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March 6, 2009

Mr. Gary McKamie  
City Manager  
City of Euless  
201 N. Ector Dr.  
Euless, Texas 76039-3595

Fax No.: 817-685-1416

Re: SOB Ordinance Summary

Dear Gary:

This is the Sexually Oriented Business Ordinance Summary below.

### **BACKGROUND AND PURPOSE**

Staff and counsel recommend amending Chapter 18 of the City of Euless, Texas Code of Ordinances to provide the City with additional tools in order to address the negative secondary effects of sexually oriented businesses ("SOB") that would locate within the City.

As the Council may be aware, SOBs enjoy various First Amendment protections; however, because various studies and cases have recognized that these businesses create negative secondary effects, the courts have recognized that local governments have an interest in mitigating those effects through content neutral time, place and manner restrictions. But because of the ever-changing nature of SOBs, crafting definitions that pass constitutional muster can be difficult. The Supreme Court has upheld definitions that manage to balance First Amendment combat harmful secondary effects with time, place and manner regulations. A regulation must not be vague so as to require people of (at least) normal intelligence to guess at its meaning, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); however, the vagueness prohibition "does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." *Rose v. Locke*, 423 U.S. 87, 94 (1975).

Cities may rely on a number of cases that have found that prostitution, indecent exposure, masturbation and other elicit sexual activity frequently occurs on the premises (and in the vicinity) of sexually oriented businesses. *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82 (5<sup>th</sup> Cir. 1992). Courts have upheld regulations that require booths to either be visible by persons adjacent to the booth ("line of sight" regulations), or an employee who is required to monitor booth activity via closed circuit television, in spite of privacy and equal protection challenges. These regulations discourage prostitution and unprotected

anonymous sex associated with adult theaters, for example. *Bamon Corp. v. City of Dayton*, 923 F.2d 470 (6<sup>th</sup> Cir. 1991).

Courts have routinely invalidated SOB regulations because administrative and judicial review is not sufficiently prompt. Since 1998, this has been one of the most frequent avenues of challenge to local ordinances. *Baby Tam and Company v. Las Vegas*, 154 F.3d 1097 (9<sup>th</sup> Cir. 1998) (Baby Tam I); *Baby Tam and Company v. Las Vegas*, 199 F.3d 111 (9<sup>th</sup> Cir. 1999) (Baby Tam II); *Baby Tam and Company v. Las Vegas*, 247 F.3d 1003 (9<sup>th</sup> Cir. 2001) (Baby Tam III) but see the discussion at 3.D. *infra*. Also, an alleged failure to leave open reasonable alternatives is another common basis of attack; therefore, most local governments must be sure that land use regulations do not effectively “zone out” SOBs. *City of Renton v. Play Time Theatres Inc.*, 475 U.S. 41 (1986).

Case law has established that non-obscene adult entertainment is a protected First Amendment activity for which local governments must make sites reasonably available. Arguably, however, the Supreme Court has held open the possibility that not every small jurisdiction must allow a sexually oriented business. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981). For example, in *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, n. 2 (11<sup>th</sup> Cir. 1999), the court determined that the relevant real estate market contained available sites for adult entertainment, including those as far as one and a quarter miles south of the city limits. Previously the same court had noted that the Supreme Court had not decided that “every unit of local government entrusted with zoning responsibilities must provide a commercial zone in which protected activities permitted.” *Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586, n. 2 (11<sup>th</sup> Cir. 1997). Nevertheless, if it is possible at all to essentially “zone out” SOBs, this would apply only to the smallest of communities, and a local government must be prepared to engage in a protracted court fight with a likely well-funded foe.

The plurality of the Supreme Court in the *Pap's A.M.* decision stated that “as long as the evidence relied upon is reasonably believed to be relevant to the problem that the City addresses,” then the City does not have to produce its own evidence, but may rely on evidence of harmful secondary effects. *Pap's A.M.*, 529 U.S. at 296. In an important 2002 decision, *City of Los Angeles v. Alameda Books*, 535 U.S. 435 (2002), the Supreme Court reaffirmed its holding in *City of Renton* and addressed the relationship between the local government and the evidence upon which it relies for its regulations. The first issue the court addressed was the fact that the study was 25 years old at the time of the decision and had been several years old at the time the city relied on it. The Court stated:

A municipality may rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest. This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

*Alameda* reaffirms the proposition that a local government retains discretion to make findings from the studies before it and may draw reasonable conclusions about what regulatory techniques will be beneficial in addressing the findings. Also, the municipality should be able to rely on evidence of negative secondary effects from other cities. If the Plaintiff is successful in casting any doubts upon the evidence relied upon by the city, the city should be able to provide additional evidence at trial that renews support for a theory that justifies its ordinance. In 2003, the Fifth Circuit decided *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162, 173 (5<sup>th</sup> Cir. 2003). It held that in determining content-neutrality, the proper inquiry is whether the “predominant concern” of the ordinance is addressing secondary effects, versus banning content. It went on to state that a local government can justify the ordinance based on evidence developed prior to the ordinance’s enactment, and also that adduced at trial. The *N.W. Enterprises* case supports the analysis in *Alameda* by allowing the local government discretion to draw reasonable conclusions based on the evidence before it prior to enacting the ordinance. *N.W. Enterprises* also supports the notion that a city should be allowed to provide additional evidence at trial of negative secondary effects should plaintiff succeed in its burden of casting doubt on the city’s rational for enacting the ordinance.

Even though it is not clear how much evidence of secondary effects a government must show to justify its need for the law, it is clear that there must be a reasonable nexus between the regulations and the evidence/studies upon which they are based. See *Encore Video, Inc. v. City of San Antonio*, 330 F.3d 288 (5<sup>th</sup> Cir. 2003). In *Encore*, the plaintiff successfully argued that the City’s reliance on studies that did not differentiate between on-premise businesses, and strictly off-premise take home rental stores was not reasonable. In response, Mick McKamie, Bradford Bullock and various other municipal lawyers around the state were part of the steering committee that helped put together the recently published study cited in this draft ordinance, which successfully found that so-called “off premise” adult bookstores create negative secondary effects, including increased crime and reductions in property values. Thus, the primary mode of attack in *Encore* is now likely a dead-end for plaintiffs.

Improper interpretation of ordinance terms by regulatory officials can also lead to invalidation of the regulations. In *Tollis v. San Bernardino County*, 827 F.2d 1329 (9<sup>th</sup> Cir. 1987), a county official interpreted the county’s adult use ordinance to apply to mainstream theaters even if the theater showed pornographic films only on one occasion. The district court agreed with the plaintiff that the ordinance was unconstitutionally over broad as applied. The Ninth Circuit affirmed but instead of finding that the ordinance was over broad, concluded that the ordinance was not narrowly tailored to serve a substantial governmental interest because the county presented no evidence that a single showing of an adult movie would have any harmful secondary effects on the community. It is clear that definitions must be interpreted to apply only to a category of establishments that are associated with negative secondary effects, and a one time use of a building for sale or presentation of sexually explicit fare does not bring it within that category.

Local governments are urged to use the term “regularly” in the definitions of adult theatre, adult cabaret, adult performance or adult performance center to eliminate the possibility of a “single use” interpretation like the one that lead to the invalidation of the ordinance in *Tollis*. As Justice Scalia wrote in his concurring opinion in *FW/PBS, Inc. v. City of Dallas*, “regularly features” means “a continuous presentation of the sexual material as one of the very objectives of the commercial enterprise.” *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 260 (1990). The Council will note that the term “regularly” is used consistently in the definitional section of this proposed draft ordinance.

The term "prior restraint" is used "to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993). The purpose of the prior restraint doctrine is to prevent government censorship. *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1220 (10<sup>th</sup> Cir. 1990). Prior restraint must take place "under procedural safeguards designed to obviate the dangers of a censorship system." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975). *Freedman v. Maryland*, 380 U.S. 51 (1965) illustrates the classic example of unconstitutional prior restraint censorship. In *Freedman*, the state passed a statute stating that it was unlawful to sell, lend, lease or exhibit a motion picture or film unless the film had been submitted to the state board of censors, who would examine the film for objectionable content including obscenity. In a unanimous decision, the Supreme Court found the statute unconstitutional.

While *Freedman* might be an easy call, especially with 40 years of hindsight, local governments today are faced with a much more pervasive adult industry than that which the *Freedman* court faced. In *FW/PBS Inc. v. City of Dallas*, 493 U.S. 215 (1990), the Supreme Court gave cities some guidance regarding what to avoid in licensing ordinances. While prior restraints are not unconstitutional per se, any scheme that focuses on subjective discretion versus objective, clearly defined criteria will be unconstitutional. Further, any licensing ordinance absolutely must provide strict administrative time limits on the decision making process, and it must provide for the possibility of prompt judicial review in the event a license is erroneously denied. See *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 781 (2004).

Not only must the administrative requirements be sufficiently well defined, but the Constitution requires any substantive hurdles to be defined by narrow, definite, and objective criteria in order to avoid prior restraint problems. *City of Lakewood v. Plain Dealer Publ'g Company*, 486 U.S. 750 (1988). Unbridled discretion in the hands of a government official to deny a license constitutes censorship. The ordinance must be specific in spelling out what sexual acts, exposed parts of the human body, or what criminal convictions constitute the basis for denial of a permit. If drafted with sufficient care, the ordinance can be upheld under the constitutional challenge because it has been recognized by the Courts that a "modicum of judgment" must be exercised by the regulators. *Baby Tam and Company, Inc. v. City of Las Vegas*, 247 F.3d 1003 (9<sup>th</sup> Cir. 2001) (Baby Tam III).

With these principles in mind, a section by section analysis follows.

### **Sec. 18-77 Purpose and Intent**

This section establishes that these regulations are promulgated pursuant to the City's police powers.

### **Sec. 18-78 Findings**

This section cites applicable cases and studies upon which the City will reasonably rely to justify its regulation of negative secondary effects. Counsel will lead the City Council through a discussion of these cases and findings at length. The Council will note that the most recent study relating to off-premise SOBs is referenced.

### **Sec. 18-79 Definitions**

This section establishes the definitions of various terms, including SOBs, and creates a minimum threshold for a business to be considered "sexually oriented" (25% of inventory and/or floor space). Counsel recommends setting a hard minimum as it is more readily ascertainable for enforcement purposes as opposed to "primary business purpose" language (although both can be defended successfully). Other definitions worth noting are those of "nudity" and semi-nudity," which specifically exclude breast feeding mothers (semi-nudity), but include realistic devices used to simulate nudity (latex "nipple" pasties).

### **Sec. 18-81 License Required**

This section sets out the requirement that all SOBs must apply for and receive an SOB license before they can operate. It requires an SOB to obtain its SOB license before it can obtain a certificate of occupancy, but sets forth constitutionally required strict limits on the time frame for accepting or denying an application. It also provides that if a license is not denied within the specified time frame, it is automatically granted (as required by the case law).

### **Sec. 18-82 License Issuance and Grounds for Denial**

This section sets out the procedure for granting a license, and the terms under which one may be denied. Council should note that conviction of various crimes is grounds for denial.

### **Sec. 18-83 Inspection and Maintenance of Records**

This section authorizes the City to inspect SOBs and requires that records pertaining to employees and ownership be maintained by the SOB.

### **Sec. 18-84 Expiration and Renewal of License**

This section provides that a SOB license is valid for one year.

### **Sec. 18-85 Suspension**

This section provides that SOB licenses may be suspended based on violations of the ordinance.

### **Sec. 18-86 Grounds for Revocation**

This section sets forth the circumstances under which a SOB license may be revoked. Council should note that very specific standards must be met (a constitutional requirement) in order to revoke a license.

### **Sec. 18-87 Denial, Suspension and Revocation Procedures**

This section sets forth the administrative procedure for revoking a SOB license.

**Sec. 18-88 Period of Suspension or Revocation**

This section sets forth the length of time a SOB license may be suspended or revoked.

**Sec. 18-89 Administrative Hearing and Appeals**

This section sets forth the procedural aspects of revoking or suspending a SOB license. Council should note that it provides that in the event a license is suspended or revoked, the licensee has 30 days to file a suit for injunctive relief in district court. If such a suit is filed, the City must grant a provisional license if the applicant was not licensed at the location in question (a constitutional requirement); however, it also sets forth circumstances under which a provisional license need not be granted.

**Sec. 18-90 Transfer of License**

This section sets forth the procedure for a transfer between applicants.

**Sec. 18-91 Exemption from Location Restrictions**

This provision allows an applicant to seek a waiver of the 1,000 foot locational restriction on SOBs. The Zoning Board of Adjustment will grant or deny such a request. This section is a constitutional requirement as it is illegal to "zone out" all SOBs. If, in the future, the City is so densely populated that no locations meet the 1,000 foot rule, the City will need a mechanism to vary from this locational restriction. Council should note that failure of the ZBA to act within specified time periods constitutes an automatic grant of the waiver request (a constitutional requirement).

**Sec. 18-92 Defenses/Exceptions**

This section sets forth the circumstances under which a person or entity is not subject to the provisions of this ordinance. First, it is not permissible to ban nudity in all public venues. The Supreme Court has previously held that such a ban is overbroad because it encompasses matters of serious artistic merit. Second, Council should note that in some instances it is an exception to prosecution (meaning that a person may not be charged in the first place), whereas in other instances a person has an affirmative defense (meaning that a person could be charged, but if they prove their affirmative defense, would not be liable).

**Sec. 18-100 Definitions**

This section sets forth additional definitions related to SOBs.

**Sec. 18-101 Cumulative**

This section establishes that the regulations created by this ordinance are in addition to any other regulatory authority available to the City.

**Sec. 18-102 Permit Required**

This section requires entertainers and employees to obtain permits to work in a SOB.

**Sec. 18-103 Issuance of Permits**

This section sets forth the procedure for obtaining an employee SOB permit. Council should note that it sets forth specific time frames for the issuance of said permit.

**Sec. 18-104 Term, Transfer, Amendment**

This section sets forth the term that a permit is valid and prohibits transfer between persons.

**Sec. 18-105 Display**

This section requires entertainers to display their permits.

**Sec. 18-106 Revocation**

This section sets forth the circumstances under which a permit may be revoked. Council should note that the permittee may seek judicial relief pending revocation.

**Sec. 18-107 Nudity and Semi-Nudity Prohibited in a Public Place**

This section prohibits nudity and semi-nudity in public places. This has the practical effect of banning totally nude adult cabarets in Euless, which is constitutionally permissible. It does not ban topless clubs; however, it will require dancers to wear pasties and g-strings, also constitutionally permissible. Council should note two important things – (1) as stated earlier, an exception must be made for nudity that has serious artistic merit; and (2) an exception is also made for breastfeeding.

**Sec. 18-110 Additional Regulations for Sexually Oriented Cabaret**

The ordinance prohibits minors from entering or working in a SOB. It also holds management criminally liable for knowingly allowing employees to be near patrons in a state of nudity or semi-nudity. It prohibits entertainers from touching patrons and when they are performing on stage, requires a six foot separation between entertainers and customers (i.e. it prohibits “lap dances”). It also prohibits enclosed areas of a club that are not visible from a manager’s station.

**Sec. 18-111 Additional Regulations for Escort Agencies**

This section requires escort agency employees to attend training offered by the City related to the requirements under this ordinance.

**Sec. 18-112 Additional Regulations for Nude Model Businesses**

This section sets forth additional regulations for nude modeling, such as prohibiting touching, and prohibiting sofas, beds, etc. where the modeling will take place. It requires a line-of-site manager's station and prohibits customers from becoming nude or semi-nude.

**Sec. 18-113 Additional Regulations for Sexually Oriented Theaters and Sexually Oriented Motion Picture Theaters**

This section applies the training requirement, among others, to these SOBs.

**Sec. 18-114 Regulations Pertaining to Exhibition of Sexually Explicit Films, Photographs, Pictures or Videos**

This section sets forth the requirements pertaining to the exhibition of adult material. It requires a manager's station, line-of-site, it prohibits more than one individual in a viewing booth at a time and prohibits viewing booths from having doors or coverings. It prohibits live entertainment, nudity and also prohibits openings or holes between viewing booths and creates minimum lighting standards.

**Sec. 18-115 Additional Regulations Pertaining to Sexually Oriented Bookstores, Sexually Oriented Novelty Stores and Sexually Oriented Video Stores**

This section applies the regulations set forth in Sec. 18-114 to adult bookstores, etc.

**Sec. 18-120 Hours of Operation**

This section prohibits 24 hour SOBs.

**Sec. 18-121 Prohibition Against Children in a Sexually Oriented Business**

This section generally prohibits persons under 18 from entering a SOB.

**Sec. 18-122 – (Deleted and incorporated into another section)**

**Sec. 18-123 Conspicuous Signage and Markings Required**

This section sets forth the interior sign requirements for SOBs.

**Sec. 18-130 Violation a Misdemeanor**

This section classifies certain violations as a Class C and others pertaining to licensing, permitting and inspections as a Class A, pursuant to the Texas Local Government Code requirement.

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**Sec. 18-131 Notice of Violation**

This section requires the City to provide notice of violations.

**Sec. 18-140 Sign Requirements**

This section sets forth in detail the exterior sign standards for SOBs.

**Sec. 18-150 Location Requirements**

This section links the SOB ordinance to the Zoning Ordinance 1,000 foot rule.

If you have any questions or concerns please call me.

Sincerely,



Bradford E. Bullock

BEB/cjh