



September 15, 2017

Via U.S. Mail and E-mail to 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
Portland, Tennessee 37148

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Dear Mr. Wilber and Members of the Board of Aldermen:

The ACLU Foundation of Tennessee, Inc. (ACLU-TN) represents the interests of Elite Productions (“Elite”) and Envy Restaurant Bar & Grill, LLC (“Envy”) with regard to City of Portland, Ordinance No. 17-59, which seeks to amend the Combined Zoning Ordinance of the City of Portland, Tennessee and the Portland Planning Region (the “zoning ordinance”). The existing zoning ordinances contain regulations on the operations of “Adult Oriented Businesses.” Ordinance No. 17-59’s main purpose appears to be adding a new category of Adult-Oriented Business – the Adult Cabaret. This new definition and the intent behind its inclusion in the zoning code raises serious First Amendment freedom of speech concerns which, ultimately, would prove fatal to the amendments or any attempt to regulate the protected activities of our clients.

The recitals for Ordinance No. 17-59 state:

WHEREAS, it is not the intent of the city to suppress any speech activities protected by the First Amendment, but to enact a content neutral ordinance which addresses the secondary effects of sexually oriented businesses;

Despite this self-serving statement of intent, the Ordinance seeks to suppress protected speech that clearly does not fall within the category of sexual or erotic. The timing of the

ordinance and the obvious targeting of Elite's female impersonators also belie the ordinance's stated content neutrality

I. Artistic expression is not sexual or erotic in nature simply because it involves male or female impersonators and, therefore, it cannot be regulated like "adult-oriented businesses."

Courts have repeatedly faced challenges to the constitutionality of local regulations of sexual or adult-oriented businesses. See Richland Bookmart, Inc. v. Knox County, 555 F.3d 512, 520 (6th Cir.2009); Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, 274 F.3d 377, 396 (6th Cir.2001). While such speech is protected as free speech and expression by the First Amendment, the Supreme Court has held that governments may regulate sexual or erotic speech and expression if those regulations are intended to address the "adverse secondary effects of such expression, so long as the restrictions placed on expression survive intermediate scrutiny."¹ Entertainment Productions, Inc. v. Shelby County, 588 F.3d 372, 378 (6th Cir. 2009) (Citing United States v. O'Brien, 391 U.S. 367, 377 (1968); City of Renton v. Playtime Theatres, 475 U.S. 41, 47 (1986)). Undoubtedly, Portland may regulate businesses that regularly purvey "sexually explicit but non-obscene speech, such as adult publications and adult videos, and second, 'symbolic speech' or 'expressive conduct,' such as nude dancing." Richland Bookmart, Inc., 555 F.3d at 520.

Ordinance No. 17-59's new definition seeks to regulate speech and expression beyond that which could plausibly be considered "sexually explicit" or erotic expression.

The Ordinance defines an Adult Cabaret as:

Activities in commercial establishments which feature adult entertainment that **may** be erotic nature [sic]; including exotic dancers, table dancers, private dancers, strippers, **male or female impersonators**, or similar entertainers.

By using the term "may," the new provision attempts to define any form of entertainment, whether sexual or erotic in nature, which includes male or female impersonators. The problem is that, while some sexually explicit performances may, on occasion, include a male or female impersonator, not all performances by impersonators include sexually explicit content. Just because some people may be uncomfortable with, or even offended by, male or

¹ Too our knowledge, any alleged or specific adverse secondary effects from a drag show have not be explained by the City of Portland or studied in any meaningful way.

female impersonators, such discomfort cannot automatically qualify anything they do as sexually explicit. The actual content of a performance is what must be reviewed, and not someone's costume, clothing, makeup or portrayal of another gender.

Elite produces stage shows for the entertainment of its audience. The shows are meant to be entertaining and fun – to evoke thought and laughter. They have performed at Envy on at least one occasion and have several performances planned in the future. These shows run in the same vein of a variety show, with a host who guides the audience through various performances. The acts include dance numbers, theatrical performances and lip syncing to popular songs. The artists are female impersonators, who, in addition to their onstage performances, express their artistic talent by transforming themselves to create an illusion of the male or female for the audience.

What the performances do not include is any display of “specified anatomical areas” or “specified sexual activity,” as defined by Art. III, Ch. 2 of the current zoning ordinances.² The productions are not sexual or erotic in nature and, in no way, could fall within the category of an “adult-oriented business.”

Despite the absence of sexual or erotic content, Elite's performances would be considered “Adult Cabaret” under the proposed ordinance simply because its performers are impersonators. They would therefore be precluded from exhibition at Envy, which is not zoned in an IS District, the one zone where adult-oriented businesses are allowed to operate in Portland. Zoning Ordinance § 8-402(A). Because Ordinance No. 17-59 would impermissibly regulate more than sexually

² SPECIFIED ANATOMICAL AREAS: (Added by Ordinance 549, October 6, 1997)

- (A) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus or female breasts below a point immediately above the top of the areolae; or
- (B) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

SPECIFIED SEXUAL ACTIVITY: (Added by Ordinance 549, October 6, 1997)

- (A) Human genitals in a state of sexual stimulation or arousal;
- (B) Acts of human masturbation, sexual intercourse or sodomy;
- (C) Fondling or other erotic touching of human genitals, pubic regions, buttocks or female breasts;
- (D) Flagellation or torture in the context of a sexual relationship;
- (E) Masochism, erotic or sexually oriented torture, beating or the infliction of pain;
- (F) Erotic touching, fondling or other such contact with an animal by a human being;
- (G) Human excretion, urination, menstruation, vaginal or anal irrigation

explicit speech or expression, such as Elite's performances, the ordinance is unconstitutional.

II. The Ordinance is not a "content neutral" restriction and, therefore, is presumed invalid unless Portland can satisfy the requirements of strict scrutiny

Time, place and manner regulations that are content-neutral must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. See Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 573 (1987). Where a regulation is content-based, it is "considered presumptively invalid and subject to strict scrutiny." City of Los Angeles v. Alameda Books, 535 U.S. 425, 434 (2002). "The principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984)). Regulation of expressive activity is content neutral if it is "justified without reference to the content of the regulated speech." Clark, 468 U.S. at 293.

The Ordinance includes male and female impersonators in its definition of Adult Cabaret without regard for whether any such speech or expression has a sexual or erotic component. As stated above, while a sexually explicit performance can indeed include male or female impersonators, the mere fact that something is being performed by an impersonators does not automatically make it sexual. The inclusion of impersonators in the definition is not aimed at regulating sexually explicit speech, but rather to regulate speech and expression by impersonators. The Ordinance, therefore, seeks to regulate the content of speech rather than seeking to be neutral.

The Court has also recognized a category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "justified without reference to the content of the regulated speech" or that were adopted by the government "because of disagreement with the message [the speech] conveys," Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015).

Elite's performances appear to be the catalyst for Ordinance 17-59, which seeks to bring any production that includes "male or female impersonators" under the definition of an "adult cabaret" and subject it to stringent regulations. Those

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regulations would effectively end Elite's shows at Envy and, possibly, regulate them entirely out of existence within the City of Portland. The whole reason for amending the zoning ordinance appears to be to remove Elite's performances from Portland altogether or, at the least, banish them to a very limited area. Because the Ordinance would be adopted to further the city's desire to restrict impersonators from performing or because of its disagreement with the message they convey, the regulations would be content based and, therefore, unconstitutional.

For these reasons, we urge you to vote against or remove from consideration Ordinance No. 17-59. Its passage would certainly be a content based and unconstitutional regulation on the free speech rights of Elite, their performers and Envy. Should the Ordinance pass, you will leave us with no choice but to pursue our remedies in the federal or state courts.

Sincerely,

A handwritten signature in black ink, appearing to read 'Thomas H. Castelli', written in a cursive style.

Thomas H. Castelli
Legal Director