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April 29, 2005

Council President, Melinda Hill
City of Rochester Hills
1000 Rochester Hills Drive
Rochester Hills, Michigan 48309-3033

**Re: Proposed Ordinance Revising Zoning Ordinance Section 138-1074
Adult Entertainment Regulations**

Dear Council President Hill:

Attached is a proposed ordinance to amend and update Section 138-1074 of Chapter 38, Adult Entertainment Regulations. The ordinance has not been revised in almost 20 years. Thus, the purpose of the revision is to update the ordinance to comply with changes in the law and ensure that the ordinance complies with constitutional standards to make it more defensible if challenged. The revisions include three major changes to strengthen the ordinance and deletions of language that was either confusing or superfluous.

The first revision is the addition of "adult novelty store" to the collective definition of "adult bookstore, adult novelty store, or adult video store" in subsection (a). This term was not included in the original definition and therefore would not necessarily be regulated by the ordinance as it now stands. For example, a novelty operation could cater to adult entertainment; however, if its inventory and revenues were not derived from adult films, magazines and/or other media type items, as opposed to novelty items, the present ordinance would not regulate the business location.

The second revision is also found in the definition of "adult bookstore, adult novelty store, or adult video store." The important change is in the last sentence of the new definition identifying that "substantial and significant" within the definition means 25% or more of the term modified in the definition. In other words, any adult entertainment enterprise, which has 25% or more of its stock in adult entertainment material and/or derives 25% or more of its revenues from such adult products will constitute an adult bookstore, adult novelty store, or adult video store respectively. The addition of the 25% clarification is necessary due to a recent federal court decision in a case out of Grand Rapids.

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That case determined that an ordinance that attempts to regulate businesses that have a "substantial and significant"... "segment or section" devoted to the sale of adult oriented products (as the current Rochester Hills ordinance reads) is vague and overly broad violating the due process clause of the United States Constitution. The problem with the definition is that it impacts essentially any business that has a section of its business, regardless of size, dedicated to the sale or display of adult materials. This includes standard bookstores, mini-marts, and newsstands. The court case did not establish a threshold percentage of material for sale necessary before regulation is permissible. Rather, the court recognized that municipalities must be allowed reasonable flexibility to experiment with solutions to address this type of problem.

The common sense approach to the ordinance is to regulate what the layperson would identify as adult entertainment businesses. In that respect, we have chosen 25% as an appropriate threshold level for the regulation. This will enable the city to properly regulate those businesses that deal predominately in adult entertainment while excluding the normal bookstore or convenience store operation.

The third major revision is the addition of an expanded purpose section in subsection (b). The new provision sets forth the constitutional standards for adopting ordinances that regulate adult entertainment businesses. Since these types of enterprises have been determined to be a form of first amendment protected speech/expression, it is important that the ordinance include a recitation of the court cases and public studies that identify the negative secondary effects caused by adult business enterprises to establish the City's authority to regulate them.

These changes, along with the minor clean-up alterations, are intended to strengthen the ordinance and its enforceability. If satisfactory, the proposed ordinance may be processed in the usual manner for placement on a city council agenda. I would be happy to discuss this matter if there are any further questions.

Very truly yours,

BEIER HOWLETT, P.C.



Trey Brice

TB/drd
Enclosure

cc: Mayor Pat Somerville
Ed Anzek, City of Rochester Hills