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ORDINANCE NO. _____

AN ORDINANCE AMENDING ORDINANCE NO. 016624 (AN ORDINANCE RELATING TO LICENSING REQUIREMENTS AND REGULATIONS FOR SEXUALLY ORIENTED BUSINESSES WITHIN EL PASO) TO AMEND SECTION 5.54.230, EFFECTIVE DATE.

WHEREAS, the City Council of the City of El Paso, by Ordinance 016624 approved on May 8, 2007, repealed and replaced Chapter 5.54 of the El Paso City Code; and,

WHEREAS, the City of El Paso desires to amend Section 5.24.230 of Chapter 5.54 to revise the effective date of compliance under this chapter.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO, TEXAS:

1. **That Section 5.54.230 (Effective Date) of Chapter 5.54 (Sexually Oriented Business) shall be and hereby is amended to read as follows:**

   5.54.230 Effective Date.

   Upon adoption, the provisions of this chapter shall apply to the activities of all sexually oriented businesses and sexually oriented business employees defined herein, whether such businesses or activities were established or commenced before, on or after the effective date of this chapter, which was May 8, 2007. All existing sexually oriented businesses that are operating under an existing license from the City shall continue operation under the same license and renew said license when applicable under this chapter. By August 10, 2007, all sexually oriented business must make any and all necessary changes to the interior configuration of the regulated business premises to conform to this chapter. All employees of sexually oriented businesses must make application for a license pursuant to this chapter by August 10, 2007, and thereafter, within ten (10) days of becoming an employee subject to this ordinance.

2. Except as herein provided, Title 5 (Business Taxes, Licenses and Regulations), Chapter 5.54 shall remain in full force and effect.

PASSED AND APPROVED this ___ day of _____ 2007.

CITY OF EL PASO

_____
John F. Cook
Mayor

ATTEST:

_____
Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:

_____
Charlie McNabb
City Attorney

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ORDINANCE NO. _____

Document Name:ORD-07-Amend 5.54.230 SOB Ordinance
Document #: 32003
Author_Id: CMCN

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ORDINANCE NO. 016624

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AN ORDINANCE RELATING TO LICENSING REQUIRMENTS AND REGULATIONS FOR SEXUALLY ORITENTED BUSINESSES WITHIN EL PASO.

Section

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5.54.190	Scienter Required to Prove Violation or Business Licensee Liability.
5.54.200	Failure of City to Meet Time Frame Not to Risk Applicant/Licensee Rights.
5.54.210	Severability.
5.54.220	Conflicting Code Provisions Repealed.
5.54.230	Effective Date.

WHEREAS, sexually oriented businesses require special supervision from the public safety agencies of the City in order to protect and preserve the health, safety and welfare of the patrons of such businesses as well as citizens of the City; and

WHEREAS, the City Council finds that sexually oriented businesses, as a category of establishments, are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature; and

WHEREAS, there is convincing documented evidence that sexually oriented businesses, as a category of establishments, have deleterious secondary effects and are often associated with crime and adverse effects on surrounding properties; and

WHEREAS, the City Council desires to minimize and control these adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from crime; preserve the quality of life; preserve the character of surrounding neighborhoods and deter the spread of urban blight; and

WHEREAS, the City recognizes its constitutional duty to interpret, construe, and amend its laws to comply with constitutional requirements as they are announced; and

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WHEREAS, with the passage of any Ordinance, the City and the City Council accept as bind the applicability of general principles of criminal and civil law and procedure and the rights and obligations under the United States and Texas Constitutions, Texas State Statutes, and the Texas Rules of Civil and Criminal Procedure; and

WHEREAS, it is not the intent of this Ordinance to suppress any speech activities protected by the U.S. Constitution or the Texas Constitution, but to enact legislation to further the content-neutral governmental interests of the City, to-wit, the controlling of secondary effects of sexually oriented businesses.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

1. That the current Chapter 5.54 of the El Paso City Code be repealed and replaced with the following:

Section 5.54.010. Rationale and findings.

(a) Purpose. It is the purpose of this Ordinance to regulate sexually oriented businesses in order to promote the health, safety, moral and general welfare of the citizens of the City, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the City. The provisions of this Ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content or reasonable access to any communicative materials, including sexually oriented materials. Similarly, it is neither 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 nor effect of this Ordinance to condone or legitimize the distribution of obscene material.

(b) Findings and Rationale. Based on evidence of the adverse secondary effects of adult uses presented in hearings and in reports made available to the City Council, and on findings, interpretations, and narrowing constructions incorporated in the cases of *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *California v. LaRue*, 409 U.S. 109 (1972); and *Fantasy Ranch, Inc. v. City of Arlington*, No. 04-11337, 2006 WL 2147559 (5th Cir. 2006); *N.W. Enters. v. City of Houston*, 352 F.3d 162 (5th Cir. 2003); *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002); *BGHA, LLC v. City of Universal City*, 210 F. Supp. 2d (W.D. Tex. 2002), *aff'd* 340 F.3d 295 (5th Cir. 2003); *LLEH, Inc. v. Wichita County*, 289 F.3d 358 (5th Cir. 2002); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995); *Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995); *J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988); *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Heideman v. South Salt Lake City*, 342 F.3d 1182 (10th Cir. 2003); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 973 F. Supp. 1428 (M.D. Fla. 1997), *aff'd* 176 F.3d 1358 (11th Cir. 1999); *Ctr for Fair Public Policy v. Maricopa County*, 336 F.3d 1152 (9th Cir. 2003); *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004); *Reliable Consultants, Inc. v. City of Kennedale*, Case No. 4:05-CV-166-A (N.D. Tex., May 16, 2005); *Sensations, Inc. v. City of Grand Rapids*, 2006 WL 2504388 (W.D. Mich., Aug. 28, 2006); *Gammoh v. City of La Habra*, 395 F.3d 1114 (9th Cir. 2005); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003);

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And based upon reports concerning secondary effects occurring in and around sexually oriented businesses, including, but not limited to, Austin, Texas – 1986; Indianapolis, Indiana – 1984; Garden Cove, California – 1991; Houston, Texas – 1983; Phoenix, Arizona – 1979, 1995-98; Chattanooga, Tennessee – 1999-2003; Minneapolis, Minnesota – 1980; Los Angeles, California – 1977; Whittier, California – 1978; Spokane, Washington – 2001; St. Cloud, Minnesota – 1994; Littleton, Colorado – 2004; Oklahoma City, Oklahoma – 1986; Dallas, Texas – 1997, 2004; Greensboro, North Carolina – 2003; Kennedale, Texas – 2005; Effingham, Illinois – 2005; Amarillo, Texas – 1977; El Paso, Texas – 1986; New York, New York Times Square – 1994; and the Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (June 6, 1989, State of Minnesota),

The City Council finds:

(1) Sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects including, but not limited to personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter and sexual assault and exploitation.

(2) Sexually oriented businesses should be separated from sensitive land uses to minimize the impact of their secondary effects upon such uses, and should be separated from other sexually oriented businesses, to minimize the secondary effects associated with such uses and to prevent an unnecessary concentration of sexually oriented businesses in one area.

(3) Each of the foregoing negative secondary effects constitutes a harm, which the City has a substantial government interest in preventing and/or abating. This substantial government interest in preventing secondary effects, which is the City's rationale for this Ordinance, exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses. Additionally, the City's interests in regulating sexually oriented businesses extend to preventing future secondary effects of either current or future sexually oriented businesses that may locate in the City. The City finds that the cases and documentation relied on in this Ordinance are reasonably believed to be relevant to said secondary effects.

Section 5.54.020. Definitions

For purposes of this Ordinance, the words and phrases defined in the sections hereunder shall have the meanings therein respectively ascribed to them unless a different meaning is clearly indicated by the context.

A. "*Adult Bookstore or Adult Video Store*" shall mean an establishment which, as one of its principal business activities, offers for sale or rental for any form of consideration any one or more of the following: books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, compact discs, digital video discs, or other visual representations which are characterized by their emphasis upon the display of specified sexual activities or specified anatomical areas.

A "principal business activity" exists where the commercial establishment:

1. Has a substantial portion of its displayed merchandise which consists of said items, or

2. Has a substantial portion of the wholesale value of its displayed merchandise which consists of said items, or

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3. Has a substantial portion of the retail value of its displayed merchandise which consists of said items, or

4. Derives a substantial portion of its revenues from the sale or rental, for any form of consideration of said items, or

5. Maintains a substantial section of its interior business space for the sale or rental of said items, or

6. Maintains an "adult arcade," which 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 regularly maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are characterized by their emphasis upon matter exhibiting specified sexual activities or specified anatomical areas.

B. "*Adult Cabaret*" shall mean a nightclub, bar, juice bar, restaurant, bottle club or other commercial establishment, whether or not alcoholic beverages are served, whose primary business is the offering to customers of live entertainment that features persons who appear semi-nude.

C. "*Adult Lounge*" shall mean an adult cabaret, as defined above, which is permitted or licensed premises, pursuant to the Texas Alcoholic Beverage Code, where alcoholic beverages may be served or sold.

D. "*Adult Motion Picture Theater*" or "*Adult Movie Theatre*" shall mean an establishment that contains a room with a screen or projection area, whose primary business is the exhibition to customers of films, motion pictures, videocassettes, digital video disc, slides, any electronically produced media or similar photographic reproductions which are distinguished by or characterized by an emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical areas or intended to provide sexual stimulation or sexual gratification to such customers and are regularly shown to more than five persons for any form of consideration.

E. "*Characterized by*" shall mean describing the essential character or quality of an item. As applied in this Ordinance, no business will be classified as a sexually oriented business by virtue of showing, selling or renting materials rated NC-17 or R by the Motion Picture Association of America.

F. "*City*" shall mean City of El Paso, Texas.

G. "*Conduct any business in a sexually oriented business*" shall mean any person who engages in any one (1) or more of the following:

1. Operate a cash register, cash drawer or other depository on the premises of the sexually oriented business where cash funds or records of credit card or other credit transactions generated in any manner by the operation of the sexually oriented business or the activities of the premises of the sexually oriented business;

2. Display or take orders from any customer for any merchandise, goods, entertainment or other services offered on the premises of the sexually oriented business;

3. Deliver or provide to any customer any merchandise, goods, entertainment or other services offered on the premises of the sexually oriented business;

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4. Act as a door attendant to regulate entry of customers or other persons into the premises of the sexually oriented business; or

5. Supervise or manage other persons in the performance of any of the foregoing activities on the premises of the sexually oriented business.

H. "*Director*" shall mean the Building Permits and Inspections Director.

I. "*Employee*" shall mean any person, whether or not the person is designated as an employee, independent contractor, agent or otherwise, who renders any service whatsoever to the customers of a sexually oriented business, works in or about a sexually oriented business or who conducts any business in a sexually oriented business and who receives or has the expectation of receiving any compensation from the operator, or customers of the sexually oriented business. By way of example, rather than limitation, the term includes the operator and other management personnel, clerks, dancers, models and other entertainers, food and beverage preparation and service personnel, door persons, bouncers, and cashiers. It is expressly intended that this definition cover not only conventional employer-employee relationships but also independent contractor relationships, agency relationships and any other scheme or system whereby the "employee" has an expectation of receiving compensation, tips or other benefits from the sexually oriented business or its customers in exchange for services performed on the premises. Employee does not include a person exclusively on the premises for repair or maintenance of the premises or for the delivery of goods to the premises.

J. "*Establish or Establishment*" shall mean and include 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; or

3. The addition of any sexually oriented business to any other existing sexually oriented business.

K. "*Hearing Officer*" shall mean an attorney who is licensed to practice law in Texas, and retained to serve as an independent tribunal to conduct hearings under this Ordinance.

L. "*Influential Interest*" shall mean any of the following: (1) the actual power to operate the sexually oriented business or control the operation, management or policies of the sexually oriented business or legal entity which operates the sexually oriented business, (2) ownership of a financial interest of thirty percent (30%) or more of a business or of any class of voting securities of a business, or (3) holding an office (e.g., president, vice president, secretary, treasurer, managing member, managing director, etc.) in a legal entity which operates the sexually oriented business.

M "*Licensee*" shall mean a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual or individuals listed as an applicant on the application for a sexually oriented business license. In the case of an "employee" it shall mean the person in whose name the sexually oriented business employee license has been issued.

N. "*Manager*" shall any person who supervises, directs or manages any employee of a sexually oriented business or any other person who conducts any business in a sexually oriented business with

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respect to any activity conducted on the premises of the sexually oriented business, including any on-site manager.

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O. "*Nudity or a State of Nudity*" shall mean the showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple and areola.

P. "*On-Site Manager*" shall mean a person charged by an owner or operator of a sexually oriented business with the responsibility for direct supervision of the operation of the sexually oriented business and with monitoring and observing all areas of the sexually oriented business to which customers are admitted at all times during which the sexually oriented business is open for business or customers are on the premises of the sexually oriented business.

Q. "*Operate or Cause to Operate*" shall mean to cause to function or to put or keep in a state of doing business.

R. "*Operator*" shall mean any person on the premises of a sexually oriented business who causes the business to function or who puts or keeps in operation the business or who is authorized to manage the business or exercise overall operational control of the business premises. A person may be found to be operating or causing to be operated a sexually oriented business whether or not that person is an owner, part owner, or licensee of the business.

S. "*Person*" shall mean individual, proprietorship, partnership, corporation, association, or other legal entity.

T. "*Premises*" means the real property upon which the sexually oriented business is located, and all appurtenances thereto and buildings thereon, including, but not limited to, the sexually oriented business, the grounds, private walkways, and parking lots and/or parking garages adjacent thereto, under the ownership, control or supervision of the licensee, as described in the application for a sexually oriented business license.

U. "*Regularly*" means and refers to the consistent and repeated doing of the act so described.

V. "*Semi-Nude or State of Semi-Nudity*" means the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard or similar wearing apparel provided the areola is not exposed in whole or in part.

W. "*Sexual Device*" means any three (3) dimensional object designed and marketed for stimulation of the male or female human genitals, anus, female breast or for sadomasochistic use or abuse of oneself or others and shall include devices such as dildos, vibrators, penis pumps, and physical representations of the human genital organs. Nothing in this definition shall be construed to include devices primarily intended for protection against sexually transmitted diseases or for preventing pregnancy or devices primarily intended for medical or healthcare use.

X. "*Sexual Device Shop*" means a commercial establishment that regularly features sexual devices. Nothing in this definition shall be construed to include any pharmacy, drug store, medical clinic, or any establishment primarily dedicated to providing medical or healthcare products or services, nor shall this

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definition be construed to include commercial establishments which doe not restrict access to their premises by reason of age.

Y. "*Sexually Oriented Business*" means an "adult bookstore or adult video store," an "adult cabaret," an "adult motion picture theater," or a "sexual device shop."

Z. "*Specified Anatomical Areas*" means and includes:

1. Less than completely and opaquely covered: human genitals, pubic regions, buttock, and female breast below a point immediately above the top of the areola; and

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

AA. "*Specified Criminal Activity*" means any of the following specified crimes for which less than five years elapsed since the date of conviction or the date of the release from confinement imposed for that conviction, whichever is the later date:

1. Prostitution; promotion of prostitution; aggravated promotion of prostitution; compelling prostitution; obscenity; sale, distribution or display of harmful material to minor; sexual performance by a child; employment harmful to children; or possession or promotion of child pornography; as defined in Chapter 43 of the Texas Penal Code;

2. Public lewdness; indecent exposure; or indecency with a child; as defined in Chapter 21 of the Texas Penal Code;

3. Sexual assault or aggravated sexual assault as defined in Chapter 22 of the Texas Penal Code;

4. Criminal attempt, solicitation or conspiracy to commit any of the foregoing offenses; or

5. Any offense in another jurisdiction that, had the predicate act(s) been committed in Texas, would have constituted any of the foregoing offenses.

AB. "*Specified Sexual Activity*" means any of the following:

1. Intercourse, oral copulation, masturbation or sodomy; or

2. Excretory functions as part of or in connection with any of the activities described in (1.) above.

AC. "*Substantial*" means at least thirty-five percent (35%) of the item(s) so modified.

AD. "*Transfer of Ownership or Control*" of a sexually oriented business shall mean any of the following:

1. The sale, lease or sublease of the business;

2. The transfer of securities which constitute an influential interest in the business, whether by sale, exchange or similar means; or

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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.

AE. "*Viewing Room or Booth*" shall mean the room, booth or area where a patron of a sexually oriented business would ordinarily be positioned while watching a film, videocassette, digital video disc, any electronically produced media or other video production which are characterized by their emphasis upon the display of specified sexual activities or specified anatomical areas.

Section 5.54.030. Classification.

The classifications for sexually oriented businesses shall be as follows:

1. Adult bookstore or adult video store;
2. Adult cabaret or adult lounge;
3. Adult motion picture theater or movie theatre;
4. Sexual device shop.

Section 5.54.040. License Required.

A. *Business License*. It shall be unlawful for any person to engage in, conduct, or operate a sexually oriented business in the City without a valid sexually oriented business license.

B. *Employee License*. It shall be unlawful for any person to be an "employee," as defined in this Ordinance, of a sexually oriented business in the City without a valid sexually oriented business employee license, except that a person who is a licensee under a valid sexually oriented business license shall not be required to also obtain a sexually oriented business employee license.

C. *Application*. An applicant for a sexually oriented business license or a sexually oriented business employee license shall file in person at the office of the Director a completed application made on a form provided by the Director. A sexually oriented business may designate an individual with an influential interest in the business to file its application for a sexually oriented business license in person on behalf of the business. The application shall be signed as required by subsection (D) herein and shall be notarized. An application shall be considered complete when it contains, for each person required to sign the application, the information and/or items required in this subsection (C), accompanied by the appropriate licensing fee:

1. The applicant's full legal name and any other names used by the applicant in the preceding five (5) years. Applicant is also required to include mother's maiden name.

2. Current address of the applicant.

3. Written proof of age, in the form of a driver's license or a copy of a birth certificate accompanied by a picture identification document issued by a governmental agency.

4. A current photograph of applicant.

5. If the application is for a sexually oriented business license, the business name, location, mailing address and phone number of the sexually oriented business.

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6. If the application is for a sexually oriented business license, the name and business address of the statutory agent or other agent authorized to receive service of process.

7. A statement of whether an applicant has been convicted of or has pled guilty or nolo contendere to a specified criminal activity as defined in this Ordinance, and if so, each specified criminal activity involved, including the date, place and jurisdiction of each as well as the dates of conviction and release from confinement, where applicable.

8. A statement of whether any sexually oriented business in which an applicant has had an influential interest, has, in the previous five (5) years (and at a time during which the applicant had the influential interest):

(a) Been declared by a court of law to be a nuisance; or

(b) Been subject to a court order of closure or padlocking.

9. An application for a sexually oriented business license shall be accompanied by a legal description of the property where the business is located and 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 shall 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. Applicants who are required to comply with the stage, booth and/or room configuration requirements of this Ordinance shall submit a diagram indicating that the setup and configuration of the premises meets the requirements of the applicable regulations.

At the time of filing an application, the filing applicant shall present himself or herself to the City of El Paso Police Department Headquarters for the purpose of being fingerprinted and photographed. The police department shall take the photographs and fingerprints within four business hours of the time that the filing applicant presents himself or herself to be fingerprinted and photographed.

The information provided pursuant to this subsection (C) shall be supplemented in writing by certified mail, return receipt requested, to the Director within ten (10) working days of a change of circumstances which would render the information originally submitted false or incomplete.

D. *Signature.* A person who seeks a sexually oriented business employee license under this section shall sign the application for a license. If a person who seeks a sexually oriented business license under this section is an individual, he or she shall sign the application for a license as applicant. If a person who seeks a sexually oriented business license is other than an individual, each person with an influential interest in the sexually oriented business or in a legal entity that controls the sexually oriented business shall sign the application for a license as applicant. Each applicant must be qualified under this Ordinance and each applicant shall be considered a licensee if a license is granted.

E. The information provided by an applicant in connection with an application for a license under this Ordinance shall be maintained by the office of the Director on a confidential basis, and such information may be disclosed only as may be required, and only to the extent required, by law or a court order.

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Section 5.54.050. Issuance of License.

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A. *Business License.* Upon the filing of a completed application for a sexually oriented business license, the Director shall immediately issue a Temporary License to the applicant if the completed application is from a pre-existing sexually oriented business that is lawfully operating in the City and the completed application, on its face, indicates that the applicant is entitled to an annual sexually oriented business license. The Temporary License shall expire upon the final decision of the City to deny or grant an annual license. Within twenty (20) days of the filing of a completed sexually oriented business license application, the Director shall either issue a license to the applicant or issue a written notice of intent to deny a license to the applicant. The Director shall issue a license unless:

1. An applicant is less than eighteen (18) years of age.

2. An applicant has failed to provide information required by this Ordinance for issuance of a license or has falsely answered a question or request for information on the application form.

3. The license application fee required by this Ordinance has not been paid.

4. The sexually oriented business, as defined herein, is not in compliance with the interior configuration requirements of this Ordinance or is not in compliance with locational requirements of the El Paso Zoning Ordinance or any other portion of the El Paso City Code.

5. Any sexually oriented business in which the applicant has had an influential interest, has, in the previous five (5) years (and at a time during which the applicant had the influential interest):

(a) Been declared by a court of law a nuisance; or

(b) Been subject to an order of closure or padlocking.

6. An applicant has been convicted of or pled guilty or nolo contendere to a specified criminal activity, as defined in this Ordinance.

B. *Employee License.* Upon the filing of a completed application for a sexually oriented business employee license, the Director shall immediately issue a Temporary License to the applicant if the applicant seeks licensure to work in a licensed sexually oriented business and the completed application, on its face, indicates that the applicant is entitled to an annual sexually oriented business employee license. The Temporary License shall expire upon the final decision of the City to deny or grant an annual license. Within twenty (20) days of the filing of a completed sexually oriented business employee license application, the Director shall either issue a license to the applicant or issue a written notice of intent to deny a license to the applicant. The Director shall issue license unless:

1. The applicant is less than eighteen (18) years of age.

2. The applicant has failed to provide information as required by this Ordinance for issuance of a license or has falsely answered a question or request for information on the application form.

3. The license application fee required by this Ordinance has not been paid.

4. Any sexually oriented business in which the applicant has had an influential interest, has, in the previous five (5) years (and at a time during which the applicant had the influential interest):

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(a) Been declared by a court of law to be a nuisance; or

(b) Been subject to an order of closure or padlocking.

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5. The applicant has been convicted of or pled guilty or nolo contendere to a specified criminal activity, as defined in this Ordinance.

C. The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the number of the license issued to the licensee(s), the expiration date, and, if the license is for a sexually oriented business, the address of the sexually oriented business. The sexually oriented business license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be read at any time that the business is occupied by patrons or is open to the public. A sexually oriented business employee shall keep the employee's license on his or her person or on the premises where the licensee is then working or performing.

Section 5.54.060. Fees.

The initial license and annual renewal fees for sexually oriented business licenses and sexually oriented business employee licenses shall be as follows: five-hundred-fifty dollars ($550) for the initial fee for a sexually oriented business license and three-hundred-fifty dollars ($350) for annual renewal; fifty dollars ($50) for the initial sexually oriented business employee license and twenty-five ($25) for annual renewal.

Section 5.54.070. Inspection.

Sexually oriented businesses and sexually oriented business employees shall permit the Director and his or her agents to inspect, from time to time on an occasional basis, the portions of the sexually oriented business premises where patrons are permitted, for the purpose of ensuring compliance with the specific regulations of this Ordinance, during those times when the sexually oriented business is occupied by patrons or is open to the public. This section shall be narrowly construed by the City to authorize reasonable inspections of the licensed premises pursuant to this Ordinance, but not to authorize a harassing or excessive pattern of inspections.

Section 5.54.080. Expiration and Renewal of License.

A. Each license shall remain valid for a period of one (1) calendar year form the date of issuance unless otherwise suspended or revoked. Such license may be renewed only by making application and payment of a fee as provided in this Ordinance.

B. Application for renewal of an annual license should be made at least ninety (90) days before the expiration date of the current annual license, and when made less than ninety (90) days before the expiration date, the expiration of the current license will not be affected.

Section 5.54.090. Suspension.

A. *Business License.* The Director shall issue a written notice of intent to suspend a sexually oriented business license for a period not to exceed thirty (30) days if the sexually oriented business licenses has knowingly violated this Ordinance or has knowingly allowed an employee to violate this Ordinance.

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B. *Employee License.* The Director shall issue a written notice of intent to suspend a sexually oriented business employee license if the employee license if the employee has knowingly violated this Ordinance.

Section 5.54.100. Revocation.

A. The Director shall issue a written notice of intent to revoke a sexually oriented business license or a sexually oriented business employee license, as applicable, if the licensee knowingly violates this Ordinance on two (2) or more occasions within a twelve (12) month period.

B. The Director shall issue a written notice of intent to revoke a sexually oriented business license or a sexually oriented business employee license, as applicable, if:

1. The licensee has knowingly given false information in the application for the sexually oriented business license or the sexually oriented business employee license;

2. The licensee has knowingly or recklessly engaged in or allowed possession, use or sale of controlled substances on the premises of the sexually oriented business;

3. The licensee knowingly or recklessly engaged in or allowed prostitution on the premises of the sexually oriented business;

4. The licensee knowingly or recklessly operated the sexually oriented business during a period of time when the license was finally suspended or revoked; or

5. The licensee has knowingly or recklessly engaged in or allowed any specified sexual activity to occur in or on the premises or the sexually oriented business.

C. The fact that any relevant conviction is being appealed shall have no effect on the revocation of the license, provided that, if any conviction which serves as a basis of a license revocation is overturned or reversed on appeal, that conviction shall be treated as null and of no effect for revocation purposes.

D. When, after the notice and hearing procedure described in this Ordinance, the City revokes a license, the revocation shall continue for one (1) year and the licensee shall not be issued a sexually oriented business license or sexually oriented business employee license for one (1) year from the date the revocation becomes effective.

Section 5.54.110. Hearing; Denial, Revocation and Suspension; Appeal.

A. When the Director issues a written notice of intent to deny, suspend, or revoke a license, the Director shall immediately send such notice, which shall include the specific grounds under this Ordinance for such action, to the applicant or licensee (respondent) by personal delivery or certified mail. The notice shall be directed to the most current business address or other mailing address on file with the Director for the respondent. The notice shall specify a date, not less than ten (10) days nor more than twenty (20) days after the date the notice is issued, on which the hearing officer shall conduct a hearing on the Director's written notice of intent to deny, suspend, or revoke the license.

At the hearing, the respondent shall have the opportunity to present all of respondent's arguments and to be represented by counsel (at respondent's expense), present evidence and witnesses on his or her behalf, and cross-examine any of the Director's witnesses. The Director shall also be represented by counsel, and shall bear the burden of proving the grounds for denying, suspending, or revoking the license. The

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hearing shall take no longer than two (2) days, unless extended at the request of the respondent to meet the requirements of due process and proper administration of justice. The hearing officer shall issue a written decision, including specific reasons for the decision pursuant to this Ordinance, to the respondent within five (5) days after the hearing. The decision shall include a statement advising the respondent of the right to appeal such decision to a court of competent jurisdiction.

If the decision is to deny, suspend, or revoke the license, the decision shall become effective on the thirtieth (30th) day after it is rendered. If the hearing officer's decision finds that no grounds exist for denial, suspension, or revocation of the license, the hearing officer shall, contemporaneously with the issuance of the decision, order the Director to immediately withdraw the intent to deny, suspend, or revoke the license and to notify the respondent in writing by certified mail of such action. If the respondent is not yet licensed, the Director shall contemporaneously therewith issue the license to the applicant.

B. If any court action challenging a license denial, suspension, or revocation is initiated, the City shall prepare and transmit to the court a transcript of the hearing within ten (10) days after receiving written notice of the filing of the court action. The City shall comply with any expedited schedule set by the court, and shall facilitate prompt judicial review of the proceedings. The following shall apply to any sexually oriented business that is lawfully operating as a sexually oriented business, or any sexually oriented business employee that is lawfully employed as a sexually oriented business employee, on the date on which the completed business or employee application, as applicable, is filed with the Director: Upon the filing of any court action to appeal, challenge, restrain, or otherwise enjoin the City's enforcement of the denial, suspension, or revocation, the Director shall immediately issue the respondent a Provisional License. The Provisional License shall allow the respondent to continue operation of the sexually oriented business or to continue employment as a sexually oriented business employee and will expire upon the court's entry of a judgment on the respondent's appeal or other action to restrain or otherwise enjoin the City's enforcement.

Section 5.54.120. Transfer of License.

A licensee shall not transfer his or her license to another, nor shall a licensee operate a sexually oriented business under the authority of a license at any place other than the address designated in the sexually oriented business license application.

Section 5.54.130. Hours of Operation and Supervision of Premises.

A. No sexually oriented business shall be or remain open for business between 2:00 a.m. and 6:00 a.m. on any day.

B. The licensee or manager named and approved with respect to issuance of a permit or the holder of the current manager's permit, shall be present on the premises of a sexually oriented business at all times when the establishment is in operation.

Section 5.54.140. Regulations Pertaining to Exhibition of Sexually Explicit Films or Videos.

A. A person who operates or causes to be operated a sexually oriented business which exhibits in a booth or viewing room on the premises, through any mechanical or electronic image-producing device, a film, video cassette, digital video disc, or other video reproduction characterized by an emphasis on the display of specified sexual activities or specified anatomical areas shall comply with the following requirements.

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1. Each application for a sexually oriented business license shall contain a diagram of the premises showing the location of all operator's stations, booths or viewing room, overhead lighting fixtures, and restrooms, and shall designate all portions of the premises in which patrons will not be permitted. Restrooms shall not contain equipment for displaying films, video cassettes, digital video discs, any electronically produced media or other video productions. The diagram shall also designate the place at which the license will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however, each diagram shall be oriented to the north or to some designated street or object and shall be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six inches. The Director may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.

2. It shall be the duty of the operator, and of any employees present on the premises, to insure that no patron is permitted access to any area of the premises, which has been designated as an area in which patrons will not be permitted.

3. The interior premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than five (5.0) foot candles as measured at the floor level. It shall be the duty of the operator, and of any employees present on the premises, to insure that the illumination described above is maintained at all times that the premises is occupied by patrons or open for business.

4. It shall be the duty of the operator, and of any employees present on the premises, to insure that no sexual activity occurs in or on the licensed premises.

5. It shall be the duty of the operator to post conspicuous signs in well-lighted entry areas of the business stating all of the following:

(a). That the occupancy of viewing rooms less than 150 square feet is limited to one person.

(b) That sexual activity on the premises is prohibited.

(c) That the making of openings between viewing rooms is prohibited.

(d) That violators will be required to leave the premises.

(e) That violations of these regulations are unlawful.

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6. It shall be the duty of the operator to enforce the regulations articulated in (5)(a) through (d) above.

7. The interior of the premises shall be configured in such a manner that there is an unobstructed view from a operator's station of every area of the premises, including the interior of each viewing room but excluding restrooms, to which any patron is permitted access for any purpose. An operator's station shall not exceed thirty-two (32) square feet of floor area. If the premises has two (2) or more operator's stations designated, then the interior shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one of the operator's stations. The view required in this paragraph must be by direct line of sight from the operator's station. It is the duty of the operator to insure that at least one employee is on

duty and situated in each operator's station at all times that any patron is on the premises. It shall be the duty of the operator, and it shall also be the duty of any employees present on the premises, to insure that the view area specified in this paragraph remains unobstructed by any doors, curtains, walls, merchandise, display racks or other materials or enclosures at all times that any patron is present on the premises.

B. It shall be unlawful for a person having a duty under this section to knowingly fail to fulfill that duty.

Section 5.54.150. Loitering, Exterior Lighting, Visibility, and Monitoring Requirements.

A. It shall be the duty of the operator of a sexually oriented business to: (1) post conspicuous signs stating that no loitering is permitted on such property; (2) designate one or more employees to monitor the activities of persons on such property by visually inspecting such property at least once every ninety (90) minutes or inspecting such property by use of video cameras and monitors; and (3) provide lighting of the exterior premises to provide for visual inspection or video monitoring to prohibit loitering. If used, video cameras and monitors shall operate continuously at all times that the premises are open for business. The monitors shall be installed within an operator's station.

B. It shall be unlawful for a person having a duty under this section to knowingly fail to fulfill that duty.

C. No sexually oriented business shall erect a fence, wall, or other barrier that prevents any portion of the parking lot(s) for the establishment from being visible from a public right of way.

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Section 5.54.160. Penalties and Enforcement.

A. A person who knowingly engages in or permits another person to engage in a specified sexual activity on the premises of a sexually oriented business shall be guilty of a Class A misdemeanor. A person who engages in any violation of this Ordinance other than a specified sexual activity violation shall be guilty of a Class C misdemeanor. Each day a violation is committed, or permitted to continue, shall constitute a separate offense.

B. Any premises, building, or other structure in which a sexually oriented business, as defined in this Ordinance, is repeatedly operated or maintained in violation of the provisions of this Ordinance shall constitute a public nuisance and shall be subject to abatement proceedings initiated by the City of El Paso in a court of competent jurisdiction. Three violations of this Ordinance in a twelve-month period shall constitute repeated operation or maintenance as discussed in the preceding sentence.

C. The City's legal counsel is hereby authorized to institute civil proceedings necessary for the enforcement of this Ordinance to prosecute, restrain, or correct violations hereof. Such proceedings, including injunction, shall be brought in the name of the City, provided, however, that nothing in this section and no action taken hereunder, shall be held to exclude such criminal or administrative proceedings as may be authorized by other provisions of this Ordinance, or any of the laws in force in the City or to exempt anyone violating this code or any part of the said laws from any penalty which may be incurred.

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Section 5.54.170. Applicability of Ordinance to Existing Businesses.

All existing sexually oriented businesses and sexually oriented business employees are hereby granted a *De Facto* Temporary License to continue operation or employment for a period of ninety (90) days following the effective date of this Ordinance. By the end of said ninety (90) days, all sexually oriented

businesses and sexually oriented business employees must conform to and abide by the requirements of this Ordinance.

Section 5.54.180. Prohibited Conduct.

It is unlawful for a sexually oriented business licensee to knowingly violate the following regulations or to knowingly allow an employee or any other person to violate the following regulations.

A. It shall be a violation of this Ordinance for a patron, employee, or any other person to knowingly or intentionally, in a sexually oriented business, appear in a state of nudity, regardless of whether such public nudity is expressive in nature.

B. It shall be a violation of this Ordinance for a person to knowingly or intentionally, in a sexually oriented business, appear in a semi-nude condition unless the person is an employee who, while semi-nude, remains at least six (6) feet from all patrons and on a stage at least eighteen (18) inches from the floor in a room of at least six hundred (600) square feet.

C. It shall be a violation of this Ordinance for any employee who while appearing semi-nude in a sexually oriented business to knowingly or intentionally touch a customer or the clothing of a customer on the premises of a sexually oriented business.

D. It shall be a violation of this Ordinance for any person to knowingly allow a person under the age of eighteen (18) years to come or remain on the premises of a sexually oriented business as an employee or patron.

A sign in a form to be prescribed by the Director, and summarizing the provisions of subsections (A), (B), (C), (D), and (E) shall be posted near the entrance of the sexually oriented business in such a manner as to be clearly visible to patrons upon entry.

Section 5.54.190. Scienter Required to Prove Violation or Business Licensee Liability.

This Ordinance does not impose strict liability. Unless a culpable mental state is otherwise specified herein, a showing of a knowing or reckless mental state is necessary to establish a violation of a provision of this Ordinance. Notwithstanding anything to the contrary, for the purposes of this Ordinance, an act by an employee that constitutes grounds for suspension or revocation of that employee's license shall be imputed to the sexually oriented business licensee for the purposes of finding a violation of this Ordinance, or the purposes of license denial, suspension, or revocation, only if an officer, director, or general partner, or a person who managed, supervised, or controlled the operation of the business premises, knowingly or recklessly allowed such act to occur on the premises. It shall be a defense to liability that the person to whom liability was imputed was powerless to prevent the act.

Section 5.54.200. Failure of City to Meet Deadline Not to Risk Applicant/Licensee Rights.

In the event that a City official is required to act or to do a thing pursuant to this Ordinance within a prescribed time, and fails to act or to do such thing within the time prescribed, said failure shall not prevent the exercise of constitutional rights of an applicant or licensee. If the act required of the City official under this Ordinance, and not completed in time prescribed, includes approval of condition(s) necessary for approval by the City of an applicant or licensee's application for sexually oriented business employee's license (including a renewal), the license shall be deemed granted and the business/employee allowed to commence operations or employment the day after the deadline for the City's action has passed.

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Section 5.54.210. Severability.

This Ordinance and each section and provision of said Ordinance hereunder, are hereby declared to be independent divisions and subdivisions and, not withstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provisions of said Ordinance, or the application thereof to any person or circumstance is held to be invalid, the remaining sections or provisions and the application of such sections and provisions to any person or circumstances other than those to which it is held invalid, shall not be affected thereby, and it is hereby declared that such sections and provisions would have been passed independently of such section or provision so known to be invalid. Should any procedural aspect of this Ordinance be invalidated, such invalidation shall not affect the enforceability of the substantive aspects of this Ordinance.

Section 5.54.220. Conflicting Code Provisions Repealed.

Any provision(s) in the El Paso City Code specifically in conflict with any provision in this Ordinance is hereby deemed inoperative and repealed.

Section 5.54.230. Effective Date.

Upon adoption, the provisions of this chapter shall apply to the activities of all sexually oriented businesses and sexually oriented business employees defined herein, whether such businesses or activities were established or commenced before, on or after the effective date of this chapter. All existing sexually oriented businesses that are operating under an existing license from the City shall continue operation under the same license and renew said license when applicable under this chapter. No later than ninety (90) days following the effective date of this chapter, all sexually oriented business must make any and all necessary changes to the interior configuration of the regulated business premises to conform to this chapter. All employees of sexually oriented businesses must make application for a license pursuant to this chapter no later than ninety (90) days following the effective date of this chapter and thereafter, within ten (10) days of becoming an employee subject to this ordinance.

PASSED AND APPROVED this 8th day of May, 2007.

CITY OF EL PASO

John F. Cook
Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:

Laura P. Gordon
Deputy City Attorney

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