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1 11, Article 2 regarding viewing booths, and the provisions of Chapter 11,
2 Article 6 regarding the distribution of obscene material.

3 (C) This Ordinance is promulgated pursuant to the city’s home rule
4 authority and Article I and Article IV § 8 of the City Charter.

5 (D) Any approvals granted under this ordinance do not authorize or
6 legalize any conduct, activity, or business that is illegal under city, state or
7 federal law.

8 Section 3. DEFINITIONS.

9 For the purpose of this Ordinance the following definitions shall apply
10 unless the context clearly indicates or requires a different meaning:

11 ADULT AMUSEMENT ESTABLISHMENT. An establishment such as an
12 auditorium, bar, cabaret, concert hall, nightclub, restaurant, theater, or other
13 commercial establishment that provides amusement or entertainment
14 featuring one or more of the following:

15 (1) A live performance or act distinguished or characterized by an
16 emphasis on the depiction, description, exposure, or representation of
17 specified anatomical areas or the conduct or simulation of specified sexual
18 activities; or

19 (2) Audio or video displays, computer displays, films, motion
20 pictures, slides or other visual representations or recordings characterized or
21 distinguished by an emphasis on the depiction, description, exposure or
22 representation of specified anatomical areas or the conduct or simulation of
23 specified sexual activities.

24 ADULT CABARET. A type of Adult Amusement Establishment that
25 regularly features live entertainment that is intended to provide sexual
26 stimulation or sexual gratification.

27 ADULT CABARET ENTERTAINER. An employee of a sexually oriented
28 business who engages in or performs adult cabaret entertainment.

29 ADULT CABARET ENTERTAINMENT. Live entertainment that is intended
30 to provide sexual stimulation or sexual gratification and is distinguished or
31 characterized by an emphasis on specified anatomical areas or specified
32 sexual activities.

33 APPLICANT.

1 (1) A person in whose name a license to operate a sexually oriented
2 business will be issued;

3 (2) Each individual who signs an application for a sexually oriented
4 business license;

5 (3) Each individual who is an officer of a sexually oriented business
6 for which a license application is made regardless of whether the individual's
7 name or signature appears on the application;

8 (4) Each individual who has a 20 percent or greater ownership
9 interest in a sexually oriented business for which a license application is made
10 regardless of whether the individual's name or signature appears on the
11 application; and

12 (5) Each individual who exercises substantial de facto control over
13 a sexually oriented business for which a license application is made
14 regardless of whether the individual's name or signature appears on the
15 application.

16 **CONVICTION.** A conviction, including a plea agreement, in a federal
17 court or a court of any state or foreign nation or political subdivision of a state
18 or foreign nation that has not been reversed, vacated, or pardoned.

19 "Conviction" includes disposition of charges against a person by probation or
20 deferred adjudication.

21 **DESIGNATED OPERATOR.** The person or persons identified in the
22 license application, or in any supplement or amendment to the license
23 application, as being a designated operator of the sexually oriented business.

24 **EMPLOYEE.** Any individual who:

25 (1) Is listed as a part-time, full-time, temporary, or permanent
26 employee on the payroll of an applicant, licensee, or sexually oriented
27 business; or

28 (2) Performs or provides entertainment on the sexually oriented
29 business premises for any form of compensation or consideration, including
30 persons working as contractors or independent contractors.

31 **LICENSEE.**

32 (1) A person in whose name a license to operate a sexually oriented
33 business has been issued;

- 1 (2) Each individual listed as an applicant on the application for a
2 license;
- 3 (3) Each individual who is an officer of a sexually oriented business
4 for which a license has been issued under this Ordinance, regardless of
5 whether the individual's name or signature appears on the license application;
- 6 (4) Each individual who has a 20 percent or greater ownership
7 interest in a sexually oriented business for which a license has been issued
8 under this Ordinance, regardless of whether the individual's name or signature
9 appears on the license application; and
- 10 (5) Each individual who exercises substantial de facto control over
11 a sexually oriented business for which a license has been issued under this
12 Ordinance, regardless of whether the individual's name or signature appears
13 on the license application.

14 **MAYOR.** Mayor of the City of Albuquerque or his or her authorized
15 designee.

16 **MINOR.** A person under the age of 18 years.

17 **OPERATES OR CAUSES TO BE OPERATED.** To cause to function or to
18 put or keep in operation. A person may be found to be operating or causing to
19 be operated a sexually oriented business whether or not that person is an
20 owner, part owner, or licensee of the business.

21 **OPERATOR.** Any person who has managerial control of the on-site,
22 day-to-day operations of a sexually oriented business, regardless of whether
23 that person is a designated operator of the sexually oriented business.

24 **PERSON.** An individual, proprietorship, partnership, corporation,
25 association, or other legal entity.

26 **SEXUALLY ORIENTED BUSINESS.** An Adult Amusement Establishment,
27 or other commercial enterprise the primary business of which is the offering
28 of a service intended to provide sexual stimulation or sexual gratification to
29 the customer through live performances.

30 **SPECIFIED ANATOMICAL AREAS.**

- 31 (1) Less than completely and opaquely covered human:
- 32 (a) Genitals, pubic region;
- 33 (b) Buttock or anus;

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1 (c) Female breast below a point immediately above the top
2 of the areola to and including the bottom of the breast; covering of on the the
3 nipple and areola of the breast shall not constitute such covering;

4 (2) Human male genitals in a discernibly turgid state, even if
5 completely and opaquely covered; and

6 (3) A covering or device that, when worn, gives the appearance of or
7 simulates the above listed specified anatomical areas.

8 **SPECIFIED SEXUAL ACTIVITIES.**

9 (1) Human genitals in a state of sexual stimulation or arousal;

10 (2) Actual or simulated sex acts of human masturbation, sexual
11 intercourse, sodomy, or similar acts; or

12 (3) Fondling or other erotic touching of human genitals, pubic region,
13 buttock, anus, or female breast.

14 **TRANSFER OF OWNERSHIP OR CONTROL of a sexually oriented**
15 **business.**

16 (1) The sale, lease, or sublease of the business;

17 (2) The transfer of securities that constitute a controlling interest in
18 the business, whether by sale, exchange, or similar means; or

19 (3) The establishment of a trust, gift, or other similar legal device that
20 transfers the ownership or control of the business, except for transfer by
21 bequest or other operation of law upon the death of the person possessing the
22 ownership or control.

23 **VIP ROOM.** Any separate area, room, booth, cubicle, or other portion of
24 the interior of an Adult Amusement Establishment (excluding a restroom and
25 excluding an area of which the entire interior is clearly and completely visible
26 from the exterior of the area) to which one or more customers are allowed
27 access or occupancy and other customers are excluded.

28 **Section 4. LICENSE AND DESIGNATED OPERATOR REQUIRED.**

29 (A) A person commits an offense if he operates a sexually oriented
30 business without a valid license issued by the City for the particular type of
31 business.

32 (B) An application for a license must be made on a form provided by the
33 Mayor. The application must be accompanied by a sketch or diagram showing

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1 the configuration of the premises, including a statement of total floor space
2 occupied by the business. The sketch or diagram need not be professionally
3 prepared.

4 (C) Only a person who is an officer of or who has an ownership interest
5 in a sexually oriented business may apply for a license for the business. Each
6 applicant must be qualified according to the provisions of this Ordinance.

7 (D) If a person who wishes to operate a sexually oriented business is an
8 individual, he must sign the application for a license as the applicant. If a
9 person who wishes to operate a sexually oriented business is other than an
10 individual, each individual who is an officer of the business or who has a 20
11 percent or greater ownership interest in the business must sign the
12 application for a license as an applicant. The application must be sworn to be
13 true and correct by each applicant.

14 (E) In addition to identifying those persons required to sign an
15 application under Subsection (D), the application must identify all parent and
16 related corporations or entities of any person who will own or operate the
17 sexually oriented business and include the names of the officers of each
18 parent or related corporation or entity.

19 (F) The application must also include the name, address, and telephone
20 number of one or more designated operators who will be present on the
21 premises of the sexually oriented business during all hours of operation. The
22 applicant or licensee shall maintain a current list of designated operators with
23 the Mayor. Before a person may serve as a designated operator of the
24 sexually oriented business, the person must be named in the license
25 application, or a supplement or amendment to the license application, and not
26 be disqualified to operate a sexually oriented business under this Ordinance.

27 (G) A licensee commits an offense if he fails to maintain at least one
28 designated operator present on the premises of the sexually oriented
29 business during all hours of operation.

30 **Section 5. ISSUANCE OF LICENSE.**

31 (A) The Mayor shall approve the issuance of a license within 30 days
32 after receipt of an application unless the Mayor determines:

33 (1) An applicant is a minor;

- 1 (2) An applicant or an applicant's spouse is overdue in payment to the
2 city of taxes, fees, fines, or penalties assessed against or imposed upon the
3 applicant or the applicant's spouse in relation to a sexually oriented business;
- 4 (3) An applicant has failed to provide information reasonably
5 necessary for issuance of the license or has falsely answered a question or
6 request for information on the application form;
- 7 (4) An applicant, an applicant's spouse, or a designated operator has
8 been convicted of a violation of a provision of this Ordinance within two years
9 immediately preceding the application;
- 10 (5) Any fee required by this Ordinance has not been paid;
- 11 (6) An applicant has been operating the proposed business as a
12 sexually oriented business without a valid license issued under this
13 Ordinance;
- 14 (7) Operation of the proposed sexually oriented business would
15 violate the city's zoning ordinances; or
- 16 (8) An applicant, an applicant's spouse, or a designated operator has
17 been convicted of any of the following New Mexico crimes or comparable
18 crimes in any other jurisdiction:
- 19 (a) Prostitution, § 30-9-2 NMSA 1974;
- 20 (b) Promoting Prostitution, § 30-9-4 NMSA 1974;
- 21 (c) Accepting Earnings of a Prostitute, § 30-9-4.1 NMSA 1974;
- 22 (d) Patronizing prostitutes, § 30-9-3 NMSA 1974;
- 23 (e) Sexual exploitation of children, § 30-6A-3 NMSA 1974;
- 24 (f) Sexual exploitation of children by prostitution, § 30-6A-4
25 NMSA 1974;
- 26 (g) Prostitution; loitering; promoting § 60-7A-17 NMSA 1974;
- 27 (h) Criminal sexual penetration; § 30-9-11 NMSA 1974;
- 28 (i) Criminal sexual contact; § 30-9-12 NMSA 1974;
- 29 (j) Criminal sexual contact of a minor; § 30-9-13 NMSA 1974;
- 30 (k) Criminal sexual communication with a child; § 30-37-3.3 NMSA
31 1974;
- 32 (l) Indecent exposure; § 30-9-14 NMSA 1974;
- 33 (m) Aggravated indecent exposure; § 30-9-14.3 NMSA 1974;

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1 (n) Retail display; § 30-37-2.1 NMSA 1974; or

2 (o) Incest; § 30-10-3 NMSA 1974.

3 (9) Subsection 8 shall only apply if:

4 (a) Less than two years has elapsed since the date of conviction or
5 the date of release from confinement imposed for the conviction, whichever is
6 the later date, if the conviction is for a misdemeanor offense;

7 (b) Less than five years has elapsed since the date of conviction or
8 the date of release from confinement for the conviction, whichever is the later
9 date, if the conviction is for a felony offense; or

10 (c) Less than five years has elapsed since the date of the last
11 conviction or the date of release from confinement for the last conviction,
12 whichever is the later date, if the convictions are of two or more misdemeanor
13 offenses or combination of misdemeanor offenses occurring within any 24-
14 month period.

15 (B) The Mayor is authorized to conduct such records background check
16 on any applicant as is permitted by law. The actual cost of any such
17 background check shall be charged to the applicant.

18 (C) The Mayor, upon approving issuance of a sexually oriented business
19 license, shall send to the applicant, by certified mail, return receipt requested,
20 written notice of that action and state where the applicant must pay the license
21 fee and obtain the license. The Mayor's approval of the issuance of a license
22 does not authorize the applicant to operate a sexually oriented business until
23 the applicant has paid all fees required by this Ordinance and obtained
24 possession of the license.

25 (D) The license, if granted, must state on its face the name of the person
26 or persons to whom it is granted, the expiration date, and the address of the
27 sexually oriented business. The license must be posted in a conspicuous
28 place at or near the entrance to the sexually oriented business so that it may
29 be easily read at any time.

30 Section 6. FEES.

31 There shall be an annual fee for a sexually oriented business license to
32 cover the cost of inspections and license approval. The fee shall be a uniform
33 amount for all sexually oriented businesses determined by the Mayor that is

1 based upon the annual cost to administer the program including inspections
2 and license approvals.

3 Section 7. INSPECTION.

4 An applicant, licensee, operator, or employee shall permit representatives
5 of City Departments, including, but not limited to, the Police Department, the
6 Fire Department, the Planning Department and the Environmental Health
7 Department, to inspect the premises of a sexually oriented business, for the
8 purpose of ensuring compliance with the law, at any time it is occupied or
9 open for business and at other reasonable times upon request.

10 Section 8. IDENTIFICATION RECORDS.

11 (A) A person commits an offense if he operates a sexually oriented
12 business without maintaining on the premises a current registration card or
13 file that clearly and completely identifies all employees of the sexually
14 oriented business as required by this section.

15 (B) The registration card or file must contain the following information for
16 each employee:

- 17 (1) Full legal name.
- 18 (2) All aliases or stage names.
- 19 (3) Date of birth.
- 20 (4) Race and gender.
- 21 (5) Hair color, eye color, height, and weight.
- 22 (6) Current residence address and telephone number, and, for
23 designated operators and entertainers, all residence addresses during the 12-
24 month period preceding commencement of an employment or contractual
25 relationship with the sexually oriented business.
- 26 (7) Legible copy of a valid driver's license or other government-issued
27 personal identification card containing the employee's photograph and date of
28 birth.
- 29 (8) Date of commencement of employment or contractual relationship
30 with the sexually oriented business.
- 31 (9) Original color photograph with a full face view that accurately
32 depicts the employee's appearance at the time the employee commenced an
33 employment or contractual relationship with the sexually oriented business.

1 (C) All records maintained on an employee in compliance with this
2 section must be retained at the sexually oriented business for at least 90 days
3 following the date of any voluntary or involuntary termination of the
4 employee's employment or contract with the sexually oriented business.

5 (D) A person who operates a sexually oriented business or the person's
6 agent or employee shall allow immediate access to these records by
7 representatives of the Mayor.

8 (E) To the extent allowed by law, the Mayor shall treat all registration
9 card information as confidential information; provided, however, nothing in
10 this Ordinance shall prohibit the use of such information for legitimate public
11 safety purposes and for enforcement of this Ordinance.

12 Section 9. EXPIRATION OF LICENSE.

13 Each license expires one year from the date of issuance. A license may be
14 renewed only by making application as provided in this Ordinance.
15 Application for renewal should be made at least 30 days before the expiration
16 date, and when made less than 30 days before the expiration date, the
17 expiration of the license will not be affected by the pendency of the
18 application.

19 Section 10. SUSPENSION.

20 The Mayor shall suspend a license for a period not to exceed 30 days if the
21 Mayor determines that a licensee, an operator, or an employee has violated or
22 is not in compliance with Sections 4(G), 8, 15, or 16 of this Ordinance;

23 Section 11. REVOCATION.

24 (A) The Mayor shall revoke a license if a cause of suspension in Section
25 10 occurs and the license has been suspended within the preceding 12
26 months.

27 (B) The Mayor shall revoke a license if the Mayor determines one or
28 more of the following has occurred:

29 (1) A licensee gave false or misleading information in the material
30 submitted to the Mayor during the application process;

31 (2) A licensee or an operator has knowingly allowed possession, use,
32 or sale of controlled substances on the premises;

1 (3) A licensee or an operator has knowingly allowed prostitution on
2 the premises;

3 (4) A licensee or an operator knowingly operated the sexually oriented
4 business during a period of time when the licensee's license was suspended;

5 (5) A licensee or designated operator has been convicted of an
6 offense listed in Section 5(A)(8) for which the time period required in Section
7 5(A)(9) has not elapsed.

8 (6) On two or more occasions within a 12- month period, a person or
9 persons committed an offense occurring in or on the sexually oriented
10 business premises of a crime listed in Section 5(A)(8) for which a conviction
11 has been obtained, and the person or persons were employees of the licensee
12 or the sexually oriented business at the time the offenses were committed.

13 (7) A licensee or an operator has knowingly allowed any act of sexual
14 intercourse, sodomy, oral copulation or masturbation to occur in or on the
15 sexually oriented business premises.

16 (8) A licensee or an operator has violated Section 17 of this Ordinance.

17 (C) The fact that a conviction is being appealed has no effect on the
18 revocation of the license.

19 (D) When the Mayor revokes a license, the revocation will continue for
20 one year, and the licensee, for one year after the date the revocation becomes
21 effective, shall not be issued a sexually oriented business license for the same
22 location for which the license was revoked. If, subsequent to revocation, the
23 Mayor finds that the basis for the revocation has been corrected or abated,
24 the applicant may apply for and be granted a license if at least 90 days have
25 elapsed since the date the revocation became effective. If the license was
26 revoked under Subsection (B)(5), an applicant may not apply for or be granted
27 another license until the appropriate number of years required under Section
28 5(A)(9) has elapsed.

29 Section 12. DENIAL, SUSPENSION, REVOCATION, OR DENIAL OF
30 RENEWAL OF A LICENSE FOR CRIMINAL CONVICTIONS.

31 (A) In determining whether a sexually oriented business license should
32 be denied, suspended, revoked, or denied for renewal based on criminal
33 convictions of an applicant or licensee of a sexually oriented business, or on

1 convictions of an operator or employee of the applicant, the licensee, or the
2 sexually oriented business, all convictions for offenses occurring within a
3 designated time period will be counted, regardless of whether the offenses
4 occurred during the current license period, a prior license period, or an
5 unlicensed period.

6 (B) Notwithstanding Subsection (A), a conviction for an offense
7 committed during a prior license period or an unlicensed period will not be
8 counted against a current applicant or licensee of a sexually oriented
9 business if no person who is deemed a current applicant or licensee was an
10 applicant, licensee, owner, or operator of the sexually oriented business
11 during the prior license period or unlicensed period in which the offense was
12 committed.

13 Section 13. NOTICE OF DENIAL OF ISSUANCE OR RENEWAL OF
14 LICENSE OR SUSPENSION OR REVOCATION OF LICENSE; SURRENDER OF
15 LICENSE.

16 (A) If the Mayor denies the issuance or renewal of a sexually oriented
17 business license or suspends or revokes a sexually oriented business license,
18 the Mayor shall deliver to the applicant or licensee, either by hand delivery or
19 by certified mail, return receipt requested, written notice of the action, the
20 basis of the action, and a notice of the right to an appeal.

21 (B) If the Mayor suspends or revokes a license or denies renewal of a
22 license that was valid on the date the application for renewal was submitted,
23 the Mayor may not enforce such action before the 11th day after the date the
24 written notice required by Subsection (A) is delivered to the applicant or
25 licensee.

26 (C) After suspension or revocation of a license or denial of renewal of a
27 license that was valid on the date the application for renewal was submitted,
28 the applicant or licensee shall discontinue operating the sexually oriented
29 business and surrender the license to the Mayor by 11:59 p.m. of the 10th day
30 after the date:

31 (1) Notice required by Subsection (A) is delivered to the applicant or
32 licensee, if no appeal is filed; or

1 (2) A final appellate decision is issued by a hearing officer upholding
2 the action of the Mayor.

3 (D) For purposes of this Ordinance, written notice is deemed to be
4 delivered:

5 (1) On the date the notice is hand delivered to the applicant or
6 licensee; or

7 (2) Three days after the date the notice is placed in the United States
8 mail with proper postage and properly addressed to the applicant or licensee
9 at the address provided for the applicant or licensee in the most recent license
10 application.

11 Section 14. APPEAL.

12 (A) Upon delivery of written notice of the denial, suspension, or
13 revocation of a sexually oriented business license the applicant or licensee
14 whose application for a license or license renewal has been denied or whose
15 license has been suspended or revoked has the right to appeal.

16 (B) An appeal shall be heard by a hearing officer under the authority of
17 the City's Independent Office of Hearings. The burden of proof shall be on the
18 City to show that denial, suspension, or revocation is proper.

19 (C) The filing of an appeal under this section stays the action of the
20 Mayor in suspending or revoking a license, or in denying renewal of a license
21 that was valid on the date the application for renewal was submitted, until a
22 final decision is made by the hearing officer.

23 (D) The decision of the hearing officer is final and may be appealed to a
24 court of competent jurisdiction.

25 Section 15. POSTING REQUIREMENT.

26 (A) Each sexually oriented business shall post in every bathroom and
27 dressing room of the business a notice no smaller than 8-1/2 inches by 11
28 inches. Such notices will be available from the City and provided at the time
29 of licensing and license renewal, and shall state:

30 'If you or someone you know is being forced to engage in any activity and
31 cannot leave – whether it is commercial sex, housework, farm work, or any
32 other activity – call the National Human Trafficking Resource Center Hotline at
33 1-888-373-7888 to access help and services.

1 Victims of human trafficking are protected under the laws of the United
2 States and New Mexico. The hotline is available 24 Hours a day, 7 days a
3 week; toll-free; operated by a non-profit, non-governmental organization;
4 anonymous and confidential; accessible in 170 languages, and able to provide
5 help, referral to services, training, and general information.’

6 (B) Such notice shall be printed in English and Spanish. Additional
7 languages may be included as determined by the City.

8 (C) It is the responsibility of the operator of the sexually oriented
9 business to have the notice properly posted at all times. If a notice is
10 damaged or removed, the operator shall cause the notice to be replaced
11 immediately.

12 Section 16. **ADDITIONAL REGULATIONS FOR ADULT CABARET.**

13 (A) A licensee or an operator of an adult cabaret commits an offense if he
14 employs, contracts with, or otherwise allows a person to act as an adult
15 cabaret entertainer if the person has been convicted of an offense listed in
16 Section 5(A)(8) for which the time period required in Section 5(A)(9) has not
17 elapsed.

18 (B) An adult cabaret may not contain any VIP rooms, except that any VIP
19 room contained in a lawfully operating adult cabaret on the date this
20 ordinance is adopted may continue in existence for one year, provided that no
21 adult cabaret entertainment occurs in the VIP room.

22 (C) Except for a restroom or an area of which the entire interior is clearly
23 and completely visible from the exterior of the area, no area of an adult
24 cabaret that is accessible to a customer may be separated from any other
25 customer-accessible area by a door, wall, curtain, drape, partition, or room
26 divider of any kind. Nothing in this subsection precludes the installation or
27 maintenance of any wall or column that is essential to the structural integrity
28 of the building. Any adult cabaret lawfully operating on the date this
29 Ordinance is adopted must comply with the requirements of this subsection
30 not later than one year from the date this Ordinance is adopted.

31 (D) A licensee, an operator, or an employee of an adult cabaret commits
32 an offense if he permits any customer access to an area of the premises:

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1 (1) Not visible from the manager's station or not visible by a walk
2 through of the premises without entering a closed area, excluding a restroom;
3 or

4 (2) Not regularly open to all customers of the business.

5 (E) Adult cabaret entertainment must occur only in an open and visible
6 area, and in the presence of, and be visually observable by, an employee who
7 is not an adult cabaret entertainer. A licensee or operator commits an offense
8 if he knowingly allows adult cabaret entertainment to be performed in violation
9 of this subsection.

10 (F) The purpose of Subsections (B), (C), (D), and (E) of this section is to
11 reduce the opportunity for unlawful activity such as indecent exposure,
12 solicitation for prostitution, and prostitution that occurs in VIP rooms and
13 other areas of adult cabarets that are not open to the view of management
14 personnel, law enforcement officers, and customers. By prohibiting VIP rooms
15 and requiring adult entertainment to be performed in more open and visible
16 surroundings, unlawful activity will be deterred because it will be more readily
17 observable by management personnel, law enforcement officers, and
18 customers.

19 Section 17. PROHIBITION AGAINST MINORS IN SEXUALLY ORIENTED
20 BUSINESSES.

21 (A) A licensee or an operator commits an offense if he knowingly:

22 (1) Allows a minor to enter the interior premises of a sexually oriented
23 business;

24 (2) Employs, contracts with, or otherwise engages or allows a minor to
25 perform adult cabaret entertainment; or

26 (3) Employs a minor in a sexually oriented business.

27 (B) Knowledge on the part of the licensee or operator is presumed under
28 paragraph (2) or (3) of Subsection (A) if identification records were not kept in
29 accordance with the requirements of this Ordinance, and properly kept
30 records would have informed the licensee or operator of the minor's age.

31 (C) An employee of a sexually oriented business commits an offense if
32 the employee knowingly:

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1 (1) Allows a minor to enter the interior premises of a sexually oriented
2 business;

3 (2) Employs, contracts with, or otherwise engages or allows a minor to
4 perform adult cabaret entertainment; or

5 (3) Employs a minor in a sexually oriented business.

6 Section 18. ENFORCEMENT.

7 (A) Whenever a person does an act that is prohibited, fails to perform an
8 act that is required, or commits an act that is made an offense by any
9 provision of this Ordinance, the violation is punishable as provided by § 1-1-99
10 ROA 1994.

11 (B) The remedies provided for in this Ordinance are not exclusive and
12 the City may employ any other remedy, including but not limited to
13 injunction.”

14 SECTION 2. SEVERABILITY CLAUSE. If any section, paragraph, sentence,
15 clause, word or phrase of this Ordinance is for any reason held to be invalid or
16 unenforceable by any court of competent jurisdiction, such decision shall not
17 affect the validity of the remaining provisions of this Ordinance. The Council
18 hereby declares that it would have passed this Ordinance and each section,
19 paragraph, sentence, clause, word or phrase thereof irrespective of any
20 provision being declared unconstitutional or otherwise invalid.

21 SECTION 3. COMPILATION. This Ordinance shall be incorporated in and
22 made part of the Revised Ordinances of Albuquerque, New Mexico, 1994.

23 SECTION 4. EFFECTIVE DATE. This Ordinance shall take effect five days
24 after publication by title and general summary.

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City of Albuquerque

Legal Department

City Attorney David Tourek

INTEROFFICE MEMORANDUM

May 23, 2012

TO: Laura Mason, Director of Counsel Services

FR: David Tourek, City Attorney
Gregory Wheeler, Assistant City Attorney

RE: Regulation of Sexually Oriented Business

QUESTION PRESENTED

If the proposed Sexually Oriented Business Ordinance (“SOBO”) is enacted and the opponents of SOBO file a lawsuit alleging that the ordinance violates free expression, will a court enjoin SOBO?

SHORT ANSWER

SOBO is likely to survive a legal challenge.

I.

INTRODUCTION

A proposed ordinance titled the Sexually Oriented Business Ordinance (“SOBO”) requires a person who operates a sexually oriented business, referred to by SOBO as an Adult Amusement Establishment (“AAE”), to obtain a license from the City. To obtain the license, the applicant must identify the applicant’s interest in the business, all persons interested in the business, and the interests of the applicant and all other interested persons in other corporations and business entities. Persons who will manage the business must be designated as operators who will be on site during business hours.

Within thirty (30) days from the receipt of an application for a license, the Mayor or his designee (“Mayor”) is required to make a decision with regard to whether the application will be approved or denied. The applicant can obtain a hearing to review the denial of an application. The applicant must satisfy eight requirements to qualify. The applicant does not qualify if the

applicant, an applicant's spouse, or the designated operator has been convicted of any of the fifteen sexually related crimes listed in the ordinance.

Record keeping with regard to performers is another component of SOBO. The AAE is required to keep registration cards for each employee or independent contractor (collectively "Employee"). The registration card requirement has been utilized by other cities to deter the unscrupulous AAE from operating as a hub for human trafficking and exploitation. While SOBO does not expressly state that one of the goals of the legislation is to deter human trafficking, the opponents have indicated they will argue in court that SOBO is, in fact, designed to address human trafficking and that there is no evidence of human trafficking by AAEs in Albuquerque.

SOBO expressly states that the intent of City Council is to "promote the health, safety, and general welfare of the citizens of the city and to minimize the deleterious secondary effects of such sexually oriented businesses both inside such businesses and outside in the surrounding communities." The industry attorneys and the American Civil Liberties Union have threatened to sue to enjoin SOBO if enacted. The challengers will allege, among other things, that SOBO unconstitutionally chills free expression.

II.

STATISTICS AND STUDIES

Executive Summary

- City Council is not required to decide which side of the debate has the strongest statistical support.
- City Council satisfies the legal requirement if its policy choice is informed by studies and statistics information that supports the reasonable belief that there is an important or substantial governmental interest in protecting the community from crime or adverse secondary effects that may be associated with the industry.

To survive constitutional scrutiny, SOBO must further an important or substantial governmental interest unrelated to the suppression of expression. *Heideman v. South Salt Lake City* 348 F.3d 1182, 1197-1198 (10th Cir. 2003). Municipalities across the country typically satisfy this requirement by relying on statistics and studies that show increases in crime and dilatory secondary effects associated with the AAE industry. *Id.* The industry will argue that the local AAEs are well managed and do not cause the increases in crime and dilatory secondary effects experienced by other cities. There are well managed and poorly managed AAEs in every community. A legislative body can take action in response to the poorly managed AAE or the mere possibility that a poorly managed AAE may come to the community in the future.

In a lawsuit, both sides will argue that the studies support their argument regarding whether there is or is not a causal connection between AAEs and crime or adverse secondary

effects in the community. City Council is not required to decide which side of the debate has the strongest statistical support. Instead, City Council satisfies the legal requirement if its policy choice is informed by information that supports the reasonable belief that there is an important or substantial governmental interest in protecting the community from crime or adverse secondary effects that may be associated with the industry. The following information supports the enactment of SOBO in that regard.

A. Local

The Albuquerque Police Department had provided an analysis of the local crimes associated with AAEs from 2009 to the present. The analysis titled 2009-2011 [updated to May 2012] Police Report and Calls for Service Totals and Types for Sex-Oriented Businesses (SOB) Locations and Eighth-Mile (660 Feet) Distance Around Each Location (“Study is in the legislative record. The Study shows a nexus between crime and AAEs. While there is a high volume of police service calls to AAEs in high crime areas, as expected, there are also numerous police service calls to AAEs in relatively low crime areas.

B. National

City Council can rely on studies from other jurisdictions to ascertain the need for local legislation pertaining to public safety or quality of life, such as SOBO. *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 51-52 (1986); *Heideman v. South Salt Lake City* 348 F.3d 1182, 1197-1198 (10th Cir. 2003)(dancers challenge to ordinance banning nudity within sexually oriented businesses unsuccessful). Moreover, the City Council can take action before the crime and secondary effects experienced elsewhere become a comparable local problem.

In *Renton*, the Supreme Court held that “[t]he First Amendment does not require a city, before enacting such an ordinance (location of adult theatres), to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses.” 475 U.S. at 51–52. “Accordingly, it is common in these cases for cities to cite and rely on seemingly pre-packaged studies, as well as the findings of courts in other cases.” *Heideman v. South Salt Lake City* 348 F.3d 1182, 1197 -1198 (10th Cir. 2003).

Pursuant to *Heideman*, we provide the following studies and court findings that support the constitutionality of SOBO:

(1) “**Fourteen studies** from around the United States have documented a strong connection between AAEs and **increased levels of crime** in an area [emphasis added]. Arrington, Barry K., Local Regulation of Sexually Oriented Businesses, 22 Colo. Law. 537, 537 (1993).

(2) Studies have shown that there are other adverse effects of AAEs including the **reduction in the value of properties** near the businesses and unhealthy sexual activity that may pose a serious health risk. *Id.* at 538.

(3) A study by the **Planning Department in the City of New York** incorporated studies from other metropolitan areas. Berger, James E., Zoning Adult Establishments in New York: A Defense of the Adult-Use Zoning Text Amendments of 1995. 24 Fordham Urb. L.J. 105, 110 (1996). The studies in these jurisdictions found the following:

(a) Los Angeles: Areas with concentrations of adult entertainment uses have **higher rates of certain crimes**. Concentrations of adult entertainment uses have an adverse impact on the value of nearby commercial and residential properties.

(b) Indianapolis: Major crimes occurred in areas with at least one adult entertainment use at a **rate significantly higher than in control areas** and the city as a whole. Adult-use establishments located in middle-income residential or commercial areas have an adverse impact on property values.

(c) Whittier: Commercial and **residential areas adjacent to adult uses had higher turnover rates**. A study area containing adult entertainment uses had much higher increases in crime than the city as a whole. Adult uses are associated with **excessive noise and intoxication**.

(d) Islip: Concentrations of adult entertainment uses give rise to **‘dead zones’ avoided by shoppers and pedestrians**.

(e) Austin and Phoenix: A **direct positive correlation** existed between the number of adult entertainment establishments and the **rate of sex-related crime**.

(f) Minnesota: Areas with concentrations of adult entertainment uses showed a statistically significant positive relationship between adult entertainment uses, crime, and **neighborhood blight**.

(4) The **Employees are highly susceptible to intimidation** by AAEs and will not cooperate with law enforcement even where their own safety is at risk. Wilmet, Holly J., Naked Feminism: The Unionization of the Adult Entertainment Industry, American University Journal of Gender, Social Policy and the Law 465, 493 (1999).

(5) Many AAEs attempt to disavow any association with or responsibility for the performers by **claiming they are independent contractors** rather than employees. “Courts have astutely observed that it is a common practice within the adult entertainment industry for a dancer to sign a boilerplate contract, wherein she agrees to define her relationship to the club as one of an independent contractor, tenant, or lessee. However, because such contracts are usually the result of **intimidation or an ultimatum**, the courts have declared that they may be voided after an examination of the employment circumstances.” *Id.*

(6) In 2000, the United States Congress enacted the **Trafficking Victims Protection Act** “as the result of a growing national awareness of the global epidemic of international trafficking in human beings, . . . which is second only to drug trafficking in terms of revenue.” Cianciarulo, Marisa Silenzi, The Trafficking and Exploitation Victims Assistance Program: A Proposed Early

Response Plan for Victims of International Human Trafficking in the United States. 38 N.M. L. Rev. 373, 374 -375 (2008).

(7) The Department of Health and Human Services estimates that 14,500-17,500 individuals per year are brought into the United States and **forced, defrauded or coerced into providing sexual and labor services**. *Id.*

(8) Many victims are recruited to come to the United States under the false pretense that they will work in non-sex industry jobs and then told they **have to work in strip clubs to pay off fraudulent “debts” to the smugglers**. *Id.* at 382.

(9) Human trafficking cases are among the most **difficult cases to study and prosecute** because the corrupt trafficking organization operates internationally and the victims recant, leave the country, or are otherwise unavailable to testify. Loftus, Britta S., Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims. 43 Colum. Hum. Rts. L. Rev. 143, 150 (2011) (“In contrast to that overwhelming number of believed victims, only 49,105 victims have been identified, and only 4,166 perpetrators were prosecuted in 2009.”)

(10) The University of Michigan Law School has created a data base pertaining to human trafficking which can be searched by the type of sex industry that was associated with a particular case. www.law.umich.edu/clinicalHuTrafficCases/Pages/searchdatabase.aspx. A summary of the most egregious strip club/human trafficking cases follows:

(11) In *State v. Russell*, 2010 WL 786207, 1 (Ct .App. Iowa 2010), the defendant gave **two runaway girls ages fifteen and sixteen the registration cards of women in their twenties** and forced them to work in strip clubs.

(12) In *United States v. Aleksandr Maksimenko et al.* , No. 05-80187 (D.C. Mich. 2005) defendants plead guilty to forcing Eastern European women to work as exotic dancers in Detroit area strip clubs. Once in the country, defendants controlled the victims by threats of physical violence, **confiscating their passports and other forms of identification**, confining victims to their apartments when they were not working, and threatening to turn them over to immigration authorities.

(13) In *United States v. Corey Davis*, 2008 U.S. Dist. LEXIS 99802 (D.C. Conn. 2008), defendant plead guilty to forcing **girls as young as twelve** to work as strippers, dancers, and prostitutes for up to twelve hours a day.

(14) In *State of Texas v. Stephen Lynn Buggs*, No. F-06-86343-UT (Dallas County D.C. 2008), defendant was convicted for **kidnapping and forcing a fourteen year old** to work in strip clubs.

(15) In *United States v. Sardar Gasanov*, No. EP-01-CR-1423-2-DB (W.D. D.C. Tex. 2002), brought Uzbekistani women to the the United States with promises they would earn large sums as “models.” Once here, the defendants confiscated all of the women’s true identification,

provided them with false identification, and forced them to live in squalor. **Defendants made over \$500,000** from the illegal forced sexual activities including stripping.

(16) In *United States v. Elizabeth P. Castaneda*, No. CR-97-00038-01 (D.C. Northern Mariana Islands 2002), appellate opinion vacated at 239 F.3d 978 (2003), women from the Philippines were brought to the United States to work as waitresses and then **forced to work in a strip club and accompany men into so-called “VIP rooms”** where the women were groped and otherwise exploited.

III.

LEGAL ANALYSIS

A. Introduction

No New Mexico appellate court has ruled on the question presented. New Mexico courts will probably follow the lead of other states and the federal courts, which have found that laws similar to SOBO survive constitutional scrutiny. Freedom of expression is protected by the United States Constitution and the New Mexico Constitution. The respective provisions are probably not dissimilar enough to change the outcome. However, a New Mexico Court will interpret the New Mexico Constitution more liberally than the federal counterpart with regard to freedom of expression. See generally, *City of Farmington v. Fawcett*, 114 N.M. 537, 843 P.2d 839 (Ct.App.1992). Under *Fawcett*, a New Mexico Court has the option of expanding precedent in favor of individual rights. This rule is a factor in the analysis but does not change our conclusion.

The opponents of SOBO will argue that (1) SOBO is an unconstitutional prior restraint of a constitutionally protected form of expression, (2) SOBO is pretextual because SOBO is not aimed at public safety and is, instead, designed to appease the moral outrage of some members of the community regarding the content of the expressive activity that takes place at an AAE, and (3) SOBO violates due process.¹

B. The Intermediate Scrutiny Test

A court will apply the intermediate scrutiny test to the question of whether SOBO results in an unconstitutional prior restraint. *Heideman v. South Salt Lake City* 348 F.3d 1182 (10th Cir. 2003); *Abilene Retail No. 30, Inc. v. Board of Com'rs of Dickinson County, Kan.*, 492 F.3d 1164, 1170 (10th Cir. 2007); *State v. Druktenis*, 2004-NMCA-032, ¶ 97, 135 N.M. 223, 252, 86 P.3d 1050, 1079. Under intermediate scrutiny, a restriction on expression must: (1) be within the constitutional power of government to adopt; (2) further an important or substantial governmental interest which (3) is unrelated to the suppression of expression, and (4) be no greater restriction on First Amendment freedom than is essential to furtherance of the government's purpose. *Heideman* at 1197.

¹ The opponents may also bring a variety of claims that are either beyond the scope of this analysis or not ripe until SOBO is enforced against a particular AAE. ACLU generally alleges that the laws it disfavors are vague and overbroad.

1. SOBO is Within the Power of City Council

A municipality can regulate nude dancing under its police power. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000). There is no doubt that the Albuquerque City Council has the power to enact SOBO.

2. SOBO Furthers an Important or Substantial Governmental Interest

The second factor is whether SOBO furthers an important or substantial governmental interest. *Heidman*, like several courts, addresses the second factor in a manner that creates an ambiguity in the law on point:

To survive intermediate scrutiny, the government must be able to demonstrate that the challenged speech restriction serves a “substantial governmental interest.” *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673. The burden of proof is on the government to **“demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”** *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).FN8 On the other hand, the Court has repeatedly emphasized that “municipalities must be given a ‘reasonable opportunity to experiment with solutions’ to address the secondary effects of protected speech.” *Alameda Books*, 535 U.S. at 439, 122 S.Ct. 1728, quoting *Renton*, 475 U.S. at 52, 106 S.Ct. 925, quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality op.) (internal quotation marks omitted). **The standards for the quantity and nature of the empirical evidence needed to uphold a city ordinance based on the negative secondary effects of sexually oriented speech in general, or nude dancing in particular, are continuing to evolve.** [emphasis added]

....

Accordingly, it is common in these cases for cities to cite and rely on seemingly pre-packaged studies, as well as the findings of courts in other cases.

Heideman v. South Salt Lake City, 348 F.3d 1182, 1197 (2003).

On one hand, the *Heideman* Court seems to hold that there has to be an actual local harm that the ordinance will “alleviate” in a direct and material way. On the other hand, *Heideman* seems to hold that a city can look at studies done elsewhere and take action to prevent the harm. We can expect the opposition to attempt to exploit the ambiguity by arguing that the City cannot

prove SOBO is a fair reaction to local crime, secondary effects and human trafficking. We will counter by arguing that the opposition has to prove that SOBO does not meet any of its stated purposes. Our success depends upon whether a trial judge concludes that the City can legislate proactively with regard to harms it cannot prove. Human trafficking is difficult to study and prove. Loftus, Britta S., Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims. 43 Colum. Hum. Rts. L. Rev. 143, 150 (2011). Nevertheless, we conclude that the City has a better chance of success than failure.

3. SOBO is Unrelated to the Suppression of Expression

The third factor is that SOBO has to be unrelated to the suppression of expression. SOBO satisfies this part of the test for two reasons. First, the statistics and studies cited in this Memorandum, and which may be relied upon by the City Council, provide the predicate to show SOBO is aimed at legitimate public policy goals wholly unrelated to expression. Second, the City is not suppressing expression because there are several AAEs in the City. If the City suspended or revoked one AAE's license, there are several remaining locations for the expressive activity. An ordinance will generally survive if it "leaves open ample alternative channels of communication." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1131 (10th Cir. 2012) (Albuquerque cannot ban sex offenders from all of its libraries at all times because such a ban does not leave open alternative channels of communication.) Therefore, even if we assumed, *arguendo*, that SOBO impacted expression, which it does not, expression is not suppressed by the government where there is an "alternative source of communication." The fact that SOBO does not suppress all channels of the expressive activity also satisfies the fourth part of the test which is that SOBO has to have no greater restriction on First Amendment freedom than is essential.

C. Due Process

1. Procedural Due Process

There is constitutional right to due process, which requires SOBO to provide, (1) notice of the conduct the law prohibits and (2) an opportunity to be heard on the issue of whether the law was fairly applied. *American Civil Liberties Union of New Mexico v. City of Albuquerque*, 128 N.M. 315, 323, 992 P.2d 866, 874 (1999)(curfew ordinance). The opponents of SOBO might argue that SOBO does not give fair notice of what conduct constitutes a violation of its provisions or provide an adequate opportunity to challenge allegations of violations. We conclude SOBO provides due process because its provisions are easily understood by a reasonable person and every determination by a public official is subject to review by a City hearing officer and the court system.

SOBO is similar to ordinances elsewhere that have survived these claims. In *FW/PBS, Inc. v. City of Dallas* 493 U.S. 215 (1990), the United States Supreme Court held that a City of Dallas ordinance was inadequate because the ordinance did not contain a specific time period within which a public official was required to deny an application for a license. Under SOBO, within thirty (30) days from the receipt of an application for a license, the Mayor or his designee

is required to make a decision with regard to whether the application will be approved or denied. SOBO satisfies *FW/PBS, Inc. v. City of Dallas*.

In *City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 781, (2004) the Court added a requirement that an AAE license scheme must provide speedy review by the district court of the decision of an administrative tribunal regarding the denial or suspension of an AAE license. Under New Mexico law, the AAE can seek review by the district court under Rule 75 of the rules of civil procedure in thirty days. SOBO meets the *Littleton* requirement of speedy review by a district court.

2. Substantive Due Process

SOBO prohibits issuance or renewal of a permit where the applicant has been convicted of certain crimes of a sexual nature. The challengers might argue that this prohibition violates their substantive due process rights because they have not been given a hearing to determine if they are currently dangerous. *State v. Druktenis*, 2004-NMCA-032, ¶ 58, 135 N.M. 223, 241, 86 P.3d 1050, 1068. The substantive due process claim is very unlikely to succeed. A criminal conviction is a constitutionally permissible basis for restricting the rights of a convicted person in comparison to the rights of those who are conviction free. *Id.*

Additionally, where an applicant for a license or renewal of a license “has been convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction directly relates to the particular employment, trade, business or profession,” NMSA 1978, § 28-2-4(A)(1) (1997), a governmental entity may deny the application or refuse to renew the license. Therefore, our case law and statutes probably extinguish a substantive due process claim.

IV.

CONCLUSION

SOBO is likely to survive a legal challenge. City Council satisfies the legal requirement if its policy choice is informed by studies that support the reasonable belief that there is an important or substantial governmental interest in protecting the community from crime or adverse secondary effects that may be associated with the industry. The studies in the record provide the basis for the belief that SOBO is necessary.

SOBO passes the intermediate scrutiny test. The City responds to an application for an AAE license in a timely manner. An aggrieved licensee or would be licensee receives a fair hearing before an administrative tribunal and can appeal that ruling to the district court. A well managed AAE already maintains most if not all of the records required by SOBO and is not actually burdened by the proposed ordinance. New legislative solutions are sometimes challenged by businesses who believe, and often rightfully so, that poorly managed businesses in an industry are increasing the burden on legitimate businesses in difficult economic times. We believe a court will receive SOBO as a rational limited public safety response to existing and threatened societal problems. SOBO will survive if challenged in court.