

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672

10841 HOUSE JUDICIARY

GARA

Amendment #2 Jo HB 367 - ~~FAILED~~

Delete all material. Insert:

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the licensing and regulation of adult-oriented businesses; and
2 providing for an effective date."

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 * Section 1. The uncodified law of the State of Alaska is amended by adding a new section
5 to read:

6 **LEGISLATIVE PURPOSE AND FINDINGS REGARDING ADULT-ORIENTED**
7 **BUSINESSES.** The legislature finds that

8 (1) the legislature intends to regulate adult-oriented entertainment businesses
9 in order to reduce the incidence of and opportunities for illegal activity such as lewd acts,
10 solicitation of prostitution, and prostitution and to mitigate the demonstrated negative
11 secondary effects of adult-oriented entertainment businesses on the neighboring communities;

12 (2) the legislature does not intend by these amendments to deny adults access
13 to adult-oriented activities protected by the First Amendment to the Constitution of the United
14 States or to deny access by the distributors and exhibitors of adult-oriented entertainment to

1 their intended market; the legislature finds that adult-oriented entertainment businesses,
2 because of their operational characteristics, create significant secondary effects on the
3 neighborhoods and communities in which they are located;

4 (3) special regulation of adult-oriented entertainment businesses is necessary
5 to ensure that the recognized negative secondary effects, including accosting and harassment
6 of law-abiding residents and the proliferation of litter, particularly litter of an adult nature
7 associated with these businesses, will not have a deleterious effect on adjacent neighborhoods
8 and communities;

9 (4) it is the purpose and intent of these amendments to provide for the orderly
10 regulation of adult-oriented entertainment businesses in the state by establishing certain
11 minimum standards for the conduct of this type of business to protect the public order and the
12 health, safety, and general welfare of the residents of the state by preventing prostitution, lewd
13 acts, the spread of disease, and the deterioration and blighting of neighborhoods, reducing
14 crime in and around adult-oriented entertainment businesses, and preserving the quality of
15 urban life in the state; and

16 (5) the legislature does not intend by these amendments to authorize, legalize,
17 or permit the establishment or operation of any business, building, or use that violates any
18 other state or federal statute.

19 * Sec. 2. AS 08.01.010 is amended by adding a new paragraph to read:

20 (38) regulation of adult-oriented businesses under AS 08.90.

21 * Sec. 3. AS 08 is amended by adding a new chapter to read:

22 **Chapter 90. Adult-Oriented Businesses.**

23 **Article 1. Licensing.**

24 **Sec. 08.90.010. License required.** A person may not

25 (1) operate an adult-oriented business without a license to operate an
26 adult-oriented business issued under this chapter;

27 (2) obtain or attempt to obtain a license under this chapter by
28 fraudulent means.

29 **Sec. 08.90.020. Adult-oriented business license.** An applicant for a license
30 to operate an adult-oriented business shall submit to the department, in the manner and
31 on forms prescribed by the department, written evidence, verified by oath, that the

1 applicant meets the qualifications to operate an adult-oriented entertainment business,
2 and that the owner of the premises consents to the operation of the adult-oriented
3 business on the premises.

4 **Sec. 08.90.03v. Regulations for adult-oriented business licenses.** The
5 department shall by regulation establish requirements for licensing businesses
6 providing adult-oriented entertainment at the premises specified in the application,
7 licensure and renewal procedures, inspection procedures, standards, fees, and
8 requirements for operation. In adopting regulations under this section, the department
9 shall require the following:

10 (1) unless the adult-oriented business owner resides on the business
11 premises and the adult-oriented business owner is a legal guardian of minors residing
12 in the residential unit, a licensed adult-oriented business premises may not share with
13 any residential unit inhabited by minors a

14 (A) public entrance;

15 (B) restroom or entrance to a restroom; or

16 (C) hallway;

17 (2) the interior layout of the premises of an adult-oriented business
18 must physically separate adult-oriented business entertainers from patrons during
19 performances and ensure that any booth, stall, room, or partitioned portion of a room
20 is open to view from a public room of the premises, except for private offices or other
21 rooms that are not open to any person other than employees, or individual restrooms
22 on the premises;

23 (3) an applicant shall provide satisfactory evidence that the owner of
24 the real property in which the adult-oriented business is conducted consents to the
25 operation of the adult-oriented business;

26 (4) an individual whose name and address is required to be provided
27 with an application for a license under AS 08.90.040 may not have been convicted of
28 any of the following offenses:

29 (A) prostitution or promotion of prostitution; unlawful
30 exploitation of a minor; possession or distribution of child pornography;
31 indecent exposure; sexual assault; sexual abuse of a minor; or any similar sex-

1 related offenses to those described above under the criminal or penal code of
2 this state, other states, or other countries; tax evasion; underage employment;
3 alcohol violations; illegal drugs; allowing a minor to enter and remain within
4 premises where adult entertainment is offered; or any offense causing
5 revocation of an adult-oriented business license; or

6 (B) an offense for which less than 10 years have elapsed since
7 the date of conviction or the date of release from confinement imposed for a
8 conviction, whichever date is later, if the conviction is of a felony offense.

9 **Sec. 08.90.040. Application for license.** (a) An applicant for a license shall
10 file with the department a written application on a form designated by the department,
11 signed and sworn to by the applicant, giving the applicant's name and address. If the
12 applicant is a corporation, the application shall be executed by the authorized officers
13 of the corporation. If the applicant is a partnership, including a limited partnership,
14 the application shall be executed by an authorized general partner. The application
15 must include

16 (1) the license fee; and

17 (2) any other information required by the department.

18 (b) A corporation applying for a license to operate an adult-oriented business
19 shall provide the names and addresses of the president, vice-president, secretary,
20 managing officer, and all stockholders who own 10 percent or more of the stock in the
21 corporation, together with any other information required by the department.

22 (c) A partnership, including a limited partnership, that applies for a license
23 shall provide information required by the department including the names and
24 addresses of all general partners and all partners with an interest of 10 percent or
25 more.

26 (d) A limited liability organization that applies for a license shall provide
27 information required by the department, including the names and addresses of all
28 members with an ownership interest of 10 percent or more and the names and
29 addresses of all managers.

30 **Sec. 08.90.050. Notice of application for adult-oriented business license.**

31 (a) Before a new license is issued, the applicant shall post a copy of the application

1 for 10 days at the location of the proposed licensed premises and at any additional
2 locations designated by the department. The department may require the applicant to
3 provide

4 (1) a copy of the application to newspapers and radio and television
5 stations for public service announcement; or

6 (2) paid notice of the application once each week for three successive
7 weeks in a newspaper or by radio.

8 (b) Upon receipt of an application for the issuance or renewal of a license for
9 premises or proposed premises that are located within one-half mile of the boundary of
10 a community council established by municipal charter or ordinance, the department
11 shall

12 (1) immediately provide written notice of the application to

13 (A) the community council; and

14 (B) any nonprofit community organization that has requested
15 notification in writing; and

16 (2) at least 10 days before the date set for departmental action on the
17 application, provide written notice of the proposed action to

18 (A) the community council; and

19 (B) any nonprofit community organization that has requested
20 notification in writing.

21 **Sec. 08.90.060. Fees.** The department shall set fees under AS 08.01.065 for
22 the application for or renewal of a license to operate an adult-oriented business.

23 **Sec. 08.90.070. Grounds for denial, suspension, or revocation of license.**
24 The department may deny, suspend, or revoke the license of a person who

25 (1) has obtained or attempted to obtain a license under this chapter by
26 fraud or deceit;

27 (2) has been convicted of a felony or other crime if the felony or other
28 crime is substantially related to the qualifications, functions, or duties of the licensee;
29 or

30 (3) has wilfully or repeatedly violated a provision of this chapter or
31 regulations adopted under it.

1 **Sec. 08.90.080. Person and location for adult-oriented business license. (a)**

2 Each license to operate an adult-oriented business shall be issued to a specific
3 individual or individuals, to a partnership, including a limited partnership, to a limited
4 liability organization, or to a corporation. If the license is issued to a corporation or a
5 limited liability organization, the registered agent of the corporation or limited liability
6 organization is required to be an individual resident of the state.

7 (b) A specific location shall be indicated on the license as the licensed
8 premises, the principal address of which shall be indicated on the license. The mailing
9 address of a licensee or, if the licensee is a corporation, the address of the registered
10 office of the corporation must be kept current and on file in the main office of the
11 department.

12 (c) A license issued by the department is not transferable or assignable.

13 (d) A licensee shall report to the department

14 (1) permanent closing of a licensed premises; and

15 (2) other matters and occurrences the department may require by
16 regulation.

17 **Article 2. Business Operations.**

18 **Sec. 08.90.200. Entertainers employed by business. (a)** A licensee of an
19 adult-oriented business may not with criminal negligence allow a person under 21
20 years of age to be employed as an adult-oriented business entertainer in the licensee's
21 premises. In this section, "criminal negligence" has the meaning given in
22 AS 11.81.900.

23 (b) The department shall develop and provide adult-oriented businesses with
24 written material to be made available to all employees who are adult-oriented business
25 entertainers and to be prominently displayed in two locations within the premises
26 approved by the department. This written material shall explain the wage and hour
27 issues relevant to adult-oriented business entertainers, including information about
28 independent contractors and employees, the minimum wage, and allowable deductions
29 from wages by an employer.

30 (c) A licensee may not employ an adult-oriented entertainer who has been
31 convicted of any of the following offenses:

- 1 (1) prostitution or promotion of prostitution;
2 (2) unlawful exploitation of a minor;
3 (3) possession or distribution of child pornography;
4 (4) indecent exposure;
5 (5) sexual assault;
6 (6) sexual abuse of a minor;
7 (7) any sex-related offense that is similar to those described in (1) - (6)
8 of this subsection under the criminal or penal code of this state, other states, or other
9 countries; or
10 (8) distribution or sale of illegal drugs.

11 (d) The licensee shall maintain on the premises a written application form
12 signed by each person employed at the licensed premises as an adult-oriented business
13 entertainer evidencing that the adult-oriented business entertainer states that the person
14 has never been convicted of any of the offenses listed in (c) of this section.

15 **Sec. 08.90.210. Business hours.** A person who is licensed to operate an
16 adult-oriented business may not allow patrons to be present on the licensed premises
17 between the hours of 5:00 a.m. and 8:00 a.m. each day. In addition, for adult-oriented
18 businesses located within a municipality, the restriction against allowing patrons on
19 the premises must include any additional hours set by a municipality for the closure of
20 licensed premises providing entertainment under AS 04.

21 **Sec. 08.90.220. Access of persons under 18 years of age to licensed**
22 **premises.** A licensee or an agent or employee of a licensee of an adult-oriented
23 business may not with criminal negligence allow a person under 18 years of age to
24 enter and remain within licensed premises. In this section, "criminal negligence" has
25 the meaning given in AS 11.81.900.

26 **Sec. 08.90.230. Proof of age.** (a) If an adult-oriented business licensee or an
27 agent or employee of the adult-oriented business licensee questions or has reason to
28 question whether a person entering licensed premises has attained the age of 18 years,
29 the licensee, agent, or employee shall require the person to furnish proof of age
30 acceptable under (b) of this section in a form determined by the department. If the
31 person questioned does not furnish proof of age acceptable under (b) of this section, or

1 if a licensee, agent, or employee questions or has reason to question the validity of the
2 proof of age furnished, the licensee, employee, or agent shall require the person to sign
3 a statement that the person is 18 years of age or older. This statement shall be made
4 on a form prepared by and furnished to the licensee by the department.

5 (b) A valid driver's license or a valid identification card is acceptable as proof
6 of age when used for identification in securing entry to and remaining on the premises
7 of an adult-oriented business if the license or identification card is made of or encased
8 in plastic and contains a photograph of the licensee or card holder and a statement of
9 age or date of birth.

10 (c) A licensee or an agent or employee of the licensee may not be charged for
11 a violation of AS 08.90.220 if a signed statement as provided in (a) of this section is
12 secured in good faith, or if a valid driver's license or identification card is presented
13 indicating that the owner and possessor of the presented driver's license or
14 identification card is 18 years of age or older.

15 **Sec. 08.90.240. Responsibility of licensees, agents, and employees.** An
16 adult-oriented business licensee has a duty to exercise that degree of care that a
17 reasonable person would observe to ensure that a business under the person's control is
18 lawfully conducted. This duty of the licensee includes ensuring the compliance

19 (1) by agents or employees with this chapter and regulations adopted
20 under this chapter, including acting with reasonable diligence to determine that agents
21 or employees are advised of the provisions of this chapter and the regulations adopted
22 under this chapter, either by securing the agent's or employee's written
23 acknowledgment of posted instructions or otherwise; and

24 (2) of the premises with public health, fire, and safety codes and
25 ordinances of the state or municipality having jurisdiction.

26 **Article 3. Miscellaneous Provisions.**

27 **Sec. 08.90.300. Disciplinary sanctions.** (a) If, after a hearing, the
28 department finds that a licensee has committed an act set out in AS 08.90.070, the
29 department may

30 (1) permanently revoke a license issued under this chapter or suspend a
31 license for a determinate period of time; and

1 (2) impose a civil fine of not more than \$10,000.

2 (b) The department may summarily suspend a license before final hearing or
3 during the appeals process if the department finds that the licensee poses a clear and
4 immediate danger to the public health and safety if the licensee continues to operate
5 under a license issued under this chapter. A person whose license is suspended under
6 this subsection is entitled to a hearing by the department not later than seven days after
7 the effective date of the order.

8 (c) A person who receives a disciplinary sanction under this section may
9 appeal the sanction to a court of competent jurisdiction.

10 (d) The department shall be consistent in the application of disciplinary
11 sanctions. A significant departure from earlier decisions of the department involving
12 similar situations must be explained in findings of fact or orders made by the
13 department.

14 **Sec. 08.90.310. Violations.** (a) A person who violates this chapter is guilty
15 of a misdemeanor and, upon conviction, is punishable by a fine of not more than
16 \$5,000, or by imprisonment for not more than one year, or by both. Each day of
17 illegal practice is a separate offense.

18 (b) A person who knowingly provides false information in an application for a
19 license to operate an adult-oriented business is guilty of a misdemeanor and, upon
20 conviction, is punishable by a fine of not more than \$5,000, or by imprisonment for
21 not more than one year, or by both, except that a person who knowingly provides false
22 information about the applicant's specified criminal activity is guilty of a class C
23 felony.

24 **Sec. 08.90.320. Limitation of liability.** An action may not be brought against
25 a person for damages resulting from a report made in good faith to a public agency by
26 the person or participation by the person in an investigation by a public agency or an
27 administrative or judicial proceeding relating to the report if the report relates to
28 activity requiring a license under this chapter.

29 **Sec. 08.90.330. Accessibility of license and licensed premises to inspection.**

30 (a) A licensee who operates an adult-oriented business shall, upon request, make the
31 licensed premises available for inspection by officers charged with the enforcement of

1 this chapter, including employees of the department, during all regular business hours.

2 (b) A license for an adult-oriented business issued under this chapter shall be
3 conspicuously posted within the licensed premises so as to be easily viewed by the
4 public and available for inspection upon request by a peace officer or other person
5 during regular business hours.

6 **Sec. 08.90.340. License a privilege.** (a) A license issued under this chapter
7 is a personal privilege, not a property right.

8 (b) The privilege conferred upon the licensee is personal in nature and affords
9 protection to the licensee only.

10 **Sec. 08.90.350. Municipal regulation.** A municipality may adopt and
11 enforce an ordinance that places prohibitions or restrictions on adult-oriented
12 entertainment that are additional to or stricter than those required under this chapter.

13 **Article 4. General Provisions.**

14 **Sec. 08.90.500. Definitions.** In this chapter,

15 (1) "adult-oriented business" means a person who regularly offers
16 adult-oriented entertainment at a premises for compensation;

17 (2) "adult-oriented business entertainer" means an employee of an
18 adult-oriented business who performs adult-oriented entertainment;

19 (3) "adult-oriented business licensee" or "licensee" means a person
20 licensed under AS 08.90.020 to operate an adult-oriented business;

21 (4) "adult-oriented entertainment" means entertainment by nude or
22 semi-nude individuals who personally appear before an audience, and the primary
23 purpose of the entertainment is for the sexual interests or titillation of the audience;

24 (5) "department" means the Department of Community and Economic
25 Development;

26 (6) "employee" means a person who performs any service on the
27 premises of an adult-oriented business on a full-time, part-time, contract, or
28 independent basis, whether or not the person is an employee, independent contractor,
29 agent, or otherwise and whether or not the said person is paid a salary, wage, or other
30 compensation by the operator of the adult-oriented business; "employee" does not
31 include a person exclusively on the premises for repair or maintenance of the premises

1 or equipment on the premises, or for the delivery of goods to the premises, nor does
2 "employee" include a person exclusively on the premises as a patron or customer;

3 (7) "license" means a license to operate an adult-oriented business
4 issued under AS 08.90.020;

5 (8) "nude" or "semi-nude" means the appearance of an anus, anal area,
6 pubic area, male genitals, female genitals, or vulva, either bare or with less than a fully
7 opaque covering; or a female breast with less than a fully opaque covering of any part
8 of the areola;

9 (8) "premises" means the real property on which the adult-oriented
10 business is located, including the adult-oriented business, the grounds, private
11 walkways, parking lots, and parking garages of the adult-oriented business under the
12 ownership, control, or supervision of the licensee, as described in the application for a
13 license to operate an adult-oriented business under this chapter.

14 * Sec. 4. AS 08.90.200 is amended by adding a new subsection to read:

15 (e) An adult-oriented business shall require each adult-oriented business
16 entertainer who is under 21 years of age to demonstrate, within the first 80 hours of
17 the entertainer's employment, that the entertainer has been informed of certain
18 information specified by the department. The information must cover the following
19 topics: educational opportunities within the state, financial assistance programs for
20 education, and vocational education. Attendance at a department-approved counseling
21 session of not more than one hour fulfills this information requirement. The
22 department may allow a certificate of counseling signed by a school official to be
23 substituted for the counseling session. If the adult-oriented business entertainer is
24 charged for the cost of the required counseling session, the licensee shall promptly
25 reimburse the entertainer.

26 * Sec. 5. AS 08.90.200(a) is repealed.

27 * Sec. 6. The uncodified law of the State of Alaska is amended by adding a new section to
28 read:

29 SEVERABILITY. Under AS 01.10.030, the provisions of this Act are severable.

30 * Sec. 7. The uncodified law of the State of Alaska is amended by adding a new section to
31 read:

1 CONTINGENT EFFECT. (a) Sections 4 and 5 of this Act take effect only if a court
2 of competent jurisdiction whose decisions are binding in this state enters a final judgment on
3 the merits that AS 08.90.200(a), added by sec. 3 of this Act, violates the Constitution of the
4 United States or the Constitution of the State of Alaska.

5 (b) The attorney general shall promptly notify the lieutenant governor and the revisor
6 of statutes of the occurrence of the contingency described in (a) of this section.

7 * **Sec. 8.** Sections 4 and 5 of this Act take effect on the date of the attorney general's
8 notification to the lieutenant governor and to the revisor of statutes under sec. 7(b) of this Act
9 that a court has entered final judgment that AS 08.90.200(a), added by sec. 3 of this Act,
10 violates the Constitution of the United States or the Constitution of the State of Alaska and
11 that the time for an appeal of that judgment has expired or, if an appeal was taken, a final
12 order on the appeal has been entered that AS 08.90.200(a) violates the Constitution of the
13 United States or the Constitution of the State of Alaska.

14 * **Sec. 9.** Sections 1 - 3, 6, and 7 of this Act take effect July 1, 2005.

23-LS1394\W
Craver
2/25/04

CS FOR HOUSE BILL NO. 367()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MCGUIRE AND GARA, Dahlstrom, Anderson

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17 or permit the establishment or operation of any business, building, or use that violates any
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2 and that the owner of the premises consents to the operation of the adult-oriented
3 business on the premises.

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15 must include

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31 regulations adopted under it.

1 **Sec. 08.90.080. Person and location for adult-oriented business license. (a)**

2 Each license to operate an adult-oriented business shall be issued to a specific
3 individual or individuals, to a partnership, including a limited partnership, to a limited
4 liability organization, or to a corporation. If the license is issued to a corporation or a
5 limited liability organization, the registered agent of the corporation or limited liability
6 organization is required to be an individual resident of the state.

7 (b) A specific location shall be indicated on the license as the licensed
8 premises, the principal address of which shall be indicated on the license. The mailing
9 address of a licensee or, if the licensee is a corporation, the address of the registered
10 office of the corporation must be kept current and on file in the main office of the
11 department.

12 (c) A license issued by the department is not transferable or assignable.

13 (d) A licensee shall report to the department

14 (1) permanent closing of a licensed premises; and

15 (2) other matters and occurrences the department may require by
16 regulation.

17 **Article 2. Business Operations.**

18 **Sec. 08.90.200. Entertainers employed by business. (a)** A licensee of an
19 adult-oriented business may not with criminal negligence allow a person under 21
20 years of age to be employed as an adult-oriented business entertainer in the licensee's
21 premises. In this section, "criminal negligence" has the meaning given in
22 AS 11.81.900.

23 (b) The department shall develop and provide adult-oriented businesses with
24 written material to be made available to all employees who are adult-oriented business
25 entertainers and to be prominently displayed in two locations within the premises
26 approved by the department. This written material must explain the wage and hour
27 issues relevant to adult-oriented business entertainers, including information about
28 independent contractors and employees, the minimum wage, and allowable deductions
29 from wages by an employer.

30 (c) A licensee may not employ an adult-oriented entertainer who has been
31 convicted of any of the following offenses:

- 1 (1) prostitution or promotion of prostitution;
- 2 (2) unlawful exploitation of a minor;
- 3 (3) possession or distribution of child pornography;
- 4 (4) indecent exposure;
- 5 (5) sexual assault;
- 6 (6) sexual abuse of a minor;
- 7 (7) any sex-related offense that is similar to those described in (1) - (6)
- 8 of this subsection under the criminal or penal code of this state, other states, or other
- 9 countries; or
- 10 (8) possession, distribution, or sale of illegal drugs.

11 (d) The licensee shall maintain on the premises a written application form
12 signed by each person employed at the licensed premises as an adult-oriented business
13 entertainer evidencing that the adult-oriented business entertainer states that the person
14 has never been convicted of any of the offenses listed in (c) of this section.

15 **Sec. 08.90.210. Business hours.** A person who is licensed to operate an
16 adult-oriented business may not allow patrons to be present on the licensed premises
17 between the hours of 5:00 a.m. and 8:00 a.m. each day. In addition, for adult-oriented
18 businesses located within a municipality, the restriction against allowing patrons on
19 the premises must include any additional hours set by a municipality for the closure of
20 licensed premises providing entertainment under AS 04.

21 **Sec. 08.90.220. Access of persons under 21 years of age to licensed**
22 **premises.** A licensee or an agent or employee of a licensee of an adult-oriented
23 business may not with criminal negligence allow a person under 21 years of age to
24 enter and remain within licensed premises. In this section, "criminal negligence" has
25 the meaning given in AS 11.81.900.

26 **Sec. 08.90.230. Proof of age.** (a) If an adult-oriented business licensee or an
27 agent or employee of the adult-oriented business licensee questions or has reason to
28 question whether a person entering licensed premises has attained the age of 21 years,
29 the licensee, agent, or employee shall require the person to furnish proof of age
30 acceptable under (b) of this section in a form determined by the department. If the
31 person questioned does not furnish proof of age acceptable under (b) of this section, or

1 if a licensee, agent, or employee questions or has reason to question the validity of the
2 proof of age furnished, the licensee, employee, or agent shall require the person to sign
3 a statement that the person is 21 years of age or older. This statement shall be made
4 on a form prepared by and furnished to the licensee by the department.

5 (b) A valid driver's license or a valid identification card is acceptable as proof
6 of age when used for identification in securing entry to and remaining on the premises
7 of an adult-oriented business if the license or identification card is made of or encased
8 in plastic and contains a photograph of the licensee or card holder and a statement of
9 age or date of birth.

10 (c) A licensee or an agent or employee of the licensee may not be charged for
11 a violation of AS 08.90.220 if a signed statement as provided in (a) of this section is
12 secured in good faith, or if a valid driver's license or identification card is presented
13 indicating that the owner and possessor of the presented driver's license or
14 identification card is 21 years of age or older.

15 **Sec. 08.90.240. Responsibility of licensees, agents, and employees.** An
16 adult-oriented business licensee has a duty to exercise that degree of care that a
17 reasonable person would observe to ensure that a business under the person's control is
18 lawfully conducted. This duty of the licensee includes ensuring the compliance

19 (1) by agents or employees with this chapter and regulations adopted
20 under this chapter, including acting with reasonable diligence to determine that agents
21 or employees are advised of the provisions of this chapter and the regulations adopted
22 under this chapter, either by securing the agent's or employee's written
23 acknowledgment of posted instructions or otherwise; and

24 (2) of the premises with public health, fire, and safety codes and
25 ordinances of the state or municipality having jurisdiction.

26 **Article 3. Miscellaneous Provisions.**

27 **Sec. 08.90.300. Disciplinary sanctions.** (a) If, after a hearing, the
28 department finds that a licensee has committed an act set out in AS 08.90.070, the
29 department may

30 (1) permanently revoke a license issued under this chapter or suspend a
31 license for a determinate period of time; and

1 (2) impose a civil fine of not more than \$10,000.

2 (b) The department may summarily suspend a license before final hearing or
3 during the appeals process if the department finds that the licensee poses a clear and
4 immediate danger to the public health and safety if the licensee continues to operate
5 under a license issued under this chapter. A person whose license is suspended under
6 this subsection is entitled to a hearing by the department not later than seven days after
7 the effective date of the order.

8 (c) A person who receives a disciplinary sanction under this section may
9 appeal the sanction to a court of competent jurisdiction.

10 (d) The department shall be consistent in the application of disciplinary
11 sanctions. A significant departure from earlier decisions of the department involving
12 similar situations must be explained in findings of fact or orders made by the
13 department.

14 **Sec. 08.90.310. Violations.** (a) A person who violates this chapter is guilty
15 of a misdemeanor and, upon conviction, is punishable by a fine of not more than
16 \$5,000, or by imprisonment for not more than one year, or by both. Each day of
17 illegal practice is a separate offense.

18 (b) A person who knowingly provides false information in an application for a
19 license to operate an adult-oriented business is guilty of a misdemeanor and, upon
20 conviction, is punishable by a fine of not more than \$5,000, or by imprisonment for
21 not more than one year, or by both, except that a person who knowingly provides false
22 information about the applicant's specified criminal activity is guilty of a class C
23 felony.

24 **Sec. 08.90.320. Limitation of liability.** An action may not be brought against
25 a person for damages resulting from a report made in good faith to a public agency by
26 the person or participation by the person in an investigation by a public agency or an
27 administrative or judicial proceeding relating to the report if the report relates to
28 activity requiring a license under this chapter.

29 **Sec. 08.90.330. Accessibility of license and licensed premises to inspection.**

30 (a) A licensee who operates an adult-oriented business shall, upon request, make the
31 licensed premises available for inspection by officers charged with the enforcement of

1 this chapter, including employees of the department, during all regular business hours.

2 (b) A license for an adult-oriented business issued under this chapter shall be
3 conspicuously posted within the licensed premises so as to be easily viewed by the
4 public and available for inspection upon request by a peace officer or other person
5 during regular business hours.

6 **Sec. 08.90.340. License a privilege.** (a) A license issued under this chapter
7 is a personal privilege, not a property right.

8 (b) The privilege conferred upon the licensee is personal in nature and affords
9 protection to the licensee only.

10 **Article 4. General Provisions.**

11 **Sec. 08.90.500. Definitions.** In this chapter,

12 (1) "adult-oriented business" means a person who regularly offers
13 adult-oriented entertainment at a premises for compensation;

14 (2) "adult-oriented business entertainer" means an employee of an
15 adult-oriented business who performs adult-oriented entertainment;

16 (3) "adult-oriented business licensee" or "licensee" means a person
17 licensed under AS 08.90.020 to operate an adult-oriented business;

18 (4) "adult-oriented entertainment" means entertainment by nude or
19 semi-nude individuals who personally appear before an audience, and the primary
20 purpose of the entertainment is for the sexual interests or titillation of the audience;

21 (5) "department" means the Department of Community and Economic
22 Development;

23 (6) "employee" means a person who performs any service on the
24 premises of an adult-oriented business on a full-time, part-time, contract, or
25 independent basis, whether or not the person is an employee, independent contractor,
26 agent, or otherwise and whether or not the said person is paid a salary, wage, or other
27 compensation by the operator of the adult-oriented business; "employee" does not
28 include a person exclusively on the premises for repair or maintenance of the premises
29 or equipment on the premises, or for the delivery of goods to the premises, nor does
30 "employee" include a person exclusively on the premises as a patron or customer;

31 (7) "license" means a license to operate an adult-oriented business

1 issued under AS 08.90.020;

2 (8) "nude" or "semi-nude" means the appearance of an anus, anal area,
3 public area, male genitals, female genitals, or vulva, either bare or with less than a
4 fully opaque covering; or a female breast with less than a fully opaque covering of any
5 part of the areola;

6 (8) "premises" means the real property on which the adult-oriented
7 business is located, including the adult-oriented business, the grounds, private
8 walkways, parking lots, and parking garages of the adult-oriented business under the
9 ownership, control, or supervision of the licensee, as described in the application for a
10 license to operate an adult-oriented business under this chapter.

11 * Sec. 4. AS 08.90.200 is amended by adding a new subsection to read:

12 (e) An adult-oriented business shall require each adult-oriented business
13 entertainer who is under 21 years of age to demonstrate, within the first 30 hours of
14 the entertainer's employment, that the entertainer has been informed of certain
15 information specified by the department. The information must cover the following
16 topics: educational opportunities within the state, financial assistance programs for
17 education, and vocational education. Attendance at a department-approved counseling
18 session of not more than one hour fulfills this information requirement. The
19 department may allow a certificate of counseling signed by a school official to be
20 substituted for the counseling session. If the adult-oriented business entertainer is
21 charged for the cost of the required counseling session, the licensee shall promptly
22 reimburse the entertainer.

23 * Sec. 5. AS 08.90.220 is amended to read:

24 **Sec. 08.90.220. Access of persons under 18 [21] years of age to licensed**
25 **premises.** A licensee or an agent or employee of a licensee of an adult-oriented
26 business may not with criminal negligence allow a person under 18 [21] years of age
27 to enter and remain within licensed premises. In this section, "criminal negligence"
28 has the meaning given in AS 11.81.900.

29 * Sec. 6. AS 08.90.230(a) is amended to read:

30 (a) If an adult-oriented business licensee or an agent or employee of the adult-
31 oriented business licensee questions or has reason to question whether a person

1 entering licensed premises has attained the age of 18 [21] years, the licensee, agent, or
2 employee shall require the person to furnish proof of age acceptable under (b) of this
3 section in a form determined by the department. If the person questioned does not
4 furnish proof of age acceptable under (b) of this section, or if a licensee, agent, or
5 employee questions or has reason to question the validity of the proof of age
6 furnished, the licensee, employee, or agent shall require the person to sign a statement
7 that the person is 18 [21] years of age or older. This statement shall be made on a
8 form prepared by and furnished to the licensee by the department.

9 * Sec. 7. AS 08.90.230(c) is amended to read:

10 (c) A licensee or an agent or employee of the licensee may not be charged for
11 a violation of AS 08.90.220 if a signed statement as provided in (a) of this section is
12 secured in good faith, or if a valid driver's license or identification card is presented
13 indicating that the owner and possessor of the presented driver's license or
14 identification card is 18 [21] years of age or older.

15 * Sec. 8. AS 08.90.200(a) is repealed.

16 * Sec. 9. The uncodified law of the State of Alaska is amended by adding a new section to
17 read:

18 SEVERABILITY. Under AS 01.10.030, the provisions of this Act are severable.

19 * Sec. 10. The uncodified law of the State of Alaska is amended by adding a new section to
20 read:

21 CONTINGENT EFFECT. (a) Sections 4 and 8 of this Act take effect only if a court
22 of competent jurisdiction whose decisions are binding in this state enters a final judgment on
23 the merits that AS 08.90.200(a), added by sec. 3 of this Act, violates the Constitution of the
24 United States or the Constitution of the State of Alaska.

25 (b) The attorney general shall promptly notify the lieutenant governor and the revisor
26 of statutes of the occurrence of the contingency described in (a) of this section.

27 * Sec. 11. The uncodified law of the State of Alaska is amended by adding a new section to
28 read:

29 CONTINGENT EFFECT. (a) Sections 5 - 7 of this Act take effect only if a court of
30 competent jurisdiction whose decisions are binding in this state enters a final judgment on the
31 merits that AS 08.90.220, added by sec. 3 of this Act, violates the Constitution of the United

1 States or the Constitution of the State of Alaska.

2 (b) The attorney general shall promptly notify the lieutenant governor and the revisor
3 of statutes of the occurrence of the contingency described in (a) of this section.

4 * **Sec. 12.** Sections 4 and 8 of this Act take effect on the date of the attorney general's
5 notification to the lieutenant governor and to the revisor of statutes under sec. 10(b) of this
6 Act that a court has entered final judgment that AS 08.90.200, added by sec. 3 of this Act,
7 violates the Constitution of the United States or the Constitution of the State of Alaska and
8 that the time for an appeal of that judgment has expired or, if an appeal was taken, a final
9 order on the appeal has been entered that AS 08.90.200(a) violates the Constitution of the
10 United States or the Constitution of the State of Alaska.

11 * **Sec. 13.** Sections 5 - 7 of this Act take effect on the date of the attorney general's
12 notification to the lieutenant governor and to the revisor of statutes under sec. 11(b) of this
13 Act that a court has entered final judgment that AS 08.90.220, added by sec. 3 of this Act,
14 violates the Constitution of the United States or the Constitution of the State of Alaska and
15 that the time for an appeal of that judgment has expired or, if an appeal was taken, a final
16 order on the appeal has been entered that AS 08.90.220 violates the Constitution of the United
17 States or the Constitution of the State of Alaska.

18 * **Sec. 14.** Sections 1 - 3, and 9 - 11 of this Act take effect July 1, 2005.

23-LS1394V
Craver
2/23/04

CS FOR HOUSE BILL NO. 367()

**IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURE - SECOND SESSION**

BY

**Offered:
Referred:**

Sponsor(s): REPRESENTATIVES MCGUIRE AND GARA, Dahlstrom, Anderson

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the licensing and regulation of adult-oriented businesses; and**
2 **providing for an effective date."**

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 *** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
5 to read:

6 **LEGISLATIVE PURPOSE AND FINDINGS REGARDING ADULT-ORIENTED**
7 **BUSINESSES.** The legislature finds that

8 (1) the legislature intends to regulate adult-oriented entertainment businesses
9 in order to reduce the incidence of and opportunities for illegal activity such as lewd acts,
10 solicitation of prostitution, and prostitution and to mitigate the demonstrated negative
11 secondary effects of adult-oriented entertainment businesses on the neighboring communities;

12 (2) the legislature does not intend by these amendments to deny adults access
13 to adult-oriented activities protected by the First Amendment to the Constitution of the United
14 States or to deny access by the distributors and exhibitors of adult-oriented entertainment to

1 their intended market; the legislature finds that adult-oriented entertainment businesses,
2 because of their operational characteristics, create significant secondary effects on the
3 neighborhoods and communities in which they are located;

4 (3) special regulation of adult-oriented entertainment businesses is necessary
5 to ensure that the recognized negative secondary effects, including accosting and harassment
6 of law-abiding residents and the proliferation of litter, particularly litter of an adult nature
7 associated with these businesses, will not have a deleterious effect on adjacent neighborhoods
8 and communities;

9 (4) it is the purpose and intent of these amendments to provide for the orderly
10 regulation of adult-oriented entertainment businesses in the state by establishing certain
11 minimum standards for the conduct of this type of business to protect the public order and the
12 health, safety, and general welfare of the residents of the state by preventing prostitution, lewd
13 acts, the spread of disease, and the deterioration and blighting of neighborhoods, reducing
14 crime in and around adult-oriented entertainment businesses, and preserving the quality of
15 urban life in the state; and

16 (5) the legislature does not intend by these amendments to authorize, legalize,
17 or permit the establishment or operation of any business, building, or use that violates any
18 other state or federal statute.

19 * Sec. 2. AS 08.01.010 is amended by adding a new paragraph to read:

20 (38) regulation of adult-oriented businesses under AS 08.90.

21 * Sec. 3. AS 08 is amended by adding a new chapter to read:

22 **Chapter 90. Adult-Oriented Businesses.**

23 **Article 1. Licensing.**

24 **Sec. 08.90.010. License required.** A person may not

25 (1) operate an adult-oriented business without a license to operate an
26 adult-oriented business issued under this chapter;

27 (2) obtain or attempt to obtain a license under this chapter by
28 fraudulent means.

29 **Sec. 08.90.020. Adult-oriented business license.** An applicant for a license
30 to operate an adult-oriented business shall submit to the department, in the manner and
31 on forms prescribed by the department, written evidence, verified by oath, that the

1 applicant meets the qualifications to operate an adult-oriented entertainment business,
2 and that the owner of the premises consents to the operation of the adult-oriented
3 business on the premises.

4 **Sec. 08.90.030. Regulations for adult-oriented business licenses.** The
5 department shall by regulation establish requirements for licensing businesses
6 providing adult-oriented entertainment at the premises specified in the application,
7 licensure and renewal procedures, inspection procedures, standards, fees, and
8 requirements for operation. In adopting regulations under this section, the department
9 shall require the following:

10 (1) unless the adult-oriented business owner resides on the business
11 premises and the adult-oriented business owner is a legal guardian of minors residing
12 in the residential unit, a licensed adult-oriented business premises may not share with
13 any residential unit inhabited by minors a

14 (A) public entrance;

15 (B) restroom or entrance to a restroom; or

16 (C) hallway;

17 (2) the interior layout of the premises of an adult-oriented business
18 must physically separate adult-oriented business entertainers from patrons during
19 performances and ensure that any booth, stall, room, or partitioned portion of a room
20 is open to view from a public room of the premises, except for private offices or other
21 rooms that are not open to any person other than employees, or individual restrooms
22 on the premises;

23 (3) an applicant shall provide satisfactory evidence that the owner of
24 the real property in which the adult-oriented business is conducted consents to the
25 operation of the adult-oriented business;

26 (4) an individual whose name and address is required to be provided
27 with an application for a license under AS 08.90.040 may not have been convicted of
28 any of the following offenses:

29 (A) prostitution or promotion of prostitution; unlawful
30 exploitation of a minor; possession or distribution of child pornography;
31 indecent exposure; sexual assault; sexual abuse of a minor; or any similar sex-

1 related offenses to those described above under the criminal or penal code of
2 this state, other states, or other countries; tax evasion; underage employment;
3 alcohol violations; illegal drugs; allowing a minor to enter and remain within
4 premises where adult entertainment is offered; or any offense causing
5 revocation of an adult-oriented business license; or

6 (B) an offense for which less than 10 years have elapsed since
7 the date of conviction or the date of release from confinement imposed for a
8 conviction, whichever date is later, if the conviction is of a felony offense.

9 **Sec. 08.90.040. Application for license.** (a) An applicant for a license shall
10 file with the department a written application on a form designated by the department,
11 signed and sworn to by the applicant, giving the applicant's name and address. If the
12 applicant is a corporation, the application shall be executed by the authorized officers
13 of the corporation. If the applicant is a partnership, including a limited partnership,
14 the application shall be executed by an authorized general partner. The application
15 must include

16 (1) the license fee; and

17 (2) any other information required by the department.

18 (b) A corporation applying for a license to operate an adult-oriented business
19 shall provide the names and addresses of the president, vice-president, secretary,
20 managing officer, and all stockholders who own 10 percent or more of the stock in the
21 corporation, together with any other information required by the department.

22 (c) A partnership, including a limited partnership, that applies for a license
23 shall provide information required by the department including the names and
24 addresses of all general partners and all partners with an interest of 10 percent or
25 more.

26 (d) A limited liability organization that applies for a license shall provide
27 information required by the department, including the names and addresses of all
28 members with an ownership interest of 10 percent or more and the names and
29 addresses of all managers.

30 **Sec. 08.90.050. Notice of application for adult-oriented business license.**

31 (a) Before a new license is issued, the applicant shall post a copy of the application

1 for 10 days at the location of the proposed licensed premises and at any additional
2 locations designated by the department. The department may require the applicant to
3 provide

4 (1) a copy of the application to newspapers and radio and television
5 stations for public service announcement; or

6 (2) paid notice of the application once each week for three successive
7 weeks in a newspaper or by radio.

8 (b) Upon receipt of an application for the issuance or renewal of a license for
9 premises or proposed premises that are located within one-half mile of the boundary of
10 a community council established by municipal charter or ordinance, the department
11 shall

12 (1) immediately provide written notice of the application to

13 (A) the community council; and

14 (B) any nonprofit community organization that has requested
15 notification in writing; and

16 (2) at least 10 days before the date set for departmental action on the
17 application, provide written notice of the proposed action to

18 (A) the community council; and

19 (B) any nonprofit community organization that has requested
20 notification in writing.

21 **Sec. 08.90.060. Fees.** The department shall set fees under AS 08.01.065 for
22 the application for or renewal of a license to operate an adult-oriented business.

23 **Sec. 08.90.070. Grounds for denial, suspension, or revocation of license.**
24 The department may deny, suspend, or revoke the license of a person who

25 (1) has obtained or attempted to obtain a license under this chapter by
26 fraud or deceit;

27 (2) has been convicted of a felony or other crime if the felony or other
28 crime is substantially related to the qualifications, functions, or duties of the licensee;
29 or

30 (3) has wilfully or repeatedly violated a provision of this chapter or
31 regulations adopted under it.

1 **Sec. 08.90.080. Person and location for adult-oriented business license. (a)**

2 Each license to operate an adult-oriented business shall be issued to a specific
3 individual or individuals, to a partnership, including a limited partnership, to a limited
4 liability organization, or to a corporation. If the license is issued to a corporation or a
5 limited liability organization, the registered agent of the corporation or limited liability
6 organization is required to be an individual resident of the state.

7 (b) A specific location shall be indicated on the license as the licensed
8 premises, the principal address of which shall be indicated on the license. The mailing
9 address of a licensee or, if the licensee is a corporation, the address of the registered
10 office of the corporation must be kept current and on file in the main office of the
11 department.

12 (c) A license issued by the department is not transferable or assignable.

13 (d) A licensee shall report to the department

14 (1) permanent closing of a licensed premises; and

15 (2) other matters and occurrences the department may require by
16 regulation.

17 **Article 2. Business Operations.**

18 **Sec. 08.90.200. Entertainers employed by business. (a)** A licensee of an
19 adult-oriented business may not with criminal negligence allow a person under 21
20 years of age to be employed as an adult-oriented business entertainer in the licensee's
21 premises. In this section, "criminal negligence" has the meaning given in
22 AS 11.81.900.

23 (b) The department shall develop and provide adult-oriented businesses with
24 written material to be made available to all employees who are adult-oriented business
25 entertainers and to be prominently displayed in two locations within the premises
26 approved by the department. This written material shall explain the wage and hour
27 issues relevant to adult-oriented business entertainers, including information about
28 independent contractors and employees, the minimum wage, and allowable deductions
29 from wages by an employer.

30 (c) A licensee may not employ an adult-oriented entertainer who has been
31 convicted of any of the following offenses:

- 1 (1) prostitution or promotion of prostitution;
- 2 (2) unlawful exploitation of a minor;
- 3 (3) possession or distribution of child pornography;
- 4 (4) indecent exposure;
- 5 (5) sexual assault;
- 6 (6) sexual abuse of a minor;
- 7 (7) any sex-related offense that is similar to those described in (1) - (6)
- 8 of this subsection under the criminal or penal code of this state, other states, or other
- 9 countries; or
- 10 (8) distribution or sale of illegal drugs.

11 (d) The licensee shall maintain on the premises a written application form
12 signed by each person employed at the licensed premises as an adult-oriented business
13 entertainer evidencing that the adult-oriented business entertainer states that the person
14 has never been convicted of any of the offenses listed in (c) of this section.

15 **Sec. 08.90.210. Business hours.** A person who is licensed to operate an
16 adult-oriented business may not allow patrons to be present on the licensed premises
17 between the hours of 5:00 a.m. and 8:00 a.m. each day. In addition, for adult-oriented
18 businesses located within a municipality, the restriction against allowing patrons on
19 the premises must include any additional hours set by a municipality for the closure of
20 licensed premises providing entertainment under AS 04.

21 **Sec. 08.90.220. Access of persons under 18 years of age to licensed**
22 **premises.** A licensee or an agent or employee of a licensee of an adult-oriented
23 business may not with criminal negligence allow a person under 18 years of age to
24 enter and remain within licensed premises. In this section, "criminal negligence" has
25 the meaning given in AS 11.81.900.

26 **Sec. 08.90.230. Proof of age.** (a) If an adult-oriented business licensee or an
27 agent or employee of the adult-oriented business licensee questions or has reason to
28 question whether a person entering licensed premises has attained the age of 18 years,
29 the licensee, agent, or employee shall require the person to furnish proof of age
30 acceptable under (b) of this section in a form determined by the department. If the
31 person questioned does not furnish proof of age acceptable under (b) of this section, or

1 if a licensee, agent, or employee questions or has reason to question the validity of the
2 proof of age furnished, the licensee, employee, or agent shall require the person to sign
3 a statement that the person is 18 years of age or older. This statement shall be made
4 on a form prepared by and furnished to the licensee by the department.

5 (b) A valid driver's license or a valid identification card is acceptable as proof
6 of age when used for identification in securing entry to and remaining on the premises
7 of an adult-oriented business if the license or identification card is made of or encased
8 in plastic and contains a photograph of the licensee or card holder and a statement of
9 age or date of birth.

10 (c) A licensee or an agent or employee of the licensee may not be charged for
11 a violation of AS 08.90.220 if a signed statement as provided in (a) of this section is
12 secured in good faith, or if a valid driver's license or identification card is presented
13 indicating that the owner and possessor of the presented driver's license or
14 identification card is 18 years of age or older.

15 **Sec. 08.90.240. Responsibility of licensees, agents, and employees.** An
16 adult-oriented business licensee has a duty to exercise that degree of care that a
17 reasonable person would observe to ensure that a business under the person's control is
18 lawfully conducted. This duty of the licensee includes ensuring the compliance

19 (1) by agents or employees with this chapter and regulations adopted
20 under this chapter, including acting with reasonable diligence to determine that agents
21 or employees are advised of the provisions of this chapter and the regulations adopted
22 under this chapter, either by securing the agent's or employee's written
23 acknowledgment of posted instructions or otherwise; and

24 (2) of the premises with public health, fire, and safety codes and
25 ordinances of the state or municipality having jurisdiction.

26 **Article 3. Miscellaneous Provisions.**

27 **Sec. 08.90.300. Disciplinary sanctions.** (a) If, after a hearing, the
28 department finds that a licensee has committed an act set out in AS 08.90.070, the
29 department may

30 (1) permanently revoke a license issued under this chapter or suspend a
31 license for a determinate period of time; and

1 (2) impose a civil fine of not more than \$10,000.

2 (b) The department may summarily suspend a license before final hearing or
3 during the appeals process if the department finds that the licensee poses a clear and
4 immediate danger to the public health and safety if the licensee continues to operate
5 under a license issued under this chapter. A person whose license is suspended under
6 this subsection is entitled to a hearing by the department not later than seven days after
7 the effective date of the order.

8 (c) A person who receives a disciplinary sanction under this section may
9 appeal the sanction to a court of competent jurisdiction.

10 (d) The department shall be consistent in the application of disciplinary
11 sanctions. A significant departure from earlier decisions of the department involving
12 similar situations must be explained in findings of fact or orders made by the
13 department.

14 **Sec. 08.90.310. Violations.** (a) A person who violates this chapter is guilty
15 of a misdemeanor and, upon conviction, is punishable by a fine of not more than
16 \$5,000, or by imprisonment for not more than one year, or by both. Each day of
17 illegal practice is a separate offense.

18 (b) A person who knowingly provides false information in an application for a
19 license to operate an adult-oriented business is guilty of a misdemeanor and, upon
20 conviction, is punishable by a fine of not more than \$5,000, or by imprisonment for
21 not more than one year, or by both, except that a person who knowingly provides false
22 information about the applicant's specified criminal activity is guilty of a class C
23 felony.

24 **Sec. 08.90.320. Limitation of liability.** An action may not be brought against
25 a person for damages resulting from a report made in good faith to a public agency by
26 the person or participation by the person in an investigation by a public agency or an
27 administrative or judicial proceeding relating to the report if the report relates to
28 activity requiring a license under this chapter.

29 **Sec. 08.90.330. Accessibility of license and licensed premises to inspection.**

30 (a) A licensee who operates an adult-oriented business shall, upon request, make the
31 licensed premises available for inspection by officers charged with the enforcement of

1 this chapter, including employees of the department, during all regular business hours.

2 (b) A license for an adult-oriented business issued under this chapter shall be
3 conspicuously posted within the licensed premises so as to be easily viewed by the
4 public and available for inspection upon request by a peace officer or other person
5 during regular business hours.

6 **Sec. 08.90.340. License a privilege.** (a) A license issued under this chapter
7 is a personal privilege, not a property right.

8 (b) The privilege conferred upon the licensee is personal in nature and affords
9 protection to the licensee only.

10 **Sec. 08.90.350. Municipal regulation.** A municipality may adopt and
11 enforce an ordinance that places prohibitions or restrictions on adult-oriented
12 entertainment that are additional to or stricter than those required under this chapter.

13 **Article 4. General Provisions.**

14 **Sec. 08.90.500. Definitions.** In this chapter,

15 (1) "adult-oriented business" means a person who regularly offers
16 adult-oriented entertainment at a premises for compensation;

17 (2) "adult-oriented business entertainer" means an employee of an
18 adult-oriented business who performs adult-oriented entertainment;

19 (3) "adult-oriented business licensee" or "licensee" means a person
20 licensed under AS 08.90.020 to operate an adult-oriented business;

21 (4) "adult-oriented entertainment" means entertainment by nude or
22 semi-nude individuals who personally appear before an audience, and the primary
23 purpose of the entertainment is for the sexual interests or titillation of the audience;

24 (5) "department" means the Department of Community and Economic
25 Development;

26 (6) "employee" means a person who performs any service on the
27 premises of an adult-oriented business on a full-time, part-time, contract, or
28 independent basis, whether or not the person is an employee, independent contractor,
29 agent, or otherwise and whether or not the said person is paid a salary, wage, or other
30 compensation by the operator of the adult-oriented business; "employee" does not
31 include a person exclusively on the premises for repair or maintenance of the premises

1 or equipment on the premises, or for the delivery of goods to the premises, nor does
2 "employee" include a person exclusively on the premises as a patron or customer;

3 (7) "license" means a license to operate an adult-oriented business
4 issued under AS 08.90.020;

5 (8) "nude" or "semi-nude" means the appearance of an anus, anal area,
6 pubic area, male genitals, female genitals, or vulva, either bare or with less than a fully
7 opaque covering; or a female breast with less than a fully opaque covering of any part
8 of the areola;

9 (8) "premises" means the real property on which the adult-oriented
10 business is located, including the adult-oriented business, the grounds, private
11 walkways, parking lots, and parking garages of the adult-oriented business under the
12 ownership, control, or supervision of the licensee, as described in the application for a
13 license to operate an adult-oriented business under this chapter.

14 * Sec. 4. AS 08.90.200 is amended by adding a new subsection to read:

15 (e) An adult-oriented business shall require each adult-oriented business
16 entertainer who is under 21 years of age to demonstrate, within the first 80 hours of
17 the entertainer's employment, that the entertainer has been informed of certain
18 information specified by the department. The information must cover the following
19 topics: educational opportunities within the state, financial assistance programs for
20 education, and vocational education. Attendance at a department-approved counseling
21 session of not more than one hour fulfills this information requirement. The
22 department may allow a certificate of counseling signed by a school official to be
23 substituted for the counseling session. If the adult-oriented business entertainer is
24 charged for the cost of the required counseling session, the licensee shall promptly
25 reimburse the entertainer.

26 * Sec. 5. AS 08.90.200(a) is repealed.

27 * Sec. 6. The uncodified law of the State of Alaska is amended by adding a new section to
28 read:

29 SEVERABILITY. Under AS 01.10.030, the provisions of this Act are severable.

30 * Sec. 7. The uncodified law of the State of Alaska is amended by adding a new section to
31 read:

1 CONTINGENT EFFECT. (a) Sections 4 and 5 of this Act take effect only if a court
2 of competent jurisdiction whose decisions are binding in this state enters a final judgment on
3 the merits that AS 08.90.200(a), added by sec. 3 of this Act, violates the Constitution of the
4 United States or the Constitution of the State of Alaska.

5 (b) The attorney general shall promptly notify the lieutenant governor and the revisor
6 of statutes of the occurrence of the contingency described in (a) of this section.

7 * **Sec. 8.** Sections 4 and 5 of this Act take effect on the date of the attorney general's
8 notification to the lieutenant governor and to the revisor of statutes under sec. 7(b) of this Act
9 that a court has entered final judgment that AS 08.90.200(a), added by sec. 3 of this Act,
10 violates the Constitution of the United States or the Constitution of the State of Alaska and
11 that the time for an appeal of that judgment has expired or, if an appeal was taken, a final
12 order on the appeal has been entered that AS 08.90.200(a) violates the Constitution of the
13 United States or the Constitution of the State of Alaska.

14 * **Sec. 9.** Sections 1 - 3, 6, and 7 of this Act take effect July 1, 2005.

23-LS1394Q
Craver
2/16/04

CS FOR HOUSE BILL NO. 367()

**IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURE - SECOND SESSION**

BY

**Offered:
Referred:**

Sponsor(s): REPRESENTATIVES MCGUIRE AND GARA, Dahlstrom, Anderson

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the licensing and regulation of adult-oriented businesses; and**
2 **providing for an effective date."**

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 *** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
5 to read:

6 **LEGISLATIVE PURPOSE AND FINDINGS REGARDING ADULT-ORIENTED**
7 **BUSINESSES.** The legislature finds that

8 (1) the legislature intends to regulate adult-oriented entertainment businesses
9 in order to reduce the incidence of and opportunities for illegal activity such as lewd acts,
10 solicitation of prostitution, and prostitution and to mitigate the demonstrated negative
11 secondary effects of adult-oriented entertainment businesses on the neighboring communities;

12 (2) the legislature does not intend by these amendments to deny adults access
13 to adult-oriented activities protected by the First Amendment to the Constitution of the United
14 States or to deny access by the distributors and exhibitors of adult-oriented entertainment to

1 their intended market; the legislature finds that adult-oriented entertainment businesses,
2 because of their operational characteristics, create significant secondary effects on the
3 neighborhoods and communities in which they are located;

4 (3) special regulation of adult-oriented entertainment businesses is necessary
5 to ensure that the recognized negative secondary effects, including accosting and harassment
6 of law-abiding residents and the proliferation of litter, particularly litter of an adult nature
7 associated with these businesses, will not have a deleterious effect on adjacent neighborhoods
8 and communities;

9 (4) it is the purpose and intent of these amendments to provide for the orderly
10 regulation of adult-oriented entertainment businesses in the state by establishing certain
11 minimum standards for the conduct of this type of business to protect the public order and the
12 health, safety, and general welfare of the residents of the state by preventing prostitution, lewd
13 acts, the spread of disease, and the deterioration and blighting of neighborhoods, reducing
14 crime in and around adult-oriented entertainment businesses, and preserving the quality of
15 urban life in the state; and

16 (5) the legislature does not intend by these amendments to authorize, legalize,
17 or permit the establishment or operation of any business, building, or use that violates any
18 other state or federal statute.

19 * Sec. 2. AS 08.01.010 is amended by adding a new paragraph to read:

20 (38) regulation of adult-oriented businesses under AS 08.90.

21 * Sec. 3. AS 08 is amended by adding a new chapter to read:

22 **Chapter 90. Adult-Oriented Businesses.**

23 **Article 1. Licensing.**

24 **Sec. 08.90.010. License required.** A person may not

25 (1) operate an adult-oriented business without a license to operate an
26 adult-oriented business issued under this chapter;

27 (2) obtain or attempt to obtain a license under this chapter by
28 fraudulent means.

29 **Sec. 08.90.020. Adult-oriented business license.** An applicant for a license
30 to operate an adult-oriented business shall submit to the department, in the manner and
31 on forms prescribed by the department, written evidence, verified by oath, that the

1 applicant meets the qualifications to operate an adult-oriented entertainment business,
2 and that the owner of the premises consents to the operation of the adult-oriented
3 business on the premises.

4 **Sec. 08.90.030. Regulations for adult-oriented business licenses.** The
5 department shall by regulation establish requirements for licensing businesses
6 providing adult-oriented entertainment at the premises specified in the application,
7 licensure and renewal procedures, inspection procedures, standards, fees, and
8 requirements for operation. In adopting regulations under this section, the department
9 shall require the following:

10 (1) unless the adult-oriented business owner resides on the business
11 premises and the adult-oriented business owner is a legal guardian of minors residing
12 in the residential unit, a licensed adult-oriented business premises may not share with
13 any residential unit inhabited by minors a

14 (A) public entrance;

15 (B) restroom or entrance to a restroom; or

16 (C) hallway;

17 (2) the interior layout of the premises of an adult-oriented business
18 must physically separate adult-oriented business entertainers from patrons during
19 performances and ensure that any booth, stall, room, or partitioned portion of a room
20 is open to view from a public room of the premises, except for private offices or other
21 rooms that are not open to any person other than employees, or individual restrooms
22 on the premises;

23 (3) an applicant shall provide satisfactory evidence that the owner of
24 the real property in which the adult-oriented business is conducted consents to the
25 operation of the adult-oriented business;

26 (4) an individual whose name and address is required to be provided
27 with an application for a license under AS 08.90.040 may not have been convicted of
28 any of the following offenses:

29 (A) prostitution or promotion of prostitution; unlawful
30 exploitation of a minor; possession or distribution of child pornography;
31 indecent exposure; sexual assault; sexual abuse of a minor; or any similar sex-

1 related offenses to those described above under the criminal or penal code of
2 this state, other states, or other countries; tax evasion; underage employment;
3 alcohol violations; illegal drugs; allowing a minor to enter and remain within
4 premises where adult entertainment is offered; or any offense causing
5 revocation of an adult-oriented business license; or

6 (B) an offense for which less than 10 years have elapsed since
7 the date of conviction or the date of release from confinement imposed for a
8 conviction, whichever date is later, if the conviction is of a felony offense.

9 **Sec. 08.90.040. Application for license.** (a) An applicant for a license shall
10 file with the department a written application, signed and sworn to by the applicant,
11 giving the applicant's name and address. If the applicant is a corporation, the
12 application shall be executed by the authorized officers of the corporation. If the
13 applicant is a partnership, including a limited partnership, the application shall be
14 executed by an authorized general partner. The application must include

- 15 (1) the type of license desired;
16 (2) the license fee;
17 (3) any other information required by the department.

18 (b) A corporation applying for a license to operate an adult-oriented business
19 shall provide the names and addresses of the president, vice-president, secretary,
20 managing officer, and all stockholders who own 10 percent or more of the stock in the
21 corporation, together with any other information required by the department.

22 (c) A partnership, including a limited partnership, that applies for a license
23 shall provide information required by the department including the names and
24 addresses of all general partners and all partners with an interest of 10 percent or
25 more.

26 (d) A limited liability organization that applies for a license shall provide
27 information required by the department, including the names and addresses of all
28 members with an ownership interest of 10 percent or more and the names and
29 addresses of all managers.

30 **Sec. 08.90.050. Notice of application for adult-oriented business license.**

31 (a) Before a new license is issued, the applicant shall post a copy of the application

1 for 10 days at the location of the proposed licensed premises and at any additional
2 locations designated by the department. The department may require the applicant to
3 provide

4 (1) a copy of the application to newspapers and radio and television
5 stations for public service announcement; or

6 (2) paid notice of the application once each week for three successive
7 weeks in a newspaper or by radio.

8 (b) Upon receipt of an application for the issuance or renewal of a license for
9 premises or proposed premises that are located within one-half mile of the boundary of
10 a community council established by municipal charter or ordinance, the department
11 shall

12 (1) immediately provide written notice of the application to

13 (A) the community council; and

14 (B) any nonprofit community organization that has requested
15 notification in writing; and

16 (2) at least 10 days before the date set for departmental action on the
17 application, provide written notice of the proposed action to

18 (A) the community council; and

19 (B) any nonprofit community organization that has requested
20 notification in writing.

21 **Sec. 08.90.060. Fees.** The department shall set fees under AS 08.01.065 for
22 the application for or renewal of a license to operate an adult-oriented business.

23 **Sec. 08.90.070. Grounds for denial, suspension, or revocation of license.**
24 The department may deny, suspend, or revoke the license of a person who

25 (1) has obtained or attempted to obtain a license under this chapter by
26 fraud or deceit;

27 (2) has been convicted of a felony or other crime if the felony or other
28 crime is substantially related to the qualifications, functions, or duties of the licensee;

29 or

30 (3) has wilfully or repeatedly violated a provision of this chapter or
31 regulations adopted under it.

1 licensed premises providing entertainment under AS 04.

2 **Sec. 08.90.220. Access of persons under 18 years of age to licensed**
3 **premises.** A licensee or an agent or employee of a licensee of an adult-oriented
4 business may not with criminal negligence allow a person under 18 years of age to
5 enter and remain within licensed premises. In this section, "criminal negligence" has
6 the meaning given in AS 11.81.900.

7 **Sec. 08.90.230. Proof of age.** (a) If an adult-oriented business licensee or an
8 agent or employee of the adult-oriented business licensee questions or has reason to
9 question whether a person entering licensed premises has attained the age of 18 years,
10 the licensee, agent, or employee shall require the person to furnish proof of age
11 acceptable under (b) of this section in a form determined by the department. If the
12 person questioned does not furnish proof of age acceptable under (b) of this section, or
13 if a licensee, agent, or employee questions or has reason to question the validity of the
14 proof of age furnished, the licensee, employee, or agent shall require the person to sign
15 a statement that the person is 18 years of age or older. This statement shall be made
16 on a form prepared by and furnished to the licensee by the department.

17 (b) A valid driver's license or a valid identification card is acceptable as proof
18 of age when used for identification in securing entry to and remaining on the premises
19 of an adult-oriented business if the license or identification card is made of or encased
20 in plastic and contains a photograph of the licensee or card holder and a statement of
21 age or date of birth.

22 (c) A licensee or an agent or employee of the licensee may not be charged for
23 a violation of AS 08.90.220 if a signed statement as provided in (a) of this section is
24 secured in good faith, or if a valid driver's license or identification card is presented
25 indicating that the owner and possessor of the presented driver's license or
26 identification card is 18 years of age or older.

27 **Sec. 08.90.240. Responsibility of licensees, agents, and employees.** An
28 adult-oriented business licensee has a duty to exercise that degree of care that a
29 reasonable person would observe to ensure that a business under the person's control is
30 lawfully conducted. This duty of the licensee includes ensuring the compliance

31 (1) by agents or employees with this chapter and regulations adopted

1 under this chapter, including acting with reasonable diligence to determine that agents
2 or employees are advised of the provisions of this chapter and the regulations adopted
3 under this chapter, either by securing the agent's or employee's written
4 acknowledgment of posted instructions or otherwise; and

5 (2) of the premises with public health, fire, and safety codes and
6 ordinances of the state or municipality having jurisdiction.

7 **Article 3. Miscellaneous Provisions.**

8 **Sec. 08.90.300. Disciplinary sanctions.** (a) If, after a hearing, the
9 department finds that a licensee has committed an act set out in AS 08.90.070, the
10 department may

11 (1) permanently revoke a license issued under this chapter or suspend a
12 license for a determinate period of time; and

13 (2) impose a civil fine of not more than \$10,000.

14 (b) The department may summarily suspend a license before final hearing or
15 during the appeals process if the department finds that the licensee poses a clear and
16 immediate danger to the public health and safety if the licensee continues to operate
17 under a license issued under this chapter. A person whose license is suspended under
18 this subsection is entitled to a hearing by the department not later than seven days after
19 the effective date of the order.

20 (c) A person who receives a disciplinary sanction under this section may
21 appeal the sanction to a court of competent jurisdiction.

22 (d) The department shall be consistent in the application of disciplinary
23 sanctions. A significant departure from earlier decisions of the department involving
24 similar situations must be explained in findings of fact or orders made by the
25 department.

26 **Sec. 08.90.310. Violations.** (a) A person who violates this chapter is guilty
27 of a misdemeanor and, upon conviction, is punishable by a fine of not more than
28 \$5,000, or by imprisonment for not more than one year, or by both. Each day of
29 illegal practice is a separate offense.

30 (b) A person who knowingly provides false information in an application for a
31 license to operate an adult-oriented business is guilty of a misdemeanor and, upon

1 conviction, is punishable by a fine of not more than \$5,000, or by imprisonment for
2 not more than one year, or by both, except that a person who knowingly provides false
3 information about the applicant's specified criminal activity is guilty of a class C
4 felony.

5 **Sec. 08.90.320. Limitation of liability.** An action may not be brought against
6 a person for damages resulting from a report made in good faith to a public agency by
7 the person or participation by the person in an investigation by a public agency or an
8 administrative or judicial proceeding relating to the report if the report relates to
9 activity requiring a license under this chapter.

10 **Sec. 08.90.330. Accessibility of license and licensed premises to inspection.**

11 (a) A licensee who operates an adult-oriented business shall, upon request, make the
12 licensed premises available for inspection by officers charged with the enforcement of
13 this chapter, including employees of the department, during all regular business hours.

14 (b) A license for an adult-oriented business issued under this chapter shall be
15 conspicuously posted within the licensed premises so as to be easily viewed by the
16 public and available for inspection upon request by a peace officer or other person
17 during regular business hours.

18 **Sec. 08.90.340. License a privilege.** (a) A license issued under this chapter
19 is a personal privilege, not a property right.

20 (b) The privilege conferred upon the licensee is personal in nature and affords
21 protection to the licensee only.

22 **Article 4. General Provisions.**

23 **Sec. 08.90.500. Definitions.** In this chapter,

24 (1) "adult-oriented business" means a person who offers entertainment
25 at a premises for compensation for the sexual interests or titillation of an audience by
26 an individual who personally appears before the audience in a state of nudity or semi-
27 nudity;

28 (2) "adult-oriented business entertainer" means an employee of an
29 adult-oriented business who performs services described in (1) of this section for the
30 sexual interests or titillation of an audience;

31 (3) "adult-oriented business licensee" or "licensee" means a person

1 licensed under AS 08.90.020 to operate an adult-oriented business;

2 (4) "department" means the Department of Community and Economic
3 Development;

4 (5) "employee" means a person who performs any service on the
5 premises of an adult-oriented business on a full-time, part-time, contract, or
6 independent basis, whether or not the person is an employee, independent contractor,
7 agent, or otherwise and whether or not the said person is paid a salary, wage, or other
8 compensation by the operator of the adult-oriented business; "employee" does not
9 include a person exclusively on the premises for repair or maintenance of the premises
10 or equipment on the premises, or for the delivery of goods to the premises, nor does
11 "employee" include a person exclusively on the premises as a patron or customer;

12 (6) "license" means a license to operate an adult-oriented business
13 issued under AS 08.90.020;

14 (7) "nudity" means the appearance of an anus, anal area, pubic area,
15 male genitals, female genitals, or vulva, either bare or with less than a fully opaque
16 covering; or a female breast with less than a fully opaque covering of any part of the
17 areola;

18 (8) "premises" means the real property on which the adult-oriented
19 business is located, including the adult-oriented business, the grounds, private
20 walkways, parking lots, and parking garages of the adult-oriented business under the
21 ownership, control, or supervision of the licensee, as described in the application for a
22 license to operate an adult-oriented business under this chapter;

23 (9) "semi-nude" or "semi-nudity" means the appearance of the female
24 breast below a horizontal line across the top of the areola at its highest point; this term
25 includes the entire lower portion of the human female breast, but does not include any
26 portion of the cleavage of the human female breast exhibited by a dress, blouse, skirt,
27 leotard, bathing suit, or other wearing apparel if the areola is not exposed in whole or
28 in part.

29 * Sec. 4. AS 08.90.200 is amended by adding a new subsection to read:

30 (c) Adult-oriented businesses shall provide all adult-oriented business
31 entertainers under 21 years of age with certain information specified by the

1 department. The information to be provided by the businesses shall be a presentation
2 or written materials approved by the department to cover the following topics:
3 educational opportunities within the state, financial assistance programs for education
4 and vocational education; the department shall verify that businesses are providing the
5 required information to all adult-oriented entertainers under 21 years of age.

6 * Sec. 5. AS 08.90.200(a) is repealed.

7 * Sec. 6. The uncodified law of the State of Alaska is amended by adding a new section to
8 read:

9 SEVERABILITY. Under AS 01.10.030, the provisions of this Act are severable.

10 * Sec. 7. The uncodified law of the State of Alaska is amended by adding a new section to
11 read:

12 CONTINGENT EFFECT. (a) Sections 4 and 5 of this Act take effect only if a court
13 of competent jurisdiction whose decisions are binding in this state enters a final judgment on
14 the merits that AS 08.90.200(a), added by sec. 3 of this Act, violates the Constitution of the
15 United States or the Constitution of the State of Alaska.

16 (b) The attorney general shall promptly notify the lieutenant governor and the revisor
17 of statutes of the occurrence of the contingency described in (a) of this section.

18 * Sec. 8. Sections 4 and 5 of this Act take effect on the date of the attorney general's
19 notification to the lieutenant governor and to the revisor of statutes under sec. 7(b) of this Act
20 that a court has entered final judgment that AS 08.90.200(a), added by sec. 3 of this Act,
21 violates the Constitution of the United States or the Constitution of the State of Alaska and
22 that the time for an appeal of that judgment has expired or, if an appeal was taken, a final
23 order on the appeal has been entered that AS 08.90.200(a) violates the Constitution of the
24 United States or the Constitution of the State of Alaska.

25 * Sec. 9. Sections 1 - 3, 6, and 7 of this Act take effect July 1, 2005.

**LAW OFFICES OF
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February 16, 2004

*Admitted in AK and WA
**Admitted in AK, WA, and MT
***Admitted in SD
All others admitted in AK

Representative Les Gara
State Capital, Room 422
Juneau, AK 99801-1182

Sent by FAX to: 907-465-3518

RE: House Bill 367 Regulating Sexually Oriented Businesses

Dear Representative Gara:

You asked me for an opinion as to whether HB 367 would necessarily be deemed unconstitutional pursuant to Mickens v. City of Kodiak, 640 P.2d 818 (Alaska 1982). The short answer is clearly no.

First, it is important to remember that the U.S. Supreme Court has held that nude dancing is at the outer limitation of First Amendment speech. I think our Supreme Court would agree.

In Mickens, the City of Kodiak had prohibited nude entertainment at places where alcohol was sold. The only factual support for this ban was public testimony from citizens who feared increased crime, and an increase in the number of police calls to the location where this entertainment occurred. Mickens, 640 P.2d at 822. The court noted that there was no evidence that the increase in police calls was caused by the nude entertainment, as opposed to an increase in business that would result from any type of live entertainment.

Representative Les Gara
February 16, 2004
Page 2 of 3

Id. The court made very clear that any limits on expression must be justified:

Here the City has offered no justification for distinguishing between entertainment involving nudity from other forms of entertainment as a means to prevent crowds from congregating in establishments where intoxicating liquor is sold. Without such a justification, the ordinance can't stand.

Id. The court also noted that it was important to keep in mind that Kodiak's ordinance was not an effort to protect children from non-obscene sexually oriented displays. Mickens, 640 P.2d at 823.

There are several ways in which the proposed legislation differs from the ordinance in Mickens. First, the Legislature has heard far more scientific testimony about the ill effects of this type of entertainment. Unlike the situation in Kodiak, you have heard testimony on the difficulty in enforcing health and safety laws, wage and hour laws, and other regulations designed to protect the public. You have heard evidence that it is particularly difficult to enforce those laws in sexually oriented business establishments aimed at the under-21 age group.

Second, you have heard scientific testimony of the ill effects this type of entertainment has both on young dancers and young viewers. This scientific evidence is a very significant difference between the proposed legislation and the Kodiak ordinance.

A third difference is the Kodiak was simply banning dancing. Twenty years later, the live nude entertainment we are talking about includes physically rubbing nude body parts against the clothed body parts of the patrons in exchange for money.

Finally, the proposed legislation is an effort to protect children. In Alaska, the Legislature has determined that citizens under 21 are not adults for all purposes. It has found that they are children for purposes of buying alcoholic beverages until age 21 and that they

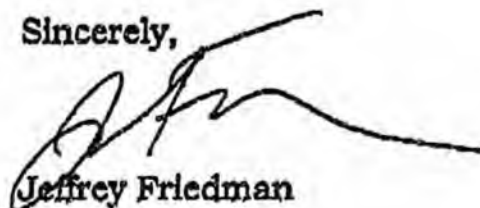
Representative Les Gara
February 16, 2004
Page 3 of 3

are children for purposes of buying tobacco until age 19.¹ There is nothing wrong in recognizing the medical research, and finding that people are still children until age 21 for purposes of viewing or participating in live nude entertainment.²

In conclusion, the Supreme Court could certainly rely on the Mickens decision as precedent in holding that the proposed legislation is unconstitutional. It could just as easily, and in my view more likely, distinguish this legislation and hold that it is constitutional because of the differences discussed above.

Please let me know if you have any further questions.

Sincerely,



Jeffrey Friedman

JAF:ms

¹ Restrictions on use of alcohol and tobacco are just as much Free Speech issues as restrictions on nude dancing. Current advertising demonstrates that smoking cigarettes and drinking beer are considered expressions of one's personality and lifestyle choices at least to the same extent as dancing naked on a stage.

² I believe the state also restricts under 21 year olds in practicing the profession of Acupuncturist and Fish and Game guide.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

Enclosed is the amendment to HB 367 you requested. These changes to the bill would require sex-oriented business licensees to prevent adults under 19 years of age from entering the sex-oriented business premises. The restriction on the first amendment rights of adults under 19 years to watch this form of expression raises serious constitutional issues.

The Alaska Supreme Court has stated that nude dancing is protected by the state constitution as well as by the First Amendment of the United States Constitution. Mickens v. Kodiak, 640 P.2d 818, 823 (Alaska 1982). (City ordinance prohibiting nudity of waiters, waitresses and entertainers in bars found to unconstitutionally suppress protected forms of expression under Alaska State Constitution.) "Dancing, including nude dancing, is a constitutionally protected form of expression under the first amendment to the United States Constitution." Id. In Alaska nude dancing is protected by the state constitution as well. "We hold, therefore, that nude dancing is also protected under Article I, Section 5^[1] of our state constitution." Id.

There is an additional issue which you may wish to consider. Raising the age to 19 for an adult to be allowed into a sex-oriented business is inconsistent with AS 11.66.300 which makes it a crime to allow minors to be present at an adult entertainment business.

Sec. 11.66.300. Prohibiting minors from being present at an adult entertainment business.

¹ Alaska Constitution, Article 1, Section 5: "Freedom of Speech. Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

Representative Lesil McGuire
January 23, 2004
Page 2

person under the age of 18 years to enter and remain within premises
entertainment is offered.

section, "business that offers adult entertainment" has
in AS 23.10.350(f).

who violates this section is guilty of a class A
violation is a separate offense.

, please advise.

LEGISLATIVE RESEARCH REPORT

MARCH 1, 2004



REPORT NUMBER 04.135

STATEWIDE AGE RESTRICTIONS ON NUDE OR SEMI-NUDE DANCERS

PREPARED FOR REPRESENTATIVE LESIL MCGUIRE

BY PATRICIA YOUNG, MANAGER

You wished to know if lawmakers in any states have enacted specific statewide age restrictions on nude or semi-nude dancers, also known as *exotic* dancers. If so, you wished to know whether the laws have been challenged.

Local governments, rather than state governments, generally regulate nude and semi-nude dancing as part of sexually oriented businesses. While we have not conducted an exhaustive search, we identified only two states having enacted statewide age restrictions for such dancing.¹ Those states are Missouri and West Virginia, and courts have enjoined enforcement of the laws in both, although the age restriction in West Virginia was not among the provisions specifically challenged. We also found an opinion issued by the Office of the Attorney General of Nevada concluding that Nevada law, while not specifically restricting the age of exotic dancers, prohibits the employment of persons 18 through 20 as dancers in adult entertainment establishments where alcohol is served for on-site consumption.

In 2003, the Missouri Legislature passed a law prohibiting persons under the age of 19 from dancing in *adult cabarets*—establishments in which persons appear nude in the performance of their duties.² Before the law could take effect, a Kansas City juice bar (featuring nude dancing but no alcohol) and two 18-year old dancers brought a suit in federal court claiming that the law was arbitrary and violated dancers' First Amendment rights. According to news reports at the time, plaintiffs argued that restricting 18-year olds from such employment serves no compelling state interest. They noted that a *minor* in Missouri is defined as anyone under the age of 18; and

¹ We also identified one state (North Carolina) that gives local government explicit authority to regulate such businesses through various measures including limits on the age of patrons and employees (North Carolina General Statutes § 160A – 181.1).

² Assistant Attorney General John Mollenkamp was reported to have argued that the law allowed for alternatives—although it prohibited 18-year olds from dancing nude in adult clubs, it did not prevent them from dancing partly-clothed in clubs that serve liquor, dancing nude in the privacy of their homes or even appearing on videotapes. Dan Margolies, "Judge Bars Age Change for Nude Dancers—18-Year Olds Can Still Work in Clubs," *Kansas City Star*, August 28, 2003. We include a copy of Missouri Statute § 573-509 and this news article as Attachment A.

that 18-year olds in Missouri are allowed to vote, enter into contracts, consent to surgical or medical treatment, and become notaries. The judge granted a temporary restraining order noting that the plaintiffs would likely prevail on the merits and stating as follows:

I am not persuaded that [the law] furthers a substantial government interest, nor am I persuaded that the government interest in this case is unrelated to suppression of free speech.³

According to the Office of the Missouri Attorney General, the case is still pending in U.S. District Court, with a hearing set for September. The district attorney for Jackson County has replaced the Attorney General as a party to the action. The most recent order continues to enjoin enforcement of the law.⁴

In 2000, the West Virginia Legislature enacted a law requiring that operators of commercial exotic entertainment facilities obtain licenses and providing a very limited window for securing such licenses.⁵ Among other things, the law prohibited licensees from allowing individuals under the age of 18 to perform as exotic entertainers and from allowing individuals under the age of 21 (other than performing exotic entertainers) to be on the premises on any day that any such entertainment was offered.

Within a short amount of time, the law was challenged, particularly in regard to the limited time for licensing. Although the State argued that the licensing scheme was designed to regulate *juice bars*—unlicensed establishments with nude dancing where alcohol is served—the court determined that the unlicensed sale of alcohol in juice bars was already illegal, and the statute's purpose was clearly to regulate, restrict, and eventually to prohibit nude dancing. The court found that the statute imposed a prior restraint on expressive conduct protected by the First Amendment, and that it conferred unlimited discretion on government agents to grant or withhold licensing of such facilities. On that basis, the court enjoined implementation or enforcement of the law.

Although not specifically a statewide age restriction on nude or semi-nude dancing, laws in Nevada—NRS § 202.030 and 202.060—prohibit saloonkeepers from allowing persons under the age of 21 years either to "loiter" or to "remain" in establishments where alcohol is sold. In 2002, the Office of the Attorney General of Nevada issued an opinion concluding that these laws prohibit the employment of young adults aged 18 through 20 as dancers in adult entertainment establishments where alcohol is served for on-site consumption. As the author of the opinion noted,

We do not believe the Nevada Legislature intended to permit persons under 21 to engage in such employment activities in establishments where alcohol is served for on-site consumption. Certainly neither NRS 202.030 nor 202.060 expressly provide an exception that would permit such activity, and we are unwilling to read one into the statutes. Moreover, the Nevada Supreme Court has held that statutes regulating the sale of alcohol are legally analogous to

³ Margolles, August 28, 2003.

⁴ Mark Long, assistant attorney general, Missouri Office of the Attorney General, 573-751-3321.

⁵ We include a copy of West Virginia Code §60-4-23 and *R.W.B. of Riverview, Inc. v. Stemple*, 222 F. Supp. 2d 748 (2000 U.S. Dist.) as Attachment B.

statutes regulating gaming and, given the special class of industry and the privileges that are at issue, such statutes should be strictly construed against the licensee.⁶

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

⁶ Attachment C is a copy of Nevada Revised Statutes § 202.030 and 202.060 and Opinion No. 2002-45, Office of the Attorney General, November 13, 2002.

Attachment A

Missouri Revised Statute § 573-509

and

Dan Margolies, "Judge Bars Age Change for Nude Dancers—18-Year Olds Can Still Work in Clubs," *Kansas City Star*, August 28, 2003

Missouri

§ 573.509 R.S.Mo. (2004)

§ 573.509. Adult cabaret, persons less than nineteen years of age prohibited from dancing, penalty

1. No person less than nineteen years of age shall dance in an adult cabaret as defined in section 573.500, nor shall any proprietor of such establishment permit any person less than nineteen years of age to dance in an adult cabaret.

2. Any person who violates the provisions of subsection 1 of this section is guilty of a class A misdemeanor.

HISTORY: L. 2003 S.B. 298

§ 573.500. Definitions

As used in sections 573.500 to 573.507, the following terms mean:

(1) "Adult cabaret", a nightclub, bar, restaurant, or similar establishment in which persons appear in a state of nudity in the performance of their duties;

(2) "Nudity", the showing of either:

(a) The human male or female genitals or pubic area with less than a fully opaque covering; or

(b) The female breast with less than a fully opaque covering on any part of the nipple.

HISTORY: L. 1993 S.B. 180 § 11

A NATIONAL NETWORK
OF LOCAL NEWS AND INFORMATION

Kansas City Star, The (MO)

August 28, 2003

Section: NATIONAL

Edition: METROPOLITAN

Page: A1

Judge bars age change for nude dancers 18-year-olds can still work in clubs

DAN MARGOLIES
The Kansas City Star

A judge Wednesday barred enforcement of a Missouri law raising the minimum age of nude dancers from 18 to 19, a measure initially promoted to prevent exploitation of young women.

"I'm not persuaded that (the law) furthers a substantial government interest, nor am I persuaded that the government interest in this case is unrelated to suppression of free speech," U.S. District Judge Ortrie Smith ruled. The law had been set to take effect today.

Smith granted a temporary restraining order sought by Bazooka's, a Kansas City cabaret featuring nude dancing, and two of its 18-year-old dancers.

Smith said the 18-year-old dancers were likely to suffer irreparable harm if the statute were enforced. Both dancers testified Wednesday, describing themselves as "live adult entertainers" whose work at Bazooka's was the primary means of support for themselves and their 2-year-old children.

After the hearing, the general manager of Bazooka's, Richard T. Snow, said he was pleased with Smith's ruling.

"I didn't think the government's case had any merit," Snow said.

Bazooka's and the two dancers - Ashlea Nichol Williamson and Christine Dunkin - sued on Monday to prevent enforcement of the statute. Jay Nixon, as the state's attorney general charged with enforcing Missouri's laws, was named as the only defendant.

The law was passed by the General Assembly in May and signed by Gov. Bob Holden last month. Tucked into an otherwise unrelated liquor-control bill, the provision was sponsored by Sen. Sarah Steelman, a Rolla Republican.

Stelman originally had sought to raise the minimum age to 21, but that bill did not make it out of the House. At the time, Steelman was quoted as saying that women could earn hundreds of dollars a day dancing nude but were at risk of being exploited. She also expressed concern that young women who performed in adult clubs might get involved in pornography.

Stelman could not be reached for comment Wednesday.

Bazooka's, which is at 17th and Main streets, is a so-called juice bar and serves no alcohol. As such, it is not regulated by state and local laws requiring dancers in clubs that serve alcohol to be partly covered.

In arguing that the minimum-age law was arbitrary and violated the First Amendment, Bazooka's attorney Richard Bryant acknowledged that the government could regulate nude dancing but said the statute impinged too much on the right of free speech.

The bill, he said, bans 18-year-olds "from engaging in the exact same activity as a 19-year-old," even though 18-year-olds are not considered minors under Missouri law.

Assistant Attorney General John Mollenkamp, representing Nixon's office, argued that while the law prohibited 18-year-olds from dancing nude in adult clubs, it did not prevent them from dancing partly clothed in clubs that serve liquor, dancing nude in the privacy of their homes or even appearing nude in videotapes.

"In another words," he said, "there are alternatives."

But a skeptical Smith asked Mollenkamp: "What is the government interest here?"

Mollenkamp responded: "The protection of young people."

Mollenkamp also said that legislators were concerned about the secondary effects associated with some adult entertainment establishments, such as crime.

Smith questioned why there would be any greater secondary effects from 18-year-olds dancing nude than from 19-year-olds.

In issuing the restraining order, Smith said he was satisfied that the plaintiffs would probably prevail on the merits of the case. Although he said he was not convinced that Bazooka's would suffer irreparable harm - Snow testified Wednesday that no more than half a dozen of the club's 70-plus dancers were 18 - Smith said he expected Williamson and Dunkin would "suffer a threat of irreparable harm" if enforcement of the statute were not prevented.

Both women said they made about \$200 a day. They said the money enabled them to pay for their housing, automobiles, day-care expenses and other bills.

The restraining order expires in 10 days unless the parties agree to extend it. Smith will then consider whether to issue a preliminary injunction, pending a full trial on the merits, barring enforcement of the statute.

- To reach Dan Margolies, call (816) 234-7740 or send e-mail to dmargolies@kcstar.com.

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Attachment B

West Virginia Code §60-4-23
and

R.W.B. of Riverview, Inc. v. Stemple, 222 F. Supp. 2d 748 (2000 U.S. Dist.)

1 of 1 DOCUMENT

WEST VIRGINIA CODE ANNOTATED
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*** (STATUTES CURRENT THROUGH 2003 SECOND EXTRAORDINARY
SESSION OF THE LEGISLATURE) ***
*** ANNOTATIONS CURRENT THROUGH JULY 15, 2003 ***

CHAPTER 60. STATE CONTROL OF ALCOHOLIC LIQUORS
ARTICLE 4. LICENSES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

W. Va. Code § 60-4-23 (2003)

§ 60-4-23. License to operate a facility where exotic entertainment is offered; definitions; restrictions, regulations and prohibitions; prohibitions against minors; application, renewal, license fee, restrictions on transfer; effective date; legislative rules; unlawful acts and penalties imposed

(a) For purposes of this section:

(1) "Exotic entertainment" means live nude dancing, nude service personnel or live nude entertainment, and "nude" means any state of undress in which male or female genitalia or female breasts are exposed.

(2) "Places set apart for traditional family-oriented naturism" means family nudist parks, clubs and resorts chartered by the American association for nude recreation or the naturist society, including all of their appurtenant business components, and also including places temporarily in use for traditional family-oriented naturist activities.

(b) No person may operate any commercial facility where exotic entertainment is permitted or offered unless such person is granted a license by the commissioner to operate a facility where exotic entertainment may be offered. The provisions of this subsection apply whether or not alcoholic liquor, wine or nonalcoholic beer is legally kept, served, sold or dispensed in a facility, or purchased for use in a facility, or permitted to be brought by others into a facility and whether or not such person holds any other license or permit issued pursuant to chapter sixty [§§ 60-1-1 et seq.] of this code.

(c) A licensee is subject to all the regulatory provisions of article seven [§§ 60-7-1 et seq.] of this chapter, whether or not the licensee is otherwise a private club. The commissioner shall have all the powers and authorization granted under article seven of this chapter to regulate, restrict and sanction a licensee under this section. No licensee may purchase, keep, sell, serve, dispense or purchase for use in a licensed facility, or permit others to bring into the facility, any alcoholic liquor, wine or nonintoxicating beer without having the appropriate license therefor. No licensee may operate a private club without being licensed therefor.

(d) No person or licensee may allow a person under the age of eighteen years to perform as an exotic entertainer. No person under the age of twenty-one years, other than a performing exotic entertainer, may be allowed to be in a commercial facility on any day on which any exotic entertainment is offered therein. No licensee may hold special nonalcoholic entertainment events for persons under age twenty-one pursuant to the provisions of section eight [§ 60-7-8], article seven of this chapter in the licensed facility.

(e) Any person operating a commercial facility where exotic entertainment is offered on the effective date of this section may apply to the commissioner for a license to operate a facility where exotic entertainment may be offered. Applications must be filed with the commissioner on or before the first day of July, two thousand; thereafter no application for license may be received by the commissioner. The commissioner may issue a license to a person complying with the provisions of this chapter. Upon application for renewal, the commissioner shall annually, on the first day of July of each succeeding year, renew the license of any licensee then in compliance with the provisions of this chapter. The commissioner shall specify the form of application and information required of applicants and licensees. No license which

has lapsed, been revoked or expired without renewal may be reissued.

(f) A person to whom a license is issued or renewed under the provisions of this section shall pay annually to the commissioner a license fee of three thousand dollars. A municipal corporation wherein any such licensee is located shall issue a municipal license to any person to whom the commissioner has issued a license and may impose a license fee not in excess of the state license fee.

(g) A person shall not sell, assign or otherwise transfer a license without the prior written approval of the commissioner. For purposes of this section, the merger of a licensee or the sale of more than fifty percent of the outstanding stock of or partnership interests in the licensee shall be deemed to be a sale, assignment or transfer of a license under this section. A license shall not be transferred to another location, except within the county of original licensure. A transferee of a licensed facility may apply for reissuance of the transferor's license if the transferee applicant otherwise qualifies for a license. The commissioner is authorized to propose the promulgation of a legislative rule in accordance with the provisions of chapter twenty-nine-a [§§ 29A-1-1 et seq.] of this code, to implement the provisions of this subsection.

(h) This section shall be effective upon passage by the Legislature in the year two thousand. On or before the first day of May, two thousand, the commissioner shall promulgate an emergency legislative rule pursuant to the provisions of chapter twenty-nine-a [§§ 29A-1-1 et seq.] of this code to effectuate the provisions of this section, and shall propose a legislative rule therefor, for consideration by the Legislature, prior to the last day of December, two thousand.

(i) Any person who violates any provision of this section, or principal of a firm or corporation which violates any provision of this section, or licensee, agent, employee or member of any licensee who violates any provision of this section, or who violates any of the provisions of section twelve [§ 60-7-12], article seven of this chapter, on the premises of a licensed facility, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one thousand dollars nor more than three thousand dollars, or imprisoned for a period not to exceed one year, or both so fined and imprisoned.

(j) The provisions of this section do not apply to places set apart for traditional family-oriented naturist activities.

HISTORY: 2000, c. 120.

NOTES:

EDITOR'S NOTES.—Concerning the reference in (e) to "the effective date of this section," Acts 2000, c. 120, which enacted this section, provided that the act take effect March 11, 2000.

EFFECTIVE DATES.—Acts 2000, c. 120, provided that the act take effect March 11, 2000.

FEDERAL COURT HAS ENJOINED W. VA. FROM IMPLEMENTING OR ENFORCING THIS ACT.—Nude dancing and entertainment remain expressive activity protected by the First Amendment of the Constitution. In the First Amendment, free expression context, permitting government officials unbridled discretion in determining whether to allow protected speech presents an unacceptable risk of both indefinitely suppressing and chilling protected speech. This act contains abundant examples of such unbridled discretion. The Court's Preliminary Injunction Order, enjoining Defendant Commissioner and his officers, agents, servants and employees and all persons in active concert or participation with them from implementing or enforcing West Virginia Code § 60-4-23 and West Virginia Legislative Rules, Title 175, Series 7, pending final judgment on the merits, shall continue in full force and effect. *R.W.B. of Riverview, Inc. v. Stemple*, 111 F. Supp. 2d 748 (S.D.W. Va. 2000).

This exotic entertainment statute confers unlimited discretion on the Commissioner in contravention of constitutional requirements. Court has issued preliminary injunction enjoining implementation or enforcement of this section. *R.W.B. of Riverview, Inc. v. Stemple*, 111 F. Supp. 2d 748 (S.D.W. Va. 2000).

USER NOTE: For more generally applicable notes, see notes under the first section of this part, subpart, article, or chapter.

LEXSEE 111 F. SUPP. 2D 748

R.W.B. of RIVERVIEW, INC., et al., Plaintiffs, v. DONALD STEMPLE, Commissioner,
Alcohol Beverage Control Commission, Defendant.

CIVIL ACTION NO. 2:00-0552

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST
VIRGINIA, CHARLESTON DIVISION

111 F. Supp. 2d 748; 2000 U.S. Dist. LEXIS 12165

August 18, 2000, Decided

August 18, 2000, Entered

DISPOSITION: **[**1]** Case dismissed with prejudice.

LexisNexis (TM) HEADNOTES- Core Concepts:

COUNSEL: For R.W.B. OF RIVERVIEW, INC., R.W.B. OF MORGANTOWN, INC., R.W.B. OF CLARKSBURG, INC., R.W.B. OF BECKLEY, INC., R.W.B. OF SMITHVILLE, INC., R.W.B. OF WHEELING, INC., FORT KNOCKS, INC., ACADEMY, INC., CAL'S LOUNGE, INC., plaintiffs: Kyle G. Lusk, Beckley, WV.

For R.W.B. OF RIVERVIEW, INC., R.W.B. OF MORGANTOWN, INC., R.W.B. OF CLARKSBURG, INC., R.W.B. OF BECKLEY, INC., R.W.B. OF SMITHVILLE, INC., R.W.B. OF WHEELING, INC., FORT KNOCKS, INC., ACADEMY, INC., CAL'S LOUNGE, INC., plaintiffs: J. Michael Murray, Jeremy A. Rosenbaum, Steven D. Shafron, BERKMAN, GORDON, MURRAY & DeVAN, Cleveland, OH.

For DONALD STEMPLE, defendant: Darrell V. McGraw, Jr., Esquire, Jeffrey G. Blaydes, Scott E. Johnson, OFFICE OF THE ATTORNEY GENERAL, Charleston, WV.

JUDGES: Charles H. Haden II, Chief Judge.

OPINIONBY: Charles H. Haden II

OPINION: **[*752]**

MEMORANDUM OPINION AND SHOW CAUSE ORDER

On July 25, 2000, following a preliminary injunction hearing, the Court issued its Memorandum Opinion and Order Granting Preliminary Injunction. This Opinion elaborates and enlarges the initial ruling.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 11, 2000 the West Virginia Legislature **[**2]** enacted a law creating a new section of the *West Virginia Code*, section 60-4-23, "regulating, restricting and placing a prohibition on additional exotic entertainment facilities." Under the statute, licenses are required for facilities offering "exotic entertainment," that is, "live nude dancing, nude service personnel or live nude entertainment." *W. Va. Code § 60-4-32(a)(1)*. "Nude" means "any state of undress in which male or female genitalia or female breasts are exposed." *Id.*

Effective from passage, the statute provides a brief and very limited opportunity for exotic entertainment facility licensing, and imposes criminal penalties on those who engage in unlicensed exotic entertainment. n1 Any person who was operating a commercial facility offering exotic entertainment on March 11, 2000 could apply to the Defendant Alcohol Beverage Control Commissioner (Commissioner) for a license from March 11 until July 1, 2000. n2 See *W. Va. Code § 60-4-23(e)*. "Thereafter no application for license may be received by the commissioner." *Id.* Licenses which lapse, are revoked or expire may not be reissued. See *id.*

n1 Fines from one to three thousand dollars or imprisonment up to one year, or both, are penalties imposable for violation of the section.

[3]**

n2 The statute ordered the Commissioner to issue an emergency legislative rule to effectuate the law by May 1, 2000. Thereafter, the Commissioner issued regulations, Title 175, Series 7, "Licensing of Exotic Entertainment Facilities."

On June 30, the day before the exotic entertainment licensing period was to end forever, in response to Plaintiffs' application and with notice to Defendant, the Court issued a temporary restraining order (TRO) enjoining Defendant and his agents from enforcing the new statute and regulations promulgated thereunder. By a second Order of July 10, 2000, the Court *sua sponte* continued the TRO until July 25, 2000 and scheduled a preliminary injunction hearing for that date, after which the initial, brief Memorandum Opinion and Order Granting Preliminary Injunction issued.

The Court found and concluded the statute 1) imposed a prior restraint on exotic entertainment, expressive conduct, protected by the First Amendment, and 2) conferred unlimited discretion on the Commissioner to grant or withhold licensing of exotic entertainment facilities. On that basis the preliminary [**4] injunction was granted, enjoining the Commissioner or his agents from implementing or enforcing *West Virginia Code* § 60-4-23 and *West Virginia Legislative Rules*, Title 175, Series 7, pending final judgment on the merits. This more expansive Memorandum Opinion and Order was promised.

II. DISCUSSION

A. Preliminary Injunction Standard

The Court applies a balancing test to determine whether a preliminary injunction is properly granted. See *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977). The sequential application of the Blackwelder factors was discussed most recently in *Steakhouse, Inc. v. City of Raleigh, North Carolina*:

In deciding whether to grant a preliminary injunction, the district court is to consider three factors. First, it must balance the likelihood of irreparable harm to the plaintiff if the injunction is refused against the likelihood of irreparable harm to the defendant if it is granted. Second, the court should consider [*753] the likelihood that the plaintiff will succeed on the merits. The more the balance of harms leans away from the plaintiff, the stronger his showing on the merits must be. [**5] Finally, the court must consider the public interest.

166 F.3d 634, 637 (4th Cir. 1999) (citing *Blackwelder*). The plaintiff bears the burden of proving the factors favor the grant of an injunction. See *Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir. 1997).

In applying the balancing test, the most important factors are the two factors regarding the balancing of harms.

See *id.* A plaintiff must demonstrate harm that is "neither remote nor speculative, but actual and imminent." *Id.* (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2nd Cir. 1989)). If, after balancing the harm to the plaintiffs if the injunction were not granted against the harm to the defendants if the injunction were granted,

the balance 'tips decidedly' in favor of the plaintiff, a preliminary injunction will be granted if 'the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.' As the balance tips away from the plaintiff, a stronger showing on the merits is required.

Id. (citations [**6] omitted).

Finally, the Court notes that "The grant of interim relief [is] an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in [the] limited circumstances which clearly demand it." *Steakhouse*, 166 F.3d 634 at 637 (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991)).

B. The Purpose of the West Virginia Exotic Entertainment Statute

Defendant proposes West Virginia's exotic entertainment licensing scheme is designed to regulate "juice bars" and the pernicious secondary effects of such entertainment. (Def.'s Supplemental Br. in Opp'n to Pls.' Mot. for T.R.O. and Prelim. Inj. (Def.'s Supp. Br.) at 16-17.) Juice bars are unlicensed entities said to be offering nude dancing, and dispensing alcoholic beverages. According to Defendant, the illegal sale of beer and liquor at these establishments has become commonplace. (see Def.'s Supp. Br. at 6-7; Def.'s Mem. in Opp'n to Mot. for T.R.O. and Prelim. Inj. at 1-2), often as an "all you can drink proposition." The new statute was enacted in an attempt to regulate juice bars and limit their secondary [**7] effects, such as drunken driving, larcenies, assaults, and narcotics use.

Defendant's characterization of the statutory purpose poses two significant problems. First, the unlicensed sale of alcohol in juice bars is already illegal. But second, and more important for the Court's analysis, the exotic entertainment statute is bold and clear on its face: its purpose is to regulate, restrict, and prohibit additional exotic entertainment, i.e., nude dancing and entertainment, facilities. No word in this law refers to juice bars or their

secondary effects. In fact, the statute applies "whether or not alcoholic liquor, wine or [*754] nonalcoholic beer is legally kept, served, sold or dispensed in a facility, or permitted to be brought by others into a facility and whether or not such person holds any other license or permit issued pursuant to chapter sixty of this code." *W. Va. Code § 60-4-23(b)*. In other words, this law has nothing to do with the sale or service of alcohol, juice bars, or their pernicious secondary effects, and everything to do with live nude dancing and entertainment.

n3 Under West Virginia law, alcoholic liquors may not be sold for consumption on the premises where sold, without licenses and regulation under West Virginia Code Chapter 60, Article 7. Even Defendant notes in his brief that what juice bars are doing is illegal. Thus, statutes were already in place under which the unlicensed sale of alcohol may be regulated and sanctioned.

Defendant also argues the only method to sanction juice bars before passage of this law was through criminal prosecution, (Def.'s Mem. in Opp'n to Mot. for T.R.O. at 2.) However, criminal prosecution is still the only method to sanction juice bars in the exotic entertainment statute except, of course, denying them a license, which is a sanction only if they are prosecuted for lacking one. Recognizing this, the Commissioner argued that county prosecutors were necessary parties to this action because they are the ones who impose criminal penalties. (Def.'s Supp. Br. at 12.)

[**8]

The Court agrees West Virginia may regulate the sale and service of alcoholic beverages. That it has done — and may elaborate upon. See *W. Va. Code § 60-1-1 et seq.* The State may regulate the secondary effects of facilities providing alcohol or exotic entertainment. See e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986). The Court even agrees that, under *City of Erie v. Pap's A.M.*, 529 U.S. 277, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000), the State may require certain covering to prevent total public nudity. n4 The West Virginia exotic entertainment statute, however, by its clear and unequivocal language, does none of these things. In the short term, the statute requires a license before the operator of commercial facilities may offer nude dancing or nude entertainment. In the long term, the statute is designed to reduce the number of nude dancing and entertainment facilities, if not eliminate them entirely.

n4 In *City of Erie*, the Supreme Court held a public nudity statute requiring G-strings and

pasties on people otherwise nude in public constitutionally permissible. Defendant argues West Virginia's exotic entertainment statute is therefore also constitutional. Were this a public nudity statute requiring pasties and G-strings, the argument probably would prevail. See *City of Erie*, 120 S. Ct. at 1388 (offering a the precise formulation of a constitutional statute so regulating public nudity). This is not that statute.

[**9]

Under its provisions, only facilities offering exotic entertainment on March 11, 2000 could apply for a license. Application could be tendered only between March 11 and July 1, 2000. No further applications will ever be accepted, and licenses which lapse, are revoked, or expire may never be renewed. This scheme belies Defendant's argument that no ban or elimination of expression is intended. As Justice Powell observed in concurrence in *Young v. American Mini Theatres*, 427 U.S. 50, 82 n.4, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976), "Had [Detroit] been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location." West Virginia has undertaken to restrict severely and ultimately phase out nude dancing and entertainment venues. That is why the statute places a "prohibition on additional exotic entertainment facilities." Suffice it to say, there will be no more, and eventually there will be many fewer.

The purpose of the exotic entertainment statute is simple and straightforward: to license, regulate, and reduce the number of facilities offering nude dancing, nude entertainment, and nude [**10] service personnel. This statute does not regulate nudity as conduct alone. It targets nudity that has an erotic message, nude dancing, as well as nude entertainment, which could express any message art is capable of conveying. The Court FINDS and CONCLUDES exotic ("nude") entertainment statute is, on its face and by its explicit terms, a scheme for licensing, regulating, and ultimately making unavailable venues for any live art that employs nudity to convey its message.

C. Nude Expressive Activity is Protected by the First Amendment

Defendant justifies the statutory licensing scheme at issue here by minimizing the importance of nude dancing: an expressive mode of severely limited societal good that has received only lukewarm recognition from the Supreme Court. "It disserves the memories of America's civil rights heroes who fought for the equality and dignity of humanity to equate their courageous [*755] acts with

that of nude exotic dancing." (Def.'s Supp. Br. at 5.) Nude dancing and entertainment, precisely because of the erotic message they convey, are anathema to some, distasteful to many, but intriguing to others.

Nevertheless, in its most recent pronouncement [**11] on the subject the Supreme Court stated, "Nude dancing . . . is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection." *City of Erie, 120 S. Ct. at 1391* (citing *Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991)*). The Court held the particular ordinance Erie passed was a "content neutral" public nudity statute, *120 S. Ct. at 1388*, which could, therefore, require a fully opaque covering over the genitals, pubic hair, buttocks, and female breast. "Government restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in *O'Brien* n5 for content-neutral restrictions on symbolic speech." *Id.* at 1391.

n5 *United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968)*.

Defendant proposes City of Erie controls, and because West Virginia's exotic entertainment scheme is designed to regulate "juice bars" and the pernicious secondary effects of such entertainment, [**12] the Court should apply the *O'Brien* test n6 and uphold the statute.

n6 Under *O'Brien*, where a statute sets forth content-neutral restrictions on symbolic speech, a court analyzes constitutionality by a four-part test:

- (a) is the government regulation within the constitutional power of the government,
- (b) does the regulation further an important government interest,
- (c) is the government interest unrelated to the suppression of free expression, and
- (d) is the restriction no greater than is essential to further the government interest?

As the discussion thus far and below demonstrates, the exotic entertainment statute fails prongs (c) and likely (d) of the *O'Brien* test, thus making untenable prongs (a) and (b).

The West Virginia statute, however, is not directed at conduct. It does not outlaw public nudity, juice bars, or associated drunken driving, larceny, assault, or narcotics use. The statute requires licenses for facilities offering nude dancing and nude entertainment. Whatever

the Supreme [**13] Court intends by ambit-analysis and its location of nude dancing in the outer ambit, this Court understands nude dancing remains expressive conduct within the First Amendment's protection.

Interestingly, Defendant concentrated his argument exclusively on the dangers and bad effects of nude dancing. Plaintiffs, in turn, also focused on nude dancing, that being a main commercial offering of their businesses. n7 The statute, however, also covers nude entertainment, a far broader category, which presumably includes the well accepted artistic performances of "Equus," "Hair," "Oh, Calcutta," and any other play, opera, musical, or "entertainment" in which nudity is a component. n8 To the extent the statute requires licensing for nude entertainment, it extends broadly over many recognized types of free expression. The Court further FINDS and CONCLUDES that nude dancing and entertainment remain expressive [**756] activity protected by the First Amendment of the United States Constitution.

n7 Plaintiffs' briefs and argument also focused on prior restraint problems with the statute, although they have reserved a number of broad areas of First Amendment jurisprudence for future challenge, including overbreadth and vagueness. (See Br. in Supp. of Pls' Mot. at 8 n.1.) The Court does not address the potential overbreadth and/or vagueness problems created with regard to "nude entertainment" at this time because, except for Plaintiffs' single reference at oral argument, the parties have not mentioned them.

[**14]

n8 Perhaps the Commissioner never considered the range of performances nude entertainment might encompass, for regulations requiring, e.g., suitable kitchens capable of preparing a freshly cooked meal, seem inappropos when applied to theater performances of "Equus," and the like." See 175 W. Va. C.S.R. § 7.4.11.2.

D. Licensing Statute as Prior Restraint of Free Expression

There is a special presumption under the First Amendment against the use of prior restraints. See *Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976)* (Prior restraints "are the most serious and the least tolerable infringement on First Amendment rights."). It is well settled "that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official

or agency constitutes a prior restraint and may result in censorship." 11126 *Baltimore Boulevard, Inc. v. Prince George's County, Md.*, 58 F.3d 988, 994 (4th Cir. 1995) (quoting *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988)). "Nor can it [**15] be doubted that a scheme establishing a prior restraint on protected speech that places unbridled discretion in the decisionmaker by failing to impose either objective standards for decision or adequate procedural safeguards creates an impermissible risk of suppression with every application." *Id.* (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990)).

Although the exotic entertainment statute is a scheme licensing expressive activity, Defendant proposes initially that prior restraint analysis is inapplicable because cases such as *Baltimore Boulevard* dealt with time-sensitive written and spoken messages. In contrast, however, as our Court of Appeals famously phrased it, "Topless dancing does not go similarly stale — it tends not to be keyed to external events, and the strength of whatever message it conveys remains more or less constant over time." *Steakhouse, Incorporated v. City of Raleigh, NC*, 166 F.3d 634, 641 (4th Cir. 1999). This distinction may — or may not — alter analysis of how timely license application must be handled, but it does not affect whether a statute imposes a prior restraint. Regarding special use permits for [**16] topless dancing bars, the court instructed in *Steakhouse*, "an ordinance acts as [a prior] restraint when 'it prohibits [adult establishments] from operating anywhere within the [City] until permission in the form of a special exception has been granted.'" *Id.* at 638 (quoting *Baltimore Boulevard*, 58 F.3d at 995). Under the exotic entertainment statute at issue, facilities offering nude dancing or entertainment cannot operate anywhere in the State until permission in the form of a license has been granted. That is definitive of a prior restraint and cannot stand under First Amendment scrutiny.

Defendant also ignores the total ban on exotic entertainment licenses for anyone who was not providing such entertainment on March 11, 2000 and for anyone who did not apply for a license by July 1, 2000. That this effect is deliberate is evidenced by the statement of purpose: "to prohibit additional exotic entertainment facilities." *W. Va. Code § 60-4-23* (emphasis added). There can never be more than were extant on the day in March when the legislation became effective. All others, including future generations yet unborn, suffer not just a prior [**17] restraint, but a permanent denial of their right to offer or enjoy this expressive activity in commercial establishments. In effect, the State has erected a permanent procedural barrier to the acquisition of exotic entertainment licenses: not only will there be no review and no appeal, but for

many there will not even be a right to apply.

1. Commissioner's discretion unbridled

Any licensing scheme to engage in constitutionally protected expression must satisfy procedural and substantive safeguards required by *Freedman v. Maryland*, 380 U.S. 51, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965). "Two evils" not tolerated in prior restraints are 1) unbridled discretion in the hands of a government official or [**757] agency and 2) failure to place limits on the time in which decisionmaker must act to issue the license. n9 See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990).

n9 Defendant argues that the statute incorporates the licensure and regulation provisions for private clubs found in *W. Va. Code § 60-7*, providing for timely decision and review. Even if the review process for the severely limited number of applications the statute allows were constitutionally adequate, it is no more than a pretense because it applies only to license applications tendered in the brief period of March 11 to July 1, 2000, and never again. Accordingly, the Court declines to analyze time limits and review processes whose application is hypothetical, at best, for any but the favored few.

[**18]

The Court previously examined the statute and regulations promulgated by the Commissioner thereunder and noticed abundant examples of unbridled discretion. See *R.W.B. of Riverview, Inc. v. Stemple*, 111 F. Supp. 2d 748 (S.D.W. Va. 2000). For example, the statute provides, "The commissioner may issue a license to a person complying with the provisions of this chapter." *W. Va. Code § 60-4-23(e)* (emphasis added). "May" grants the Commissioner discretion to issue or not issue licenses, even though an applicant complies with every requirement of the law.

Under the regulations, a licensee must be a "bona fide club of good reputation in the community in which it operates." 175 W. Va. C.S.R. § 7.3.6.1.3 (emphasis added). Ownership and management must involve "suitable persons" at a "suitable place." *Id.* Owners must be "of good moral character or repute," *id.* § 3.6.2.j, and may not have "the general reputation of drinking alcoholic beverages or nonintoxicating beer to excess." *Id.* § 3.6.2.m (emphasis added). Issuance of a license may not be "detrimental to the interest, morals, safety or welfare of the public." *Id.* § 3.6.4.

These are [**19] just the sort of "boundless terms" and manipulable "malleable concepts" our Court of Appeals held constitutionally unacceptable because

they clothe a decisionmaker with unfettered discretion. *Steakhouse*, 166 F.3d at 639. To meet constitutional muster, a licensing scheme must, *inter alia*, "sufficiently cabin the decision-maker's discretion." *Id.* at 638.

The numerous cases Defendant cites in which the West Virginia Supreme Court of Appeals has "cabin[ed]" the Commissioner's discretion in issuing private club, i.e., liquor, licenses are inapposite. See e.g., *W. Va. Nonintoxicating Beer Commr. v. A & H Tavern*, 181 W. Va. 364, 382 S.E.2d 558 (1989). As syllabus point 2 of *A & H* instructs, "There is no inherent right in any individual . . . to engage in a business which the state, in the exercise of the police power, has placed under surveillance and permits only as a privilege or franchise." *Id.* In contradistinction, persons offering nude dancers and nude entertainment have an inherent, constitutional right to engage in the activity. In the First Amendment, free expression context, "permitting government officials unbridled discretion [**20] in determining whether to allow protected speech presents an unacceptable risk of both indefinitely suppressing and chilling protected speech." *Baltimore Boulevard*, 58 F.3d at 994 (citations omitted).

2. Standardless licenses appropriate for facial challenge

The evils of standardless licensing "can be effectively alleviated only through a facial challenge." *City of Lakewood*, 486 U.S. at 757. As the Court explained,

First, the mere existence of the licensor's unfettered discretion [intimidates] parties into censoring their own speech, even if the discretion and power are never actually abused. . . . Second, the absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power.

[*758]

Id. "When these risks are threatened to a significant degree by state regulation, courts must permit those subject to the laws to bring an immediate facial challenge." *Baltimore Boulevard*, 58 F.3d at 994. For these reasons, the Court permitted Plaintiffs' facial challenge to the West Virginia exotic entertainment statute. [**21]

III. FINDINGS AND CONCLUSIONS

The Supreme Court held in *Elrod v. Burns*, "The loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. 347, 353, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) (citing *New York Times v. United States*, 403 U.S. 713, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1976)). The Defendant Commissioner, on the other hand, will not be harmed by the Court's injunction of his ability to issue licenses under a scheme that impedes the constitutional rights of West Virginia citizens and threatens them with criminal prosecution. West Virginia's exotic entertainment limited licensing scheme obstructs the free exercise of citizens' First Amendment rights and thus, the balance of harms tips decidedly in favor of Plaintiffs. Were this statutory scheme to be implemented, the constitutional harms would be actual and immediate.

As this Court previously held, the public interest is best served by unrelenting protection of the First Amendment rights of all its citizens, even those whose expressive conduct may be distasteful and offensive to many.

After careful consideration of the merits of this action, it appears the Court has resolved all issues raised [**22] and supported by briefing in favor of Plaintiffs. Accordingly, Defendant is **ORDERED** to show cause why a permanent injunction should not issue and the case be dismissed with prejudice. The Court schedules a show cause hearing for **Friday, September 22, 2000 at 9:30 a.m.**

The Court's Preliminary Injunction Order, enjoining Defendant Commissioner and his officers, agents, servants and employees and all persons in active concert or participation with them from implementing or enforcing *West Virginia Code § 60-4-23* and West Virginia Legislative Rules, Title 175, Series 7, pending final judgment on the merits, shall continue in full force and effect.

The Clerk is directed to send a copy of this Memorandum Opinion and Show Cause Order to counsel of record and post this published opinion at <http://www.wvsc.uscourts.gov>.

ENTER: August 18, 2000

Charles H. Haden II, Chief Judge

Attachment C

Nevada Revised Statutes § 202.030 and 202.060
and

Office of the Attorney General, Opinion No. 2002-45, November 13, 2002.

Nevada Revised Statutes--NRS § 202.030 and 202.060 (2003)

§ 202.030. Minor loitering in place where alcoholic beverages sold

Any person under 21 years of age who shall loiter or remain on the premises of any saloon where spirituous, malt or fermented liquors or wines are sold shall be punished by a fine of not more than \$ 500. Nothing in this section shall apply to:

1. Establishments wherein spirituous, malt or fermented liquors or wines are served only in conjunction with regular meals and where dining tables or booths are provided separate from the bar; or

2. Any grocery store or drugstore where spirituous, malt or fermented liquors or wines are not sold by the drink for consumption on the premises.

HISTORY: 1949, p. 126; 1955, p. 144; 1967, p. 482.

§ 202.060. Saloonkeeper allowing minor to remain in establishment

Any proprietor, keeper or manager of a saloon or resort where spirituous, malt or fermented liquors or wines are sold, who shall, knowingly, allow or permit any person under the age of 21 years to remain therein shall be punished by a fine of not more than \$ 500. Nothing in this section shall apply to:

1. Establishments wherein spirituous, malt or fermented liquors or wines are served only in conjunction with regular meals and where dining tables or booths are provided separate from the bar; or

2. Any grocery store or drugstore where spirituous, malt or fermented liquors or wines are not sold by the drink for consumption on the premises.

HISTORY: 1911, p. 314; 1955, p. 85; 1967, p. 483.

OPINIONS OF ATTORNEY GENERAL

PURPOSE. --The purpose of statutes prohibiting minors from loitering in premises where alcoholic beverages are sold is to protect the morals and health of minors by keeping them away from premises where they might come into contact with undesirable persons and be subjected to the urge to purchase intoxicating liquors at an age when such beverages would be detrimental to their health. AGO 337 (12-19-1957).

THIS SECTION DOES NOT APPLY TO HOTEL THEATER-RESTAURANTS. --The provisions of this section, which provide that it is unlawful to permit any person under the age of 21 years to remain in a saloon or resort where spirituous, malt or fermented liquors or wines are sold, do not apply to hotel theater-restaurants. AGO 50 (7-11-1963).

MINOR MAY BE PRESENT FOR REPAIRING MECHANICAL DEVICES. --On premises where alcoholic beverages are sold, when a minor is present for the purpose of repairing mechanical devices, there is no violation of NRS 202.030 or this section, provided the minor leaves the premises immediately after his job is completed. AGO 337 (12-19-1957).

AND MAY BE EMPLOYED AS AN ENTERTAINER. --Under NRS 202.030 and this section, which respectively provide penalties for a minor who loiters and a proprietor who permits a minor to remain in a place where alcoholic beverages are sold, entertainers who are minors may be employed in establishments selling alcoholic beverages if such minors do not remain after their work is performed. AGO 260 (9-8-1965).

BUT MAY NOT BE EMPLOYED AS A WAITER. --It is unlawful to employ a minor as a waiter in a dining room in an establishment where gambling is conducted and alcoholic beverages are served in other rooms. AGO 368 (3-28-1958).

EMPLOYMENT OF YOUNG ADULTS IN ADULT ENTERTAINMENT ESTABLISHMENTS PROHIBITED. --County may not adopt an ordinance allowing young adults aged 18 through 20 to be employed as dancers in adult entertainment establishments where alcohol is served for on-site consumption. AGO 02-45 (11-13-2002).



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

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FRANKIE SUE DEL PAPA
Attorney General

THOMAS M. PATTON
First Assistant Attorney General

November 13, 2002

OPINION NO. 2002-45

EMPLOYMENT; MINORS; ENTERTAINMENT;
LIQUOR: NRS 202.030 and 202.060 prohibits
Clark County from adopting an ordinance allowing
young adults aged 18 through 20 to be employed as
dancers in adult entertainment establishments where
alcohol is served for on-site consumption.

Stewart L. Bell, District Attorney
Office of the Clark County District Attorney
Post Office Box 552215
Las Vegas, Nevada 89155-2215

Dear Mr. Bell:

You have requested an opinion from this office regarding the employment of young adults under the age of 21 by adult entertainment establishments where alcohol is served. The question as presented to this office is set forth below, and our analysis follows.

QUESTION

May Clark County adopt an ordinance that allows underage dancers to provide services to customers and solicit additional business in adult entertainment establishments where alcohol is served?

ANALYSIS

After telephone inquiry with your office, the term "underage" in the question was clarified as referring only to young adults aged 18 through 20 (young adults). Your office also clarified that such young adults would be employed by "adult entertainment establishments" where alcoholic beverages are both served and consumed on the premises. The employment activities of the young adults would include soliciting business and providing "lap dances" to patrons of the establishments. As referred to in this analysis, "lap dancing" involves a partially nude young adult dancing for patrons of the establishment, either at a table or in a private room, wherein some physical touching may occur. In "soliciting business," the young adults circulate throughout the establishment seeking out patrons to purchase lap dances. The young adults may also dance on a stage or platform at a distance from the patrons.

It should be noted that the adult establishments are partial nudity establishments, which require young adults to have some clothing over their pubic region. The question presented does not encompass, and this opinion does not address, the employment of young adults in full nudity establishments where alcohol is not sold or consumed.

Chapter 202 of the Nevada Revised Statutes addresses the presence of persons under the age of 21 in places where alcohol is sold and consumed. Specifically, NRS 202.030 prohibits persons under 21 years of age from "loitering" or "remaining" in a saloon,¹ and provides in full as follows:

Any person under 21 years of age who shall loiter or remain on the premises of any saloon where spirituous, malt or fermented liquors or wines are sold shall be punished by a fine of not more than \$500. Nothing in this section shall apply to:

1. Establishments wherein spirituous, malt or fermented liquors or wines are served only in conjunction with regular meals and where dining tables or booths are provided separate from the bar; or
2. Any grocery store or drugstore where spirituous, malt or fermented liquors or wines are not sold by the drink for consumption on the premises.

¹ We note here that BLACK'S LAW DICTIONARY defines the term "saloon" as: "In common parlance, a place where intoxicating liquors are sold and consumed." BLACK'S LAW DICTIONARY, 1340 (6th ed. 1990). Your office clarified that the adult entertainment establishments referred to in your question are issued a liquor license and are places where intoxicating liquors are sold and consumed. Therefore, these adult entertainment establishments are considered saloons for purposes of the analysis of NRS 202.030 and NRS 202.060.

Stewart L. Bell
November 13, 2002
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In addition, NRS 202.060 prohibits any saloonkeeper from allowing any person under the age of 21 from "remaining" in a place where alcohol is served and consumed. NRS 202.060 provides in full as follows:

Any proprietor, keeper or manager of a saloon or resort where spirituous, malt or fermented liquors or wines are sold, who shall, knowingly, allow or permit any person under the age of 21 years to remain therein shall be punished by a fine of not more than \$500. Nothing in this section shall apply to:

1. Establishments wherein spirituous, malt or fermented liquors or wines are served only in conjunction with regular meals and where dining tables or booths are provided separate from the bar; or
2. Any grocery store or drugstore where spirituous, malt or fermented liquors or wines are not sold by the drink for consumption on the premises.

This office has issued three opinions regarding the application of one or both of these statutes to persons under the age of 21. In Op. Nev. Att'y Gen. No. 57-337 (December 19, 1957), this office concluded that it is permissible for a minor employed as a repair person to enter the premises of an establishment where alcohol is sold and consumed, in order to repair a machine in the establishment, provided that the minor leaves upon completion of the task. The opinion reasoned that if a minor is performing a business task in an establishment where alcohol is sold and consumed, the minor is neither "loitering" nor "remaining" in the establishment since he is there to perform a specific business task and departs once the task is accomplished. Therefore, the minor's activities violated neither the letter nor spirit of NRS 202.030 and NRS 202.060.

In Op. Nev. Att'y Gen. No. 58-368 (March 28, 1958), this office addressed whether it was lawful for a minor between the ages of 18 and 20 to be employed as a waiter and serve both food and alcohol in an establishment with a bar and gaming room if the employee's services would be confined to the restaurant portion of the establishment or the employee's exposure to the public bar and gaming areas of the establishment were otherwise minimized. This office reviewed the provisions of NRS 202.020 (prohibiting the purchase or consumption of alcohol by persons under 21), NRS 202.060 (as set forth above), and NRS 463.350 (prohibiting persons under age 21 from loitering in a room or establishment where licensed gaming activity is conducted) and opined that such employment was not permitted by the above statutes.

Finally, in Op. Nev. Att'y Gen. No. 65-260 (September 8, 1965), this office concluded that an establishment where alcohol is sold and consumed may employ a minor as an entertainer, performing in a lounge show or theater restaurant, without violating NRS 202.030 or NRS 202.060, provided that the young adult departs upon completion of his or her act.

In each of these prior attorney general opinions (AGOs), this office noted that the intent of the Legislature was to protect the health and morals of persons under the age of 21 by prohibiting them from frequenting establishments where alcoholic beverages are sold and consumed. The Legislature has specified two exceptions in the above statutes, permitting persons under 21 to be present in the restaurant portion of an establishment where alcohol is sold and consumed and permitting persons under 21 to be present in a retail store where alcohol is not sold for consumption on site.

As noted, focusing on either or both of the terms "loiter" or "remain," this office has previously concluded that NRS 202.030 and 202.060 do not prohibit the temporary presence of a minor, working as an equipment repair person in an establishment that serves alcohol for on-site consumption, provided that the minor leaves the premises when the business task is completed. This office has also concluded that these statutes do not prohibit the employment of minors, as entertainers who perform in lounge shows or theater restaurants where alcohol is sold and consumed, provided that they depart the premises upon the conclusion of their act. In our opinion, however, the presence of young adults employed as dancers engaged in the activities described above in establishments that serve alcoholic beverages for on-site consumption violates both the letter and intent of NRS 202.030 and 202.060. A comparison of the circumstances at issue in AGOs 57-337 and 65-260 reveals significant differences in the employment activities at issue and leads us to conclude that NRS 202.030 and 202.060 do not permit such employment activities as are encompassed in the current question.

AGO 57-337 addressed a minor working for a local business as an equipment repair person who might enter another business establishment where alcohol was sold and consumed. Under such circumstances, the minor's presence in the establishment is temporary and limited only to that amount of time needed to perform a specific business task. Further, the minor's task is confined to repairing a mechanical device, and interaction with patrons of the establishment is either non-existent or at least minimized, as such interaction would serve no apparent business purpose. Similarly, a minor performing in a lounge act or restaurant theater show, as contemplated in AGO 65-260, is presumably provided some measure of physical separation from the patrons of the establishment, is present temporarily solely in order to perform an act, and such performance does not rely primarily upon direct personal and physical interaction with the patrons of the establishment.

Unlike the above-described circumstances, a dancer's employment in an establishment where alcohol is served and consumed requires the dancer's ongoing, rather than temporary, presence in the establishment. Moreover, the dancer's employment activities reportedly require continuous and direct personal and physical interaction with the establishment's patrons. Indeed, such continuous and direct personal and physical interaction is described as the specific business purpose to be accomplished through the dancer's presence in the establishment.

Stewart L. Bell
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Page 5

We do not believe the Nevada Legislature intended to permit persons under 21 to engage in such employment activities in establishments where alcohol is served for on-site consumption. Certainly neither NRS 202.030 nor 202.060 expressly provide an exception that would permit such activity, and we are unwilling to read one into the statutes. Moreover, the Nevada Supreme Court has held that statutes regulating the sale of alcohol are legally analogous to statutes regulating gaming and, given the special class of industry and the privileges that are at issue, such statutes should be strictly construed against the licensee. *Carson City v. Lepire*, 112 Nev. 363, 365-366, 914 P.2d 631 (1996) (quoting *West Indies v. First National Bank*, 67 Nev. 13, 34, 214 P.2d 144, 154 (1950)). Accordingly, it is this office's conclusion that Clark County may not legally adopt an ordinance that allows young adults to be employed as dancers in establishments where alcohol is served for on-site consumption.

CONCLUSION

Through the adoption of NRS 202.030 and 202.060, the Nevada Legislature has evidenced its intent to prohibit persons under 21 from frequenting establishments where alcohol is served for on-site consumption. The described activities to be performed by a person employed as a dancer require the dancer's continuous and direct physical and personal interaction with the patrons of the establishment. A young adult's presence for purposes of engaging in such employment activities in an establishment that serves alcohol for on-site consumption is not permitted under NRS 202.030 and 202.060. Accordingly, Clark County may not adopt an ordinance allowing young adults aged 18 through 20 to be employed as dancers in adult entertainment establishments where alcohol is served for on-site consumption.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By:

GEORGE G. CAMPBELL
Deputy Attorney General
Commerce Section
(775) 684-1214

cc: Mary-Anne Miller, County Counsel
Keith Kizer, Chief Deputy Attorney General
Clark County Commissioners
John T. Moran, Jr., Esq.

To: Municipality Clerks Office
Anchorage Municipal Assembly
PO Box 196650
Anchorage, Alaska 99519-6650

May 5, 2003

Legislators
Dear Anchorage Assembly Members,

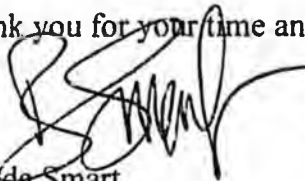
The Spenard Community Council is opposed to having Teen Strip Clubs in Anchorage, especially here in Spenard where we have worked so hard to 'clean up' our community. We passed a resolution unanimously April 2nd, 2003 to request our points below be reviewed and action to be taken upon them by the Anchorage Assembly for the betterment of our town, and most especially for the well being and future of our youth.

We feel this type of establishment, if allowed to exist ought to be enforced under law as Adult Entertainment, using the same Standards and Operating Procedures upheld by the ABC Board of such similar establishments with liquor licenses, making an age requirement of 21 and dealing with 'no touching' type rules.

There is much concern, not just here in Spenard but all over town regarding our High School Students being able to attend and actually work in these Teen Strip Clubs and many health as well as crime related problems tend to spread from this type of business. There is an article detailing exactly this topic in the Anchorage Chronicle dated May 1st, 2003. The Anchorage Police Department too is against such type establishments and has historic problems dealing with the existing ShowBoat management- as a main example.

We request of the Anchorage Assembly to look into the many depths of this problem and we look forward to resolve on the subject. There is talk of opening up even more of these Clubs across town and we do not see their being able to do so as a viable option.

Thank you for your time and response,


Brenda Smart
Vice-Chair, Spenard Community Council
~~3411 Willow Street, Spenard~~ PO Box 91313
Spenard, Alaska ~~99517-2067~~ 99509
222-3988
brendasmart@gci.net

Keep up the good work as this Bill evolves. The refusal to testify ON income speaks more than what they "say". Keep public safety in mind.

I witnessed Sat Feb 7th's 5 hours of testimony at town meetings and part of today's. Thank you for a thorough review. Brenda

NOW:

2/16/04 Submitted for HB 367 Judiciary Committee Testimony
Jacqueline S. Pickens

PINETTES, INC.

5221 Old Seward Highway, ANCHORAGE, AK 99518

PHONE (907)562-4406

STAGE NAME: _____

APPLICATION FOR EMPLOYMENT

NAME:
(LAST) (FIRST) (MI) PHONE #

SOC. SEC. NO. ADL# EXP. DATE: CELL PHONE:

DATE OF BIRTH: BIRTHPLACE:

PRESENT ADDRESS:

PERMANENT ADDRESS:

HEIGHT WEIGHT REFERRED BY: WHEN CAN YOU START:

ARE YOU PRESENTLY ATTENDING HIGH SCHOOL? YES NO WHICH SCHOOL?

***** WE DO NOT HIRE ADULTS THAT ARE STILL ATTENDING HIGH SCHOOL*****

BRIFLY STATE WHY YOU WOULD LIKE TO DANCE FOR US:

HAVE YOU EVER DANCED PROFESSIONALLY BEFORE? WHEN: WHERE:

PERSONAL REFERENCES: (LIST TWO):

NAME: ADDRESS: PHONE:

NAME: ADDRESS: PHONE:

IN CASE OF EMERGENCY, PLEASE NOTIFY:

NAME: ADDRESS: PHONE:

I certify that all statements made within are accurate. I understand that my employment may be terminated without previous notice if any of these facts are found to be misrepresented. I agree to comply with the rules of my workplace, and understand that my employment may be terminated if I break said rules. I understand that my employment will be terminated immediately if I engage in prostitution or if I am in possession of alcohol, non-prescription substances (drugs), or weapons of any kind at my workplace.

SIGNATURE: DATE:

FOR INTERVIEWERS USE ONLY:

I have reviewed this application and recommend that the applicant be hired. I have been presented with sufficient proof that the applicant is eighteen years of age or older and therefore eligible to work as a dancer in the Municipality of Anchorage.

NAME: TITLE:

SIGNATURE: DATE:

Subject: Re: important considerations before voting on HB 367

Date: Wed, 25 Feb 2004 00:30:11 -0900

From: "Sharon Parker" <mysticwisdom@acsalaska.net>

Organization: Essential Harmony

To: "Nancy Tankersley Fair" <fairwinds@gci.net>,
"Tom Anderson" <Representative_Tom_Anderson@legis.state.ak.us>,
"Lesil McGuire" <Representative_Lesil_McGuire@legis.state.ak.us>,
"Les Gara" <Representative_Les_Gara@legis.state.ak.us>,
<Representative_Jim_Holm@legis.state.ak.us>,
<Representative_Dan_Ogg@legis.state.ak.us>,
"Ralph Samuels" <Representative_Ralph_Samuels@legis.state.ak.us>,
<Representative_Max_Gruenberg@legis.state.ak.us>

CC: "Nancy Dahlstrom" <Representative_Nancy_Dahlstrom@legis.state.ak.us>,
"representative_kevin_meyer" <representative_kevin_meyer@legis.state.ak.us>

Dear House Judiciary Committee:

Please consider tougher employment criteria for these strip clubs who are perpetrating our sons and daughters, our granddaughters, nieces, nephews, grandsons, parents and grandparents, elders. Most employers offer health benefits (or unemployment), pre-employment physical, TB test, mandatory drug/alcohol testing, a background investigation prior to hire. Does the health department give periodically/random inspections? Do the employees wash their hands after dancing, table dancing before working the bar or serving the patrons non-alcoholic beverages. Are there any sanitation guidelines and who monitors/sanctions any violations, such as clean working attire, sharing their work attire, is a wash machine/dryer provided on the premises? Are the owners really concerned about what is best for their employees and patrons and why?

Is there an application for employment application, screening, interview required?

I am concerned with the amount of crime, domestic violence and child abuse already plaguing our country....I hope you vote in favor of HB367.

Sharon Parker, M.S.
Victim Advocate



Sharon Parker, M.S., CDC-1, CASA
President & Founder
Essential Harmony
Creative Immersed Counseling
Anchorage Alaska 99517 USA
907.242.3339
907.242.3339
mysticwisdom@acsalaska.net www.webspawner.com/users/essense

Add this card to your address book

Sometimes you just have to take the leap and build your wings on the way down!

Essential Harmony
Culturally Diverse Counseling and Intuitive Guidance
907.242.3339

----- Original Message -----

From: Nancy Tankersley Fair

To: Tom Anderson ; "Lesil McGuire" ; "Les Gara" ; Representative Jim Holm@legis.state.ak.us ;
Representative Dan Ogg@legis.state.ak.us ; "Ralph Samuels" ;

Subject: [Fwd: House Judiciary Committee, HB 367, public testimony February 16, 04, 1:00 PM]

Date: Mon, 16 Feb 2004 08:16:32 -0900

From: Lesil McGuire <Representative_Lesil_McGuire@Legis.state.ak.us>

Organization: Alaska State Legislature

To: Heath Hilyard <Heath_Hilyard@legis.state.ak.us>,
Vanessa Tondini <Vanessa_Tondini@legis.state.ak.us>

----- Original Message -----

Subject: House Judiciary Committee, HB 367, public testimony February 16, 04, 1:00 PM

Date: Mon, 16 Feb 2004 13:34:34 +0000

From: "Becky Roberts" <bee_happy55@hotmail.com>

To: Representative_Lesil_McGuire@legis.state.ak.us,
Representative_Tom_Anderson@legis.state.ak.us,
Representative_Jim_Holm@legis.state.ak.us,
Representative_Dan_ogg@legis.state.ak.us,
Representative_Ralph_Samuels@legis.state.ak.us,
Representative_Les_gara@legis.state.ak.us,
Representative_Max_Gruenberg@legis.state.ak.us

Dear Representative McGuire and other Judiciary committee members:

Please see the attached testimony on HB 367 - Licensing for sex-oriented businesses (strip clubs) and dancers.


This bill is a reasonable licensing procedure and an appropriate mechanism to place the burden of regulation on the owners, operators, and employees of sexually oriented businesses.

I welcome this legislation and encourage you to pass it.

Sincerely,

Rebecca Roberts, Anchorage

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|  Judiciary Committee HB 367 doc. Testimony Feb 16, 04.doc | Name: Judiciary Committee HB 367 doc. Testimony Feb 16, 04.doc Type: WINWORD File (application/msword) Encoding: base64 |
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HOUSE BILL NO.367

**IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURES – SECOND SESSION
BY REPRESENTATIVE(S) MCGUIRE, GARA**

**Introduced: 1/09/94
Referred: Labor and Commerce
Referred: Judiciary**

**A BILL
FOR AN ACT ENTITLED**

“ An Act relating to the licensing and regulation of sex-oriented businesses and sex-oriented business entertainers; relating to protection of the safety and health of and to education of young persons who perform in adult entertainment establishments; and providing for an effective date.”

Public Testimony by:
Rebecca Roberts, Anchorage, AK

Legislative Hearing Dates:
January 30, 2004, 3:15 PM
Resubmitted to the Judiciary Committee: February 16, 2004, 1:00PM

February 16, 2004

Dear Representative McGuire and other committee members:

I urge your support of HB 367 which will provide stricter licensing requirements and regulation for sexually oriented businesses and employees in order to protect school children and other youth under the age of 21.

This legislation is desperately needed to start addressing a very serious state-wide issue: The adverse effects of sexually oriented businesses such as increased crime especially sex related crimes, sexually transmitted diseases, endangerment of youth, urban blight, declining property values, and diminished quality of life.

According to the National Law Center for Children and Families numerous case studies across America show that prostitution, crime and drug use correspond with sexually oriented businesses. In particular, live nude dance clubs encourage prostitution, increase sexual assaults, and attract other criminal activity. I believe it is appropriate to regulate sexually oriented businesses differently from other commercial businesses, based on the significant negative impact caused by this industry.

I appreciate the fact that this bill will strengthen the public notification process regarding sexually oriented businesses by notifying community councils and other non-profit groups when license applications or renewals for sexually oriented businesses are submitted.

This bill is a reasonable licensing procedure and an appropriate mechanism to place the burden of regulation on the owners, operators and employees of sexually oriented businesses. There shouldn't be a fiscal note tied to this bill as DCED is under mandate to make their licensing program self-supporting thru license fees. These establishments should be paying their own way instead of the community picking up the tab. Such a licensing procedure will place an incentive on the operators to see that the sexually oriented business is run in a manner consistent with the health, safety, and welfare of youth and other patrons and employees, as well as the citizens of the communities where they locate.

I welcome this legislation and encourage you to pass it.

Thank you for your time.

Rebecca Roberts

If we are going to put in an under 21 ban, we have to have a backup bill in case it gets struck down. Please insert this suggestion at line 10 of the bill:

10 Chapter 90. Sex-Oriented Businesses and Entertainers.

- (a) It is the intent of this legislation to protect young persons who perform in adult entertainment establishments through enactment of safety and health, educational requirements.
- (b) The Department of Community and Economic Development will be the lead agency to coordinate with other State entities as necessary to implement these provisions, and shall work in consultation with knowledgeable groups and organizations that focus on the protection of women and youth.

This suggestion is based on legislation from 1997 "An Act Relating to Civil Actions...."

SCS CSSHB 58 (RLS) am S

This legislation specifically stated the intent of the legislation as well as directing the Alaska Judicial Council to consult with the Alaska Dispute Settlement Association.

Subject: Official record for House Judiciary Committee HB 367

Date: Mon, 16 Feb 2004 21:56:25 +0000

From: "Becky Roberts" <bee_happy55@hotmail.com>

To: vanessa_tondini@legis.state.ak.us

CC: fairwinds@gci.net, garag@alaska.net

Dear Vanessa,

Please include this attachment in the official record for HB 367, Judiciary Committee Meeting, 2/16/04, 1:00PM.

The attached research paper ("Drug Abuse as Primary Contributing Factor in Prostitution, Abnormal Psychology, January 28, 2004") has been submitted by Gary Apperson. This observation is from the researcher's 25 years of police duty in the Municipality of Anchorage, Alaska. He is a valuable resource regarding sex-oriented businesses (strip clubs) and their negative impact on youth. Mr. Apperson is willing to share his research and further testimony with the House Judiciary Committee in support of HB 367. He would like the committee to know that this paper is not yet published. Mr. Apperson's phone number is (907)348-0699.

Please forward to all Judiciary committee members.

Thank you,

Rebecca Roberts
(907)229-6137

From: Gary Apperson <garag@alaska.net>
To: Becky Roberts <bee_happy55@hotmail.com>
Subject: Street Level Research
Date: Sun, 15 Feb 2004 20:47:24 -0900

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Becky Roberts wrote:

Thanks!

Becky

From: Gary Apperson <garag@alaska.net>
To: bee_happy55@hotmail.com
Subject: Test message from Gary
Date: Sun, 15 Feb 2004 20:33:40 -0900

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DRUG ABUSE AS PRIMARY CONTRIBUTING FACTOR IN PROSTITUTION

Drug Abuse as Primary Contributing Factor in Prostitution

Gary Apperson

Abnormal Psychology

January 28, 2004

Professor Longval