

ORDINANCE

REGULATING THE LOCATION OF BUSINESSES OFFERING EXOTIC ENTERTAINMENT

An ordinance regulating the location of a business offering exotic entertainment and related activities to promote the health, safety, morals and general welfare of the citizens of Hardy County, West Virginia.

WHEREAS, West Virginia Code Chapter 7, Article 1, Section 3ii, grants authority to the County Commission to enact ordinances restricting the location of businesses offering exotic entertainment, and

WHEREAS, there is convincing evidence that adult entertainment businesses, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the depreciation of property value; and

WHEREAS, it is recognized that adult entertainment businesses, due to their nature have serious objectionable operational characteristics, particularly when they are located in close proximity to each other thereby contributing to blight and downgrading the quality of life in the adjacent areas; and

WHEREAS, the Hardy County Planning Commission desires to minimize and control these adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from increased crime; preserve the property values and character of surrounding neighborhoods and deter the spread of urban blight; and

WHEREAS, it is not the intent of this Ordinance to suppress any speech related activities protected by the First Amendment but to enact a content neutral Ordinance which addresses the secondary effects of adult entertainment businesses; and

WHEREAS, it is not the intent of the Hardy County Planning Commission to condone or legitimize the distribution of obscene material nor affect the imposition of limitations or restrictions on the content of any communicative materials protected by the First Amendment and the Hardy County Planning Commission recognizes that State and Federal law prohibits the distribution of obscene materials and expects and encourages State law enforcement officials to enforce State obscenity statutes against any such illegal activities in the unincorporated areas of Hardy County;

WHEREFORE: The Hardy County Planning Commission recommends the enactment of this Ordinance by the Hardy County Commission for the government and regulation of such business.

NOW, THEREFORE, THE HARDY COUNTY PLANNING COMMISSION HEREBY ORDAINS:

Section 1: Definitions for the purposes of this chapter the terms hereafter set forth shall have the following meanings:

- (A) “Exotic Entertainment” means live entertainment, dancing or other services conducted by persons while nude or seminude in the commercial setting or for profit.
- (B) “Seminude” means the appearance of:
 - 1. The female breast below a horizontal line across the top of the areola at its highest point, including the entire lower portion of the human female breast, but does not include any portion of the cleavage of the human female breast exhibited by a dress, blouse, skirt, leotard, bathing suit or other wearing apparel provided the areola is not exposed, in whole or in part;
 - 2. A human bare buttock, anus, anal cleft or cleavage, pubic area, male genitals, female genitals or vulva, with less than a fully opaque covering or
 - 3. A human male genital in a discernibly turgid state even if completely and opaquely covered
- (C) Types of sexually oriented businesses:
 - 1. Adult bookstore or adult video store means a commercial establishment that, as one of its principal business purposes, offers for sale or rental for any form of consideration any one or more of the following:
 - a. Books, magazines, periodicals or other printed matter or photographs, films, motion pictures, video cassettes or video reproduction, slides, or other visual representations which depict or describe “specified sexual activities” or “specified anatomical areas.”
 - b. Instruments, devices, or paraphernalia that are designed for use in connection with “specified sexual activities.”

2. A commercial establishment may have other principal purposes that do not involve the offering for sale or rental of material depicting or describing “specified sexual activities” or “specified anatomical areas” and still be categorized as adult bookstore or adult video store. Such other business purposes will not serve to exempt such commercial establishments from being categorized as an adult bookstore or adult video store so long as one of its principal business purposes is the offering for sale or rental for consideration of the specified materials which depict or describe “specified sexual activities” or “specified anatomical areas.” A principal business purpose need not be a primary use of an establishment so long as it is a significant use based upon the visible inventory or commercial activity of the establishment.
3. Adult cabaret means nightclub, bar, restaurant or other similar commercial establishment that regularly features:
 - a. Persons that appear in a state of nudity or semi-nudity; or
 - b. Live performances that are characterized by the exposure of “specified anatomical areas” or by “specified sexual activities”; or
 - c. Films, motion pictures, video cassettes or photographic reproductions that are characterized by the depiction or description of “specified sexual activities” or “specified anatomical areas”, or
 - d. Persons engaged in lewd, lascivious, or erotic dancing or performances that are intended for the sexual interest or titillation of an audience or customers.

(D) Establishment means and includes any of the following:

1. The opening or commencement of any business offering exotic entertainment as a new business;
2. The conversion of an existing business, whether or not a business offering exotic entertainment, to a business offering exotic entertainment.
3. The relocation of any business offering exotic entertainment.

(E) Licensed day care center means a facility by the State of West Virginia, whether situated within the unincorporated area of Hardy County or not, that provides care, training, education, custody, treatment or supervision for four (4) or more children under the age of eighteen years of age, where such children are not related by blood, marriage or by adoption to the owner or operator of the facility, for less than twenty-four hours a day, regardless of whether or not

the facility is operated for profit or charges for services it offers.

- (F) Permittee means a person in whose name the permit to operate a business offering exotic entertainment has been issued as well as the individual listed as an applicant on the application for a permit and/or license.
- (G) Person means an individual, proprietorship, partnership, corporation, association or other legal entity.
- (H) Residential area means two or more structures utilized as a primary residence within 500' of each other.
- (I) Specified anatomical areas means the male genitals and/or the vulva or more intimate parts of the female genitals.
- (J) Specified sexual activities means and includes any of the following:
 - 1. The fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts.
 - 2. Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy.
 - 3. Masturbation, actual or simulated; or
 - 4. Excretory functions as part of or in connection with any of the activities set forth in paragraphs 1-3.
- (K) Administrator shall mean the person designated and approved by the Hardy County Commission as the Administrator for the unincorporated areas of Hardy County or any other such person as said Administrator so designates in his or her place or stead to receive the filing of forms, registrations, exemption applications, and to undertake the duties of this Ordinance.

Section 2: Classifications; Sexually oriented business entertainment are classified as follows:

- (A) Adult bookstore or adult video stores
- (B) Adult cabaret
- (C) Adult motion pictures theaters

This Ordinance shall apply only to those businesses which offer exotic entertainment as defined herein.

Section 3: Location Permit Required. After the effective date of this Ordinance;

- (A) It shall be unlawful for any person to establish a business offering exotic entertainment without first obtaining a valid location permit issued by the Administrator.
- (B) Application for a permit must be made to the office of the Administrator by the intended operator of the enterprise. Applications must be submitted by hand delivery to the office of the Administrator during regular working hours. Application forms shall be available through the office of the Administrator.

The intended operator shall be required to give the following information on the application form:

1. The name, street address and mailing address and West Virginia driver's license number of the intended operator.
 2. The name, street address and mailing address of each individual who has a 10% or greater interest in the respective business.
 3. The name under which the establishment is to be operated and a general description of the services to be provided.
 4. The telephone number of the establishment.
 5. The address and legal description of the tract of land upon which the establishment is to be located.
 6. The date on which the establishment intends to commence operations as a business offering exotic entertainment at the location for which the permit is sought.
- (C) If a person who wishes to operate a business offering exotic entertainment is an individual, he or she must sign the application for a permit. If the person who wishes to operate a business offering exotic entertainment is other than an individual, each individual who has a 10% or greater interest in the business must sign the application for a permit.
 - (D) Upon submission of the application to the Administrator for approval, the application shall be accompanied by:
 1. Payment of the application fee in full
 2. If the establishment is a West Virginia corporation, a certified copy of the Articles of Incorporation
 3. A copy of a West Virginia Business License
 - (E) In addition, the application must be accompanied by a site plan. Such site plan must be prepared by a licensed land surveyor or professional engineer. The plat shall be drawn on durable paper in ink or by plotter, measuring a minimum of 8.5" x 14".

The site plan shall contain the following information:

1. The bearings and distances of the boundary lines and all existing easements, railroad and utility rights-of-way.
2. North arrow, scale, date of survey and seal of the licensed land surveyor or professional engineer.
3. The names of adjoining property owners, including tax parcel information. Distance from the adjoining property lines and the site of the proposed business offering exotic entertainment must be clearly annotated.
4. Locations, widths and names of all streets and roads.
5. Any areas delineated by the Corps of Engineers or the Federal Emergency Management Agency as flood hazard areas including 100-year floodplains.
6. Copies of existing and proposed deed restriction or protective covenants.

Section 4: Issuance of Permit

(A) The Administrator shall approve the issuance of a permit to an applicant within thirty (30) days after receipt of a complete application unless he finds one or more of the following to be true:

- (1) Any one of the applicants is under 18 years of age.
- (2) Any applicant is overdue in his or her payment to the City, County, State of West Virginia or the United States government for taxes, fines or penalties assessed against him or imposed upon him in relation to a business offering exotic entertainment.
- (3) An applicant has failed to provide information reasonably necessary for issuance of the permit or has falsely answered a question on the application form.
- (4) The permit fee as required by this Ordinance has not been paid.
- (5) The applicant has failed to file a completed site plan.
- (6) The applicant or business offering exotic entertainment is in violation of any of the provisions of this Ordinance.

Section 5: Location Permit Fee

The one-time permit fee for a business offering exotic entertainment is Five Hundred Dollars (\$500.00). This fee is to be used for the costs of the administration and enforcement of this Ordinance. The renewal fee will be one hundred dollars (\$100.00).

The one-time permit fee for a business offering exotic entertainment is Fifteen Hundred Dollars (\$1,500.00). This fee is to be used for the costs of administration and enforcement of this Ordinance. The yearly renewal fee will be Fifteen Hundred Dollars (\$1,500.00).

NOTE: Since the initial fee and the renewal fee are both \$1,500.00, shouldn't the wording be changed to: "The initial permit fee for a business offering exotic entertainment is Fifteen Hundred Dollars (\$1,500.00)."

Section 6: Expiration of Permit and/or License

Each permit issued pursuant to Section 4 shall expire one (1) year from the date of issuance.

Section 7: Revocation

The Administrator shall revoke a permit if he determines that:

- i. a permittee gave false or misleading information in the materials submitted during the application process;
- ii. a permittee or an agent or employee of the permittee has knowingly allowed possession, use or sale of a controlled substance (as defined by West Virginia State Law) on the premises.
- iii. a permittee or an employee has knowingly allowed prostitution on the premises;
- iv. a permittee or an employee has knowingly operated the business offering exotic entertainment during a period of time when the permittee's permit was suspended;
- v. a permittee or an employee has knowingly permitted an act to occur in or on the licensed premises in violation of the provisions of this Ordinance;
- vi. a permittee is delinquent in payment to the County, State or Federal governments for any taxes or fees past due;
- vii. the owner operator of the permitted establishment knowingly allowed a person under 18 years of age enter the establishment or
- viii. there was a change of ownership for which a transfer application was not filed in a timely manner.

When the Administrator revokes a permit and/or license, the revocation shall continue for a period of one year and the permittee and /or any person listed on the original application form shall not be issued a new location permit for one year from the date the revocation became effective. Any reapplication shall be considered a new application and shall be required to comply with all location standards applicable at the time.

Section 8: Transfer of Permit and/or License

- (A) A permittee shall not transfer his permit to another, nor shall a permittee operate a business offering exotic entertainment under the authority of a permit at any place other than the address designated in the application.
- (B) Any sale or transfer of any interest from one individual to another shall require the application of a permit to be issued by the Administrator accompanied by a new application fee.

Section 9: Location Restrictions

Businesses offering exotic entertainment shall be permitted in any unincorporated area of Hardy County provided that such business offering exotic entertainment may not be operated within two thousand five hundred (2,500) feet of:

- (A) a church, synagogue or regular place of religious worship;
- (B) a public or private elementary or secondary school
- (C) a public park
- (D) a licensed daycare center
- (E) a boundary of any primarily residential area

or within two thousand (2,000) feet of:

- (F) another business offering exotic entertainment or other sexually oriented business
- (G) a private club or bar serving alcoholic beverages

For purposes of this article measurements shall be made in a straight line without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a business offering exotic entertainment is conducted, to the nearest property line of a premises of a church, synagogue, regular place of worship, or public or private elementary or secondary school or to the nearest boundary of an affected public park, primary residential area, residential lot or licensed daycare center.

A business offering exotic entertainment may not be contained in the same building where alcoholic beverages are sold or allowed to be consumed.

Section 10: Exterior Portions of Businesses Offering Exotic Entertainment

- (A) It shall be unlawful for an owner or operator of a business to allow the merchandise or activities of the establishment to be visible from a point outside of the establishment.
- (B) It shall be unlawful for the owner or operator of a business offering exotic entertainment to allow the exterior portion of the business to have flashing lights or

any words, lettering, photographs, silhouettes, drawings, or pictorial representations of any manner except to the extent permitted by the provisions of this article.

- (C) It shall be unlawful for the owner or operator of a business to allow exterior portions of the establishment to be painted any color other than a single achromatic color. This provision shall not apply to a business offering exotic entertainment if the following conditions are met:

1. The establishment is part of a commercial multi-unit center; and
2. The exterior portions of each individual unit in the commercial multi-unit center, including the exterior portions of the business, are painted the same color as one another or are painted in such a way as to be a component of the overall architectural style or pattern of the commercial multi-unit center.

Section 11: Parking Facilities

All exotic entertainment establishments shall provide parking facilities off the road or street and outside of the public right-of-way. There shall be one (1) parking space of not less than two hundred (200) square feet for each one hundred fifty (150) square feet of area of the first floor of said establishment which it serves.

All exotic entertainment establishments shall provide off the street and/or road and outside of the public rights-of-way, not less than two hundred (200) square feet of space suitable for parking automobiles and other vehicles for every two (2) persons to be accommodated. Such parking area shall be within four hundred (400) feet of an entrance to such use, and shall provide adequate means of ingress and egress, and shall be available for the use of such persons.

Section 12: Signage

- (A) Notwithstanding any other County Ordinance, Code, or regulation to the contrary, it shall be unlawful for the owner or operator of any business offering exotic entertainment or any person to erect, construct, or maintain any sign for the business offering exotic entertainment other than one (1) primary sign.
- (B) Primary signs shall have not more than two (2) displaced surfaces. Each such displaced surface shall:
1. Not contain any flashing lights;
 2. Be a flat plane, rectangular in shape;
 3. Not exceed eight (8) feet in height; eight (8) feet in length; nor exceed ten (10) feet in height distance from the ground to the lowest or bottom portion of the sign.

Primary signs shall contain no photographs, silhouettes, drawings or pictorial representations in any manner, and may contain only the name of the enterprise.

Section 13: Persons Younger Than 18 Prohibited From Entry: Attendant Required

- (A) It shall be unlawful to permit any person younger than eighteen (18) years of age, entry into or to be on the premises of a business offering exotic entertainment at any time said establishment is open for business.
- (B) It shall be the requirement of the operator of each business offering exotic entertainment to ensure that an attendant is stationed at each public entrance to the business offering exotic entertainment at all times during regular business hours.
- (C) It shall be the responsibility and duty of the attendant to prohibit any person under the age of eighteen (18) years from entering the business offering exotic entertainment. For purposes of ensuring compliance with this provision, an attendant shall, if necessary, inspect an individual's valid operators, commercial operators or chauffeur's license or any other valid personal identification card reflecting that such a person's age is eighteen (18) years of age or older.

Section 14: Exemptions

It is a defense to prosecution under this Article that a person appearing in a state of nudity did so in a modeling class operated:

- (A) by a proprietary school licensed by the State of West Virginia, a college, junior college, or university supported entirely or partly by taxation;
- (B) by a private college or university that maintains and operates education programs where credits are transferable to a college, junior college or university supported entirely or partly by taxation; or
- (C) that such person appeared in a theatrical performance of socially redeeming quality or generally accepted Broadway type production.

Section 15: Injunction

Any person who operates or causes to be operated a business offering exotic entertainment without a valid permit or otherwise violates this Ordinance is subject to a suit for injunction before the Circuit Court of Hardy County as well as prosecution for criminal violations before the Magistrate Court of Hardy County as provided herein, as well as subject to all suspension and revocation powers of the Administrator for non-compliance with the provisions of this Ordinance.

Section 16: Severability

If any section, sub-section, or clause of this Ordinance shall be deemed to be unconstitutional or otherwise invalid, the validity of any remaining sections, sub-sections and clauses shall not be affected hereby.

Section 17: Penalty

Any person violating any provision of this Ordinance shall in addition to any other actions which may be taken by the Administrator, the Hardy County Planning Commission or the Hardy County Commission hereunder, shall be fined not more than one thousand dollars (\$1,000.00) or imprisoned not more than thirty (30) days or both.

Section 18: Judicial Review

Any person adversely affected by any provisions of this Ordinance is entitled to seek direct judicial review before the Circuit Court of Hardy County with regard as to whether the Ordinance impermissibly burdens his or her right to establish or operate a business offering exotic entertainment.

This Ordinance shall be effective from the date of its enactment.

This Ordinance is read this 3rd day of September, 2002.

This Ordinance is read and adopted this 3rd day of September, 2002.

HARDY COUNTY COMMISSION

Roger D. Champ

J. Michael Teets

William E. Keplinger, Jr.

Janet S. Ferrell

SEAL ATTEST