



November 15, 2017

Via U.S. Mail and E-mail to [kmayor@cityofportlandtn.gov](mailto:kmayor@cityofportlandtn.gov)

Honorable Kenneth Wilber  
Mayor, City of Portland, Tennessee  
100 South Russell Street  
Portland, Tennessee 37148

Members of the Board of Aldermen,  
c/o the Honorable Kenneth Wilber  
Mayor, City of Portland, Tennessee  
100 South Russell Street  
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Dear Mr. Wilber and Members of the Board of Aldermen:

The ACLU Foundation of Tennessee, Inc. (ACLU-TN), on behalf of our clients, Elite Productions (“Elite”) and Envy Restaurant Bar & Grill, LLC (“Envy”), writes in furtherance of our letter dated September 15, 2017, regarding efforts to amend the Combined Zoning Ordinance of the City of Portland, Tennessee and the Portland Planning Region (the “zoning ordinance”). Despite revision, Ordinance No. 17-75 continues to raise serious First Amendment freedom of speech concerns which would prove fatal to the amendments as well as to any attempt to regulate the protected activities of our clients pursuant to those amendments.

The revised definition of “Adult Cabaret” contained in Ordinance No. 17-75 continues to seek to regulate speech and expression beyond that which could plausibly be considered “sexually explicit” or “erotic” expression.

The Ordinance defines an Adult Cabaret as:

... a nightclub, bar, restaurant, or similar establishment which regularly features:

(A) Persons who appear in a state of nudity or semi-nude;

- (B) Live performances which are characterized by “specified sexual activities” or by the exposure of any of the “specified anatomical areas,” even if partially covered by opaque material or partially or completely covered by translucent material, including swim suits, lingerie, or latex covering; or
- (C) Films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description or “specified sexual activities” or “specified anatomical areas”; or
- (D) Entertainment of an erotic nature, including exotic dancers, strippers, male or female impersonators, or similar entertainers.

By including performances of male or female impersonators in the enumerated types of entertainment that are erotic in nature, the definition remains overbroad.

In determining whether governments may regulate sexual or erotic speech and expression, the restrictions must be narrowly tailored and they must not suppress protected speech unconnected to the negative secondary effects cited as legislative justification.

The first three subparts of the definition of Adult Cabaret specifically regulate adult expression by including, as elements of the definition, partial or full nudity, display of sexual activities, or display of anatomical areas. These terms are then further defined in the text of the Ordinance. *See* Zoning Ordinance § 2, 10-402 (14), (17), (18), (22), and (25).

In contrast, subpart (D) includes no such specificity. Instead, the definition sweeps broadly to include any “entertainment of an erotic nature.” Without restriction, the Ordinance then states that the entertainment being regulated includes “exotic dancers, strippers, male or female impersonators, or similar entertainers.” The term “entertainment of an erotic nature” is not otherwise defined or narrowed.

The definition of “Adult Cabaret” set forth in the Ordinance bears some similarity to the definition found in Tennessee Code Annotated § 7-51-1102(2), which states:

“Adult cabaret” means an establishment that features as a principal use of its business, entertainers, waiters, or bartenders who expose to public view



of the patrons within such establishment, at any time, the bare female breast below a point immediately above the top of the areola, human genitals, pubic region, or buttocks, even if partially covered by opaque material or completely covered by translucent material, including swim suits, lingerie, or latex covering. "Adult cabaret" includes a commercial establishment that features entertainment of an erotic nature, including exotic dancers, strippers, male or female impersonators, or similar entertainers;

Tenn. Code Ann. § 7-51-1102(2).

The constitutionality of the above statutory definition was upheld in *Entm't Prods., Inc. v. Shelby Cnty., Tenn.*, 588 F.3d 372 (6th Cir. 2009). That decision, however, was based on elements of the statutory definition that are not present in the Ordinance 17-75 amendment. The Court ultimately upheld the statute because, pursuant to the definition, an establishment was "an 'adult cabaret' *only* if entertainment by these performers is a principal use of the business *and* if their attire exposes the anatomical areas specified in the first sentence." *Id.* at 382-83.

Ordinance No. 17-75 definition of "Adult Cabaret" does not contain such narrowing language. According to the Ordinance, an "Adult Cabaret" includes establishments which "regularly feature" the listed performances, not simply those that offer such performances as a "principal use of the business." The ordinance, moreover, does not require both of the following critical elements: (1) performance by male or female impersonators; *and* (2) exposure of specified anatomical areas. The ordinance definition, in fact, requires no link to adult expression or related secondary effects.

Performances by male and female impersonators, such as those by our clients, are not inherently erotic in nature. The Court in *Entm't Prods., Inc. v. Shelby Cnty., Tenn.*, 588 F.3d 372 (6th Cir. 2009), recognized this point by specifically noting, that "some performances by entertainers listed in the second sentence bear no relation to the secondary effects the Act seeks to control." *Id.* at 382. Elite's performances feature fully clothed impersonators singing, dancing and performing comedy bits. They contain no nudity, nor are they "characterized by 'specified sexual activities' or by the exposure of any of the 'specified anatomical areas.'" Although the Ordinance enumerates studies that link secondary effects to certain types of erotic entertainment, not one of those studies connects the type of performance that Elite produces to any secondary effect that would justify regulation.

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Given the overbreadth of the ordinance, Elite's performances, despite the absence of sexual or erotic content, could still be considered "Adult Cabaret" under the proposed ordinance simply because its performers are impersonators. They would still be precluded from exhibition at Envy, due to zoning restriction relative to adult-oriented businesses.

Accordingly, the concerns raised in prior correspondence have not been resolved. By regulating more than sexually explicit speech or expression, such as Elite's performances, the Zoning Ordinance as amended remains unconstitutional.

For these reasons, we encourage you to vote against Ordinance No. 17-75 and remove it from consideration. At the least all references to "male or female impersonators" must be removed from the definition of "Adult Cabaret." Should the Ordinance pass as written, our clients will be forced to protect their First Amendment rights and pursue their remedies in court.

Sincerely,



Mandy Strickland Floyd  
Staff Attorney

cc: Kristin Ellis Berexa