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ORDINANCE NUMBER O-_____ (NEW SERIES)

ADOPTED ON **OCT 8 8 2000**

AN ORDINANCE AMENDING CHAPTER III, ARTICLE 3, DIVISION 36, OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING THE TITLE OF DIVISION 36 TO "NUDE ENTERTAINMENT BUSINESS"; REPEALING SECTION 33.3601; AMENDING AND RENUMBERING SECTION 33.3602 TO 33.3601; REPEALING SECTION 33.3603; AMENDING AND RENUMBERING SECTION 33.3604 TO 33.3602; ADDING NEW SECTION 33.3603; AMENDING AND RENUMBERING SECTION 33.3605 TO 33.3604; AMENDING AND RENUMBERING SECTION 33.3606 TO 33.3605; ADDING NEW SECTION 33.3606; REPEALING SECTIONS 33.3607, 33.3608, 33.3609, 33.3610, 33.3611, 33.3612, 33.3613, 33.3614, 33.3615, 33.3616 AND 33.3620; AND ADDING NEW SECTIONS 33.3606, 33.3607, 33.3608, 33.3609, 33.3610 AND 33.3611; ALL RELATING TO NUDE ENTERTAINMENT BUSINESS.

WHEREAS, the proposed amendments are intended to make the Municipal Code easier to read; to avoid duplicating definitions in each division; to rely on Chapter III, Article 3, Divisions 1 through 5 for rules which apply to all businesses governed by Chapter III, Article 3 of the Municipal Code, rather than repeating the rule in each division; to avoid duplicating or conflicting with other regulations governing these businesses; and to rely on Division 1 and Chapter I, Article 1, as appropriate, including the severability clause contained in Section 11.0205; and

WHEREAS, the Council of The City of San Diego takes legislative notice of the contents of the San Diego Vice and Licensing Task Force Report (June 1996) and its accompanying oral

and documentary evidence as presented before the Public Safety and Neighborhood Services Committee and the Council; and

WHEREAS, the Council of The City of San Diego, in adopting this ordinance, takes legislative notice of the existence and content of the following studies concerning the adverse secondary side effects of adult-oriented businesses, in other cities: Garden Grove, California (1991); Tucson, Arizona (1990); Seattle, Washington (1989); Austin, Texas (1986); Oklahoma City, Oklahoma (1986); Indianapolis, Indiana (1984); Houston, Texas (1983); Beaumont, Texas (1982); Minneapolis, Minnesota (1980); Phoenix, Arizona (1979); Whittier, California (1978); Amarillo, Texas (1977); Cleveland, Ohio (1977); Los Angeles, California (1977); and

WHEREAS, the Council finds that these studies are relevant to the problems addressed by the City in amending this ordinance to regulate the adverse secondary side effects of nude entertainment businesses, and more specifically finds that these studies provide convincing evidence that:

(1) Adult-oriented businesses are linked to increases in the crime rates in those areas in which they are located and in surrounding areas; and

(2) There is substantial evidence that an increase in crime tends to accompany, concentrate around, and be aggravated by adult-oriented businesses including but not limited to an increase in the crimes of narcotics distribution and use, prostitution, pandering, and violence against persons and property; and

WHEREAS, in amending this ordinance, the Council has been mindful of legal principles relating to regulation of nude entertainment businesses and does not intend to suppress or infringe upon expressive activities protected by the First Amendment of the United States and

California Constitutions, but instead desires to enact reasonable time, place, and manner regulations that address the adverse secondary effects of adult-oriented businesses; and

Whereas, the Council has considered decisions of the United States Supreme Court regarding local regulation of adult-oriented businesses, including but not limited to: *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, *reh'g denied*, 429 U.S. 873 (1976); *Renton v. Playtime Theaters*, 475 U.S. 41 *reh'g denied*, 475 U.S. 1132 (1986); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990); *Barnes v. Glenn Theater*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 207 (2000), 2000 Daily Journal DAR 3255; United States Court of Appeals 9th Circuit decisions, including but not limited to *Topanga Press, et al. v. City of Los Angeles*, 989 F.2d 1524 (1993); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (1986); *Colacurcio v. City of Kent*, 163 F.3d 545 (1998); several California cases including but not limited to: *Tily B., Inc. v. City of Newport Beach*, 69 Cal App. 4th 1 (1998); *City of National City v. Wiener*, 3 Cal. 4th 832 (1993); *People v. Superior Court (Lucero)*, 49 Cal. 3d 14 (1989); and *City of Vallejo v. Adult Books, et al.*, 167 Cal. App. 3d 1169 (1985); and other federal cases including *Lakeland Lounge v. City of Jacksonville*, 973 F.2d 1255 (5th Cir. 1992); *Hang On, Inc. v. Arlington*, 65 F.3d 1248 (5th Cir. 1995); *Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123 (3rd Cir. 1993); *International Eateries v. Broward County*, 941 F.2d 1157 (11th Cir. 1991); and *Star Satellite v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986); and

WHEREAS, the Council takes legislative notice of the facts recited in the case of *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (1986), which demonstrate how live adult entertainment results in secondary effects such as prostitution, drug dealing, and other law enforcement problems; and

WHEREAS, the Council also finds, as a wholly independent basis for regulation, that it has a substantial public interest in preserving societal order and morality; and

WHEREAS, the Council recognizes the possible harmful effects on children and minors exposed to the effects of such adult-oriented businesses and the deterioration of respect for family values, and the need and desire of children and minors to stay away from and avoid such businesses, which causes children to be fearful and cautious when walking through or visiting the immediate neighborhood of such businesses; and the City Council desires to minimize and control the adverse secondary side effects associated with the operation of adult-oriented businesses and thereby protect the health, safety, and welfare of the citizens of San Diego; protect the citizens from increased crime; preserved the quality of life; preserve property values and the character of surrounding neighborhoods and businesses; deter the spread of urban blight and protect against the threat to health from the spread of communicable and sexually transmitted diseases; and

WHEREAS, the Council finds the following based on all the evidence before it, including documents, reports, testimony, and judicial decisions:

(1) Evidence indicates that some performers in nude entertainment businesses will violate state laws, particularly those governing lewd acts, and local regulations such as the six-foot rule, in order to receive better tips from patrons; and

(2) Performers at such clubs use stage names and aliases, making it more difficult for law enforcement to identify them; and

(3) Performers at such clubs have been found to engage in acts of prostitution with the patrons, and

WHEREAS, preventing touching between performers and patrons reduces the likelihood that such persons will negotiate or transact sexual favors within the nude entertainment business; and

WHEREAS, denial of permits to those who have suffered prior license suspensions or revocations, or who have criminal backgrounds, is necessary because of the likelihood of recidivism and an increase in the secondary effects associated with nude entertainment; and

WHEREAS, the Council finds that granting of permits to those with criminal convictions and prior license suspensions or revocations presents a clear and present danger that serious substantive evil, namely the likelihood of recidivism, the encouragement of criminal activity and other secondary effects associated with nude entertainment businesses will occur; and

WHEREAS, the Council finds that requiring nude entertainment establishments to close between 2:00 a.m. and 6:00 a.m. will help reduce the secondary effects associated with those businesses, and that there is case law which supports closing-hour requirements, including *Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123 (3rd Cir. 1993), *Star Satellite v. Biloxi*, 779 F.2d. 1074 (5th Cir. 1986), and *Sundance Saloon v. San Diego*, 213 Cal. App. 3d 807 (1989); and

WHEREAS, it is not the intent of the Council of the City of San Diego to condone or legitimize the distribution of obscene material, and the City of San Diego recognizes that state law prohibits the distribution of obscene materials and expects and encourages law enforcement officials to enforce state obscenity statutes; and

WHEREAS, nothing in this ordinance is intended to authorize, legalize, or permit the establishment, operation, or maintenance of any business, building, or use which violates any

City ordinance or any statute of the State of California regarding public nuisances, unlawful or indecent exposure, sexual conduct, lewdness, obscene or harmful matter or the exhibition or public display thereof; and

WHEREAS, performers will be allowed to perform prior to obtaining their permanent police permit; NOW, THEREFORE,

BE IT ORDAINED, by the Council of The City of San Diego, as follows:

Section 1. That Chapter III, Article 3, Division 36 of the San Diego Municipal Code be and the same is hereby amended by amending the title to read as follows:

DIVISION 36

Nude Entertainment Business

Section 2. That Chapter III, Article 3, Division 36 of the San Diego Municipal Code be and the same is hereby amended by repealing Section 33.3601.

Section 3. That Chapter III, Article 3, Division 36 of the San Diego Municipal Code be and the same is hereby amended by amending and renumbering Section 33.3602 to 33.3601, to read as follows:

SEC. 33.3601 Purpose and Intent

It is the purpose and intent of this Division to provide for the orderly regulation of the business of *nude entertainment* in The City of San Diego by establishing certain minimum standards for the conduct of this type of business to protect the public order and the general welfare of the residents of The City of San Diego, including the prevention of prostitution, obscenity, lewd acts, money laundering and the infiltration of organized crime and its associated problems, the

prevention of the spread of disease, the prevention of the deterioration of neighborhoods, the reduction of crime in and around *adult entertainment businesses*, and the preservation of the quality of urban life in The City of San Diego. It is not the intent of this Division to deny adults access to adult oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of adult oriented entertainment to their intended market.

Section 4. That Chapter III, Article 3, Division 36 of the San Diego Municipal Code be and the same is hereby amended by repealing Section 33.3603.

Section 5: That Chapter III, Article 3, Division 36 of the San Diego Municipal Code be and the same is hereby amended by amending and renumbering Sections 33.3604 to 33.3602, to read as follows:

SEC. 33.3602 Definitions

For purposes of this Division:

"*Adult entertainer*" means any person who, at a fixed business location, provides *nude entertainment* or whose performance is distinguished or characterized by an emphasis upon the display of *specified anatomical areas* or *specified sexual activities*. It includes persons who perform dances such as "stage dances," "lap dances," "table dances," and "couch dances," whether or not the entertainer is *nude*.

"*Adult entertainment establishment*" includes any business that is characterized by an emphasis on depicting, describing, or showing *specified*

sexual activities, or specified anatomical areas. It includes any *establishment* regulated in Section 141.0601 of this Code.

"*Nude*" means being devoid of an opaque covering which covers the genitals, pubic hair, buttocks, perineum, anus or anal region of any person, or any portion of the female breast at or below the areola.

"*Nude entertainment*" means any live performance or activity where a nude person provides services, including, but not limited to, talking, reading, listening, singing, posing, walking, dancing, or wrestling.

"*Nude entertainment business*" means any *establishment* or business operating at a fixed location where (a) any person engages in or operates *nude entertainment*, or (b) there are live performances which are distinguished or characterized by an emphasis upon the display of *specified anatomical areas* or *specified sexual activities*. It includes nightclubs, bars, lingerie modeling studios, and similar commercial *establishments* commonly known as "topless" or "*nude*."

"*Specified anatomical areas*" means and includes less than completely and opaquely covered human genitals, pubic region, buttocks, anus, female breasts below a point immediately above the top of the areolae, or human male genitals in a discernible turgid state, even if completely and opaquely covered.

"*Specified sexual activities*" means and includes the fondling or other touching of human genitals, pubic region, buttocks, anus, or female breasts; sex acts, normal or perverted, actual or simulated, including intercourse, oral

copulation, or sodomy; masturbation, actual or simulated; or excretory functions as part of or in connection with any of the activities set forth above.

Section 6. That Chapter III, Article 3, Division 36 of the San Diego Municipal Code be and the same is hereby amended by creating a new Section 33.3603, to read as follows:

SEC. 33.3603 Permit Required to Operate Nude Entertainment Business

It is unlawful for any *person* to operate or to allow the operation of a *nude entertainment business* without a *police permit*.

Section 7. That Chapter III, Article 3, Division 36 of the San Diego Municipal Code be and is hereby amended by amending and renumbering Section 33.3605 to 33.3604, to read as follows:

SEC. 33.3604 Adult Entertainer Permit Required

It is unlawful for any person to act as an *adult entertainer* without a *police permit*.

Section 8. That Chapter III, Article 3, Division 36 of the San Diego Municipal Code be and the same is hereby amended by amending and renumbering 33.3606 to Section 33.3605 to read as follows:

SEC. 33.3605 Nude Entertainment Business Permit and Nude Entertainer Permit Application Contents

(a) Each applicant for a *permit* to operate a *nude entertainment business*, or as an *adult entertainer*, shall furnish the following information to the *Chief of Police*:

- (1) The full true name and any other names ever used by the applicant.

(2) The current residential address and telephone number of the applicant.

(3) Each residential and business address of the applicant for the five years immediately preceding the date of the application, and the inclusive dates of each such address.

(4) Written proof that the applicant is at least eighteen years of age.

(5) Applicant's height, weight, color of eyes and hair.

(6) Photographs as specified by the *Chief of Police*.

(7) Applicant's business, occupation and employment history for the five years immediately preceding the date of application, including addresses and dates of employment.

(8) Whether the applicant has ever had any *adult entertainment establishment license or permit*, or any *adult entertainment establishment employee license or permit*, or any similar *license or permit* from any agency or board, or any city, county, state or federal agency, suspended or revoked within five years immediately preceding the date of application, and the reason for the suspension or revocation.

(9) All criminal *convictions*, including those dismissed pursuant to Penal Code section 1203.4, except traffic, and the dates and places of the *convictions*.

(10) Fingerprints.

(b) In addition to furnishing the information required by Section 33.3605(a), an applicant for a *nude entertainment business permit* must furnish the following information:

(1) the proposed address and true name or names of the *nude entertainment business* including any fictitious name(s) the business will operate or advertise under;

(2) the name and address of the owner and any lessor of the real property upon which or in which the business is to be conducted, and a copy of the lease or rental agreement, and any amendments to it;

(3) the full true name and any other names used by the owners and any persons who exercise control over the operation, management, direction or policy of the business, or who are responsible for the daily operation of the business;

(4) if the applicant is a corporation, the name of the corporation exactly as shown in its articles of incorporation or charter, together with the state and date of incorporation and names and residence addresses of each of its current officers and directors;

(5) if the applicant is a partnership, the name and residence addresses of each of the partners, including limited partners;

(6) if the applicant is a limited partnership, a copy of the limited partnership's certificate of limited partnership as filed with the County Clerk;

(7) if one or more of the limited partners is a corporation, the applicant shall provide the information about that partner required by Section 33.3605 (b)(4);

(c) In addition to furnishing the information required by Section 33.3605(a), an applicant for an *adult entertainer permit* must furnish the following information:

The name and address of the *nude entertainment establishment* service at which the applicant expects to be employed.

Section 9. That Chapter III, Article 3, Division 36, of the San Diego Municipal Code, be and the same is hereby amended by adding new Section 33.3606, to read as follows:

SEC. 33.3606 Corporate Officers and Partners Deemed Applicants

Each corporate officer or partner of a *nude entertainment business* is deemed an applicant for a *nude entertainment business permit* and each must provide the information required in Section 33.3605.

Section 10. That Chapter III, Article 3, Division 36 of the San Diego Municipal Code be and is hereby amended by repealing Sections 33.3607, 33.3608, 33.3609, 33.3610, 33.3611, 33.3612, 33.3613, 33.3614, 33.3615, 33.3616, and 33.3620.

Section 11. That Chapter III, Article 3, Division 36, of the San Diego Municipal Code be and is hereby amended by adding new Sections 33.3607, 33.3608, 33.3609, 33.3610, and 33.3611, to read as follows:

SEC. 33.3607 Designation of Responsible Managing Officer, Signature on Applications

An applicant who is a corporation or partnership shall designate one of its officers or general partners to act as its responsible managing officer. The responsible managing officer may complete and sign all applications on behalf of the corporate officers and partners.

SEC. 33.3608 Grounds for Denial of Nude Entertainment Business Permit or Adult Entertainer Permit

In addition to the grounds for denial stated in Section 33.0305(a)-(e), 33.0305(e)(3) and 33.0305(f), an application for a *nude entertainment business permit* or *adult entertainer's permit* shall be denied for any of the following reasons:

(a) The applicant has within five years immediately preceding the date of the filing of the application *been convicted* of any of the following offenses:

(1) any offense described in California Penal Code sections 266h, 266i, 315, 316, 318, 653.22, or 647(a) or (b);

(2) any offense described in California Penal Code, Part One, Title 9, Chapters 7.5 and 7.6.

(b) The applicant has within five years immediately preceding the date of the filing of the application *been convicted* of a charge of violating any lesser included or lesser related offense, including California Penal Code section

415, in satisfaction of, or as a substitute for, an original charge of any of the offenses listed in this section.

(c) The applicant has *been convicted* of any offense which requires registration as a sex offender under California Penal Code section 290.

SEC. 33.3609 Nude Entertainment Businesses -- Operating Requirements

(a) It is unlawful for any *person* to allow any person below the age of eighteen years upon the *premises* of any *nude entertainment business*.

(b) It is unlawful for any *responsible person* to allow a *nude entertainment establishment* to be open for business between 2 a.m. and 6 a.m. Permittees shall not be granted an after-hours *permit* pursuant to Division 8:

(c) *Responsible persons* shall not permit or allow any *person* who is *nude* to be within six feet of any patron. This subsection is regulatory only.

(d) During any performance, *responsible persons* shall not allow any *adult entertainer* to intentionally touch any patron, or any patron to intentionally touch any *adult entertainer*, whether or not the *adult entertainer* is *nude*. This subsection is regulatory only.

(e) *Responsible persons* shall not allow any *nude* person on the *premises*, other than *adult entertainers* who are performing. This subsection is regulatory only.

(f) *Responsible persons* shall not allow any *person* to touch, caress, or fondle the *specified anatomical areas* of any other *person*. This subsection is regulatory only.

This subsection does not apply to persons in restrooms, or to *employees* in locker or changing rooms not open to the public or open to public view.

SEC. 33.3610 Adult Entertainer Operating Requirements

(a) While *nude*, an *adult entertainer* shall not be within six feet of a patron. This subsection is regulatory only.

(b) An *adult entertainer* shall not intentionally touch any patron during any performance, or allow any patron to intentionally touch the *adult entertainer* whether *nude* or not. This subsection is regulatory only.

(c) An *adult entertainer* shall not touch, caress, or fondle the *specified anatomical areas* of any *person*, or allow any *person* to touch, caress, or fondle the *specified anatomical areas* of the *adult entertainer*. This subsection is regulatory only.

(d) *Adult entertainers* must notify the *Chief of Police* of any change in their business or residential address within fifteen calendar days of the change.

SEC. 33.3611 Exemptions

The provisions of this Division shall not apply to the following:

(a) Any theater, concert hall, or similar *establishment* which is primarily devoted to theatrical performances. Any *establishment* that regularly features live performances, which are distinguished or characterized by an emphasis on specified anatomical areas or specified sexual activities, cannot obtain this exemption.

Any establishment which operated pursuant to an exemption from police regulation prior to 11/30/00 or which operated without a *nude entertainment permit* because of court adjudication prior to 11/30/00, may continue to operate in its exempt status, subject to any other requirements in place prior to 11/30/00.

(b) Any studio which is operated by any state college or university or public community college or school wherein the *persons*, firm, association, partnership, or corporation operating it have met the requirements established in Division 21 of the California Education Code for the issuance or conferring of, and is in fact authorized thereunder to issue and confer, a diploma or honorary diploma.

(c) Any *premises* where there is conducted the business of furnishing, providing or procuring figure models solely for any studio described in Section 33.3611(b).

Section 9. That a full reading of this ordinance is dispensed with prior to its final passage, a written or printed copy having been available to the City Council and the public a day prior to its final passage.

Section 10. The City Clerk is instructed to insert the effective date of this ordinance, once known, in the blank spaces in Municipal Code Section 33.3611.

Section 11. The City Clerk is instructed to delete the reference to Section 33.3615(a) contained in Section 33.1600.

Section 12. This ordinance shall take effect and be in force on the thirtieth day from and after its passage.

APPROVED: CASEY GWINN, City Attorney

By Mary T. Nuesca
Mary T. Nuesca
Deputy City Attorney

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