



Legislation Text

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CITY of ALBUQUERQUE
TWENTIETH COUNCIL

COUNCIL BILL NO. F/S O-12-16 ENACTMENT NO. _____

SPONSORED BY: DAN LEWIS, ISAAC BENTON, DEBBIE O'MALLEY

ORDINANCE

F/S Regulating The Operation Of Sexually Oriented Businesses (Lewis, Benton, O'Malley)
REGULATING THE OPERATION OF SEXUALLY ORIENTED BUSINESSES.

BE IT ORDAINED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF
ALBUQUERQUE:

SECTION 1. The "Sexually Oriented Business Ordinance" is hereby adopted to read as follows:

"Section 1. SHORT TITLE. This Ordinance shall be known and may be cited as the 'Sexually Oriented Business Ordinance.'

Section 2. PURPOSE AND INTENT.

(A) It is the purpose of this Ordinance to regulate the operation of sexually oriented businesses that provide live entertainment in order 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 provisions of this Ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative performances, including sexually oriented performances. Similarly, it is neither the intent nor effect of this Ordinance to restrict or deny access by adults to sexually oriented performances protected by the First Amendment, or to deny access by exhibitors of sexually oriented entertainment to their intended market.

(B) This Ordinance is in addition to other provisions in the Revised Ordinances of the City

of Albuquerque that deal with related but separate matters; specifically, the provisions of the Zoning Code regarding zoning regulations for Adult Amusement Establishments, the provisions of Chapter 11, Article 2 regarding viewing booths, and the provisions of Chapter 11, Article 6 regarding the distribution of obscene material.

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

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

Section 3. DEFINITIONS.

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

ADULT AMUSEMENT ESTABLISHMENT. For the purposes of this Ordinance, an establishment such as an auditorium, bar, cabaret, concert hall, nightclub, restaurant, theater, or other commercial establishment that provides amusement or entertainment featuring one or more of the following:

A live performance or act distinguished or characterized by an emphasis on the depiction, description, exposure, or representation of specified anatomical areas or the conduct or simulation of specified sexual activities. **ADULT CABARET.** A type of Adult Amusement Establishment that regularly features live entertainment that is intended to provide sexual stimulation or sexual gratification.

ADULT CABARET ENTERTAINER. An employee of a sexually oriented business who engages in or performs adult cabaret entertainment, or an independent contractor who engages in or performs adult cabaret entertainment.

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

APPLICANT.

- (1) A person in whose name a license to operate a sexually oriented business will be issued;
- (2) Each individual who signs an application for a sexually oriented business license;
- (3) Each individual who is an officer of a sexually oriented business for which a license application is made regardless of whether the individual's name or signature appears on

the application;

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

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

CONVICTION. A conviction, including a plea agreement, in a federal court or a court of any state or foreign nation or political subdivision of a state or foreign nation that has not been reversed, vacated, or pardoned. "Conviction" includes disposition of charges against a person by probation or deferred adjudication.

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

EMPLOYEE. Any individual who:

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

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

LICENSEE.

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

(2) Each individual listed as an applicant on the application for a license;

(3) Each individual who is an officer of a sexually oriented business for which a license has been issued under this Ordinance, regardless of whether the individual's name or signature appears on the license application;

(4) Each individual who has a 20 percent or greater ownership interest in a sexually oriented business for which a license has been issued under this Ordinance, regardless of whether the individual's name or signature appears on the license application; and

(5) Each individual who exercises substantial de facto control over a sexually oriented business for which a license has been issued under this Ordinance, regardless of whether the

individual's name or signature appears on the license application.

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

MINOR. A person under the age of 18 years.

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

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

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

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

SPECIFIED ANATOMICAL AREAS.

(1) Less than completely and opaquely covered human:

(a) Genitals, pubic region;

(b) Buttock or anus;

(c) Female breast below a point immediately above the top of the areola to

and including the bottom of the breast; covering of only the nipple and areola of the breast shall not constitute such covering;

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

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

SPECIFIED SEXUAL ACTIVITIES.

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

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

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

TRANSFER OF OWNERSHIP OR CONTROL of a sexually oriented business.

- (1) The sale, lease, or sublease of the business;
- (2) The transfer of securities that constitute a controlling interest in the business, whether by sale, exchange, or similar means; or
- (3) The establishment of a trust, gift, or other similar legal device that transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

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

Section 4. LICENSE AND DESIGNATED OPERATOR REQUIRED.

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

(B) An application for a license must be made on a form provided by the Mayor. The application must be accompanied by a sketch or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared, but must be sufficient to accurately convey the layout and design of the premises and business. Before the requested license can be granted, the Mayor will perform an initial inspection of the premises and business to confirm consistency with the provided sketch or diagram.

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

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

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

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

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

Section 5. ISSUANCE OF LICENSE.

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

- (1) An applicant is a minor;
- (2) An applicant or an applicant's spouse is overdue in payment to the city of taxes, fees, fines, or penalties assessed against or imposed upon the applicant or the applicant's spouse in relation to a sexually oriented business;
- (3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form;
- (4) An applicant, an applicant's spouse, or a designated operator has been convicted of a violation of a provision of this Ordinance within two years immediately preceding the application;
- (5) Any fee required by this Ordinance has not been paid;
- (6) An applicant has been operating the proposed business as a sexually oriented business without a valid license issued under this Ordinance;
- (7) Operation of the proposed sexually oriented business would violate the city's zoning ordinances; or
- (8) An applicant, an applicant's spouse, or a designated operator has been convicted of any of the following New Mexico crimes or comparable crimes in any other jurisdiction:
 - (a) Prostitution, § 30-9-2 NMSA 1974;
 - (b) Promoting Prostitution, § 30-9-4 NMSA 1974;
 - (c) Accepting Earnings of a Prostitute, § 30-9-4.1 NMSA 1974;
 - (d) Patronizing prostitutes, § 30-9-3 NMSA 1974;
 - (e) Sexual exploitation of children, § 30-6A-3 NMSA 1974;

- (f) Sexual exploitation of children by prostitution, § 30-6A-4 NMSA 1974;
- (g) Prostitution; loitering; promoting § 60-7A-17 NMSA 1974;
- (h) Criminal sexual penetration; § 30-9-11 NMSA 1974;
- (i) Criminal sexual contact; § 30-9-12 NMSA 1974;
- (j) Criminal sexual contact of a minor; § 30-9-13 NMSA 1974;
- (k) Criminal sexual communication with a child; § 30-37-3.3 NMSA 1974;
- (l) Indecent exposure; § 30-9-14 NMSA 1974;
- (m) Aggravated indecent exposure; § 30-9-14.3 NMSA 1974;
- (n) Retail display; § 30-37-2.1 NMSA 1974; or
- (o) Incest; § 30-10-3 NMSA 1974.

(9) Subsection 8 shall only apply if:

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

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

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

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

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

(D) The license, if granted, must state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The license

must be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time.

Section 6. FEES.

There shall be an annual fee for a sexually oriented business license to cover the cost of inspections and license approval. The fee shall be a uniform amount for all sexually oriented businesses determined by the Mayor that is based upon the annual cost to administer the program including inspections and license approvals.

Section 7. INSPECTION.

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

Section 8. IDENTIFICATION RECORDS.

(A) A person commits an offense if he operates a sexually oriented business without maintaining on the premises a current registration card or file that clearly and completely identifies all adult cabaret entertainers who perform at a sexually oriented business as required by this section.

(B) The registration card or file must contain the following information for each adult cabaret entertainer:

- (1) Full legal name.
- (2) All aliases or stage names.
- (3) Date of birth.
- (4) Race and gender.
- (5) Hair color, eye color, height, and weight.
- (6) Current residence address and telephone number.
- (7) Legible copy of a valid driver's license or other government-issued personal identification card containing the employee's photograph and date of birth.
- (8) Date of commencement of employment or contractual relationship with the sexually oriented business.
- (9) Original color photograph with a full face view that accurately depicts the adult cabaret entertainer's appearance at the time the adult cabaret entertainer commenced an

employment or contractual relationship with the sexually oriented business; and

(10) Any other records and documents required under federal laws for employees or independent contractors, whichever applies.

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

(D) A person who operates a sexually oriented business or the person's agent or employee shall allow immediate access to these records by representatives of the Mayor, but shall allow no other individual such access except for the designated operator or agent, or the clerical staff charged with maintaining the registration card file.

Section 9. EXPIRATION OF LICENSE.

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

Section 10. SUSPENSION.

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

Section 11. REVOCATION.

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) In determining whether a sexually oriented business license should be denied, suspended, revoked, or denied for renewal based on criminal convictions of an applicant or licensee of a sexually oriented business, or on convictions of an operator or employee of the applicant, the licensee, or the sexually oriented business, all convictions for offenses occurring within a designated time period will be counted, regardless of whether the offenses occurred during the current license period, a prior license period, or an unlicensed period.

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

period or unlicensed period in which the offense was committed.

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

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

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

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

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

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

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

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

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

Section 14. APPEAL.

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

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

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

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

Section 15. POSTING REQUIREMENT.

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

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

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

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

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

Section 16. ADDITIONAL REGULATIONS FOR ADULT CABARET.

(A) A licensee or an operator of an adult cabaret commits an offense if he knowingly employs, contracts with, a person who has been convicted of an offense listed in Section 5(A)(8) for which the time period required in Section 5(A)(9) has not elapsed.

(B) An adult cabaret may not contain any VIP rooms, except that any VIP room contained in a lawfully operating adult cabaret on the date this ordinance is adopted may continue in existence for six months.

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

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

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

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

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

Section 17. PROHIBITION AGAINST MINORS IN SEXUALLY ORIENTED BUSINESSES.

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

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

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

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

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

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

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

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

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

Section 18. ENFORCEMENT.

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

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

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

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

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

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