

## ATTACHMENT V

### COUNTY OF SACRAMENTO CALIFORNIA

For the Agenda of:  
May 11, 2005

To: Board of Supervisors

From: Department of Planning and Community Development

Subject: Regulation Of Sexually Oriented Businesses And Approve Appropriation Adjustment Request No. 25-102 To Establish Appropriations Related To Regulation Of Sexually Oriented Businesses For Fiscal Year 2004-2005

Contact: Robert Sherry, 874-6141

#### **Overview**

In 1995 the Board amended the Sacramento County Zoning Code regulations relating to the location of sexually oriented businesses, and further amended these regulations in April, 2004. There are four sexually oriented businesses currently operating in violation of these regulations, and the Planning and Community Development Department is seeking direction on enforcement of the Zoning Code provisions.

#### **Recommendations**

1. Direct the Planning and Community Development Department to begin enforcement efforts to bring sexually oriented businesses into compliance with Zoning Code requirements.
2. Approve the attached Appropriation Adjustment Request No. 25-102 in the amount of \$100,000 for 2004-2005 from Contingencies for the Planning and Community Development Department.

#### **Measures/Evaluation**

Ensure compliance with the Zoning Code and meet legal tests for allowed regulation of sexually oriented businesses.

#### **Fiscal Impact**

The Planning and Community Development Department is estimating a funding requirement of \$100,000 for the remainder of 2004-2005 to cover costs related to the compliance effort. We anticipate that additional funds will be needed for this effort in continuing in FY 2005-06, and an adjustment to the Planning Department's budget will be made at the time of the Final Budget hearings based upon our estimate at that time of what funds are needed.

**BACKGROUND:**

The County is authorized under California law to regulate the time, place and manner of operation of sexually oriented businesses, pursuant to a content neutral ordinance. However, such regulation must not unreasonably limit alternative avenues of communication for constitutionally protected expression.

The County regulates sexually oriented businesses<sup>1</sup> by means of various Zoning Code provisions that limit such uses to industrially zoned property in the M-1 and M-2 land use zones, and prevents the concentration of such uses through a series of distance limitations and related measures.<sup>2</sup>

Prior to the first set of Zoning Code amendments in 1995, several sexually oriented businesses were legally established under the pre-existing regulations and became nonconforming uses when the Board approved a new regulatory scheme for such businesses in 1995. The Zoning Code permits such uses to continue operating as legal nonconforming uses during a five-year amortization period. Such uses must terminate at the end of this five-year period unless they obtain a certificate of nonconforming use. However, the uses in question do not qualify for a certificate of non-conforming use because they are unable to satisfy the 1,000-foot distance limitation required by Zoning Code Section 120-25(d). This five-year period has expired and these previously legal nonconforming uses are now operating illegally.

Enforcement against these businesses was held in abeyance after the close of the amortization period due to significant legal developments in court cases that required adult use regulations to allow for reasonable alternative avenues of communication; i.e., there must be a reasonable number of sites available for constitutionally protected adult uses.

The law is well established that the County is entitled to regulate the secondary impacts of adult businesses by means of land use regulations that serve to disperse these uses. However, it has become equally clear that the County is constitutionally precluded from applying these land use regulations in a manner that has the effect of creating a *de facto* prohibition on such uses in the County. County Counsel has advised us that decisions by the Ninth Circuit Court of Appeals have made it apparent that zoning restrictions on sexually explicit businesses will be struck down as contrary to the First Amendment unless they allow for a reasonable number of sites for the

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<sup>1</sup> Zoning Code Section 130-157.5 defines a “sexually oriented business” as “an adult book store, adult video tape store, an adult motion picture theater or a live adult theater, or any establishment that consists of any combination of such uses.” Each of these specific uses is in turn separately defined in the Zoning Code.

<sup>2</sup> A sexually oriented business must be located more than 1,000 feet from any other sexually oriented business. Sexually oriented businesses are also prohibited within 1,000 feet of any residential-open space land use as described in Zoning Code Section 201-01 and from certain other sensitive uses (e.g., schools, churches and parks) as set forth in Zoning Code Section 325.51(b). Until April, 2004, no more than three sexually oriented businesses were allowed within any single community planning area.

location of sexually explicit businesses. (See *Isbell v. City of San Diego* (9<sup>th</sup> Cir. 2001) 258 F.3d 1108 and *Lim v. City of Long Beach* (9<sup>th</sup> Cir. 2000) 217 F.3d 1050.) While the standard for determining whether a reasonable number of such sites are in fact available under a particular zoning scheme is somewhat murky, it is clear that the County at a minimum must provide sufficient sites for the relocation of lawfully established nonconforming sexually explicit businesses if it seeks to prevent their continued operation at their existing locations.

The key to the legal viability of regulation of sexually oriented businesses is thus the availability of a reasonable number of sites to accommodate constitutionally protected adult uses. The Planning Department conducted a study in 2000 based on the restrictive criteria in the existing adult use provisions that revealed a limited number of potential sites. The limited availability of alternative sites left the prior ordinance vulnerable to challenge and in this regard hindered the County's ability to bring code enforcement actions against adult uses that currently operate in commercially-zoned areas.

As a result, the Planning Department revised the 2000 study to determine the acreage available for adult uses under the modified locational criteria contained in the current Zoning Code. In contrast to the original study, the revised mapping survey based on the new locational criteria appears to identify sufficient sites for constitutionally protected adult uses, if certain Zoning Code amendments were enacted.

In April, 2004 your Board approved changes to the Zoning Code regulation of sexually oriented businesses that bring the Zoning Code into compliance with the guidelines the courts have laid out for allowable regulation of sexually oriented businesses.

### **DISCUSSION:**

As noted above, at the time of the enactment of the current regulations regarding sexually oriented businesses, there were several businesses operating illegally in the County. The businesses in question and their status are as follows:

***The Embers*** – 5340 Auburn Blvd. This long-established bar provides topless dance entertainment. The Owner first applied for a business license in 1986, which was denied upon renewal in 1992. Eventually, after various meetings and discussions the license was granted under the understanding the dancers were not actually topless but had specified anatomical areas covered. Subsequently it was determined that the entertainment did violate County code, and their license was denied upon renewal in 1998. An administrative appeal hearing was held, and the hearing officer upheld the revocation. Due to concerns on the ability of our Zoning Code to withstand legal challenge, the County did not pursue enforcement of the revocation.

***The Body Shop*** – 5525 Auburn Blvd. Originally opening in 1995, this bar provides topless dance entertainment. It was also originally licensed under the understanding the dancers were not actually topless but had specified anatomical areas covered. As with *The Embers*, the County subsequently determined that the entertainment did violate County code, and their license was revoked in 1998. An administrative appeal hearing was held, and the hearing officer upheld the

revocation. The business then appealed the decision to the Board of Supervisors, which also upheld the denial. The County began an injunctive relief process, but due to concerns on the ability of our Zoning Code to withstand legal challenge, the County did not pursue enforcement of the revocation.

**City Limits** – 5809 Auburn Blvd. The first of the “juice bars” offering fully nude dancing and not serving alcohol, they were originally licensed in 1993 and their license was renewed in December, 1999. Due to the changes in allowed zoning for adult businesses, City Limits became a non-conforming use and had a five year amortization period (which ended in December, 2000) in which to relocate. Due to concerns on the ability of our Zoning Code to withstand legal challenge, the County did not pursue action. Their current business license expires in December, 2005.

**Regency Theater Theatre** – 4940 Watt Avenue, across from McClellan Business Park. This business has been licensed since 1989 and has a Conditional Use Permit to operate as an adult movie theater, though they also offer adult videos for sale, which are not covered by their Use Permit. They faced the same December, 2000 deadline as the other adult operations operating in the wrong zones, but again, due to concerns on the ability of our Zoning Code to withstand legal challenge, the County did not pursue action. Their current business license expires in November, 2005.

## Issues

The four businesses in question fall into two general categories – unlicensed and licensed operations. The two topless bars (The Body Shop and The Embers) are both operating without a General Business License and they have not been fully legal uses in conformance with the Zoning Code in many years. The legal issues here are fairly clear – the businesses are operating illegally.

City Limits and Regency Theatre, on the other hand, were licensed, legally conforming operations until the Zoning Code changes. These operations can point to many years of operation with few significant neighborhood complaints or law enforcement issues. While the Zoning Code changes apply to them, taking action against them is a more complex matter.

In any case, the businesses in question are expected to resist relocation or closure by the County, most likely by filing actions in Federal court on First Amendment grounds. Actions in Federal court require substantial legal and other resources, expert testimony, and the commitment to a multi-year effort. As indicated above, one of the burdens on the County is to demonstrate that, if the businesses cannot operate in their current location, there is sufficient land of the appropriate zoning available elsewhere in the County.

As part of our effort to take successful action against these businesses, we will be contracting with experts for a detailed, unbiased land use review of potential industrial zoning (M-1 and M-2) in the County. This expert study will require funding beyond the currently approved budget for the Planning and Community Development Department, and hence the attached Appropriations Adjustment Request. Additionally, staff time necessary to work on these cases as

well as coordinate with the consultant may be significant. Other programs in Code Enforcement may be impacted as a result. If additional funding is needed, we will request it in the 2005-2006 Budget hearings in September.

**MEASURES/EVALUATION:**

To ensure compliance with the Zoning Code regulations for sexually oriented businesses it is necessary to prepare for legal enforcement action. To be successful, the County must demonstrate that its requirements meet legal tests for allowed regulation of sexually oriented businesses and provision of alternative locations.

**FINANCIAL ANALYSIS:**

If directed by the Board to pursue compliance by the four sexually oriented businesses in question, the Planning and Community Development Department is requesting approval of the attached appropriations Adjustment Request No. 25-102 in the amount of \$100,000. The funds will be used for the retention of consultants and experts needed to develop the available locations map and related activities. If additional funding is needed, we will request it in the 2005-2006 Budget hearings in September.

Respectfully submitted,

APPROVED:

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ROBERT SHERRY, Director  
Planning and Community Development

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TERRY SCHUTTEN  
County Executive

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CHERYL CRESON, Administrator  
Municipal Services Agency

Attachments

# APPROPRIATION ADJUSTMENT REQUEST

2. Department Name  
*Planning + Comm. Development*

Department Name (if applicable)

3. Date  
*4/20/2005*

4. REQUEST ADJUSTMENT OF APPROPRIATION AS LISTED BELOW

	FUND#	INDEX#	ACCOUNT	ACCOUNT TITLE	AMOUNT
SOURCE OF FINANCING	001A	5980000	79790100	Contingency	100,000
USE OF FINANCING	001A	661654	20253100	Legal Services	100,000

5. JUSTIFICATION (Attach Memo if Necessary)

*Please see attached Board letter*

Department Head  
*Robert Sherry*  
By: *[Signature]* Date

Department Head (if applicable)  
*Groffrey B. Davy*  
By: *[Signature]* Date *4-20-05*

6. ACTION  
 Dept. Head Approval(s) only required  
 Board Action Required  
 Four-Fifths Vote Required

Auditor-Controller  
By: *Cheryl Fox* Date *4-20-05*

7. APPROVAL  
 Approve  
 Disapprove

County Executive  
By: *[Signature]* Date *4-20-05*

8. RESOLUTION

On a motion by Supervisor \_\_\_\_\_, seconded by Supervisor \_\_\_\_\_  
the foregoing resolution was passed and adopted by the BOARD OF SUPERVISORS of the County of Sacramento, State of California, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_ by the following vote, to wit:

**AYES:** Supervisors,  
**NOES:** Supervisors,  
**ABSENT:** Supervisors,

Resolution Number \_\_\_\_\_

(SEAL)

ATTEST:

\_\_\_\_\_  
CLERK OF THE BOARD OF SUPERVISORS

\_\_\_\_\_  
CHAIR OF THE BOARD OF SUPERVISORS OF SACRAMENTO COUNTY CALIFORNIA