

ORDINANCE NUMBER O- 18890 (NEW SERIES)

ADOPTED ON NOV 20 2000

AN ORDINANCE AMENDING CHAPTER III, ARTICLE 3, DIVISION 33, OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTIONS 33.3301, 33.3302 AND 33.3303; REPEALING SECTION 33.3304; AMENDING AND RENUMBERING SECTION 33.3305 TO 33.3304; ADDING NEW SECTIONS 33.3305, 33.3306 AND 33.3307; REPEALING SECTION 33.3313; AMENDING AND RENUMBERING SECTION 33.3315 TO 33.3308; AMENDING AND RENUMBERING SECTION 33.3314 TO 33.3309; AMENDING AND RENUMBERING SECTION 33.3319 TO 33.3310; ADDING NEW SECTIONS 33.3311, 33.3312, 33.3313 AND 33.3314; REPEALING EXISTING SECTIONS 33.3315, 33.3316, 33.3317, AND 33.3318, AND ADDING NEW SECTIONS 33.3315, 33.3316, 33.3317, AND 33.3318; ADDING A NEW SECTION 33.3319; REPEALING EXISTING SECTIONS 33.3320, 33.3321, 33.3322, 33.3323, 33.3324, 33.3325, AND 33.3326, AND ADDING NEW SECTIONS 33.3320, 33.3321, 33.3322, 33.3323, 33.3324, 33.3325, 33.3326, AND 33.3327; ALL RELATING TO PEEP SHOW ESTABLISHMENTS.

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 rules 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 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 peep show establishments, 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 peep show establishments and does not intend to suppress or infringe upon and 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 peep show establishments; 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 (1976) (Reh. Denied 429 U.S. 873); *Renton v. Playtime Theaters*, 475 U.S. 41 (1986) (Reh. Denied 475 U.S. 1132); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990); *Barnes v. Glenn Theater*, 501 U.S. 560 (1991); 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); several California cases including but not limited to: *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*, (5th Cir. 1992) 973 F.2d 1255, *Hang On, Inc. v. Arlington*, (5th Cir. 1995) 65 F.3d 1248; *Mitchell v. Commission on Adult Entertainment*, (3rd Cir. 1993) 10 F.3d 123; *International Eateries v. Broward County*, (11th Cir. 1991) 941 F.2d 1157; and *Star Satellite v. City of Biloxi*, (5th Cir. 1986) 779 F.2d 1074; 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 that reducing the size of peep show booths will reduce unlawful sexual activity in and around the booths and reduce illegal conduct that facilitates transmission of disease; and

WHEREAS, video monitoring, lighting requirements, no doors, and providing police officers with immediate access to the booths will deter illegal activity, put greater responsibility on the store employees to monitor illegal activity, and provide for efficient police inspection; and

WHEREAS, the removal of doors or other barriers has been upheld as a reasonable time, place, and manner regulation in cases such as *Deluxe Theater & Bookstore, Inc. v. City of San Diego*, 175 Cal. App. 3d 980 (1985); *EWAP, Inc. v. City of Los Angeles*, 97 Cal. App. 3d 179 (1979); *County of Sacramento v. Superior Court*, 137 Cal. App. 3d 448 (1982); *Ellwest Stereo Theatres v. Wenner*, 681 F.2d 1243 (1982); *Broadway Books, Inc. v. Roberts*, 642 F.Supp. 486

(1986) (Tennessee); *Mitchell v. Com'n on Adult Entertainment Establishments*, 10 F. 3d 123 (3rd Cir. 1993) (Delaware); and

WHEREAS, the 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 peep show booth establishments; and

WHEREAS, the Council finds that the 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 peep show establishments will occur; and

WHEREAS, the Council finds that requiring peep show 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; NOW, THEREFORE,

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

Section 1. That Chapter III, Article 3, Division 33, of the San Diego Municipal Code be and the same is hereby amended by amending Sections 33.3301, 33.3302 and 33.3303 to read as follows:

SEC. 33.3301 Purpose and Intent

It is the purpose and intent of this Division to regulate the operation of *peep show establishments* for the protection of the public from the perils of fire and hazards to health. The intent is also to establish certain minimum standards to operate *peep show establishments* to protect the public order and the general welfare of the residents of the City of San Diego. This includes the prevention of prostitution, obscenity, lewd acts, money laundering and the infiltration of organized crime with its associated problems. It also includes the prevention of the spread of disease, the prevention of the deterioration of neighborhoods, the reduction of crime in and around *adult entertainment establishments*, and the preservation of the quality of urban life in the City of San Diego. It is also the intent of this Division to deter illicit interaction between patrons of *peep show establishments*. It is the intent of this Division to accomplish these goals by restricting the size of *peep show booths* to prohibit multiple occupants, and by prohibiting apertures between *peep show booths*. It is also the intent of this

Division to place responsibility for compliance with these regulations on the *permittee* and patrons. 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.

SEC. 33.3302 Definitions

For purposes of this Division:

"*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.

"*Peep show booth*" means any room, or partitioned area of any room, in which a *peep show device* is located. "*Peep show booth*" does not include adult motion picture theaters or adult mini motion picture theaters as defined in Section 141.0601 of this Code.

"*Peep show establishment*" means any place to which the public is permitted or invited where one or more *peep show devices* are maintained.

"*Peep show device*" means any device which displays still or moving images, which are distinguished or characterized by an emphasis on "*specified sexual activities*" or "*specified anatomical areas*." "*Peep show device*" does not include televisions, video tape machines, or other image producing devices

located within hotels, motels or similar commercial lodging establishments which are licensed as such.

"*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.

SEC. 33.3303 Peep Show Establishment Permit Required

It is unlawful for any person to operate a *peep show establishment* without a *police permit*.

Section 2. That Chapter III, Article 3, Division 33, of the San Diego Municipal Code be and the same is hereby amended by repealing Section 33.3304.

Section 3. That Chapter III, Article 3, Division 33, of the San Diego Municipal Code be and the same is hereby amended by amending and renumbering Section 33.3305 to 33.3304 to read as follows:

SEC. 33.3304 Peep Show Establishment Application Contents

Each applicant for a *permit* to operate a *peep show establishment* shall furnish the following information to the *Chief of Police*:

- (a) The full true name and any other names ever used by the applicant.
- (b) The current residential address and telephone number of the applicant.
- (c) The proposed address of the business and true name of the business, including any fictitious name the business operates or advertises under.
- (d) 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.
- (e) Written proof that the applicant is at least eighteen years of age.
- (f) Applicant's height, weight, color of eyes and hair.
- (g) Photographs as specified by the *Chief of Police*.
- (h) Applicant's business, occupation and employment history for the five years immediately preceding the date of application, including addresses and dates of employment.
- (i) 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 issued by 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.

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

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

(l) Fingerprints.

(m) The name and address of the owner, 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.

(n) 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.

(o) If the applicant is a partnership, the name and residence addresses of each of the partners, including limited partners.

(p) If the applicant is a limited partnership, a copy of the limited partnership's certificate of limited partnership as filed with the County Clerk.

(q) If one or more of the limited partners is a corporation, the applicant shall provide the information about that partner required by

Section 33.3304(n).

Section 4. That Chapter III, Article 3, Division 33, of the San Diego Municipal Code be and the same is hereby amended by adding new Sections 33.3305, 33.3306 and 33.3307, to read as follows:

SEC. 33.3305 Corporate Officers and Partners Deemed Applicants

Each corporate officer or partner of a *peep show establishment* is deemed an applicant for a *peep show establishment permit* and each must provide the information required in Section 33.3304.

SEC. 33.3306 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. 33.3307 Grounds for Denial of Peep Show Booth Establishment Permit

In addition to the grounds for denial stated in Section 33.0305(a)-(d), 33.0305(c)(3) and 33.0305(f), an application for a *peep show establishment 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); or

(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 Section 33.3307(a).

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

Section 5. That Chapter III, Article 3, Division 33, of the San Diego Municipal Code be and the same is hereby amended by repealing Section 33.3313; by amending and renumbering Section 33.3315 to Section 33.3308; and by amending and renumbering Section 33.3314 to Section 33.3309; to read as follows:

SEC. 33.3308 Minimum Doorways

It is unlawful for any *person* to operate a *peep show establishment* unless there are at least two doorways that each are a minimum of 36 inches wide. The doorway shall provide ingress or egress from any room in which a *peep show booth* is located unless the Fire Chief determines that one doorway is sufficient.

Doorways shall stay unlocked during business hours.

SEC. 33.3309 Minimum Aisle Width

(a) It is unlawful for any *person* to operate a *peep show establishment* in which the width of any primary continuous aisle located between or adjacent to

peep show booths is less than 44 inches. An example of a primary continuous aisle is shown in Figure 1.

FIGURE 1

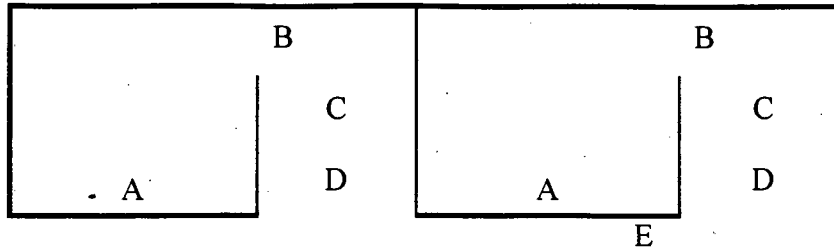


Figure 1 (SEC. 33.3309) Illustration of the following peep show booth

terms:

- (A) Viewing area
- (B) Entrance to viewing area
- (C) Secondary aisle, hallway or walkway
- (D) Entrance to peep show booth
- (E) Primary continuous aisle
- (b) It is unlawful for any *person* to operate a *peep show establishment*

where there is any secondary aisle, hallway or walkway located between or adjacent to a primary continuous aisle and a *peep show booth*. An example of a secondary aisle is shown in Figure 1.

Section 6. That Chapter III, Article 3, Division 33, of the San Diego Municipal Code be and the same is hereby amended by amending and renumbering Section 33.3319 to 33.3310, to read as follows:

SEC. 33.3310 Peep Show Booth Minimum Size and Occupancy Load

(a) Except as provided in Section 33.3326, it is unlawful for any *person* to operate a *peep show establishment* unless the floor area of the interior of the viewing area of each *peep show booth* is a maximum of fifteen square feet.

(b) A *peep show booth* shall not contain seating accommodations designed for use by more than one person at any one time. This subsection is regulatory only.

(c) The *responsible person* shall not allow more than one person in a *peep show booth* at any one time. This subsection is regulatory only.

(d) It is unlawful for any person to enter or remain in any *peep show booth* that is occupied by another person.

Section 6. That Chapter III, Article 3, Division 33 of the San Diego Municipal Code be and is hereby amended by adding new Sections 33.3311, 33.3312, 33.3313, and 33.3314, to read as follows:

SEC. 33.3311 Peep Show booth Entrances and Walls

The entrance to the *peep show booth* shall be open and remain unobstructed. Doors, walls, curtains or other obstructions at the entrance of the *peep show booth* are not allowed. The entrance to each *peep show booth* shall face a primary continuous aisle as described in Section 33.3309. The entire viewing area of the *peep show booth* must be visible from the primary continuous aisle.

The walls of a *peep show booth* shall extend downward no further than eighteen inches above the floor.

SEC. 33.3312 Legs and Supports of Peep Show Booths

A *peep show booth* shall have no more than four legs or supports. Any material used for legs or supports shall not exceed three and one-half inches square. With the exception of the legs or supports, nothing shall obstruct the view of any part of the viewing area which is within eighteen inches of the floor of any *peep show booth*.

SEC. 33.3313 Signage Required

(a) A sign setting forth the following information shall be maintained in a conspicuous location in each *peep show booth*:

"NOTICE: It is unlawful for this booth to be occupied by more than one person at any one time. This booth is subject to inspection at any time by management or peace officers. There is no expectation of privacy for any person entering or remaining inside this booth."

(b) All signs required by Section 33.3314(a) shall be at least six by eight inches in size and be printed with dark ink upon a light contrasting background with letters at least one-quarter inch in height.

(c) There shall be a light or lighted sign on the exterior of each *peep show booth* which indicates whether the *peep show device* is in use and whether the booth is occupied.

Section 7. That Chapter III, Article 3, Division 33, of the San Diego Municipal be and is hereby amended by repealing existing Sections 33.3315, 33.3316, 33.3317, and 33.3318, and adding new Sections 33.3315, 33.3316, 33.3317, and 33.3318 to read as follows:

SEC. 33.3314 Apertures Prohibited

The *responsible person* shall not create or maintain any *peep show booth* with an aperture which permits contact or communication between occupants of any two or more *peep show booths*. This section is regulatory only.

SEC. 33.3315 Sufficient Lighting Required

The *responsible person* shall ensure that there is sufficient lighting along the floor of the *peep show booths* to allow inspection of the viewing area that is visible from the main continuous aisle. Lighting is deemed sufficient if it is at least six foot candles at floor level.

SEC. 33.3316 Walkways and Aisles

All walkways, aisles and hallways of *peep show establishments* shall be maintained free of any obstruction such as a door, curtain, panel, board, slat, ribbon, cord, rope, chain or other device unless the area is out of service prior to or while being cleaned or repaired, in which case a sign shall indicate it is closed to all customers or *persons*.

SEC. 33.3317 Video Monitoring

There shall be a system of monitoring all areas of the *peep show establishment* open to the public, except rest rooms, either by direct viewing or by a system of video monitoring which allows viewing of each monitored area at least every sixty seconds by the *responsible person* on the *premises*.

Section 8. That Chapter III, Article 3, Division 33, be amended by adding a new Section 33.3319, to read as follows:

SEC. 33.3318 Peep Show Booths for the Physically Disabled

Any *peep show* built for use by a physically disabled *person* shall be clearly marked with a sign stating "Disabled Only." It is unlawful for any *responsible person* to allow this booth to be used by any person other than a physically disabled person. Any *peep show booth* built for use by a physically disabled person may exceed the floor area requirements of Section 33.3310.

Section 9. That sections Chapter III, Article 3, Division 33, be and is hereby amended by repealing existing Sections 33.3320, 33.3321, 33.3322, 33.3323, 33.3324, 33.3325, 33.3326, and adding new Sections 33.3320, 33.3321, 33.3322, 33.3323, 33.3324, 33.3325, 33.3326, and 33.3327, to read as follows:

SEC. 33.3319 Toilets; Wash Basins; Trash Receptacles

A minimum of one toilet and wash basin shall be provided for the patrons in every *peep show establishment*. Each wash basin shall be provided with soap or detergent and sanitary towels placed in permanently installed dispensers. A trash receptacle shall be provided in each toilet room.

SEC. 33.3320 Waterproof Floor Covering

In every *peep show establishment*, a waterproof covering shall be provided in each toilet room, which extends up the walls at least six inches. The floor covering shall be covered at the floor-wall juncture with at least a three-eighth inch radius. Walls of toilet rooms shall be smooth, waterproof and kept in good repair.

SEC. 33.3321 Sanitary Condition Required

(a) All walls, ceilings, floors, booths and all other physical facilities of *peep show establishments* shall be in good repair and maintained in a clean and sanitary condition.

(b) Toilet rooms shall be thoroughly cleaned at least once each day the business is in operation.

(c) The floors, seats, walls and other interior portions of all video booths shall be maintained clean and free from waste and bodily secretions.

The presence of human excrement, urine, semen or saliva in any such booths shall be evidence of improper maintenance and inadequate sanitary control.

SEC. 33.3322 Control of Vermin Required

All *peep show booth establishments* shall be maintained and operated to effectively control the entrance, harborage, and breeding of vermin, including flies. When flies or other vermin are present, effective control measures shall be instituted for their control or elimination.

SEC. 33.3323 Persons Under 18 Prohibited

It is unlawful for any *responsible person* to allow anyone under the age of eighteen in a *peep show establishment*.

SEC. 33.3324 Hours of Operation

It is unlawful for any *person* to operate a *peep show booth* or *peep show device* between the hours of 2:00 a.m. and 6:00 a.m. Permit holders shall not be granted an after-hours permit pursuant to Division 8.

SEC. 33.3325 Criminal Activity Prohibited

Each *responsible person* shall ensure that no criminal activity occurs on the *premises*, including inside the *peep show booths*.

SEC. 33.3326 Business Tax Certificate

Any *peep show establishment* with *peep show booths*, or any other booth meeting the definition of a *peep show booth*, with a current, valid police permit and business tax certificate on NOV 20 2000, and not meeting the requirements of Sections 33.3309, 33.3310(a), 33.3310(b), 33.3311, 33.3312, 33.3313, or 33.3318, is allowed to continue to operate until either: (1) the establishment is rebuilt or remodeled; or (2) new booths are constructed or installed; or, (3) until January 1, 2002, whichever occurs first.

Section 10. 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 11. The City Clerk is instructed to amend Section 141.0601 of the Municipal Code by changing the reference to Section 33.3302(c) to 33.3302.

Section 12. The City Clerk is instructed to insert the effective date of this ordinance, once known, in the blank space in Municipal Code section 33.3327.

Section 13. 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

MTN:pev:jp:jrl
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