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## M E M O R A N D U M

TO: Neil S. Pade  
CC: Michael A. Zizka  
FROM: Lana M. Glovach  
DATE: November 4, 2009  
RE: Draft Zoning Regulations for Adult Establishments

The purpose of this memo is to provide you with our comments on the October 21, 2009 draft of the proposed Adult Establishment Regulations for the LI, RLI and IPD districts. Before doing so, however, we take this opportunity to share with you some legal principles applicable to this type of regulation and some thoughts on the record the Zoning Commission (the "Commission") will need to make if it chooses to enact these regulations.

### GENERAL COMMENTS

The regulation of adult establishments is frequently challenged on constitutional grounds, specifically as a restriction on First Amendment speech. The United States Supreme Court has held that non-obscene, sexually explicit expressive materials and their distribution are entitled to protection under the First Amendment. U.S. v. Williams, 128 S.Ct. 1830, 1835 (2008); Smith v. California, 361 U.S. 147, 150 (1959). On the other hand, the Court has held that "obscene" speech, which it described as "sexually explicit material that violates fundamental notions of decency," is not entitled to First Amendment protection. 128 S.Ct. at 1835.

The permissible regulation of protected speech requires that, among other factors, the regulation not be vague and that it further a substantial governmental interest. We will briefly describe each requirement.

A regulation is not vague if it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited and if it provides explicit standards for those who apply and enforce the regulation. VIP of Berlin v. Town of Berlin, D. Conn., 2009 U.S. Dist. LEXIS 56656 (2009). Vagueness is to be avoided, but what constitutes a vague regulation is, of course, subject to differing opinions, based upon the facts of the case decided. Indeed, the federal court in Connecticut has reached different conclusions on, for example, whether “substantial portion” and “substantial and significant” are vague.

In the federal case involving VIP and the Town of Berlin, VIP of Berlin v. Town of Berlin, D. Conn., 2009 U.S. Dist. LEXIS 56656 (2009), the court concluded that the ordinance defining an adult novelty store as “any establishment having a substantial or significant portion of its stock and trade” in adult novelty products was vague as applied to VIP. In that case, VIP submitted numerous applications for a certificate of zoning compliance for a general retail business but, in each instance, the Town Manager concluded that VIP was an “adult oriented store” and, thus, required a license. VIP represented that no more than 35% of its inventory would be in adult novelty products and, in later applications, reduced that percentage to 10%-12%. The Berlin Town Manager, who is responsible under the ordinance for determining the need for a sexually oriented business license, acknowledged that there were no published guidelines or any publicly available instructions or other guidance that a business could review in advance of applying for a certificate of zoning compliance. VIP claimed that it did not understand what it needed to do to qualify as a general retail establishment with less than a substantial or significant portion of its stock in trade in adult items. The Court concluded that the ordinance was unconstitutionally vague because there was nothing in its language from which VIP could determine how much or what percentage of its stock could consist of such items without making it subject to a license under the ordinance. In short, the Court stated that VIP could not discern where the “magic threshold” delineating general retail establishment from adult oriented business lay. As to the second prong relating to enforcement standards, the Court likewise concluded that the Town’s “the business will know whether it is” a sexually oriented business and “I know it when I see it” are not constitutionally sound application and enforcement standards.

In a case decided 2-1/2 years earlier, again involving the Town of Berlin, Gold Diggers v. Town of Berlin, 469 F. Supp.2d 43 (2007), a different federal court judge in Connecticut concluded that the terms “substantial portion” and “regularly features” were not unconstitutionally vague. Based upon court cases examining those terms in other contexts and dictionary definitions of those terms, the Court concluded that the terms were sufficiently clear to apprise an applicant as to what was covered without permitting the town to engage in arbitrary enforcement.

In order to show that the regulation furthers a substantial governmental interest, the Commission must be able to show that, in enacting the regulations, it relied on “evidence ‘reasonably believed to be relevant’ to the problem of negative secondary effects. A city must provide some evidence of a connection between ‘the speech regulated by the ordinance and the secondary effects that motivated the adoption of the

ordinance. However, a city need not prove that such a link exists or prove that its ordinance will be effective in suppressing secondary effects. Based on this standard, the Supreme Court has upheld ordinances where a city conducted hearings and reviewed a report on the experience of other cities; expressly relied on the evidentiary foundation in prior judicial opinions as well as the city's own findings; and relied on a study conducted many years prior to enactment of the ordinance." White River Amusement Pub v. Town of Hartford, 481 F.3d 163, 171 (2007)(citations omitted).

Thus, it is critical, as I mentioned to you recently on the phone, that the Commission make a substantial record to support any decision to enact the proposed regulations. The Commission will want to obtain and place in the record studies analyzing the negative secondary effects of adult businesses. As I mentioned when we spoke, the American Planning Association may have such studies available for purchase. The Commission must also conduct an independent analysis of the actual and potential secondary effects of such adult entertainment establishments, and it must do so *before* enacting the regulations. It is not enough for the Commission merely to be aware that there is the potential for secondary effects and that other municipalities have analyzed the issue. "While a municipality may rely on studies conducted by other towns, it may not simply rely on its knowledge that such studies exist" because such knowledge is not evidence. 481 F.3d at 172.

Against this legal framework, we now provide our specific comments on the proposed regulations.

### SPECIFIC COMMENTS

The line "Adult Related Terms" is unnecessary and should be deleted. As a practical matter, the principal term in the proposal is "adult establishment," because that is the only term that is actually used in the substantive portions of the regulations. There is no need to corral the related terms under an "adult" heading, and doing so may have other, less obvious drawbacks (in our view, for example, doing so would only serve to spotlight the topic within the regulations, and we doubt the Commission would want "adult establishments" to be a point of particular focus).

"Establishment": In the same vein, the proposed separate definition of "establishment" should not be shepherded under an "adult uses" umbrella. The current regulations already describe a number of non-"adult" businesses as "establishments" (e.g., convalescent home, pet boarding facility). Indeed, the general term "retail establishments" is defined in a circular manner, as "Any establishment with sixty (60) percent or more of the gross floor area devoted to the sale or rental of goods or merchandise to the public."

We note, in addition, that the proposed definition of "establishment" would not really clarify anything. If an "establishment" is something regulated under Articles I, IV and V, and those articles use the same term in specifying the subject of their regulation (as in "retail establishment" or "adult establishment"), the reader is still being given no

substantive information about what an “establishment” is. As a practical matter, we think the concept of an “establishment” is clear enough to most people that a separate definition is not necessary. However, if a definition is desired, we suggest “A place of residence, business, recreation or other human activity, whether or not such activity is carried on for profit.”

*“Adult Material”*: Although a bit out of sequence, we will begin with this definition, as its use will affect many of our comments regarding other proposed definitions. In several cases in which adult-use regulations have been deemed unconstitutional by the courts, the cited problems have been (1) vagueness (it is too difficult for people to know what the scope of the regulation is and, therefore, the regulations pose too great a risk of arbitrary enforcement) or (2) overbreadth (the regulation appears to cover too many activities that should not be lumped in with the “problem” uses). In the proposed definition, the phrase “distinguished or characterized by their emphasis on” poses both vagueness and overbreadth concerns.

It is common knowledge that a vast number of novels, films, and artwork discuss or feature depictions of sexual activity or sexual organs. In the case of books whose treatment of such activities or body parts is limited to written descriptions, we think it would be nearly impossible to draw a manageable line between those that are “distinguished or characterized by their emphasis on” such activities or body parts and those that are not. Also, who would be assigned to read every novel in the bookstore to determine whether or not it crosses the line?

The determination would not be much easier in the case of films; how many minutes of nudity or sexual activity would constitute an “emphasis” on nudity or sexual activity? Common experience indicates that the vast majority of films being released by major motion picture studios contain at least some nudity. Videotapes and DVDs of many of these films are widely available at public libraries.

For these reasons, we think that the Commission should consider excluding from the regulations books and other materials in which sexual matters are depicted only through the written word. We suspect that businesses in which such materials would be the only type of “adult” materials available would be less likely to cause the types of problems that have led many communities to regulate adult uses.

With regard to films, in light of the frequency of nudity in current R-rated and PG-13 or even PG productions, it may be easiest to draw a line between those in which “specified sexual activities” are actually depicted (as opposed to simulated) and those in which there are no such depictions. We do not suggest that such a line would be ideal, or that it would address all of the issues of decency and morality with which the Commission may truly be concerned, but given the wide disparity of views on such matters and the broad scope of constitutionally protected “expression,” it is difficult to construct a line based on morals. As we noted above, when the courts have upheld “adult use” regulations, they have generally done so on the basis of studies showing the impact of

adult uses. Therefore, we believe the Commission should focus on those uses that are most likely to result in undesirable impacts.

Again, in this respect, common experience suggests that the most deleterious impacts are those caused by establishments offering an experience that is not widely available due to social disapprobation: the ability to view films containing explicit depictions of sexual activities and live performances featuring nudity. For these reasons, we recommend that the Commission consider defining “adult material” more strictly as follows: “(1) Books, magazines, periodicals, films and any other form of media that visually depict specified sexual activities; and (2) live entertainment featuring exposure of specified anatomical areas.” Our suggestions with respect to other proposed definitions will be commensurate with our suggestions as to this proposed definition.

“Adult material in stock or trade, substantial or significant”: Again, we are taking this definition out of sequence as our comments will serve as a basis for comments on other proposed definitions. We believe this definition can be deleted, as it would be best generally to avoid the use of the more ambiguous terms “significant or substantial” (a lay person may not consider 10% as “substantial” or “significant”). If retained, the words “stock or trade” should probably be changed to “stock in trade.”

“Adult bookstore”: This definition is somewhat unclear. We recommend consideration of the following alternative: “An establishment in which more than ten percent (10%) of the inventory, whether for sale or rental, is adult material.” However, since this recommendation piggybacks on our previous recommendation regarding “adult material,” we will provide the following comments for the Commission’s consideration if it chooses not to adopt our proposed change to “adult material:”

(1) This definition relates only to “obscene activities,” and not to “adult materials.” Was that intended? (2) Would a DVD fall under “motion pictures”? We note that this definition uses the phrase “motion pictures, video recordings,” while the “adult material” definition uses “films, video cassettes.” Is the use of different phrases intended to describe and reach different things? (3) The phrase after “obscene activities” (“for observation by patrons thereof”) is incomplete and missing something. (4) With respect to the phrase “or an establishment with a segment or section devoted to the sale, rental or display of such material,” is there an intended difference between “segment” and “section”? (5) With respect to the preceding comment, by its use of “segment” or “section,” does it encompass a convenience store that has an area devoted to adult magazines?

“Adult cabaret”: First, the two parts of the definition may make it difficult to distinguish an “adult cabaret” from an “adult motion picture theater” or “adult mini-motion-picture theater. We recommend that the two concepts be kept separate. Second, the introductory words “a nightclub, bar, restaurant or similar” could be deleted and the definition could begin “an establishment . . . .” Third and as noted above, the words “regularly features” have been subject to a constitutional challenge on vagueness grounds. Although not found vague in the case we cited above, we recommend that the

Commission either eliminate the word “regularly” or define it to be more specific so as not to invite a challenge to the definition, with the resultant legal expenses.

If the Commission retains the two substantive components of the definition, we have three additional comments/questions. First, the proposed definition refers to “slides or other photographic reproductions,” which phrase is not used in the definitions of “adult bookstore” or “adult material.” Again, the question is: does the Commission intend to have these differing definitions? Second, what is a “substantial portion of the total presentation time”? 10%, per the definition of “adult material in stock or trade”? We recommend that the Commission provide objective criteria (such as a percentage) for this aspect of the definition. Lastly, we recommend that the word “specified” be inserted before “anatomical areas” in the last line of the definition.

“Adult mini-motion-picture-theater”: In line with our recommended change to the definition of “adult material” (as well as for picky grammatical reasons), we recommend revising this definition as follows: “An enclosed building or part thereof with a capacity of fewer than fifty (50) persons, used for the presentation of films, slide shows or other visual projections, 80 percent or more of which constitute adult material, or any of which depict obscene activities.” The “80 percent” is a bit of a place-holder; the Commission may readily substitute another percentage.

“Adult motion picture theater”: In line with the previous recommendation, we recommend revising this definition as follows: “An enclosed building or part thereof with a capacity of fifty (50) or more persons, used for the presentation of films, slide shows or other visual projections, 80 percent or more of which constitute adult material, or any of which depict obscene activities.” The “80 percent” is, again, a place-holder.

“Lingerie modeling studio”: The phrase “couples, and groups” could be deleted and the phrase “to one or more individuals” could be substituted.

“Sexually oriented retail store”: We have a number of comments on this definition. First, we recommend the consistent use of the word “establishment,” rather than the different term “enterprise.” Second, what is the “substantial or significant amount”? As noted above, we recommend that the objective criteria be placed within the definition. Third, this definition moves away from the “stock in trade” contained in other proposed definitions and, instead, focuses on “inventory or floor space for, or its income from.” Theoretically, then, a business could be both an “adult bookstore” and a “sexually oriented retail store,” as defined by different standards (“stock in trade” and, for example, “floor space”). Fourth, we understand the “except for” in the seventh line to apply only to subpart (b). Is this the intent? If not, the language needs to be tweaked. If so, and depending on the percentage of inventory, floor space or income, a business selling medical models, which might be considered “paraphernalia,” might fall within this definition.

“Obscene activity”: See comment on “specified anatomical areas” (below) with respect to clarifying that the activity must involve at least one human.

“Specified anatomical areas”: Is subpart (1) intended to address only women, while subpart (2) is addressed only to men? If so, then subpart (1) needs to be redrafted. In any event, subpart (1)(b) contains a typo in that it should be plural, “buttocks.” More globally, this definition, by its incorporation in certain other definitions, clarifies – along with the definition of “specified sexual activities” -- that these definitions and regulations are addressed to “human” bodies and sexual activities involving at least one human. We note that this definition is not incorporated into all of the other definitions (most notably, “obscene activity”).

§ 41.3.6: We recommend that subpart (a) be rewritten in the affirmative, as follows:

Buildings, structures and parking areas used in connection with adult establishments shall be offset one hundred fifty (150) feet from all lot lines. Lots containing adult establishments must be located at least one hundred fifty (150) feet from the boundary of any residential district (Sections 21-25). Measurement under this subsection shall be based on the shortest measurable distance of one hundred fifty (150) feet.

Subpart (b): We recommend that the beginning of the sentence be revised as follows: “No adult establishment shall be permitted on any lot located within” . . . . There is a disconnect between the words “one thousand” and the number “1,500.” Also, the reference in the fifth line to “41.3.6.c” and unnecessary; it can be deleted.

The beginning of the third line of subpart (c) should read “be visible from the outside of a building.” In addition, there is an extra semi-colon at the end of the fourth line, before “and.”

Subpart (d) is awkward. We suggest the following: “Adult establishments shall operate only Monday through Saturday between 9:00 AM and 9:00 PM.”

“§§ 57.3 and 58.3.1”: We recommend the following terminology: “Adult Establishments meeting the requirements set forth in Section 41.3.6.”

