generic commercial purpose such as retail or places of assembly.
- The sites are commercially zoned.

The court in *Topanga Press* rejected Los Angeles' attempt to include sites that were clearly unavailable such as areas under water, landfills and airport sites. Other examples of unavailable sites include lands used for large warehouses, lands that are part of a sewage treatment facility,

lands that are part of an existing hospital, and large oil refineries. To avoid the pitfalls of *Topanga Press*, the City should and has excluded any sites that are outside of the “relevant commercial market.” Moreover, *Topanga Press* also holds that sites which carry a commercial zoning designation are per se available and qualify as a potential available site.

The Planning Staff has reviewed these various *Topanga* criteria and determined that all commercially zoned sites are per se available per *Topanga* and all industrially zoned sites meet all of the *Topanga* criteria.

Due to the physical and land use constraints of Chula Vista, the proposed Ordinance offers a 500 foot separation requirement between sexually oriented facilities and certain sensitive users (*i.e.*, schools, parks and residential zones). After touring the entire City and reviewing the v potential distance from sensitive users, staff further recommends that sexually oriented businesses continue to be allowed only in the C-T (Thoroughfare Commercial) zone or in the noted zones identified in the Bayfront Specific Plan, the Eastlake I, Eastlake Business Center II and Eastlake II Sectional Planning Areas (SPA) as allowing such businesses. These are the same areas locations wherein sexually oriented uses may currently locate but these revisions now insures that the zoning code and Specific Plans are clear and internally consistent.

In assessing the potentially available sites for sexually oriented businesses, we have determined that there are a total of 170 potential sites. Of those 170 sites, 59 are designated with a commercial land use, while the balance, 111 sites, are designated with an industrial land use. A list of the potential sites is found at Attachment 6. This number was reduced from the number presented to the Planning Commission because of the location of some new sensitive uses such as a recently opened religious facility.

Moreover, the locational requirements contained in the proposed ordinance do not unreasonably restrict the establishment or operation of constitutionally protected sexually oriented businesses in Chula Vista, and a sufficient and reasonable number of alternative locations for sexually oriented businesses are provided by the City of Chula Vista. The United States Supreme Court decision in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1986) requires that the City provide adult businesses a reasonable opportunity to open and operate. The Ninth Circuit decisions in *Topanga Press*, *Lim v. City of Long Beach*, 217 F.3d 1050 (9th Cir. 2000), *cert. denied* 531 U.S. 1191 (2001), and *Isbell v. City of San Diego*, 258 F.3d 1108 (9th Cir. 2001) with respect to availability of sites for sexually oriented businesses support a finding that there are sufficient sites available for sexually oriented businesses within the City.

Thus, under the locational and zoning provisions at play in Chula Vista, the criteria set forth above provide a reasonable range of available sites.

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.

File#: 14-0273, **Item#:** 23.

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 Title 19 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

There is no ongoing fiscal impact.

Attachments:

1. Ordinance
2. List of Exhibits (On File in the City Clerk's Office)
3. Summary of Studies
4. Chief of Police David Bejarano's Testimony
5. Chief of Police David Bejarano's CV
6. Location of Sites Available for Adult Business Use

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