

**ORDINANCE 2015-10 OF THE TOWNSHIP OF BERLIN, COUNTY OF CAMDEN,  
AND STATE OF NEW JERSEY, REVISING, AMENDING AND SUPPLEMENTING  
CHAPTER 268 OF THE CODE OF THE TOWNSHIP OF BERLIN ENTITLED  
“SEXUALLY ORIENTED BUSINESSES”**

**WHEREAS**, on September 9, 1996, the Township of Berlin (“Township”) adopted Ordinance No. 1996-26, which provided for regulations and restrictions governing sexually oriented businesses; and

**WHEREAS**, the owners of the Red Barn Bookstore and Berlin News Agency, both of which qualify as sexually oriented businesses under the aforesaid ordinance, have instituted litigation in Camden County Superior Court challenging the hours of operation restriction set forth in Section 268-5(D) of the Township Code, as well as N.J.S.A. 2C:33-12.2, on constitutional grounds alleging that same violate their rights under the First Amendment despite the fact that (1) municipalities are specifically authorized pursuant to N.J.S.A. 2C:33-12.2(c) to restrict the hours of operation of sexually oriented businesses; and (2) similar hours of operation restrictions have been upheld by the Third Circuit Court of Appeals in Ben Rich Trading, Inc. v. City of Vineland, 126 F.3d 155 (3d Cir. 1997), and Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware, 10 F.3d 123 (3d Cir. 1993), the District Court of New Jersey in 832 Corporation, Inc. v. Gloucester Township, 404 F. Supp.2d 614 (D.N.J. 2005), and various other courts because of the widely recognized adverse secondary effects caused by sexually oriented businesses; and

**WHEREAS**, in granting a request filed on behalf of the owners of the Red Barn Bookstore for a stay of enforcement of pending municipal court proceedings for violating, *inter alia*, the aforesaid hours of operation restriction, the trial court has preliminarily ruled that the Township may not be able to point to sufficient reasons to justify its imposition of the Ordinance; and

**WHEREAS**, as a result of the aforesaid ruling, the Township Solicitor has recommended certain changes to Chapter 268; and

**WHEREAS**, both the United States Supreme Court in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), and the New Jersey Supreme Court in Hamilton Amusement Center v. Verniero, 156 N.J. 254 (1998), have stated that the First Amendment does not require a legislative body to conduct new studies or produce evidence independent of that already generated by other cities before enacting regulations affecting sexually oriented businesses so long as whatever evidence it relies upon is reasonably believed to be relevant to the problem; and

**WHEREAS**, pursuant to N.J.S.A. 40:48-2, the Governing Body is authorized to enact and amend ordinances as deemed necessary for the preservation of the public health, safety and welfare and as may be necessary to carry into effect the powers and duties conferred and imposed upon the Township by law;

**NOW THEREFORE BE IT ORDAINED**, by the Mayor and the Township Council of the Township of Berlin, as follows:

**SECTION 1:** Chapter 268 of the Township Code, entitled “Sexually Oriented Businesses,” is hereby deleted in its entirety and replaced with a new Chapter 268, which shall provide as follows:

## **CHAPTER 268 – SEXUALLY ORIENTED BUSINESSES**

### **Article I - General Provisions**

#### **§ 268-1. Purpose; findings.**

A. It is the purpose of this ordinance to regulate sexually oriented businesses in order to promote the health, safety, morals, and general welfare of the residents of the Township of Berlin, and to establish reasonable and uniform restrictions and regulations to prevent the deleterious effects of sexually oriented businesses within the Township. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is neither the intent nor effect of this ordinance to deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this ordinance to condone or legitimize the distribution of obscene material.

B. Based on evidence concerning the adverse secondary effects that can be caused by sexually oriented businesses and adult uses as identified in the cases of City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), Young v. American Mini Theatres, 427 U.S. 50 (1976), Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), City of Erie v. Pap’s A.M., TDA “Kandyland”, 529 U.S. 277 (2000), and City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2001), as well as Hamilton Amusement Center v. Verniero, 156 N.J. 254 (1998), wherein the New Jersey Supreme Court specifically recognized the emergence of a “national consensus regarding the secondary effects of sexually oriented businesses” and acknowledged that the United States Supreme Court has recognized that sexually oriented businesses can cause concrete and non-speculative side effects that government can regulate, including promoting juvenile delinquency, contributing to an overall increase in crime, creating an environment that leads to the general deterioration of neighborhoods, and lowering property values, and Chez Sez VIII, Inc. v. Poritz, 297 N.J. Super. 331 (App. Div.), *certif. denied*, 149 N.J. 409, *cert. denied*, 522 U.S. 932 (1997), wherein the Appellate Division noted that in enacting N.J.S.A. 2C:33-12.2, the New Jersey State Legislature was aware of the dangers to public health, particularly the current concern regarding the spread of AIDS, that such anonymous sexual encounters present, and the measures that other jurisdictions have taken in an attempt to minimize these dangers, and that the Legislature was cognizant of the fact that private booths which facilitate sexual activity by patrons are conducive to the spread of sexually transmitted diseases, as well as in other cases upholding regulations of nudity and the time, place and manner of operation of sexually oriented business such as Sensations, Inc. v. City of Grand Rapids, 526 F.3d 291 (6<sup>th</sup> Cir. 2008), Déjà vu of Cincinnati, L.L.C. v. Union Township, 411 F.3d 777 (6<sup>th</sup> Cir. 2005), Gammoh v. City of La

Habra, 395 F.3d 1114 (9<sup>th</sup> Cir. 2005), 832 Corporation, Inc. v. Gloucester Township, 404 F. Supp.2d 614 (D.N.J. 2005), Tollis, Inc. v. County of San Diego, 505 F.3d 935 (9<sup>th</sup> Cir. 2007), *cert. denied*, 533 U.S. 1066 (2008); World Wide Video of Washington, Inc. v. City of Spokane, 368 F.3d 1186 (9<sup>th</sup> Cir. 2004), SOB, Inc. v. County of Benton, 317 F.3d 856 (8<sup>th</sup> Cir. 2003), G.M. Enterprises, Inc. v. Town of St. Joseph, 350 F.3d 631 (7<sup>th</sup> Cir. 2003), Heideman v. South Salt Lake City, 348 F.3d 1182 (10<sup>th</sup> Cir. 2003), Center for Fair Public Policy v. Maricopa County, 336 F.3d 1153 (9<sup>th</sup> Cir. 2003), Richland Bookmart, Inc. v. Nichols, 278 F.3d 570 (6<sup>th</sup> Cir. 2002), Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358 (11<sup>th</sup> Cir. 1998), ZJ Gifts D-2, LLC v. City of Aurora, 136 F.3d 683 (10<sup>th</sup> Cir. 1998), Ben Rich Trading, Inc. v. City of Vineland, 126 F.3d 155 (3d Cir. 1997), Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731 (1<sup>st</sup> Cir. 1995), Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware, 10 F.3d 123 (3d Cir. 1993), the legislative history accompanying the enactment of N.J.S.A. 2C:33-12.1 and 12.2, which specifically authorizes municipalities to adopt hours of operation restrictions, and on the studies and reports prepared by Alan C. Weinstein and Richard D. McCleary entitled The Association of Adult Businesses with Secondary Effects: Legal Doctrine, Social Theory and Empirical Evidence, 29 *Cardozo Arts & Entertainment Law Journal* 565 (2012), and Do "Off Site" Adult Businesses Have Secondary Effects? Legal Doctrine, Social Theory and Empirical Evidence, the Governing Body finds:

- (1) Sexually oriented businesses, as a category of commercial uses, are often associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, and sexual assault and exploitation;
- (2) Illegal and unsanitary acts involving nudity, including lewd conduct, masturbation, oral and anal sex, occur at unregulated sexually oriented businesses, including those businesses which provide private or semi-private rooms, booths, or cubicles for viewing films, videos, or live performances;
- (3) Each of the foregoing negative secondary effects constitutes a harm which the Township has a substantial governmental interest in preventing and/or abating. This substantial governmental interest, which is the rationale for this ordinance, exists independent of any comparative analysis between sexually oriented businesses and non-sexually oriented businesses. Additionally, the Township's interests in regulating sexually oriented businesses extends to preventing future secondary effects of either current or future sexually oriented businesses that may locate within the Township; and
- (4) The general welfare, health, morals and safety of the residents of the Township will be promoted by the enactment of this ordinance.

## **§ 268-2. Definitions.**

As used in this chapter, the following terms shall have the meanings indicated:

**ADULT BOOKSTORE**

An establishment, from which minors are excluded, having as a substantial or significant portion of its stock-in-trade books, magazines, or other periodicals, films or other viewing material or sexual paraphernalia which are distinguished or characterized by their emphasis on matters depicting, describing or related to specified sexual activities or specified anatomical areas, as defined herein, or an establishment in which a segment or section of the premises is diverted to the sale, rental, display or viewing of such material.

**ADULT MINI MOTION-PICTURE/LIVE ENTERTAINMENT THEATER**

An enclosed building with a capacity of less than 50 persons, from which minors are excluded, used for presenting material, films, movies, video or live shows, distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, as defined herein, for observation by patrons therein. This definition shall also apply to an enclosed building which contains any number of individual viewing booths not in excess of the maximum permitted by separate ordinance of the Township of Berlin, which a person may privately or individually view material, films, movies, videos or live shows distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas as defined herein.

**PERSON**

Any individual, proprietorship, partnership, corporation, association, or other legal entity.

**SEXUALLY ORIENTED BUSINESS**

Shall have the meaning as set forth in N.J.S.A. 2C:33-12.2a(1)(a) and N.J.S.A. 2C:34-6a. In addition, this definition shall include a business engaged in the sale of obscene material as defined in N.J.S.A. 2C:34-2 or a business engaged in the sale of objects, material or graphic representations depicting a specified sexual activity or specified anatomical area, as defined herein.

**SPECIFIED ANATOMICAL AREA**

Shall have the meaning set forth in N.J.S.A. 2C:33-12.2a(3) and N.J.S.A. 2C:34-6c.

**SPECIFIED SEXUAL ACTIVITY**

Shall have the meaning set forth in N.J.S.A. 2C:33-12.2a(4) and N.J.S.A. 2C:34-6d.

**Article II – Application/License**

**§ 268-3. Approval or disapproval of application.**

A. Upon receipt of an application for an adult use as described in this chapter, the governing body for the Township of Berlin shall proceed to consider the application and shall either approve or disapprove the issuance of a license to said applicant.

B. The decision of the governing body for the Township of Berlin in approving or disapproving this application shall be taken no later than the second regular meeting of the governing body following submission of the application and payment of the required fees by the applicant. A failure to take such action within such time by the governing body shall constitute an approval of the application. An application shall not be considered complete, and no action shall be taken thereon, until the license fee shall have been paid.

C. If the application is approved, the governing body shall authorize the Township Clerk to issue the necessary license. If the application is disapproved, the applicant shall be notified in writing of the disapproval and the reasons therefor. The applicant, upon being advised of the denial of his application, may, within 10 days of denial, request in writing a hearing before the governing body, at which time the applicant shall be afforded an opportunity to dispute or disprove the reasons for said denial at the hearing provided. The applicant may be represented by an attorney at said hearing. The governing body shall either affirm or deny the application within 15 days after the date of the hearing unless there is an extension of time agreed to by both the applicant and the governing body.

#### **§ 268-4. Licensing requirements.**

A. No person shall maintain, operate or conduct an adult use business as defined herein without having first obtained a license for such use.

B. An application for such a license under this chapter shall be made to the Township Clerk on forms to be supplied for this purpose and shall be subscribed and sworn to by the applicant. The application for the license shall contain the following:

- (1) Name and address of the owner of the premises; the name and address of the applicant if different than the owner, i.e., lessee.
- (2) Name under which the business is to be operated.
- (3) Detailed description of the type of adult use business to be conducted on the premises.
- (4) Hours of operation.
- (5) Information indicating whether the applicant has ever been convicted or pleaded guilty to a crime relating to narcotics or a controlled dangerous substance as defined in the statutes of the State of New Jersey, or a crime pertaining to gambling or gambling in violation of the statutes of the State of New Jersey, or a crime involving moral turpitude.
- (6) Plan showing distance from other uses/zoning as provided in §268-9.

(7) In the case of an adult use which contains viewing booths, seats, coin-operated machines or similar devices, a separate application shall be filed pursuant to Chapter 83, Article I, Coin-Operated Amusement Devices.

(8) Every application for a license to engage in an adult use of the type governed by this Chapter shall be filed at least 30 days prior to the date on which the operation is proposed to commence.

**§ 268-5. License term; transferability; renewal.**

A. All licenses issued pursuant to this chapter shall be for a term of one year, commencing on January 1 and expiring on December 31 of the year of issuance. The license fee shall be prorated for such use commencing less than one year from the date of January 1.

B. A license may not be transferred from one owner/applicant to a new owner/applicant without the filing of an application by the new owner/applicant with the Township pursuant to the requirements of this chapter. There shall be a fee of \$100 for all transfers.

C. All licenses are required to be renewed annually by submission of the applicable fee as set forth in this Chapter.

**§ 268-6. Revocation of license.**

A. At any time after the granting of a license under this chapter, the governing body for the Township of Berlin, in the exercise of its reasonable discretion, may revoke the license if it is determined a violation of any of the following has occurred:

(1) False or misrepresented information on the application furnished by the applicant.

(2) Failure to maintain premises in accordance with the laws of the State of New Jersey or the ordinances of the Township of Berlin.

(3) Violation of any of the provisions of this Chapter regulating sexually oriented businesses and adult uses.

(4) Such other valid and sufficient cause as may be determined by the Governing Body.

B. Upon being advised of a revocation of a license, the licensee may request a hearing and be afforded an opportunity to dispute or disprove the reasons for said revocation at said hearing. The licensee shall request said hearing within 14 days of the notice of revocation. The licensee may be represented by an attorney at said hearing. The Governing Body shall either affirm or reverse its decision in revoking said license within 15 days of the date of said hearing, unless there is an extension of time agreed to by both the licensee and the Governing Body.

**§ 268-7. Fees.**

- A. The application fee for a license shall be \$100.
- B. All adult bookstores, similar adult uses or sexually oriented businesses shall be required to pay an annual fee for the license of \$100. This fee is in lieu of the mercantile license fee and represents the fair cost for administering the regulation of sexually oriented businesses and adult uses covered under this Chapter.

**Article III – Regulations**

**§ 268-8. Regulations.**

Every licensee of an adult use as defined in this chapter shall comply with the following regulations as applicable:

- A. The licensed premises and all activities conducted therein shall in all respects comply with the laws of the State of New Jersey and the ordinances of the Township of Berlin.
- B. No persons under the age of 18 shall be admitted to any licensed premises at any time for any purpose. The licensee shall conspicuously post a sign giving notice of this regulation.
- C. The license to conduct said adult business shall be posted in a conspicuous place on the premises.
- D. The hours of operation for an adult use as defined in this chapter shall not be earlier than 9:00 a.m. nor later than 12:00 midnight, prevailing time, on weekdays and Saturdays. All licensed premises shall be closed on Sundays.
- E. No smoking is permitted in any adult mini motion-picture/live entertainment theater at any time. No consumption of alcoholic beverages is permitted at any time in any adult use as defined in this chapter.
- F. No licensee shall cause or permit any premises licensed under this Chapter to be operated in such a manner as to constitute a nuisance as defined in N.J.S.A. 2C:33-12, or as defined pursuant to the ordinances of the Township of Berlin.
- G. All licensed premises with a coin-operated machine or machines or other similar type of devices shall only be permitted by issuance of a separate currently valid license by the Township of Berlin pursuant to Chapter 83, Article I, Coin-Operated Amusement Devices.
- H. Any police officer, health officer, Uniform Construction Code or Subcode Official, and Zoning Officer, any Property Maintenance Officer, or similar authorized official of the Township of Berlin shall be authorized to enter such licensed premises at any time for

purposes of inspection and/or enforcement of the provisions of this chapter and the laws of the State of New Jersey and the ordinances of the Township of Berlin, as applicable.

**§ 268-9. Location restrictions.**

A. No person shall operate an adult bookstore, similar adult use or sexually oriented business within 1,000 feet of an existing adult bookstore, similar adult use or sexually oriented business, or any church, synagogue, temple or other place of public worship, or any elementary or secondary school or any school bus stop, or any municipal or county playground or place of public resort and recreation, or within 1,000 feet of any area zoned for residential use, or within 1,000 feet of any premises licensed for the sale or distribution of alcoholic beverages. The foregoing distance limitation shall be measured by a straight line drawn from the nearest point of the lot boundary on which the proposed adult bookstore, adult use or sexually oriented business is to be located to the nearest point of the lot or district boundary, as the case may be, of the other use or district, and such uses, district boundary lines and dimensions shall be indicated on a submitted plan by the person making an application for license to conduct such adult use.

B. All sexually oriented businesses must be located in a freestanding building which will include a buffer zone to separate it from all other businesses, said perimeter buffer being at least 50 feet in width with plantings, fence or other physical divider along the outside of the perimeter sufficient to impede the view of the interior of the premises in which the business is located.

C. Off-street parking shall be provided at the ratio required pursuant to Chapter 200, Land Use and Development, and Chapter 340, Zoning.

D. Any sign shall meet the requirements specified for retail/commercial businesses in Chapter 200, Land Use and Development, and Chapter 340, Zoning; however, no specified anatomical areas or specified sexual activity shall be shown, described or displayed on any sign, advertisement or exhibit that is visible from the outside of the building premises.

E. The interior of the adult use building shall be designed so that no interior contents of the building are visible at any time from the outside through windows, door openings or in any other manner.

F. The interior of any building in which an adult use is located shall be adequately lighted and ventilated and shall be constructed so that every portion thereof is readily visible without obstruction to the clerk or other person in charge of the building from the counter, booth, cash register or other place where such clerk or employee is normally situated.

G. All applicable BOCA code requirements, applicable health, safety and welfare ordinance requirements and other applicable Chapter 200, Land Use and Development, and Chapter 340, Zoning, requirements shall be satisfied by the applicant.

**Article IV – Enforcement**

**§ 268-10. Violations and penalties.**

A. Any person, firm, or corporation violating any of the provisions of this chapter shall, upon conviction for such violation, be fined a sum not exceeding \$2,000 or committed to the county jail for a term not exceeding 30 days, or both, at the discretion of the court.

B. Each and every day in which a violation of any provision of this chapter exists shall constitute a separate violation.

**SECTION 2:** This Ordinance, which does not alter or amend any regulation, restriction and/or licensing requirement of any previous version of this Chapter, shall apply retroactively to any currently existing person and/or business who has heretofore operated pursuant to any previous version of this Chapter and/or in accordance with any license issued thereunder.

**SECTION 3:** All Ordinances or parts of Ordinances inconsistent with this Ordinance are hereby repealed to the extent of such inconsistency.

**SECTION 4:** If the provisions of any section, subsection, paragraph, subdivision, or clause of this Ordinance shall be judged invalid by a court of competent jurisdiction, such order of judgment shall not affect or invalidate the remainder of any section, subsection, paragraph, subdivision, or clause of this Ordinance.

**SECTION 5:** This Ordinance shall take effect twenty (20) days after final adoption and publication as required by law.

Introduced: November 23, 2015

Notice is hereby given that the foregoing Ordinance was introduced and passed upon first reading at a meeting of the Mayor and Council of the Township of Berlin, Camden County, New Jersey on November 23, 2015 and the same was ordered published pursuant to statute. Said ordinance will be further considered for final adoption at a meeting of the Mayor and Council of the Township of Berlin on December 14, 2015 at 6:30 p.m. at the Berlin Township Municipal Hall, 135 Route 73 South, West Berlin, NJ.

Catherine Underwood  
Township Clerk