

BEFORE THE COUNTY COMMISSION OF BERKELEY COUNTY, WEST VIRGINIA

IN RE: LOCATION OF EXOTIC ENTERTAINMENT

(Originally adopted August 26, 2004; Amended November 18, 2004)

Pursuant to § 7-1-3jj, *Code of West Virginia of 1931*, as amended, the Berkeley County Commission ORDERS that it is appropriate and necessary, because of the rapid growth of this county and the potential for various deleterious effects of establishments offering exotic entertainment in close proximity to schools, churches and residential neighborhoods, to regulate the location of businesses offering exotic entertainment.

The Berkeley County Commission finds it appropriate to minimize and control adverse and deleterious effects of adult entertainment establishments and thereby protect the health, safety and welfare of the community and its citizens and to preserve and enhance the property values upon which this county's tax revenues are dependent.

It is not the intent of this ordinance to suppress any protected speech but, rather, to address the location of businesses offering exotic entertainment within Berkeley County.

SECTION I: DEFINITIONS

Adult Arcade: any place to which the public is permitted or invited wherein any form of consideration is necessary to view electronically, electrically, digitally or mechanically, images, however produced and/or presented, which images are displayed and distinguished or characterized as exotic entertainment, and which images are intended to be viewed by five or fewer persons at any one time.

Adult Bookstore: adult novelty or adult video store – a commercial establishment which, as one of its principal purposes, offers for sale or rental for any form of consideration, any one or more of the following, (a) books, magazines, periodicals, or other printed matter or photographs, films, motion pictures, video cassettes or

video reproductions, slides or other visual representations which are characterized as exotic entertainment or (b) instruments, devices, or paraphernalia which are designed for use in connection with exotic entertainment. A commercial establishment may have other principal business purposes that do not involve the offering for sale or rental of material depicting or describing exotic entertainment and still be categorized as an adult book store, adult novelty store, or adult video store. Such other business purposes will not serve to exempt such commercial establishments from being categorized as an adult bookstore, adult novelty store 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 which are characterized as exotic entertainment.

Adult Cabaret: a nightclub, bar, restaurant, or similar commercial establishment which regularly features (a) persons who appear in a state of nudity or semi-nudity; (b) live performances which are characterized as exotic entertainment; (c) films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized as exotic entertainment.

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 which are characterized as exotic entertainment.

Adult Theater: a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or semi-nudity or live performances which are characterized as exotic entertainment.

Employee: a person who performs any service on the premises of an exotic entertainment business on a full time, part-time, or contract basis, whether or not the person is denominated as an employee, independent contractor, agent or otherwise and whether or not 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.

Establishment: includes (a) the opening or commencement of any exotic entertainment business as a new business; (b) the conversion of an existing business, whether or not originally an exotic entertainment business, to any exotic entertainment business; (c) the additions of any exotic entertainment business to any other

existing exotic entertainment business; or (d) the relocation of any exotic entertainment business.

Exotic Entertainment: live entertainment, dancing or other services conducted by persons while nude or semi-nude in a commercial setting or for profit. Semi-nude means the appearance of the (a) the female breast below a horizontal line across the top of the areola at its highest point, including the entire lower portion of the human female breast, but does not include any portion of the cleavage of the human female breast exhibited by a dress, blouse, shirt, leotard, bathing suit or other wearing apparel provided that the areola is not exposed, in whole or in part; (b) a human fully bare buttock, anus, anal cleft or cleavage, pubic area, male genitals, female genitals or vulva, with less than a fully opaque covering; (c) a human male genital in a discernibly turgid state even if completely and opaquely covered.

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

Residential Area: two or more structures utilized as primary residences existing within 500 feet of each other.

Substantial Enlargement: the increase in floor areas occupied by the business by more than fifteen percent (15%) as the floor areas exist on the date this ordinance takes effect.

Transfer of Ownership or Control: (a) the sale, lease or sub-lease of the exotic entertainment business; (b) the transfer of securities which constitute a controlling interest in the exotic entertainment business, whether by sale, exchange or similar means; (c) the establishment of a trust, gift or other similar legal device which transfers the ownership or control of the exotic entertainment business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

SECTION II. CLASSIFICATION

Exotic entertainment businesses are classified as follows:

- 1) adult arcades;
- 2) adult bookstores, adult novelty stores or adult video stores;
- 3) adult motion pictures theaters;
- 4) adult cabarets; and

- 5) adult theaters.

SECTION III. LOCATION OF EXOTIC ENTERTAINMENT BUSINESSES

This statute prohibits any person, entity or business from establishing, operating, or causing to be operated, an exotic entertainment business within 2,000 feet of:

- 1) a church, synagogue, mosque, temple or building which is used primarily for religious worship and related religious activities;

- 2) a public or private education facility including, but not limited to, child day care facilities, nursery schools, preschools, kindergartens, elementary schools, private schools, intermediate schools, junior high schools, middle schools, high schools, vocational schools, secondary schools, continuation schools, special education schools, colleges and universities. The term schools includes the school grounds but does not include facilities used primarily for another purpose and only incidentally as a school;

- 3) a public park or recreational area which has been designated for park or recreational activities including, but not limited to, public parks, playgrounds, natural trails, swimming pools, reservoirs, athletic fields, basketball or tennis courts, public wilderness areas or other similar public lands, all of which are considered public parks or public recreational areas;

- 4) hotel, motel, campground, bed and breakfast.

- 5) the nearest property line of any primarily residential area.

This ordinance also prohibits the causing or permitting of the operation, establishment, or substantial enlargement or transfer of ownership or control of an exotic entertainment business within 2,000 feet of another exotic entertainment business.

This ordinance also prohibits the causing or permitting of the operation, establishment or maintenance of more than one exotic entertainment business, in the same building, structure or portion thereof or the increase of floor area of any exotic entertainment business in any building, structure or portion thereof containing an already existing exotic entertainment business.

For the purpose of this section, measurement shall be made in a straight line, without regard to the intervening structures or objects, from the nearest portion of the building or structure used as the part of the premises where an exotic entertainment business is conducted, to the nearest property line of the premises of a use listed in Section III. Presence of a city, county or other political subdivision boundary shall be irrelevant for purposes of calculating and applying the distance requirements of this section.

For purposes of this section, the distance between any two exotic entertainment businesses shall be measured in a straight line, without regard to the intervening structures or objects or political boundaries, from the closest exterior wall of the structure in which each business is located.

An exotic entertainment business lawfully operating as a conforming use is not rendered a non-conforming use by the location, subsequent to the establishment of such exotic entertainment business, of a use listed in this section within 2,000 feet of the exotic entertainment business.

In the event of the partial or total loss of any existing exotic entertainment business due to fire, flood, accident or any other unforeseen act, that business structure may be repaired or replaced and the business use of that structure may continue notwithstanding the existence of this ordinance. Any such repair or replacement will be limited to restoring or replacing the damaged or lost structure with a building not more than fifteen percent (15%) larger than the previous structure, as measured in square footage; and any substantial enlargement of the business structure will subject the structure to this ordinance.

In the event of a complete transfer of ownership or control of any exotic entertainment business, the building or structure in which such business is housed shall become subject to the provisions of this Ordinance without the protections of any grandfather or similar clause.

In the event of a revocation of the business or liquor license of an exotic entertainment business the building or structure in which the business is housed shall become subject to the provisions of this ordinance.

This ordinance shall not apply to or affect any municipal corporation that either: (1) Has adopted and has in effect an ordinance restricting the location of exotic entertainment or substantially similar businesses pursuant to the authority granted in articles twelve or twenty-four, chapter eight of the West Virginia Code; or (2) adopts an ordinance to exempt itself from this ordinance.

SECTION V. SEVERABILITY

If any provision of this ordinance should be held, invalid or void, all remaining provisions shall continue to have full force and effect.

ADOPTED THE 26th day of August, 2004. Amended by vote of the Commission on Thursday, November 18, 2004. Ordinance with amendments effective November 18, 2004.

The County Commission of Berkeley County

Steven C. Teufel, President

Howard L. Strauss, Commissioner

John E. Wright, Commissioner