

SEXUALLY ORIENTED BUSINESS ORDINANCE

**Porter Township
Cass County, Michigan
ORDINANCE NO. 02-10
ADOPTED JANUARY 12, 2010
EFFECTIVE: FEBRUARY 19, 2010**

An Ordinance to protect the public health, safety and general welfare of persons and property within Porter Township through the regulation, control and prohibition of conduct within a Sexually Oriented Business and to provide definitions of Sexually Oriented Businesses as well as penalties for the violation thereof.

SECTION 1: Conduct in sexually oriented businesses.

(1) Purpose and Findings.

- a. The Township of Porter hereby adopts and incorporates herein its stated findings and legislative record related to the adverse secondary effects of sexually oriented businesses, including the judicial opinions' and reports related to such secondary effects, as detailed in the findings adopted by the Edwardsburg Village Council at its regular May, 2009, meeting, and the public comments at that meeting expressed by property owners near a sexually oriented business who personally observed the said secondary effects.
- b. The Porter Township Board also relies upon findings concerning secondary effects contained in additional reports as well as in cases upholding regulations of nudity and the time, place, and manner of operation of sexually oriented businesses: *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291 (6th Circ., 2008), Rehearing and Rehearing *En Banc* Den., 8/14/08; *Déjà vu of Cincinnati, L.L.C. v. Union Township*, 411 F.3d 777 (6th Cir. 2005); *Bronco's Entertainment, Ltd. V. Charter Township of Van Buren*, 2005 U.S. App. LEXIS 18496 (6th Cir.2005); *Charter Township of Van Buren v. Garter Belt, Inc.*, 258 Mich. App. 594 (2003) (following *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), *Barnes v. Glen Theatre, Inc.* 501 U.S. 560 (1991), and *California v. LaRue*, 409 U.S. 109 (1972)); *Gammoh v. City of La Habra*, 395 F.3d 1114 (9th Cir. 2005); *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003); *G.M. Enterprises, Inc. V. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003); *Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003); *In re Tennessee Public Indecency Statute*, 1999

U.S. App. LEXIS 535 (6th Cir. 1999); *Currence v. City of Cincinnati*, 2002 U.S. App. LEXIS 1258);

Jott, Inc. v Clinton Township, 224 Mich. App. 513 (1997); *Michigan ex rel. Wayne County Prosecutor v. Dizzy Duck*, 449 Mich. 353 (1995); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995); *Tilv B Inc. v. City of Newport Beach* 69 Cal. App. 4th 1 (Cal. App. 1997); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 973 F. Supp. 1428 (M.D. Fla. 1997); *City of Elko v. Abed*, 2004 Minn. App. LEXIS 360 (Minn. App. 2004); *Center for fair public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003); *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998); *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570 (6th Cir. 2002); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1998); *Nat'l Amusements Inc. v. Town of Dedham*, 43 F.3d. 731 (1st Cir. 1995); *Mitchell v. Comm'n on Adult Enter. Est. of the State of Delaware*, 10 F.3d 123 (3rd Cir. 1993); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986); *Heideman v. South Salt Lake City*, 2006 U.S. App. LEXIS 2745 (10th Cir. 2006); *Fantasyland Video, Inc. v. San Diego County*, 373 F. Supp. 2d 1094 (S.D. Cal. 2005); *State ex rel. Nasal v. BJS No. 2, Inc.* 127 Ohio Misc. 2d 101 (Ohio Ct. Comm. Pleas 2003); *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295, F3d 471_2002 (5th Cir. 2002); *ZJ. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998); *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004); *Andy's Restaurant & Lounge, Inc. v. City of Gary*, Case No. 2:01-CV-327 (N.D. Ind. 2005); *Summaries of Kay Reports Concerning the Negative Secondary Effects of Sexually Oriented Businesses; Rome, Georgia – 1996; San Diego, California – 2003; Greensboro, North Carolina – 2003; Dallas, Texas – 1997; and numerous media reports, in finding that;*

- (i) Sexually oriented businesses, as a category of commercial uses, are often associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation.
- (ii) Illegal and unsanitary acts involving nudity, including lewd conduct, masturbation, oral and anal sex, occur at unregulated sexually

oriented businesses, including those businesses which provide private or semi-private rooms, booths, or cubicles for viewing films, videos, or live performances.

- (iii) Each of the foregoing negative secondary effects constitutes a harm which the Township has a substantial government interest in preventing and/or abating. This substantial government interest in preventing secondary effects, which is the Township's rationale for this ordinance, exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses. Additionally, the Township's interest in regulating sexually oriented businesses extends to preventing future secondary effects of either current or future sexually oriented businesses that may locate in the Township. The Township finds that the cases and documentation relied on in this ordinance are reasonably believed to be relevant to said secondary effects.

(2) Definitions

- a. The terms in this Ordinance shall have the meanings ascribed to them in, section 111.1900, of the Compilation of Ordinances for the Township of Porter, unless otherwise indicated herein.
- b. In addition, the following terms shall have the meaning ascribed to them as follows:
 - (i) "Employee" means a person who performs any service for any consideration on the premises of a sexually oriented business on a full-time, part-time, or contract basis, whether or not the person is denominated as employee, independent contractor, agent, or otherwise, and whether or not said person is paid a salary, wage, or other compensation by the operator of said sexually oriented business. Employee does not include a person exclusively on the premises for repair or maintenance of the premises or equipment on the premises or for the delivery of goods to the premises.
 - (ii) "Nudity," "Nude," or "State of Nudity" means the knowing or intentional live display of a human genital organ or anus with less than a fully opaque covering or a female's breast with less than a fully opaque covering of the nipple and areola. Nudity, as used in this section, does not include a woman's breastfeeding of a baby whether or not the nipple or areola is exposed during or incidental to the feeding.

- (iii) “Operate” or “Cause to Operate” shall mean to cause to function or to put or keep in a state of doing business. “Operator” means any person on the premises of a sexually oriented business who exercises overall operational control of the business or a part of the business, who can open or close the business to the public, or who causes to function or who puts or keeps the business open or in operation. A person may be found to be operating or causing to be operated a sexually oriented business regardless of whether that person is an owner or part owner of the business.
- (iv) “Semi-Nudity,” “Semi-Nude,” or in a “Semi-Nude Condition” means the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel provided the areola is not exposed in whole or in part.
- (v) “Sexually Oriented Business” for purposes of this Chapter shall mean any adult motion picture theater, adult book or video store, adult smoking or sexual paraphernalia store, adult cabaret, adult massage parlor or nude or semi-nude model studio as defined herein.
 - 1. Adult motion picture theater means any establishment used for presenting motion pictures, videos or live performances distinguished or characterized by an emphasis on matter or actions depicting, describing or relating to “specified sexual activities” or “specified anatomical areas”, as defined in this section, for observation by patrons.
 - 2. Adult book or video store means any establishment having as a substantial or significant part of its stock for sale or display books, videos, magazines, or other periodicals which are distinguished or characterized by their emphasis on depicting, describing or relating to “specified sexual activities” or “

specified anatomical areas”, as defined in this section, or an establishment with a segment or section devoted to the sale or display of such material.

3. Adult cabaret means a cabaret which features go-go dancers, erotic dancers, strippers, male or female impersonators or similar entertainers.
 4. Adult smoking or sexual paraphernalia store means an establishment having, as a substantial or significant portion of its stock in trade, paraphernalia designed or usable for sexual stimulation or arousal or for smoking, ingesting or inhaling marijuana, narcotics or other stimulating or hallucinogenic drug-related substances.
 5. Nude or semi nude model studio means any building, structure or premises, or any part, which offers as a principal or secondary activity the providing of models to display “specified anatomical areas” as defined in this section for artists, photographers or other persons for a fee or charge.
 6. Adult massage parlor means an establishment, excluding an establishment where massages are performed only by licensed health care professionals for therapeutic purposes, where persons conduct or permit to be conducted or performed massages of the human body or parts thereof by means of pressure, imposed friction, stroking, kneading, rubbing, tapping, pounding, vibrating or otherwise stimulating the same with hands, other parts of the human body, mechanical devices, creams, ointments, oils, alcohol or any other parts of the human body, or any other means of preparations to provide relaxation of enjoyment to the recipient.
- (vi) “Patron” means a customer of the sexually oriented business or a person from the general public, not an “employee” of the business, who is on the premises to obtain, receive, or view the products, services, or performances offered by the business.

- (vii) "Regularly" means recurring, attending, or functioning at fixed or uniform intervals.
- (viii) "Specified Sexual Activity" are:
 - 1) Human genitals in a state of sexual stimulation or arousal;
 - 2) Acts of human masturbation, sexual intercourse or sodomy;
 - 3) Erotic fondling or other erotic touching of genitals, pubic region, buttock or female breasts.

(3) Unlawful Activities:

- a. Nothing contained in this Ordinance is intended, or shall be construed, to permit or authorize activities which are unlawful under state law or any other Township ordinance. It is unlawful and a violation of this Ordinance for an operator to knowingly or intentionally violate the provisions of this Ordinance or to allow, either knowingly or intentionally, an employee or a patron to violate the provisions of this Ordinance. It shall be a defense to prosecution that the person prosecuted was powerless to prevent the violation.
- b. No person shall knowingly or intentionally, in a sexually oriented business, appear before a patron or patrons in a state of nudity, regardless of whether such public nudity is expressive in nature.
- c. No employee shall knowingly or intentionally, in a sexually oriented business, appear within view of any patron in a semi-nude condition unless the employee, while semi-nude, shall be and remain at least ten (10) feet from all patrons and on a fixed stage at least eighteen (18) inches from the floor in a room of at least six hundred (600) square feet.
- d. A sexually oriented business which exhibits on the premises, through any mechanical or electronic image-producing device, a film, video cassette, digital video disk, or other video reproduction characterized by an emphasis on the display of specified sexual activities or specified anatomical areas shall comply with the following requirements: The interior or the premises shall be configured in such a manner that there is an unobstructed view from an operator's station of every area of the premises, including the interior of each viewing room but excluding restrooms, to which any patron is permitted access for any purpose. An operator's station shall not exceed thirty-two (32) square feet of floor area. If

the premises has two (2) or more operator's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one (1) of the operator's stations. The view required in this paragraph must be by direct line of sight from the operator's station. It is the duty of the operator to ensure that at least one (1) employee is on duty and situated in an operator's station at all times that any person is on the portion of the premises monitored by that operator station. It shall be the duty of the operator, and it shall also be the duty of any employees present on the premises to ensure that the view area specified in this paragraph remains unobstructed by any doors, curtains, walls, merchandise, display racks or other materials or enclosures at all times that any patron is present on the premises.

- e. Sexually oriented businesses that do not have stages or interior configurations which meet at least the minimum requirements of this section shall be given one hundred eighty (180) days from the effective date of this Article to comply with the stage and building requirements of this section. During said one hundred eighty (180) days, any employee who appears within view of any patron in a semi-nude condition shall nevertheless remain, while semi-nude, at least ten (10) feet from all patrons.
- f. No employee who regularly appears within view of patrons in a semi-nude condition in a sexually oriented business shall knowingly or intentionally touch a patron or the clothing of a patron in a sexually oriented business.
- g. No Sexually Oriented Business shall be or remain open between the hours of ten o'clock (10:00) p.m. and ten o'clock (10:00) a.m. on any day. No Sexually Oriented Business shall be open to do business on any Sunday or legal holiday.
- h. No person younger than 18 years of age shall enter or be on the premises of a Sexually Oriented Business at any time.
- i. No person under the age of 18 shall be employed by a Sexually Oriented Business or contracted with a Sexually Oriented Business.
- j. No alcoholic beverages shall be permitted within the premises of a Sexually Oriented Business at any time.

- k. At least one bouncer or security guard employed by the Sexually Oriented Business shall be present at all times when the Sexually Oriented Business is open to do business. The bouncer or security guard shall patrol the premises, including the parking lot, to ensure compliance with the requirements of this Ordinance.
- l. No person shall engage in any Specified Sexual Activities on the premises of the Sexually Oriented Business.
- m. Sexually Oriented Business shall not disseminate, display, distribute or have on the premises any material displaying child pornography, a sexual performance by a child, child molestation, indecency with a child or any offense under the criminal or penal code of the State of Michigan.
- n. No Sexually Oriented Business shall be located on anything but Commercial – C or Industrial – I, zoning districts.
 - i. The building or structure housing the use must be located a minimum of one hundred (100) feet from the boundary of all AG, R-1, R-2, and R-3 Districts and a minimum of three hundred (300) feet from a residential use, regardless of the zoning for the residential use.
 - ii. The property must be located a minimum of five hundred (500) feet from the property line of any public, private or religious primary or secondary school; public park; library or museum; public or licensed private day care or nursery school or site of religious assembly or worship.
 - iii. The use must not be located within one thousand (1,000) feet of any other special controlled use subject to this Chapter.
- o. Violation of this Ordinance shall, in addition to all other penalties provided in this Ordinance, constitute a Nuisance.

(4) Scierter Required to Prove Violation or Business Liability.

- a. For purposes of Section 5(A) of This Ordinance, this Ordinance does not impose strict liability. Unless a culpable mental state is otherwise specified herein, a showing of a knowing or reckless mental state is necessary to establish a violation of a provision of Section 5(A). Notwithstanding anything to the contrary, for the

purposes of the Penalty provided in Section 5(A), an act by an employee shall be imputed to the sexually oriented business for purposes of finding a violation of this Ordinance only if an owner, officer, director, or general partner, or a person who managed, supervised, or controlled the operation of the business premises, knowingly or recklessly allowed such act to occur on the premises. It shall be a defense to liability under Section 5(A) that the person to whom liability is imputed was powerless to prevent the act.

- b. For purposes of the Remedies provided in Section 5(B) of this Ordinance, it shall be sufficient to show negligence by either an employee, or an owner, officer, director, or general partner, or a person who managed, supervised, or controlled the operation of the business premises, and the principal of *respondent superior* shall be fully applicable.

(5) Penalty; Equitable Remedies.

a. CRIMINAL REMEDIES

Any person, business, or entity violating or refusing to comply with any provisions of this Chapter shall, upon conviction, be deemed guilty of a misdemeanor and shall be punished by imposition of a fine not to exceed one hundred dollars (\$100.00) or by imprisonment for a period not to exceed ninety (90) days, or both. Each day that a violation is permitted to exist or occur, and each separate occurrence, shall constitute a separate offense. Further, any premises, building, dwelling, or other structure in which a sexually oriented business, as is repeatedly operated or maintained in violation of the provisions of this Chapter shall constitute a public nuisance and shall be subject to civil abatement proceedings initiated by the Township of Porter in a court of competent jurisdiction. Each day that a violation is permitted to exist or occur shall constitute a separate operation or maintenance of the violation.

b. CIVIL REMEDIES

- (i) Notwithstanding subsection (A) hereof, the Township may, in addition to prosecution under subsection (A), employ any remedy available at law or in equity to prevent or remedy a violation of any provision of this ordinance. All remedies shall be cumulative, and the doctrine of “election of remedies” shall not apply.

- (ii) Any Person or Entity aggrieved by a violation of this ordinance may institute an action for abatement of the nuisance in addition to any other remedies, at law or in equity, which such person or entity may otherwise have.

(6) Severability.

This Ordinance and each section and provision of herein, are hereby declared to be independent divisions and subdivisions and, notwithstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provisions of this Ordinance, or the application thereof to any person or circumstance is held to be invalid, the remaining sections or provisions and the application of such sections and provisions to any person or circumstances other than those to which it is held invalid, shall not be affected thereby, and it is hereby declared that such sections and provisions would have been passed independently of such section or provision so known to be invalid.

- (7)** This Ordinance shall be effective thirty (30) days following its publication.

- (8)** All Ordinances inconsistent with the provisions of this Ordinance are hereby repealed.

Adopted at a regular meeting of the Porter Township Board on the 12th day of January, 2010 by unanimous roll call vote of the board members present.

Published: JANUARY 19, 2010
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Marty Russell, Township Clerk