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HOUSTON CITY COUNCIL

SEXUALLY ORIENTED BUSINESS ORDINANCE REVISION COMMITTEE LEGISLATIVE REPORT

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INTRODUCTION

This report has been prepared by the Sexually Oriented Business Revision Committee for the purpose of summarizing the Committee's work in drafting a proposed amendment to Articles II and III of Chapter 28 of the Code of Ordinances, Houston, Texas. In addition, a new Article VIII has been proposed to be added to Chapter 28. These summaries include prior efforts of regulating sexually oriented businesses (hereinafter "SOBs"), testimony by the Vice Division of the Houston Police Department, reports and requests, citizen correspondence, industry memos, legal department research, and summaries of the principal themes heard in the public testimony taken by the Committee.

The Committee's intention is to supplement prior reports issued in 1983, 1986, and 1991. The original Ordinance was adopted in 1983. The 1986 Supplemental Report included premises that serve alcoholic beverages. The 1991 Supplemental Report addressed the addition of adult bookstores and movie theaters as regulated enterprises within the Ordinance's land use controls. The primary purpose of the current committee was twofold. First, the Committee desired to review the existing Ordinance and the City's ability to enforce the existing Ordinance. Secondly, there existed a need to assess and analyze the Ordinance with regard to its strengths and weaknesses and review them with regard to how effectively this Ordinance protects the interests of the public as well as the rights of the businesses subject to regulation. These amendments and additions relate principally to the licensing of SOB employees, lighting configurations, distancing requirements between land uses, prohibition of "glory holes," elimination of closed-off areas, public notification of sexually oriented business applications, clear lines of vision, and dancer "no-touch" policies.

SOBs enjoy Constitutional protection and must be allowed to exist and operate regardless of feelings about them. If the regulations were to be so onerous or so burdensome that they preclude or inhibit them being able to even exist, they would likely be declared unconstitutional. The Committee made it clear, both during the hearings and afterwards, that it was not the intention of the Committee to propose any ordinance that would be subject to a successful court challenge because it either directly or indirectly (or for that matter inadvertently) eliminated the opportunities for such businesses to exist in the City of Houston. Therefore, the challenge is to keep SOBs from infringing on the rights of citizens without denying SOBs a reasonable opportunity to operate in the City.

This report is not intended as a legal treatise on the regulation of SOBs, although the Committee was guided in its deliberations at various points from advice by the Legal Department and received numerous legal comments from counsel for the regulated businesses. This report is intended to be reviewed from a lay perspective for the use of the members of the City Council and members of the public in understanding the reasons that the amendments and additions to the Ordinance have been proposed. This report is intended only as a summary. The Committee has developed extensive files in connection with its work that are available for review.

On May 24, 1996, the Mayor's Office announced the members of the newly re-created committee, now titled the " Sexually Oriented Business Ordinance Revision Committee." Council Members Jew Don Boney, Jr. and Helen Huey served as co-chairs. In addition, Council Members Castillo, Driscoll, Roach, Robinson, Sanchez and Saenz served as members.

HISTORY OF THE ORDINANCE

The existing Ordinance had its basis in the work of the 1983 City Council Committee on Sexually Oriented Businesses that resulted in the adoption of Ordinance 83-1812. The history of the Committee's work is documented in the report filed with the City Secretary in connection with Ordinance 83-1812 . This ordinance adopted a land use program that was controlled through permits and various incidental regulations for SOBs. Its focus was on regulating adult modeling studios, adult entertainment parlors, adult massage parlors and other similar businesses. Ordinance 83-1812 did not extend land use controls to premises that had alcoholic beverage permits and licenses, to adult bookstores or to adult movie theaters because the state enabling law upon which the Ordinance was predicated did not then authorize land use controls on those forms of adult businesses. See former Art. 2372w Tex. Rev. Civ. Stat. Ann..

In 1985 the Texas Legislature revised the state enabling law to delete the exemption for premises that held alcoholic beverage permits and licenses. Following the revision of the state enabling law, the Committee reconvened to consider adding the so-called "topless bars" to the land use control structure of the Ordinance. The Committee reconsidered its prior work and took additional evidence relating in the adoption of Ordinance 86-323 which extended land use controls to the topless bars and placed the Ordinance into substantially its present form. The work of the Committee in the submission of Ordinance 86-323 is extensively documented in the Legislative Report filed with the City Council at the time of its adoption.

The genesis for the 1991 proposal amending the Ordinance related to circumstances virtually identical to those that arose in 1985. The Legislature in its 1989 session again amended the state enabling law. The 1989 amendments deleted the exemption from land use controls that had formerly existed in the state law for adult bookstores and adult movie theaters. However, some of the evidence received from the public in 1983 and 1986 related to adult bookstores and adult movie theaters. For this reason the Committee drew upon its 1983 and 1986 works in the preparation of the amended Ordinance draft and regarded the 1983 and 1986 evidence and experiences as pertinent to its 1991 work.

The scope of the Committee's recent work evolved as a result of increasing community concern regarding the proliferation of Sexually Oriented Business under the existing regulations.

In addition, the Houston Police Department urged the City Council to consider means to control serious violations that were increasingly repetitive at numerous SOB establishments. Because of these requests and concerns the current Committee was established to review and strengthen the existing ordinance.

A DESCRIPTION OF THE COMMITTEE'S WORK

General. The Committee was re-established in the summer of 1996 to review ideas on strengthening the current Ordinance. The Committee has conducted its business in public meetings. These meetings were posted on the City Hall bulletin board and were typically attended by the Committee Members, City support staff and interested members of the public and/or the regulated businesses. The Committee also conducted three of its meetings as public hearings at which members of the industry and the general public testified. Along with the City Hall posting, notification of these public meetings was published in the newspaper and letters were sent to civic associations, individuals who had requested participation, and current SOB permit holders. The mailing list consisted of more than 1,000 names and was maintained in the office of Council member Huey and the Mayor's Citizens Assistance Office. Proponents and opponents of the regulation of SOBs were encouraged to speak openly of their ideas and viewpoints.

In addition to these public hearings, a significant number of people chose to voice their opinions through written correspondence to the mayor, city council, and/or legal department. The authors of these letters consisted of civic association presidents, topless club owners, City of Houston citizens, SOB dancers, state elected officials, advocates of various organizations and other concerned citizens. There are approximately two hundred and seventy-five letters on file. Most urged for the strengthening and enforcement of the current ordinance. While others stressed First Amendment rights, some urged industry cooperation, and others voiced concerns about the growing number of unlicensed SOBs.

Findings and Conclusions Based upon these proceedings, the committee has made additional findings and conclusions to supplement previous legislative reports.

First, because of the criminal activities that are associated with SOBs, the Committee determined the necessity of licensing all SOB entertainers and managers. Requiring an entertainer or manager to be licensed would establish a foundation for documenting those who have previous convictions for prostitution, public lewdness and other similar offenses. In addition, licensing could help eliminate underage entertainers because they would be required to prove that they are eighteen or older in order to obtain the license.

Second, the Committee found that there exists a serious predicament in the enforcement of public lewdness, prostitution, indecent exposure, and other criminal activities. Vice officers testified that because they do not engage in inappropriate behavior (such as removing their

clothing), convictions are difficult to achieve. The officer's non-participation is perceived by the entertainer that he is working under cover. The entertainer proceeds with caution, avoiding lewd behavior that might normally occur. In addition, when a patron is charged along with the entertainer, it is difficult to obtain a conviction because of the sensitivity of the relationship between the two accused.

Third, the Committee was shown a video by the HPD Vice of a bookstore "glory hole." These exist in small rooms or booths in which individuals are admitted and permitted to use one or more arcade devices. The enclosed booths are joined to the neighboring booth by a hole in the wall. These "glory holes" are used to promote anonymous sex and thus facilitate the spread of sexually transmitted diseases.

Fourth, the Committee found that sexually oriented businesses that did not have clear lines of vision encouraged lewd behavior or sexual contact. Many businesses are designed with areas that are out of the view of managers and are conducive to illegal behavior. Entertainers are cognizant of these areas where violations can occur unobserved by management or law enforcement personnel who are conducting open inspections. For example, high back chairs are used as barricades to shield illicit behavior. In addition, testimony revealed that private, secluded, dimly lit areas have the same effect. Testimony revealed that once the entertainer felt comfortable with the patron, ruling out that he was an undercover officer, he would be asked to move to a more private area. In some cases he would be asked to pay a fee to enter the "VIP" room by either purchasing a membership or purchasing an expensive bottle of champagne. HPD cannot always afford these admittance fees in the course of investigations and often cannot access and monitor these specific areas.

Fifth, the Committee considered the issue that multifamily tracts were being counted as one tract in the residential quota, where in actuality, many families were living independently upon one tract. Through the Planning and Development Department a new formula was established based on average homeowners' property size that would account for the piece of land. These new figures were used to achieve a residential formula of eight single family tracts for each acre of multi-family track. In addition, those lots platted for residential development, but currently unimproved, were added to the residential tract formula.

Sixth, inadequate lighting prevents managers and police officers from monitoring illegal activities. Often the lighting is so dim that an investigator cannot observe the activities from one table to the next. Vice officers testified that smaller businesses use lighting as a way to camouflage illegal activities. As a measurement for responsible lighting it was suggested that the requirement be similar to those minimum requirements established by the Uniform Building Code for 'exit' signs.

Seventh, the committee determined that enterprises that had locked rooms, were often used as fronts for prostitution. An entertainer would simply request the patron to remove his clothing. Those who objected were deemed to be Vice officers therefore restricting the usual services of the entertainer. The more money that a customer showed, the greater the 'services'.

Eighth, in keeping with the theme of family preservation, the committee was urged through public and expert testimony to include public parks in distancing restrictions. A "public park" is defined as a publicly owned or publicly leased tract of land, whether situated in the city or not, designated, maintained and operated for public use for recreational purposes by the city or any political subdivision of the state and containing improvements, pathways, access or facilities intended for public recreational use. The term "public park" shall not include public roads, rights-of-way, esplanades, traffic circles, easements or traffic triangles unless such tracts or areas contain and provide improvements or access to a recreational use by the public. Additionally, members of the Committee felt that the testimony supported inclusion of "private parks" as a protected land use. The Legal Department was asked to consider possible inclusion of this category in the final draft Ordinance.

Ninth, repeated testimony requested that notification of a pending Sexually Oriented Business Permit be given to surrounding neighbors of proposed sights. It is within the framework of the current case law to require a SOB applicant to post signs on the proposed site in addition to publishing an intent to apply for a permit in the local newspaper. Testimony revealed a great deal of concern over the general public's lack of warning of the SOB application until it has been approved and opened.

Tenth, the committee found that continuing the amortization provisions of the previous Ordinances would be preferable to grandfathering the sexually oriented businesses that do not comply with the amended Ordinance. Grandfathering would allow nonconforming uses to continue under the new ordinance in perpetuity, or until market forces wiped out the business. Grandfathering creates a monopolistic position for non-conforming property uses and prevents the municipality from exercising its power to protect its residents. Under the amortization provisions of the previous Ordinance, a business regulated as to location had six months to come into compliance. However, if such a business believed that six months was an inadequate period in which to recoup a reasonable return on invested capital, that business would have the opportunity to request an extension of the compliance period. In light of this recourse, and taking into account the present, ongoing and serious detriment that such businesses pose for the community at large, the Committee determined that an appropriate balancing of interests justified continuation of the amortization provisions.

HPD Vice Review:

The Houston Police Department's Vice Division played a major role in providing the City with statistics, details and testimony regarding their experiences with SOBs. In addition to written reports, three undercover vice officers testified at the August 29th hearing. Currently, the licensed SOBs are broken down as follows:

36 Topless Clubs
9 Adult Theaters
9 Nude Clubs
4 Video Stores
28 Modeling Studios
18 Adult Bookstores

In addition to the above list, there are approximately 18 adult theaters, bookstores and video stores with injunctive relief under federal court order in pending litigation styled, 4330 Richmond Avenue Incorporated, et al. v. The City of Houston. The City cannot enforce the SOB ordinance against the enterprises while the litigation is pending.

Between July 1, 1995 and August 31, 1996, the Houston Police Vice Division recorded 517 arrests in SOBs resulting in 355 convictions, or a conviction rate of 69%. Topless clubs experienced 289 dancer arrests with a conviction rate of 59%. In addition two managers were arrested but not convicted. There were six patrons of adult theaters taken into custody, resulting in a conviction rate of 83%. Dancers in all nude clubs accounted for 31 arrests, of which 71% were convicted. Thirty-six patrons of adult video stores were arrested resulting in an 86% conviction. The modeling studios' record consisted of four arrests and one conviction. One hundred and forty-nine patrons of adult bookstores were arrested with 125 convictions (84%).

Of the 36 topless clubs, the number of arrests per club ranged from 0 to 50. While seventeen clubs had less than 10 arrests in the last two years, one club had 50. Prostitution, public lewdness, narcotics, and indecent exposure made up these violations. Auto thefts are also on the rise in topless bar vicinities. This is due largely to the fact that a thief knows that he has about an hour and a half to steal the car before the owner comes back.

Topless clubs make up the majority of arrests in the Vice Division's enforcement experience. When the officer goes under cover in a club, he must assume the identity of a patron. Employees explicitly ask for badges, weapons, handcuffs, and go as far as feeling around the patron looking for these items. Once they feel comfortable that the patron is not a police officer, they will often ask him to move to a more secluded area, or possibly the VIP room of the club. The entertainer explains that she can do better dances in these areas and a 'lot more things' because they aren't watched as closely. This is when the opportunity for sexual or lewd activities occurs.

The Vice Division representatives testified that licensing and criminal background checks will assist in the regulation of the entertainers behavior. Often, the same dancer is arrested under a different or "stage" name. A license will ensure an individuals true name, thus avoiding the use of stage names. This will ensure that individuals who are arrested and convicted are properly identified in the event of future criminal arrests.

Modeling studios, tanning salons, encounter parlors and similar SOBs require the patron to disrobe on entry. Performance is based specifically on the amount of money a patron is willing to

spend. This takes place behind locked doors. Vice officers' testimony revealed that in their opinion, these businesses were merely fronts for prostitution. Vice officers elaborated on schemes of credit card fraud contributed to these enterprises. Often the charged amounts are altered or bogus charges are sent through for payment. When the client complains, he is threatened with the disclosure of the type of enterprise that he was in.

Vice officers testified that "bookstores are nothing more than just blatant open sexual contact between people with complete anonymity." With professionally cut 'glory holes', random sexual activity between males is rampant. One officer went as far as testifying that in his eleven years with Vice he does not recall ever seeing anyone go into a booth, watch the movie for thirty minutes and walk out.

The HPD Vice officers felt that the following ordinance change suggestions would be helpful in the enforcement and regulation of sexually oriented businesses:

1.) licensing of persons involved in a SOB - manager, owners, dancers, waiters, bartenders
2.) minimum age 21 (this requires a state law change)
3.) premises need to be well lit inside
4.) no touching
5.) models in modeling studios should not be allowed to remove all their clothes
6.) make it a violation for models to ask patrons to remove all clothes
7.) require bookstores and arcades to be well lit, no dark corners, no booths, no access between video booths, and no "glory holes"
8.) entertainers to be considered employees rather than contractors
9.) all investors and shareholders to be disclosed and licensed
10.) public display of licenses
11.) 6 foot distances between performer and patron
12.) no private viewing areas
13.) devices used as barriers limited to four foot heights
14.) illumination of one candle foot at floor level minimum
15.) no locked interior doors in modeling or tanning studios
16.) regulate escort services
17.) prohibition against use of inanimate objects by SOB employees to depict sexual conduct
18.) prohibition against warning systems
19.) redefine "multi-unit center"
20.) restrict transfer of permit/license
21.) develop time line for revocation/suspension hearing
22.) amend terms "knowingly" and "negligence"
23.) owners, managers and employees of a SOB shall have their license immediately available

Although not all of these items were determined by the Legal Department as legally defensible under the extant enabling statute and case law, they were taken into consideration.

PUBLIC HEARING SUMMARY

The initial Public Hearing was held on July 15, 1996 in the City Council Chamber. Council Member Boney outlined the intentions of the current committee as:

a. review the ordinance
   1. enforcement issues
   2. effectiveness of the ordinance
   3. operating procedures
b. review all SOBs, regulated and licensed, unlicensed and illegal
c. licensing of employees
d. visibility issues
e. revision of land policies
f. balance SOBs' constitutional right and the right of the communities

The public testimony proceeded as follows:

According to members of the industry, policies for public lewdness cases are made in a personal and participative way. In other words, Vice officers encourage lewd behavior, even to the extent of participating, in order to "get a case." Industry representatives generally agreed that employee licensing is necessary, though some prefer the Police Department, others prefer the Health Department. Depending on the quality of an arrest, three or five within twelve months should be sufficient for revocation/suspension of SOB license. In addition, it is felt that there lacks effective police enforcement of unlicensed tanning salons and massage parlors.

Dr. Devinney, professor of Abnormal psychology, testified that sexual deviants are attracted to communities because of Sexually Oriented Businesses. There are some deviants who cannot get sexual satisfaction unless they pay for it. While others are not satisfied unless they take or steal it. In addition, there are some sexual deviants who cannot have sexual satisfaction without forbidden partners such as children, invalids or elderly. SOBs located in residential or even retail areas attract sexual deviants because they have their entertainment, then they come out and have a fertile field for solicitation. Therefore, they do not belong in or near residential communities.

Because of the adverse secondary effects caused by Sexually Oriented Businesses, citizen responses urged the increase of distancing of SOBs from schools, churches and licensed day cares. In addition, they perceived a need to decrease the current residential formula of 75% to 25%. They also requested notification to area residents of proposed SOBs, either by posting a large sign on the property or individual mail outs. In addition, they urged that billboard advertising be illegal.

The second public hearing occurred on July 29, 1996. Attorneys representing the SOB industry requested that a hearing panel be developed to deal with permitting issues. In addition, the panel should consist of non-law enforcement individuals, and contain several different hearing officers.

Testimony indicated that although many SOBs follow the rules, most industry representatives are not against stronger regulations in regards to licensing the entertainers. Often the dancers are transient. The establishment of a license issued through HPD would create a data base of information.

Furthermore, a great deal of discussion was given to a "no touch" policy. Owners and dancers alike stated that touching was part of the entertainment. Plexiglass barriers, mini-stages, and six foot distancing were all criticized.

A third public hearing was scheduled for the public to comment on the draft ordinance prior to final council approval, and was held January 6, 1997.

REVIEW OF WRITTEN CORRESPONDENCE

More than two hundred seventy-five letters were received regarding the sexually oriented business ordinance. These letters came from property owners, SOB employees, concerned citizens, parents, educators, civic association, and business owners. While not all suggestions could be incorporated into this summary, each letter was carefully reviewed and passed to other members of the committee. These documents are on file in the Legal Department.

Approximately one hundred seventy five letters were the result of a letter writing campaign promoted by 'Adults for Legal Freedom'. The principal theme of these letters was the over- regulation of the adult business industry. They feel that this industry attracts tourism, pays considerable tax revenues, and creates jobs, and therefore is a valuable asset to the city. In addition, they believe the reworking of this ordinance is for political reasons only.

Letters came in urging the extension of distancing between a SOB and neighborhoods, schools, licensed daycares, churches, medical clinics, government offices, historic districts, public parks, hospitals, and distancing between sexually oriented businesses. It was asked that new residential projects with preliminary approval from the planning commission be included in the residential formula. Also, concerns arose over the representation of multifamily dwellings in the residential radius computations.

Notification of the public that a Sexually Oriented Business has applied for an application was a relatively new issue brought before the committee members. Suggestions ranged from 90

day notices by property signs to postcards being mailed to all residents in the area. Notification by newspaper, certified mail, and public hearings were also brought forth.

With regard to entertainers, recommendations were to prohibit touching, prohibit asking customers to undress, install an 8' high stage, require 6 feet distances from patron, and plexiglass barriers, license all dancers, increase minimum dancing age, require criminal background checks, no licenses issued to convicted felons, and require license to be worn at all times when inside an enterprise.

Other correspondence recommended that SOB permits should be renewed annually, repeated violations should be ground for denial, prohibit locked interior doors, require sufficient illumination of the facility, and to hold owner/manager accountable for activity occurring on the premises.

While opinions and suggestions varied. Most people agreed with the proposition that sexually oriented businesses would continue to exist, and expressed concern to create a solution in which they could coexist without infringing on the rights of the citizens of the city.

COMMITTEE RECOMMENDATIONS

A. Adult Arcade Ordinance Changes.

1. It is recommended that the Police Department's concerns regarding "adult arcades" or "peep shows" be addressed by amending art. II of Ch. 28 of the Code of Ordinances to eliminate problems of sexually transmitted disease and criminal sexual conduct in such operations. At present, art II prohibits enclosed booths for viewing sexually oriented entertainment but regulates only establishments whose "arcade devices" are intended for the viewing of five or fewer persons. The recommended amendment would make devices intended for viewing by less than one hundred persons come under the purview of art. II. In addition, no adult arcade or adult mini-theatre shall be configured in such a manner as to have any opening in any partition, screen, wall or other barrier that separates viewing areas for arcade devices or adult mini-theatre devices from other viewing areas for arcade devices or adult mini-theatre devices. This provision shall not apply to conduits for plumbing, heating, air conditioning, ventilation or electrical service, provided that such conduits shall be so screened or otherwise configured as to prevent their use as openings that would permit any portion of a human body to penetrate the wall or barrier separating viewing areas. This should eliminate the

problem of enclosed booths and "glory holes," in such establishments. In addition, it shall be the duty of the owners and operator and it shall also be the duty of any agents and employees present in an adult arcade or adult mini-theatre to ensure that the premises is monitored to assure that no openings are allowed to exist in violation and to ensure that no patron is allowed access to any portion of the premises where any opening exists in violation.

2. It is recommended that responsibilities for hearing appeals from permit decisions of the Director be considered by a hearing officer, rather than the city's General Appeals Board, which is the present appellant body under art. II of Ch. 28 of the Code of Ordinances. This recommendation would only impact article II of Chapter 28, as all other appeals regarding sexually oriented businesses are presently heard by a hearing official. The hearing officer shall be an official appointed by the mayor and confirmed by city council. If, after the hearing officer determines, based upon the nature of the violation, that the ends of justice would be served by a suspension in lieu of a revocation, he may suspend the operation of the permit for a period of time to be stated in the order of suspension, not to exceed two (2) months. The General Appeals Board has never heard such an appeal is principally concerned with Building Code matters, rather than regulation of sexually oriented businesses.

3. In addition, it is recommended that the fees associated with the processing of applications should be brought up to date to reflect current actual costs.

B. Procedural Changes—Sexually Oriented Business Enforcement.

1. It is recommended that the appellate procedures in art. III of Ch. 28 of the Code of Ordinances be revised to provide for a panel of hearing officers, appointed by the Mayor and confirmed by the City Council, consisting of licensed attorneys, serving on rotation, who will consider all appeals relating to sexually oriented businesses and licenses. Decisions by such hearing officers will be final and subject to immediate judicial review. The availability of an intermediate appeal to the City Council from decisions of the hearing officer should be eliminated. Although the need for an intermediate appeal from permit decisions to the City Council at one time appeared necessary, it now appears that due process requires only one administrative hearing prior to judicial review. This change will eliminate delay and will prevent City Council from being inundated with the large number of appeals anticipated due to implementation of increased regulations.

2. It is recommended that the Chief of Police be required by ordinance to report to the Mayor and the City Council, on a monthly basis, all violations of sexually oriented business regulations and related state laws, with respect to all licensed facilities and licensed persons.

3. It is further recommended that the Legal Department, through the City Attorney, should have authority to initiate all administrative actions regarding suspension or revocation of any permit or license under the various ordinances. The city attorney shall execute a monthly report summarizing revocation actions filed, currently pending or decided during the reporting period. This authority currently rests with the Chief of Police in his capacity as Director.

4. It is recommended that sexually oriented business permits involved in administrative hearing or procedures regarding denial, suspension or revocation be prohibited from being transferred to another entity during the pendency of the administrative process.

5. It is recommended that the Chief of Police continue as Director under Ch. 28 of the Code of Ordinances for purposes of permitting, investigation and enforcement requirements, with the exception noted above that the Legal Department will be responsible for initiating administrative enforcement actions.

C. Land Use and Related Changes – Sexually Oriented Businesses.

1. Information from the Planning Department indicates that the present distance requirements with respect to churches, schools and day care centers could be substantially increased, perhaps to as much as 1500 feet from the present 750 feet, and that the radius for counting residential tracts could be increased to 1500 feet from the present 1000 feet, all without unduly restricting availability of conforming locations for sexually oriented businesses to operate. The Committee recommends that these changes be instituted to protect such land uses from the adverse secondary effects of SOBs.

2. It is recommended that multi-family dwellings situated on a single tract be considered for additional protection under the residential test. Under the present ordinance, a sexually oriented business may not operate at a location if 75 percent or more of the tracts within a 1,000 foot radius of the business are residential in character. However, many multi-family dwellings are located on single tracts. Although it may not be possible to count each unit in a multi-family development as a separate residential "tract" for purposes of the residential restrictions of the ordinance, it is recommended that a ratio of eight single family tracts for each acre

of multi-family tract be considered to provide additional consideration for protection of residential neighborhoods that include multi-family developments.

3. Signage restrictions under the present ordinance apply essentially only to single use, freestanding sexually oriented businesses and not to "multi-tenant centers." As a practical matter, this allows some sexually oriented businesses to utilize large signage and otherwise prohibited exterior decorations by the simple expedient of including two or more small non-sexually oriented businesses on the same premises. It is recommended that the signage and exterior appearance provisions of the ordinance be strengthened to eliminate this practice.

4. In keeping with the theme of family preservation, the Committee recommends the inclusion of "public park", and, if legally definable, "private parks" to the protected land uses. Public and expert witnesses testified that the inclusion of the was necessary to continue their rejuvenation. The term 'residential' shall also include any unimproved tract designated for tax appraisal purposes as residential by the Harris County Appraisal District. In addition, it shall include any tract, that, based upon the records of the planning official has been subdivided or platted for residential use, but that is not yet designated for tax appraisal purposes as residential.

5. The committee recommends that each applicant , following the filing of the application and payment of the filing fee, place signs at the premises intended as the site for the SOB (at least 24 inches x 36 inches in size) that provide notification and information specifically stating "Sexually Oriented Business Permit Application Pending."

6. The committee recommends that each applicant give notice of the application by publication at his own expense in two consecutive issues of a newspaper published in Houston, Texas.

D. Conduct and Operations - Sexually Oriented Business Entertainers and Managers

1. The committee recommends that all entertainers and managers of SOBs hold permits issued by the vice division of the police department. The permit application shall include name, address, date of birth, photo identification, a list of criminal charges pending, convictions and time in jail. Crimes justifying a denial of a permit are limited to offenses relating to criminal sexual conduct and criminal activities known to be prevalent in SOBs.

2. The committee recommends the issuance of two photographic permits, a personal card and an on-site card. Each manager or entertainer shall conspicuously display his personal card upon his person at all times while acting as an entertainer or manager of or in an enterprise. The on-site card shall remain in the charge of the on-site manager of the enterprise to hold while the manager or entertainer is on the premises.

3. The committee recommends that is shall be unlawful for any entertainer to touch a customer or the clothing of a customer while engaging in entertainment or while exposing any specified anatomical areas or engaging in any specified sexual activities.

E. Amortization

Beginning in 1983, prior to the adoption of the current series of City regulations regarding sexually oriented businesses, the City Council Committee studying the issue concluded that the nature of the adverse secondary effects produced by the operation of sexually oriented businesses could only be addressed by enforcing regulations against existing businesses (i.e., "amortization"), rather than allowing businesses existing at the time of the ordinance passage to exist essentially in perpetuity (i.e. "grandfathering"). The City Council legislative report, which was subsequently adopted by the full City Council concluded, "During the hearings, it became evident to the Committee that the problems created by sexually oriented businesses had been allowed to persist for so long that merely addressing the problem 'from here on out' would not be adequate. Prospective legislation would do little or nothing to alleviate the current serious problem caused by businesses already existing. The Committee therefore concluded that existing businesses should come under the ordinance; for this reason the Committee rejected grandfathering of existing businesses and determined that amortization would be the appropriate approach." (Houston City Council on the Proposed Regulation of Sexually Oriented Businesses Report, December 1, 1983, pg. 29).

This position was reconfirmed when the City Council revisited regulation of sexually oriented businesses in 1986 and 1991. Each subsequent revision of the City's sexually oriented business ordinances included an amortization provision, designed to give all existing affected sexually oriented businesses an initial six-month period for compliance, including relocation, if necessary, and an opportunity to justify an additional extension for lawful operation before a hearing examiner appointed by the director under the ordinance. Records of the amortization hearings indicate that many affected businesses were able to obtain extensions of up to 5 1/2 years following the initial six-month compliance period. The average extension, historically, has been about 2 to 3 years. The factors considered in granting additional extensions of time included:

(1) the amount of the owner's investment in the existing enterprise through the date of passage and approval of the Ordinance;

(2) the amount of such investment that has been or will be realized through the 180th day following the effective date of the Ordinance;

(3) the life expectancy of the existing enterprise;

(4) the existence or nonexistence of lease obligations, as well as any contingency clauses therein permitting termination of such leases.

Amortization, as opposed to grandfathering, of existing sexually oriented businesses in Houston was specifically upheld by the federal district court in the case of *SDJ, Inc. V. City of Houston*, 636 F.Supp. 1359 (S.D. Tex. 1986), affirmed 837 F.2d 1268 (5th Cir. In *SDJ*, the court held that "It is generally accepted that preexisting non-conforming uses are not to be perpetual." 636 F.Supp. at 1371. The Court noted that Texas follows the generally accepted rule that nonconforming uses, subject to zoning or similar regulations, are not to be perpetual, and that amortization to allow for the recoupment of investment in an existing land use is an appropriate measure to balance the property owners' rights against the proper exercise of the City's police power to regulate non-conforming uses. See, *e.g., City of University Park v. Benners*, 485 S.W.2d 773 (Tex. 1972).

"Grandfathering" essentially contemplates the indefinite continuance of non-conforming businesses or land uses following the passage of zoning or similar land use ordinances, notwithstanding that such businesses or uses clearly violate the provisions of the ordinance. The effect of "grandfathering" is to continue such non-conforming uses indefinitely, although new land uses may be subject to the newly enacted restrictions. A number of authorities hold that established non-conforming uses that are grandfathered must be allowed to continue the use, notwithstanding transfer or change in ownership. See, Section 25-183.50, McQuillin, Municipal Corporations. These authorities hold that only if a non-conforming use is abandoned altogether can the zoning or other ordinances be enforced against the particular property or business use. *Id.* While these authorities may not necessarily preclude termination of non-conforming rights upon transfer of ownership under Texas law, it is altogether possible that non-conforming sexually oriented businesses could find ways to structure sale of assets or ownership interests in such a manner as to perpetuate the entity "owning" the sexually oriented business to avoid termination of non-conforming rights. In any event, most non-conforming sexually oriented businesses would likely enjoy the opportunity for a very long continuation in business under any "grandfathering" scheme.

In contrast, amortization has been determined by the prevailing majority of courts in this country to be a reasonable means of accommodating the need to protect the public from

adverse land uses, while at the same time giving consideration to the rights of business owners to recoup business investments, prior to feeling the effects of a restrictive ordinance. The problem with "grandfathering" is that it perpetuates non-conforming uses for an indefinite period, thus preventing the effective exercise of the City's police powers to protect its residents. As noted by the Supreme Court of Texas, "There are strong policy arguments and a demonstrable public need for the fair and reasonable termination of non-conforming property uses which most often do not disappear but tend to thrive in monopolistic positions in the community.. We are in accord with the principle that municipal zoning ordinances requiring the termination of non-conforming uses under reasonable conditions are within the scope of municipal police power. That property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made. Otherwise, a lawful exercise of the police power by the governing body of the City would be precluded." *City of University Park v. Benners, supra*, 485 S.W.2d at 778.

The adult bookstores and theaters that challenged the 1991 City of Houston sexually oriented business amendments as requiring them to change operation or relocate claimed in the pending federal lawsuit that the City was legally required to grandfather them at their present locations. The City has vigorously contested this contention, which is not in accord with the settled law governing the matter. In additions, all prior City Council committees and City Councils considering implementation of new sexually oriented business ordinance revisions have concluded that amortization is necessary to provide protection to all residents of the City, while recognizing the ability of business owners to remain in operation without relocating for a reasonable period of time. Although the City has occasionally experimented, on a small scale, with "grandfathering" in the past, such provisions have been limited to relatively small numbers of businesses such as automotive salvage yards. In no such case has the City Council documented extensive adverse secondary effects on surrounding neighborhoods, such as have been presented to this Committee and prior City Council committees regarding the operation of sexually oriented businesses.

As a practical matter, the "grandfathering" of existing sexually oriented businesses under any proposed ordinance revision would allow such businesses to continue to operate in violation of new regulations indefinitely. However, persons proposing to operate new sexually oriented businesses would have to comply with the full force of more stringent regulations, and residents and neighborhoods presently adjacent to existing sexually oriented businesses would have to essentially live with the continuing effects of such businesses on their localities for an indefinite period. While such a situation would not necessarily give rise to any legal cause of action on the part of such new businesses or existing neighborhoods, the potential for the perception of uneven treatment with respect to the protected position of existing sexually oriented businesses is readily apparent.

Historically, the City's amortization program has significantly reduced the adverse secondary effects of sexually oriented businesses in a relatively short time-frame, while still terminating existing nonconforming businesses in a legally permissible fashion. Further, the City's position in pending litigation involving amortization of adult bookstores is best served by maintaining an amortization policy consistent with past practice, rather than experimenting with grandfathering. In conclusion, although "grandfathering" remains technically available as a legal option for implementation of proposed sexually oriented business amendments, it clearly poses significant legal and policy disadvantages, as noted above. The Committee therefore recommends that existing SOBs rendered nonconforming be allowed to recoup investment through an amortization process.

SECTION BY SECTION ANALYSIS

The Amended Ordinance incorporates a substantial number of procedural and administrative changes that reflect ten years of operating experience with the Original and two Amended Ordinances and a better understanding of the ways in which enforcement of the ordinance could be improved. This portion of the Report briefly outlines on a section-by-section basis the major changes that have been made and the reasons for those changes.

Section 28-81. Definitions. General Comment. As a general matter, definitions in Section 28-81 have in many cases been reworded to conform more closely with definitions already used in other municipal ordinances. In addition, "adult mini-theatre" has been added throughout this amended ordinance.

Section 28-81. Definitions. "Adult mini-theatre." In the previous Ordinance, no mention was made of an "adult mini-theatre." This definition has been added to incorporate theatres that are intended for the viewing of five (5) to one hundred (100) patrons.

Section 28-81. Definitions. "Mini-theatre device." In the previous Ordinance, no mention was made of a "mini-theatre device." This definition has been added to incorporate any coin or slug operated or electrically or electronically or mechanically controlled machine or device that dispenses or effectuates the dispensing of 'entertainment,' that is intended for the viewing of more than five (5) persons but less than 100 persons in exchange for any payment of any consideration. It is not intended to include any conventional motion picture screen or projections that are designed to be viewed in a room containing tier or rows of seats with a viewer seating capacity of 100 or more persons.

Section 28-81. Definitions. "Owner or owners." This definition has been expanded to include the major stockholders/controllers of a corporation. Although requests came in to list all stockholders, it does not require the disclosure of non-controlling parties.

Section 28-81. Definitions. "Specified anatomical areas." In the previous Ordinance, no mention was made of "specified anatomical areas" in this particular section. As a matter of consistency throughout the ordinance, it has been added here.

Section 28-92 (e). Application. The adult arcade or adult mini-theatre permit fee was established eleven years ago and analysis reveals that with the increase in administrative costs, this figure is no longer viable. Therefore, the increase from $75.00 to $275.00.

Section 28-92 (f). Application. In an effort to clarify the application process, the submission of the applicant must be submitted by hand delivery by 'the intended operator.'

Section 28-92 (h). Application. Where a premises is so configured and operated as to constitute both an adult arcade and an adult mini-theatre, then the operator may apply for and obtain a combined permit authorizing operation as both an adult arcade and an adult mini-theatre.

Section 28-93 (a). Issuance or denial by police chief. For purposes of consistency throughout the ordinance, the notice of issuance or denial of the permit has been expanded to twenty days with a possible extension totaling thirty days.

Section 28-93 (g). Issuance or denial by police chief. All fees must be paid with either a certified check, cashier's check or money order.

Section 28-94. Term. Permit terms have been restructured to read as follows: "Each permit shall be valid for a period of one (1) year and shall expire on the anniversary of its date of issuance, unless sooner revoked, or surrendered. Each permit shall be subject to renewal as of its expiration date by the filing of a renewal application with the police chief. Renewal applications must be filed at least twenty (20) days prior to the expiration date of the permit that is to be renewed and shall be accompanied by a fee of one hundred dollars ($100.00).

Section 28-95. (b). Transfer upon change. The original transfer fee was set over ten years ago. The Vice department recently analyzed the current costs for transfer. The transfer application fee has changed to $100.00 to reflect these costs.

Section 28-98. Conduct in adult arcades or adult mini-theatres. The terms "indecent exposure" and "lewd conduct" have been added here to be consistent throughout this Ordinance.

Section 28-99 (b). Appeals. "Secretary of the general appeals board" has been deleted and replaced by "hearing officer" because it was determined that the transfer of this duty will streamline the appeals into an efficient, professional, and impartial process. In the event it is not