

TOWN OF FORT MYERS BEACH
ORDINANCE NO. -96 -04

AN ORDINANCE OF THE TOWN OF FORT MYERS BEACH, FLORIDA, TO BE KNOWN AS THE TOWN OF FORT MYERS BEACH SEXUALLY ORENTED BUSINESSES REGULATION ORDINANCE; PROVIDING AUTHORITY; TITLE AND CITATION; PURPOSE AND INTENT; APPLICABILITY; DEFINITIONS; CLASSIFICATION; PERMIT REQUIRED; INVESTIGATION OF APPLICATION; ISSUANCE OF PERMIT; ANNUAL PERMIT FEE; INSPECTION; EXPIRATION OF PERMIT; SUSPENSION OF PERMIT; REVOCATION OF PERMIT; JUDICIAL REVIEW OF PERMIT DENIAL, SUSPENSION OR REVOCATION; TRANSFER OF PERMIT; BACK ROOM LINGERIE MODELING PROHIBITED; REGULATIONS PERTAINING TO EXHIBITION OF SEXUALLY EXPLICIT FILMS OR VIDEOS; REGULATIONS PERTAINING TO EMPLOYEE RECORDS; PROHIBITIONS REGARDING MINORS AND SEXUALLY ORIENTED BUSINESSES; HOURS OF OPERATION; NUDITY PROHIBITED AT SEXUALLY ORIENTED BUSINESSES OFFERING FOR SALE ALCOHOLIC BEVERAGES; NUDITY AT SEXUALLY ORIENTED BUSINESSES NOT OFFERING FOR SALE ALCOHOLIC BEVERAGES SUBJECT TO PROHIBITION PURSUANT TO SECTION 800.03, FLORIDA STATUTES, AND THE U.S. SUPREME COURT DECISION IN THE BARNES V. GLEN THEATRE. INC., CASE; STRADDLE DANCING AND OTHER SEXUAL ACTIVITIES PROHIBITED AT SEXUALLY ORIENTED BUSINESSES; ADDITIONAL CRIMINAL PROHIBITIONS; ADDITIONAL OPERATIONAL PROVISIONS FOR SEXUALLY ORIENTED BUSINESSES; EXEMPTIONS; CRIMINAL PENALTIES AND ADDITIONAL LEGAL, EQUITABLE AND INJUNCTIVE RELIEF; IMMUNITY FROM PROSECUTION; NOTICE; SEVERABILITY; REPEALING CLAUSE AND EFFECTIVE DATE

IT IS HEREBY ORDAINED BY THE TOWN OF FORT MYERS BEACH, FLORIDA as follows:

SECTION ONE: Authority

This Ordinance is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapter 166, Florida Statutes, and other applicable provisions of law.

SECTION TWO: Title and Citation

This ordinance shall be known and cited as the "TOWN OF FORT MYERS BEACH SEXUALLY ORIENTED BUSINESSES REGULATION ORDINANCE."

SECTION THREE: Purpose and Intent

It is the purpose of this ordinance to regulate sexually oriented businesses to promote the health, safety, morals, and

general welfare of the citizens of the Town of Fort Myers Beach, and to establish reasonable and uniform regulations to prevent the continued deleterious affects from sexually oriented businesses within the Town. The provisions of this Ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly it is not the intent nor effect of this Ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent or effect of this Ordinance to in any way condone or legitimize the distribution of obscene material.

SECTION FOUR: Applicability

This Ordinance shall apply to, and be enforced in the Town of Fort Myers Beach.

SECTION FIVE: Definitions

For the purpose of this Ordinance the following terms, phrases, words and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular and words in the singular include the plural. The words "shall" and "will" are mandatory and not discretionary.

A. EMPLOYEE means a person who works or performs in and/or for a sexually oriented business, regardless of whether or not said person is paid a salary, wage, or other compensation by the operator of said business. A person may be considered an employee under this definition even if said person is an independent contractor, provided that said person has a substantial or consistent relationship with the business of, or entertainment/services provided by the sexually oriented business.

B. ESTABLISHMENT means and includes any of the following:

(1) The opening or commencement of any sexually oriented business as a new business;

(2) The conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;

(3) The addition of any sexually oriented business to any other existing sexually oriented or non-sexually oriented business; or

(4) The relocation of any sexually oriented business.

C. LINGERIE MODELING BUSINESS means any place where a person who appears in a state of nudity or semi-nudity or in lingerie is

provided to be observed by other persons who pay money or any form of consideration.

D. NUDE MODEL STUDIO means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be observed, sketched, drawn, painted, sculpted, photographed, or similarly depicted by other persons who pay money or any form of consideration.

E. NUDITY or a STATE OF NUDITY means the appearance or to simulate the appearance of a human bare buttock, anus, pubic area, anal cleft or cleavage, male genitals, female genitals or the female breast at or below the areola thereof.

F. OPERATOR means and includes the owner, permit holder, custodian, manager, operator and person in charge of any permitted premises.

G. PERMITTED PREMISES means any premises that requires a permit and that is classified as a sexually oriented business under this ordinance.

H. PERMITTEE means a person in whose name a permit to operate a sexually oriented business has been issued as well as the individual listed as an applicant on the application for a permit.

I. PERSON means an individual, proprietorship, partnership, corporation, association, or other legal entity.

J. PHYSICAL CULTURE ESTABLISHMENT means any establishment which offers, provides or advertises massage, body rubs or physical contact with specified anatomical areas, regardless of whether or not said establishment has received a sexually oriented business permit under this Ordinance. Establishments which routinely provide medical services by State licensed medical practitioners, electrolysis treatment by permitted operators of electrolysis equipment, and massage by licensed massage therapists shall be excluded from the definition of adult physical culture establishments. It is not the intent of this Ordinance to regulate matters of massage establishments which are licensed and regulated by the Department of Professional Regulation, Board of Massage, pursuant to Chapter 480, Florida Statutes.

K. SEMI-NUDE or SEMI-NUDITY means a state of dress in which clothing covers no more than the genitals, pubic region and the areola or nipple of the female breast, as well as portions of the body covered by supporting straps or devices.

L. SEXUAL ENCOUNTER CENTER means a sexually oriented business or similar commercial enterprise that, as one of its primary business purposes, offers for any form of consideration:

- (1) Physical contact in the form of wrestling or tumbling between persons of the opposite sex; or
- (2) Activities between male and female persons and/or persons of the same sex when one or more of the persons are in a state of nudity or semi-nudity.

M. SEXUALLY ORIENTED ARCADE means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas"

N. SEXUALLY ORIENTED BOOKSTORE, SEXUALLY ORIENTED VIDEO STORE or SEXUALLY ORIENTED NOVELTY STORE

(1) SEXUALLY ORIENTED BOOKSTORE, SEXUALLY ORIENTED VIDEO STORE or SEXUALLY ORIENTED NOVELTY STORE means a commercial establishment which, 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 reproductions, slides, or other visual representations which are characterized by depictions or descriptions of "specified sexual activities" or "specified anatomical areas"; or

(b) Instruments, devices or paraphernalia which are designed for use in connection with "specified sexual activities."

(2) The term "principal business purpose" shall include any such commercial establishment which:

(a) Derives 25% or more of its gross monthly revenues from the sale or rental of the inventory and or materials described in Section Four n(1) (a) and (b), or

(b) Has as 25% or more of its stock in trade the inventory and/or materials described in Section Four n.(1) (a) and (b), or

(c) Devotes 25% or more of its interior business area to the sale or rental of the inventory and/or materials described in Section Four n. (1) (a) and @), or

(d) Devotes 25% or more of its advertising to the sale or rental of the inventory and/or materials described in Section Four n. (1) (a) and (b), or

(e) Does not meet one or more of the criteria in this subsection (2)(a) through (d), but does offer for sale or rental the inventory and/or materials described at Section Four n. (1)(a)

and (b) in a manner which demonstrates that the sale or rental of the aforesaid materials is a principal business purpose.

A commercial establishment may have other principal business purposes that do not involve the offering for sale or rental of material characterized by depictions or descriptions of "specified sexual activities" or "specified anatomical areas" and still be categorized as a SEXUALLY ORIENTED BOOKSTORE, SEXUALLY ORIENTED VIDEO STORE or SEXUALLY ORIENTED NOVELTY STORE. Such other business purposes will not serve to exempt such commercial establishments from being categorized as a SEXUALLY ORIENTED BOOKSTORE, SEXUALLY ORIENTED VIDEO STORE or SEXUALLY ORIENTED NOVELTY STORE so long as one of its Principal business purposes is the offering for sale or consideration of the specified materials characterized by depictions or descriptions of "specified sexual activities" or "specified anatomical areas."

O. SEXUALLY ORIENTED BUSINESS means a sexually oriented arcade, sexually oriented bookstore, sexually oriented video store or sexually oriented novelty store, sexually oriented cabaret, sexually oriented motion picture theater, sexually oriented theater, physical culture establishment, lingerie modeling business, nude model studio, or sexual encounter center.

P. SEXUALLY ORIENTED CABARET means a night club, bar, bottle club as defined in Chapter 561, Florida Statutes, restaurant, or other commercial business or establishment, whether or not alcoholic beverages are served or consumed, which regularly features:

- (1) Persons who appear in a state of nudity or semi-nudity; or
- (2) Live performances, appearances or exhibitions which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or
- (3) Films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

Q. SEXUALLY ORIENTED MOTION PICTURE THEATER means a commercial establishment where for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

R. SEXUALLY ORIENTED THEATER means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or semi-nudity or live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities".

S. SHERIFF means the Sheriff of Lee County, Florida or his/her deputy sheriffs.

T. SPECIFIED ANATOMICAL AREAS means:

(1) Less than completely and opaquely covered:

(a) Human genitals or pubic region; or

(b) Buttock; or

(c) Areola or nipple of the female breast.

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

U. SPECIFIED CRIMINAL ACT means:

(1) A criminal violation of this Ordinance;

(2) An offense under Chapter 794, Florida Statutes;

(3) An offense under Chapter 796, Florida Statutes;

(4) An offense under Chapter 800, Florida Statutes;

(5) An offense under Chapter 826, Florida Statutes;

(6) An offense under Section 827.04, Florida Statutes, Contributing to the Delinquency of a Minor;

(7) An offense under Chapter 837, Florida Statutes;

(8) An offense under Chapter 847, Florida Statutes;

(9) An offense under Chapter 893, Florida Statutes;

(10) An offense under any analogous statute of a state other than Florida, or under any analogous ordinance of another county or city; or

(11) An offense under either the Florida or Federal Racketeer Influenced and Corrupt Organization (RICO) Act.

V. SPECIFIED SEXUAL ACTIVITIES means:

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

(2) The fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breast(s); or

(3) Sex acts, actual or simulated, including, but not limited to, intercourse, oral copulation, or sodomy and also including as examples, but not limited to, any of the following: acts of human anilingus, bestiality, buggery, cunnilingus, coprophagy, coprophilia, fellatio, flagellation, masochism, necrophilia, pederasty, pedophilia, sadism, sado-masochism, sapphism, urolagnia or zoerasty; or

(4) Masturbation, actual or simulated; or

(5) Excretory functions as part of or in connection with any of the activities set forth in (1) through (4) above.

W. STRADDLE DANCE (also known as a lap dance) means the use by an employee of a sexually oriented business of any part of his/her body to touch the genital or pubic area of a person, or to touch the breast(s) of a female person, whether clothed or unclothed, while at the business; or the touching of the genital or pubic area of an employee by a person while at the business; or the touching of the breast(s) of a female employee, whether clothed or unclothed, by a person while at the business. It shall be a "straddle dance" regardless of whether the "touch" or "touching" occurs while the employee is clothed, nude, semi-nude or displaying or exposing any specified anatomical area. It shall also be a "straddle dance" regardless of whether the "touch" or "touching" is direct or through a medium.

X. TOWN MANAGER, as used in this ordinance, also includes the designee of the Town Manager.

Y. TRANSFER OF OWNERSHIP OR CONTROL of a sexually oriented business means and includes any of the following:

(1) The sale, lease, or sublease of a business;

(2) The transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or.

(3) The establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

SECTION SIX: Classification

Sexually oriented businesses are classified as follows:

A. Sexually oriented arcade

B. Sexually oriented bookstore, sexually oriented video store or sexually oriented novelty store

- C. Sexually oriented cabaret
- D. Sexually oriented motion picture
- E. Sexually oriented theater
- F. Lingerie Modeling Business
- G. Physical culture establishment
- H. Nude model studio
- I. Sexual Encounter Center

SECTION SEVEN: Permit Required

A. No sexually oriented business shall be permitted to operate without a valid permit issued by the County Manager for the particular type of business. Employees of sexually oriented businesses are required to obtain an individual permit issued by the County Manager. It shall be unlawful and a person commits a misdemeanor if he/she operates or causes to be operated a sexually oriented business without said permit.

B. The Town Manager is responsible for granting, denying, revoking, renewing, suspending, and canceling sexually oriented business permits for proposed or existing sexually oriented businesses or employees. The Town Manager shall ascertain whether a proposed sexually oriented business for which a permit is being applied for complies with all applicable zoning laws and/or land development regulations now in effect or as amended or enacted subsequent to the effective date of this Ordinance, and the Comprehensive Plan, whichever is applicable. The Lee County Sheriff's Office shall be responsible for providing information to the Town Manager on whether an applicant has been convicted of a specified criminal act during the time period set forth in Section Eight of this Ordinance by the performance of FCIC/NCIC records request check. The Manager is also responsible for inspecting a proposed, permitted or non-permitted sexually oriented business in order to ascertain whether it is in compliance with applicable statutes and ordinances.

C. An application for a permit must be made on a form provided by the Town of Fort Myers Beach Manager's Office. Any person desiring to operate a sexually oriented business or be an employee of a sexually oriented business shall file, with the Manager, an original and two copies of a sworn permit application on the standard application form.

D. The completed application shall contain the following information and shall be accompanied by the following documents and information:

(1) If the applicant is:

(a) an employee or individual, the applicant shall state their legal name and any aliases or former legal names, a driver's license, date of birth, and submit satisfactory proof that he/she is twenty-one years of age, and provide a photograph of themselves;

(b) a partnership, the partnership shall state its complete name, and the names of all partners, whether the partnership is general or limited, and a copy of the partnership agreement if any;

(c) a corporation, the corporation shall state its complete name, the date of its incorporation, evidence that the corporation is in good standing under the laws of Florida, the names and capacity of all officers, directors and stockholders, and the name of the registered corporate agent and the address of the registered office for service of process.

(2) If the applicant intends to operate the sexually oriented business under a name other than that of the applicant, the sexually oriented businesses fictitious name and the county of registration under Section 865.09, Florida Statutes.

(3) Whether the applicant or any of the other individuals listed pursuant to Section Six d.(1) of this Ordinance has, within the five (5) year period immediately preceding the date of the application, been convicted of a specified criminal act, and, if so, the specified criminal act involved, the date of conviction and the place of conviction.

(4) Whether the applicant or any of the other individuals pursuant to Section Six d.(1) of this Ordinance has had a previous permit under this Ordinance denied, suspended or revoked, including the name and location of the sexually oriented business for which the permit was denied, suspended or revoked, as well as the date of the denial, suspension or revocation and whether the applicant or any other individuals listed pursuant to Section Six d.(1) has been a partner in a partnership or an officer, director or stockholder of a corporation that is permitted under this Ordinance whose permit has previously been denied, suspended or revoked, including the name and location of the sexually oriented business for which the permit was denied, suspended or revoked as well as the date of denial, suspension or revocation

(5) Whether the applicant or any other individual listed pursuant to Section Six d.(1) holds any other permits under this Ordinance and, if so, the names and locations of such other permitted businesses.

(6) The single classification of permit for which the applicant is filing. The applicant shall state the general nature of the type of sexually oriented business for which the applicant is seeking a permit, including the degree to which the anticipated activities at the business meet the definitions of the enumerated sexually

oriented businesses at Sections Four and Five of this Ordinance. Such a statement shall serve as the initial basis for the permitted activities allowed under any permit that is issued.

(7) The location of the proposed sexually oriented business, including a legal description of the property, street address, and telephone number(s), if any.

(8) The applicant's mailing address and residential address.

(9) A recent photograph of the applicant and of any person listed pursuant to Section Six d (1) of this Ordinance.

(10) The applicant's driver's permit number, Social Security number, and or his/her State or federally issued tax identification number, where appropriate. The same information shall be provided for any person listed pursuant to Section Six d (1) of this Ordinance.

(11) If the applicant is a sexually oriented business, a sketch or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared but it must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six (6) inches. The sketch or diagram shall designate any portion of the premises in which patrons will not be permitted.

(12) If a person who wishes to operate a sexually oriented business is an individual, he/she must sign the application for a permit as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each individual who has a ten percent (10%) or greater interest in the business must sign the application for a permit as applicant. If a corporation is listed as Owner of a sexually oriented business or as the entity which wishes to operate such a business, each individual having a ten percent (10%) or greater interest in the corporation must sign the application for a permit as applicant.

(13) If a person wishes to operate a sexually oriented business which shall exhibit on the premises films, video cassettes, or other video reproductions which depict specified sexual activities or specified anatomical areas, then said person shall comply with the application requirements stated in Section Seventeen.

(14) The names of the employees for the proposed sexually oriented business, if known, or, if presently unknown, a statement to that effect.

E. Applicants for a permit under this Section shall have a continuing duty to promptly supplement application information required by this Section in the event that said information changes

in any way from what is stated on the application. The failure to comply with said continuing duty within thirty (30) days from the date of such change, by supplementing the application on file with the Sheriff, shall be grounds for suspension of a permit.

F. In the event that the Town Manager determines or learns at any time that the applicant has not properly completed the application for a proposed sexually oriented business, or for employment at a sexually oriented business, the manager shall promptly notify the applicant of such fact and allow the applicant ten (10) days to properly complete the application. (The time period for granting or denying a permit shall be stayed during the period in which the applicant is allowed an opportunity to properly complete the application.)

G. The applicant must be qualified according to the provisions of this Ordinance and, if a sexually oriented business, the premises must be inspected and found to be in compliance with the applicable jurisdiction's health, fire and building codes and laws.

H. If the applicant is a partnership, corporation, or individual operating a sexually oriented business, the applicant shall be required to pay a non-refundable application fee of One Thousand Dollars (\$ 1,000.00) at the time of filing an application under this Section of this Ordinance if the location of the proposed sexually oriented business is in the Town of Fort Myers Beach, Applicants for employment at a sexually oriented business shall pay a non-refundable application fee of Two Hundred Fifty Dollars (\$250.00) at the time of filing an application if they intend to work in any sexually oriented business in the Town of Fort Myers Beach. All application fees shall be subject to modification by resolution of the Town of Fort Myers Beach.

I. The fact that a person possesses other types of state or county permits and/or licenses does not exempt the person from the requirement of obtaining a Town of Fort Myers Beach sexually oriented business permit to work or operate.

J. By applying for and holding a permit under this Ordinance, the applicant permittee shall be deemed to have consented to the provisions of this Ordinance and to the exercise by the Sheriffs office and all other Lee County agencies or State or municipal agencies or officers charged with enforcing the laws, ordinances and codes applicable in Town of Fort Myers Beach of their respective responsibilities under this ordinance.

SECTION EIGHT: Investigation of Application

A. Upon receipt of an application properly filed with the Town Manager, and upon payment of the non-refundable application fee, the Town Manager shall immediately stamp the application as received and shall immediately thereafter send photocopies of the

application to State and County agencies responsible for enforcement of health, fire and building codes and laws. Each department or agency shall promptly conduct an investigation of the applicant, application and the proposed sexually oriented business in accordance with its responsibilities under law and as set forth in this ordinance. Investigation shall be completed within twenty (20) days of receipt of the application by the Town Manager for individual or employee applicants, and completed within thirty (30) days of receipt of the application if the applicant is a partnership or corporation. At the conclusion of its investigation, each department or agency shall indicate on the photocopy of the application its approval or disapproval of the application, date it, sign it, and, in the event it disapproves, state the reasons therefor.

B. A department or agency shall disapprove an application if it finds that the proposed sexually oriented business will be in violation of any provision of any statute, code, ordinance, regulation or other law in effect in Town of Fort Myers Beach. After its indication of approval or disapproval, each department or agency shall immediately return the photocopy of the application to the Town Manager.

SECTION NINE: Issuance of Permit

A. The Town Manager shall grant or deny an application for a permit within thirty (30) days from the date of its proper filing. Upon the expiration of the thirtieth (30th) day, the applicant may be permitted to begin operating the business for which the permit is sought, unless and until the Town Manager notifies the applicant of a denial of the application and states the reason(s) for that denial. Nothing contained herein is intended to, or shall be construed to, exempt an applicant from compliance with all other applicable county, municipal, State and federal laws including, but not limited to, requirements to obtain a building permit, certificate of occupancy, occupational license or zoning approval.

B. Grant of Application for Permit

(1) The Town Manager shall grant the application unless one or more of the criteria set forth in Section Eight C below is present.

(2) The permit, if granted, shall state on its face the name of the person or persons to whom it is granted, the date of issuance, the expiration date, and, if the applicant is a sexually oriented business, the name and address of the business. The permit shall also refer to Section 800.03, Florida Statutes, with the warning that any employee or sexually oriented business, whether or not a permit has been issued for said business under this ordinance, may be subject to said section's prohibition against public nudity pursuant to the United States Supreme Court decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 115 L.Ed. 2d. 504,