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ADULT ENTERTAINMENT LEGISLATIVE RECORD
by Londi K. Lindell, Federal Way City Attorney

Washington Courts have long upheld a City's right to adopt regulations to address the secondary effects of adult entertainment.

At the time a City Council considers adopting an adult entertainment ordinance or amendments thereto, a legislative record must be created establishing that the Council considered such secondary effects including increased crime, reduction in property values, destruction of the quality of the environment of neighborhoods, and/or increased municipal expenses, such as police services.

In reviewing the large body of Washington case law on the enforceability of adult entertainment ordinances, a frequent challenge by counsel for such facilities or entertainers is that the City Council did not adequately consider such secondary effects and did not make proper findings to support the adoption of the ordinance. Thus, it is important to create a legislative record to rebut such arguments.

The City of Federal Way recently amended its Adult Entertainment Ordinance. The City Council considered a legislative record of over seven hundred (700) pages. I obviously have not attached a copy of the entire legislative record. However, I have attached a copy of my memorandum to the City Council which summarizes the legislative history and cover indexes to each of the separate sections of the history.

The Washington Supreme Court has held that a City may rely on evidence generated by other jurisdictions in connection with adopting an ordinance so long as such evidence is believed to be relevant to the problem the City is seeking to address within the ordinance. World Wide Video, Inc. v. The City of Tukwila, 117 Wn.2d 382 at 389-390, 816 p.2d 18 (1991); See also Renton v. Playtime Theaters, Inc., 475 U.S. 41 at 51, 89 L.Ed.2d 504, 111 S.Ct. 2456 (1986). The City of Federal Way considered the secondary effects, such as criminal activity occurring in conjunction with adult entertainment facilities in the cities of Bellevue, Tukwila, Kent, and Bothell, Washington. The City Council reviewed an undercover video tape of a table dance, copies of police incident reports and criminal citations for prostitution and violations of adult entertainment standards of conduct.

In conclusion, the defensibility of a City's adult entertainment ordinance is greatly facilitated by a complete and adequate legislative record establishing that the City Council considered the secondary effects of adult entertainment in the adoption of the ordinance.

CITY OF FEDERAL WAY
CITY ATTORNEY'S OFFICE

Memorandum

DATE: August 9, 1995
TO: Mayor Gates and City Councilmembers
FROM: Londi K. Lindell, City Attorney
SUBJECT: Adult Entertainment Code Amendments

I. BACKGROUND

On June 1, 1995 and July 13, 1995, the Public Safety/Human Services Council Committee heard testimony regarding enforcement difficulties experienced by the King County Police Department in connection with the City's existing adult entertainment ordinance. The testimony was that the existing adult entertainment laws have proven ineffective in controlling illegal behavior. The City Attorney was instructed to draft amendments to the City's existing adult entertainment code in order to more effectively detect the large volumes of criminal activity occurring within such establishments, while recognizing legitimate and constitutionally protected expression.

The Public Safety/Human Services Council Committee reviewed the proposed amendments at its July 13, 1995 meeting, and moved to forward the Ordinance attached hereto as Exhibit "A" ("Ordinance") to the full City Council at the August 1, 1995 meeting, recommending approval.

On August 1, 1995, the City Council had a first reading of the Ordinance and heard testimony from the City Attorney and King County Police Detective J. P. Covey.

The proposed amendments specifically address the fact that various types of criminal activity continue to occur within the City, notwithstanding the existence of the City's adult entertainment laws. The record reflects that there has **never** been an instance when an undercover officer has entered an adult entertainment establishment in the City when a criminal act was **not** occurring. The record further reflects that the City has insufficient police resources to continue ongoing undercover investigations at these establishments.

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The proposed amendments include a minimum four foot (4') separation between an entertainer and a patron during couch or table dances, a minimum lighting requirement, and a minimum distance of eight feet (8') between an entertainer on a stage and a patron. These amendments specifically address the fact that proximity between entertainers and patrons during adult entertainment performances can facilitate sexual contact, prostitution and related crimes and address the enforcement problems and ongoing criminal activity discussed above.

Various ordinances and legal documents from other jurisdictions have been placed in the record, which demonstrate secondary effects of adult entertainment and other means to address adult entertainment. Other jurisdictions have taken a much harsher approach to adult entertainment than the proposed Ordinance, including absolute bans on one-on-one performances (commonly known as "couch" or "table" dances) between an adult entertainer and a patron. However, the Ordinance will be sufficient to deter criminal behavior, without limiting the entertainers' ability to express themselves in any material manner. However, if the criminal activity continues after implementation of the Ordinance, I may recommend additional measures, including a ban on such one-on-one performances.

This Ordinance, once implemented, will not only deter criminal activity, but it will also simultaneously protect the entertainers' ability to express themselves, help protect entertainers from assault and other potentially unwelcome physical contact from patrons, and provide adult entertainment management with useful tools to assist in detecting criminal violations.

II. SECONDARY IMPACTS

The City's adult entertainment ordinance seeks to mitigate the secondary impacts of adult entertainment uses. Such secondary effects include increased crime, reduction in property values, deterioration of the quality of the environment of neighborhoods, lessening of the suitability of certain areas for children, seniors or other groups, and/or increased municipal expenses such as police services.

The purpose of this section is to examine the experience of Federal Way, and other communities, and the literature on the subject of secondary impacts. The Washington Supreme Court has held that a City may rely on evidence generated by other jurisdictions in connection with the adoption of an ordinance so long as such

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evidence is believed to be relevant to the problem the City is addressing.

1. Incidence of Crime.

While it can be debated whether exposure to pornography causes delinquent or criminal behavior (see bibliography for research studies), police research, as described below, shows a linkage between crime rates and areas which contain concentrations of adult entertainment uses.

A. The City of Federal Way. The City of Federal Way has experienced criminal activity in connection with the operation of Deja Vu, an adult entertainment facility located at 31656 Pacific Highway South, Federal Way, Washington 98003. Criminal activity has also occurred in connection with the operation of X-Otic Tan, an adult entertainment facility located at 29500 Pacific Highway S., Federal Way, Washington. The video tape which will be shown this evening is representative of the type of criminal activity which is occurring at Deja Vu in Federal Way.

Please also see attached Exhibit "B" Federal Way Adult Entertainment Documents:

- Declaration of J. P. Covey from the King County Police Department;
- Summary of Prior Arrests at Deja Vu;
- Copies of 24 criminal complaints filed in Federal Way District Court covering crimes which occurred at Deja Vu over the five (5) month period of March, 1995 through July, 1995;
- Copy of Federal Way Hearing Examiner Findings of Fact, Conclusions of Law and Decision regarding X-Otic Tan dated September 30, 1994;
- Resolution No. 94-189 of the Federal Way City Council regarding the revocation of X-Otic Tan's business registration; and
- Copies of King County Police Officer Reports in support of X-Otic Tan revocation.

B. City of Bellevue: The City of Bellevue, Washington had similar experiences with Papagayos and Babes adult entertainment clubs. The Bellevue police investigation revealed a high incident of criminal activity related to primarily prostitution and violations of Bellevue's adult entertainment ordinance. See

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attached Exhibit "C" City of Bellevue Adult Entertainment Documents:

- City of Bellevue Adult Entertainment Ordinance;
- Pleadings from Ino Ino, Inc. v. City of Bellevue, King County Superior Court Cause No. 95-2-02025-9, including Amended Findings of Fact and Conclusions of Law; and
- Supporting Declarations filed in the Ino Ino case.

C. City of Tukwila: The City of Tukwila, Washington had similar experiences with Deja Vu in Tukwila. Deja Vu, Tukwila is owned by the same owners as the Deja Vu, Federal Way and provides stage dancing, table and couch dances. Tukwila police investigations conducted in the summer of 1994 resulted in over 500 criminal convictions relating primarily to sex crimes such as prostitution. The 500 convictions included 70 convictions for prostitution. See Police Incident Reports representative of the 500 convictions attached hereto as Exhibit "D" City of Tukwila Adult Entertainment Documents.

D. City of Kent: The City of Kent, Washington had similar experiences with the Roadside Inn Tavern. Prior to its forced closing, the Roadside Inn offered topless dancing and table dancing. Kent police investigations conducted in the summer of 1981 revealed a very high incidence of criminal activity at the Roadside, related primarily to sex crimes (prostitution) and drug related offenses. As a result of 57 hours of on-premise investigation, 162 charges were brought against 21 persons by the Kent Police Department. The report filed by the police stated: "The total time involved, and the number of charges, break down to a time expenditure of slightly more than 20 minutes per charge, attesting to the relative ease by which the subject of prostitution arises within an environment such as the Roadside." In September, 1981, the Roadside Inn Tavern was closed by the City of Kent. The City of Kent recently adopted an ordinance which bars any one-on-one performances such as table dances.

E. City of Bothell. Bothell's experiences with Mama Hoopah's in 1982 demonstrated a similar association between the use (an adult dance hall) and the occurrence of crime. Research by the Bothell Police Department also demonstrated the regional attraction that such an establishment can have. In one investigation of the 321 vehicles checked, 8 were registered in Bothell with most of the remainder from the Puget Sound regions, though others had out of state registration. This is potentially significant in that nonresidents of an area may be less inhibited in their personal behavior when away from their community. Nonresidents may also be

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unaware of the needs or concerns of residents/owners of areas adjacent to the adult entertainment use.

F. City of Detroit. Between 1969 and 1972, the number of adult theaters in the City of Detroit increased from 2 to 18 and the number of adult bookstores rose from 2 to 21. During the same period, the incidence of crime in and around these establishments increased dramatically. The high incidence of crime together with the blighting of skid row effect of proliferating adult businesses led Detroit in 1972 to adopt stringent locational regulations for adult uses.

G. City of Cleveland. Similar to Detroit, the City of Cleveland experienced a rapid increase of adult uses during the early 1970's. Unlike Detroit, Cleveland kept detailed crime statistics by census tract and by location of adult businesses. In 1976, 26 adult businesses (8 theaters and 18 bookstores) were located in Cleveland's 204 census tracts. The same year, the two census tracts having the highest rates of crime had a total of 8 pornography outlets. Cleveland Police statistics showed that during 1976 there was an average of 20.5 robberies per census tract. In the 15 census tracts which contained adult businesses, the average was nearly double at 40.5 robberies. A single census tract which contained 5 pornography outlets and a population of only 730 persons had a total of 136 robberies. The statistics for rape echoed the same pattern as for robbery. The citywide average of rape in Cleveland in 1976 was 2.4 census tract. In the 15 census tracts containing pornography outlets, the rate was double that.

The foregoing police records in the City of Federal Way and other jurisdictions identify a clear linkage between the incidence of criminal activity near and in association with adult entertainment establishments.

2. Other Secondary Impacts.

Attached as Exhibit "E", Adult Entertainment Studies from Other Jurisdictions, are studies performed in Kent, Washington; Bellevue, Washington; Austin, Texas; Minnesota; and Indianapolis, Indiana, of the secondary impacts of adult entertainment uses. Many of these studies conclude that adult uses result in a reduction in property values of surrounding properties. These studies also conclude that adult uses are incompatible with residential, educational and religious uses. Finally, the City of Federal Way has experienced the secondary effect of the drain on municipal resources by having

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to allocate disproportionate police resources to adult entertainment businesses.

III. DEJA VU LEGAL MEMORANDUM IN OPPOSITION TO AMENDMENTS

At the August 1, 1995 Council meeting, Jack Burns, legal counsel for Deja Vu submitted a memorandum to the City Council containing certain legal theories and analysis. This section is in response to his allegations.

1. Entitled to Full Constitutional Protection. A clear error in Jack Burns' analysis is his statement that there can be "no question that this form of expression is entitled to the full protection" of the First Amendment in Article 1, Section 5 of the State Constitution. Just this year, in JJR. Inc. v. City of Seattle, 126 Wn.2d 1 (1995), the State Supreme Court stated that nude dancing "remains far from the core of protected expression of . . ." and that ". . . nude dancing performed at an adults-only nightclub clings to the edge of protected expression." Also, a number of state court decisions, including the recent Superior Court decision on the Bellevue ordinance, characterized much of the activity at adult entertainment clubs as "conduct" and not protected expression. Sexual conduct is entirely outside the protection of the First Amendment and Article 1, Section 5 of State Constitution.

2. Tippling. The tipping provisions proposed for Federal Way are the same as in the Bellevue ordinance. These were upheld in the Ino Ino Superior Court decision by Judge Schapira (CL 33), citing Key. Inc. v. Kitsap County, 743 F.2d at 1061-62. Jack Burns refers to two problems he sees with the provision: (1) it would make the adult entertainers "employees," rather than "independent contractors," and (2) it would constitute a ban on tipping such as was found unconstitutional in the Snohomish County case he cites, PD&MK, Inc. v. Snohomish County, King County No. 87-2-04201-4.

Neither of these concerns is valid. As to the first, the City has a right to regulate time, place and manner of handling cash transfers between the patron and dancers. This was established in Key. Inc. v. Kitsap County. As to the dancer's "independent contractor" status, they could continue as independent contractors, but the ordinance requires that their tip be placed in a separate container and not placed on the entertainer's body. In addition, virtually every court which has considered this issue--and many have in a wage and hour law context--has found the dancers to be

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employees, not independent contractors (see, e.g., Reich V. Priba Corp., D.C. No. Texas, No. 3:91-CV-2786-G, 3/27/95).

On the second point, Mr. Burns' analysis is also incorrect. In the Snohomish County case, the trial judge, Susan Agid, upheld a total prohibition of tipping as to nude dancing. As to non-nude dancing, i.e., table dancing, Judge Agid said only that "a prohibition on tipping" would not be permissible. She went on to say that ". . . there may well be other methods of payment available, which will have to be developed to pay for erotic dances of all kinds under the ordinance . . .".

The proposed amendments do not prohibit tipping. The amendments establish an alternative method of payment, and the same provision has already been upheld in the recent challenge to the Bellevue ordinance. It should also be noted that Judge Agid stated that the prohibition of tipping for nude dancing served a "compelling" state interest. (CL 15.)

3. Time Place and Manner Regulation. The cases cited by Mr. Burns on page 2 of his memo concerning "subject matter restrictions imposed upon speech" are not applicable in this situation. The Collier V. Tacoma case he cites, 121 Wn.2d 737 (1993), is not on point. The State Supreme Court in Collier stated that the Tacoma ordinance requiring prompt removal of political campaign signs in residential areas was content based. 121 Wn.2d at 752. This puts the ordinance in a fundamentally different category than time, place and manner regulations of adult entertainment, which have been consistently upheld as content neutral so long as they focus solely on regulating the secondary effects of adult entertainment and not on censoring its content. Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).

And, on the state law front, the Washington Supreme Court has, as noted above, characterized nude dancing as a marginal expression clinging to the edge of constitutional protection. In contrast, the subject matter regulated in Collier--political yard signs--is pure expression at the very core of the First Amendment and state constitutional protections. In any event, the public interests involved in regulation of adult entertainment qualify as compelling state interests. Even the 1987 Superior Court case concerning the Snohomish ordinance, cited by Mr. Burns on page 4 of his letter, found that the public interest in preventing crime, prostitution and sexually transmitted disease associated with unregulated adult entertainment can qualify as compelling state interests.

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4. Narrowly Tailored. Mr. Burns cites several U.S. Supreme Court cases, as well as a couple of state law cases for the doctrine of "narrowly tailored" ordinances. Mr. Burns' analysis, however, is generally off the mark. "Narrowly tailored" does not mean that the least restrictive alternative must be employed. Narrowly tailored means only that the activities which are burdened by the regulatory measure must be those that are creating the problem.

For example, if a municipality wishes to prevent sexual contact between patrons and dancers, a regulation prohibiting all live entertainment within the City limits would not be narrowly tailored. However, as long as the municipality focuses on the particular activity causing the problem, such as table dancing at a club like Deja Vu, the courts will not second guess how the municipality chose to accomplish its time, place and manner regulation:

So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech restrictive alternative.

Ward v. Rock Against Racism, 49 U.S. 781, 105 L. Ed. 2d at 681 (1989). See also, United States v. Albertini, 472 U.S. 675, 689 (1985) (least restrictive alternative not required under O'Brien analysis).

Burns' reference to the Worldwide Video v. Tukwila case is likewise not on point. The problem in Worldwide Video was that the Tukwila ordinance defined as adult entertainment even businesses with as little as 10% of their stock consisting of X-rated materials. This definition would include mainstream video and bookstores. The City was unable to demonstrate that such businesses were likely to have the kind of secondary impacts that legally justify time, place and manner regulation. This is not the case when regulating live entertainment clubs like Deja Vu. The kind of adult entertainment they present is well documented as the type frequently associated with adverse secondary effects.

5. Increase in Stage Separation. The existing adult entertainment regulation required the stage be 18 inches high and 6 feet from the

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nearest patron. The proposed ordinance now reads 18 inches high and 8 feet separation.¹

Judge Schapira found that Bellevue's stage dimensions and distances (identical to Federal Way's proposed dimensions and distances) adequately "allowed entertainers to convey their erotic, sensual message . . ." Ino Ino, Inc., FF25. She also found that the 8 foot separation (and 36 inch rail) was established by Bellevue after a test showed this distance prevented a "seven footer" from possibly touching a nude dancer on stage. Ino Ino, Inc., FF10. The increase from 6 feet to 8 feet for nude dancing on stage also makes sense since non-nude table dancers must be 4 feet from patrons.

6. 2:00 A.M. Closing. The 2:00 A.M. closing hour is from the original ordinance and is not proposed to be amended. However, this closing hour is consistent with the closing time for bars. The City's concern is that inebriated bar patrons would travel to and enter adult clubs if the clubs remained open past 2:00 a.m. There was testimony on this in the Ino Ino case, and Judge Schapira recognized the 2:00 a.m. closing as a content-neutral time, place and manner regulation. (Cause No. 95-2-02025-9, FF44 and CL 34.)

IV. CONCLUSION

After the City Council's consideration of all the evidence in the record, including the secondary effects of adult entertainment establishments, staff recommends that the City Council enact the Ordinance.

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¹Note that Mr. Burns is incorrect where he alleges on p. 3 of his letter that under the proposed ordinance "all dancing" must occur on a stage separated 8 feet from any patron. Only nude dancing is required to be on the stage. Non-nude table dancing may occur 4 feet from the patron.

EXHIBIT "A"

**8/9/95 DRAFT ORDINANCE
AMENDING THE ADULT ENTERTAINMENT CODE**

EXHIBIT "B"

FEDERAL WAY ADULT ENTERTAINMENT DOCUMENTS

- Exhibit B-1 Declaration of J. P. Covey
- Exhibit B-2 Summary of Prior Deja Vu Arrests
- Exhibit B-3 Deja Vu Criminal Complaints and Police Officer Reports (3/95 - 7/95)
- Exhibit B-4 Memorandum dated July 7, 1995 addressed to Public Safety/Human Services Council Committee from the City Attorney
- Exhibit B-5 Federal Way Hearing Examiner Decision/X-Otic Tan dated September 30, 1995
- Exhibit B-6 Resolution No. 94-189 regarding X-Otic Tan
- Exhibit B-7 Police Officer Reports regarding X-Otic Tan
- Exhibit B-8 Deja Vu Publication/Advertisement

EXHIBIT "C"

CITY OF BELLEVUE ADULT ENTERTAINMENT DOCUMENTS

- Exhibit C-1 Bellevue Adult Entertainment Ordinance
- Exhibit C-2 Amended Findings of Fact and Conclusions of Law in
the matter of Ino Ino, Inc. v. City of Bellevue,
King County Superior Court Cause No. 95-2-02025-9
- Exhibit C-3 Declarations filed in the Ino Ino, Inc. case

EXHIBIT "D"

CITY OF TUKWILA ADULT ENTERTAINMENT DOCUMENTS

Exhibit D-1 Police Incident Reports (representative of reports
filed in 500 convictions at Deja Vu)

EXHIBIT "E"

ADULT ENTERTAINMENT STUDIES FROM OTHER JURISDICTIONS

- Exhibit E-1 Kent, Washington: Adult Use Zoning Study
- Exhibit E-2 Bellevue, Washington: A Study on the Need to
Regulate the Location of Adult Entertainment Uses
- Exhibit E-3 Austin, Texas: Report on Adult Oriented
Businesses in Austin
- Exhibit E-4 Minnesota: Report of the Attorney General's
Working Group on the Regulation of Sexually
Oriented Business
- Exhibit E-5 Indianapolis, Indiana: Adult Entertainment
Businesses in Indianapolis