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March 19, 2010

Mr. Scott Cope, Director
Building Department
City of Rochester Hills
1000 Rochester Hills Drive
Rochester Hills, Michigan 48309-3033

Re: *Mechanical and Electronic Amusement Devices*

Dear Mr. Cope:

I have prepared and enclose a proposed amendment to City Code Chapter 10, Article IV Mechanical and Electronic Amusement Devices. In connection with the City's recent processing of Game Over Lounge's application for a mechanical amusement device license, it was determined the City's ordinance should be reviewed for possible update to, basically, keep up with the times and the changing technology for electronic amusements and entertainment. As a result, your department and I have examined the ordinance and come up with proposed changes. I have incorporated those changes in the enclosed, proposed ordinance amendment. The primary changes are:

- **Sec. 10-184.** If video gaming will be involved, the applicant for a mechanical and electronic amusement device license will be required to submit the applicant's policy concerning whether and how the applicant will observe and enforce video game ratings.
- **Sec. 10-186(c)(1).** Requirement that the establishment must be located in an enclosed shopping mall with no direct entrances/exits will be deleted. This proposed amendment will allow establishments to be located in B-1, B-2, B-3 and CI zoning districts.
- **Sec. 10-186(c)(2).** Deletes the requirement that establishments must be located more than 2,000 feet from schools.

- **Sec. 10-225(3).** Modifies locational requirements similar to revised Sec. 10-186(c)(1). Adds (3)c to prohibit minors before p.m or after p.m unless accompanied by parent or legal guardian.
- **Sec. 10-229(b)(4).** Repeats the ban on minors before p.m or after p.m.
- **Sec. 10-230.** Language is added to this section which prohibits obscenity to specifically cover electronic devices (i.e., computers) and video games.

Note that we have not amended the ordinance to specifically ban playing of mature-rated video games by minors. We considered that, but our research disclosed such a ban would likely be adjudged an unconstitutional infringement on Free Speech. The ESRB video game rating system is developed, published and monitored by the industry's self-regulating body, the Entertainment Software Association. It is a voluntary system, meaning it is not mandatory for retailers to implement or enforce the rating system, although many do. In recent years, some states and local governments, including the State of Michigan, have attempted to enact regulations to prohibit distribution of sexually explicit and violent explicit video games to minors, but those efforts have been held to be unconstitutionally violative of Free Speech by various federal district courts and courts of appeals. When Michigan, in 2005, enacted 2005 PA 108 to regulate the distribution of sexually explicit and violent video games to minors, the U.S. District Court struck down the Act's regulation of violent explicit video games¹ as unconstitutional under the First Amendment finding that video games are constitutionally protected free speech and that the State failed to prove the Act was necessary to further a compelling state interest. *Entertainment Software Ass'n v Granholm*, 426 F Supp 2d 646 (ED Mich 2006).

Although the City may not be able to mandate enforcement of the ESRB video game ratings, I do think the City may amend the ordinance to require the applicant to submit the applicant's video game rating enforcement policy as part of the mechanical and electronic amusement device license application. Issuance of a license under the ordinance is a discretionary decision, and among the standards and considerations for approval spelled out in Sec. 10-188 of the ordinance, the City Council must be satisfied the establishment will not become a place for loitering and congregation of minors in violation of the ordinance, and further that the establishment will not become a nuisance. Although, the City Council may not be able to deny an application based on the proprietor's non-enforcement of ESRB video game ratings, I believe it is reasonable for the City Council to consider the applicant's video game policy as part of the license application because it is a factor that may assist the Council in reaching its discretionary decision whether the establishment will satisfy the requirements and standards for approval of the license application.

¹ The Act's prohibition of distribution of sexually explicit video games to minors was not challenged.

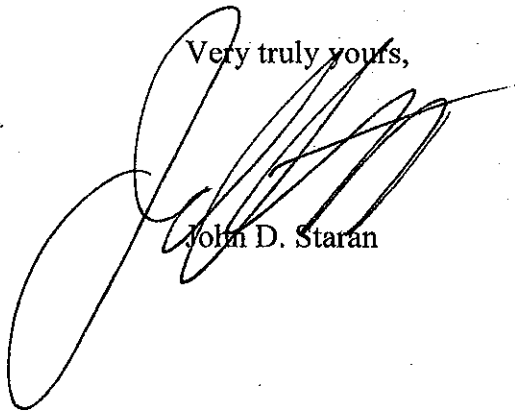
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After you review the proposed ordinance amendment, please contact me with any questions or comments you may have. Otherwise, if the proposed ordinance is satisfactory, you may process it in your usual manner to be presented to the Mayor and City Council for their consideration.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read 'John D. Staran', is written over the typed name.

John D. Staran

JDS/ijd
Enclosure

cc: Mayor Bryan K. Barnett