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# MEMORANDUM

**TO:** Melissa Cordeiro, Town Clerk (for distribution to Town Council)  
**CC:** Hon. Steven Contente, Town Administrator  
**FROM:** Amy H. Goins, Assistant Town Solicitor  
**DATE:** March 23, 2023  
**SUBJECT:** Petition re: Amending the Definition of Adult Entertainment

TOWN COUNCIL  
MAR 29 2023  
MEETING

As you know, the Council recently received a petition from Mr. Robert Botelho requesting an amendment to the definition of “adult entertainment” within the Zoning Ordinance. At the Council’s request, we are providing this memorandum to offer some context and advice relative to this request.

## Procedure for Zoning Ordinance Amendments

At the outset, it should be noted that although any resident may ask the Council to amend any portion of the Code of Ordinances, proposed amendments to the Zoning Ordinance are subject to the process for review and approval set forth in state law and further outlined in Article II, Division 2 of the Zoning Ordinance. Further, the Town’s schedule of fees set forth at Sec. 11-1 of the Code provides that a petition for a change of zoning requires a \$1,000 application fee. Mr. Botelho’s petition was not accompanied by an application fee. Consequently, the Council need not take any action on the Petition or could treat this petition as an informal request to amend the Zoning Ordinance rather than a formal request which must be referred to the Planning Board for study. Action on this request, one way or another, is at the sole discretion of the Council.

## Substance of the Petition

Mr. Botelho’s petition sets forth the current definition of “adult entertainment” alongside his proposed definition, as follows (in redline):

*Adult entertainment* means any commercial establishment or business where any individual, employee, operator, or owner exposes genitals, pubic regions, buttocks, anus, anal cleft or cleavage, or female breasts at or below the areola, or employs any device or covering which is intended to give the appearance of or

simulate genitals, pubic regions, buttocks, anus, anal cleft or cleavage or female breasts at or below the areola for viewing by patrons. and/or engages in the act of entertaining with or without music by dancing moving or behaving in a manner consistent with mimicking sexual action or seduction with or without physical contact of others with the intent to amuse, please, sexually stimulate or provide sexual gratification for viewing pleasures of legal adults within or outside of the establishment.

Because adult entertainment is a constitutionally-protected form of expression, courts have held that governments may regulate adult entertainment consistent with the First Amendment only where such activity is specifically defined. See DiRaimo v. City of Providence, 714 A.2d 554 (R.I. 1998). In DiRaimo, the Rhode Island Supreme Court noted that the United States Supreme Court had set forth the test for whether a zoning restriction on adult entertainment passes muster under the First Amendment. Id. at 563 (citing City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, reh. den. 475 U.S. 1132 (1986)). “‘Content neutral’ time, place and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.” Id. (citing City of Renton, 475 U.S. at 47). The Rhode Island Supreme Court also held that the Rhode Island Constitution provides independent protections for free speech activities, including adult entertainment, stating as follows:

“We hold that when the guarantee of free speech in article 1, section 21 of the Rhode Island Constitution is implicated by an adult-entertainment ordinance which is content-neutral and allows for reasonable alternative venues for such adult entertainment, the government has the further burden of proving that the adult-entertainment activity regulated by the ordinance is a regular and substantial part of a business's course of conduct... We believe this additional state constitutional requirement will insure that such a zoning regulation is narrowly tailored to support the asserted purpose of the ordinance and to affect only those categories of activity shown to produce unwanted secondary effects and not to bring within its purview other legitimate forms of expression characterized by only occasional or incidental adult-entertainment activity.” Id. at 565 n\*.

The current definition of “adult entertainment” is narrowly tailored and leaves very little room for guessing what activity falls within this definition. By contrast, Mr. Botelho’s proposed language contains the ambiguous phrase “consistent with mimicking sexual action or seduction.” As Vice Chairwoman Parella noted during the March 1 Council meeting, this definition could conceivably extend to performances of cheerleading squads. Steven Brown, Executive Director of the Rhode Island chapter of the American Civil Liberties Union, noted in correspondence to the Council that “a vast array of classical and contemporaneous arts performances would suddenly be deemed ‘adult entertainment’ on par with nude dancing in a bar” under Mr. Botelho’s proposed language. We agree with this assertion and interpretation.

#### Additional Licensing Regulations for Adult-Only Establishments

The Council should be aware that the Code presently contains additional licensing regulations for adult-only establishments. Section 5-71 of the Code defines an “adult-only establishment” as

“any establishment customarily not open to the public at large but only to one or more classes of the public or which excludes any minor by reason of age as a prevailing practice.” This definition extends to novelty stores, which generally do not admit minors. Section 5-96 of the Code sets forth additional licensing requirements for “adult-only establishments offering shows, exhibitions or similar forms of entertainment.” This section authorizes the Council “to impose other requirements, terms and conditions on a permit, which are reasonably necessary to control the secondary effects of adult-only entertainment.” Additionally, under Sec. 17-54 of the Code, nudity is not permitted on premises where alcoholic beverages are either offered for sale or allowed to be brought onto the premises for consumption.

#### Proximity Restrictions on Adult Entertainment

We have also been asked to offer an opinion on whether the Town can legally adopt proximity restrictions relating to adult entertainment. In fact, the Zoning Ordinance already contains such a restriction. The Permitted Use Table, found at Sec. 28-82 of the Zoning Ordinance, provides that “adult entertainment” is prohibited in all zoning districts except for the M (Manufacturing) zone, where it is permitted by right. Note 4 of the Table provides that this use is permitted in the M zone “only if not within 200 feet from a residential zone or residential use.”

However, as discussed above, such proximity restrictions are only lawful to the extent that they are tied to a definition of adult entertainment that passes muster under the First Amendment.

#### Conclusion

As noted above, the Council has the ultimate discretion to act or not act in this matter. It is our opinion that Mr. Botelho’s proposed definition of adult entertainment would likely be invalidated by a reviewing court in the event of a lawsuit. In that event, the Town would also be liable for attorney fees. Further, it is our opinion that the current definition of adult entertainment in the Zoning Ordinance is sufficient to cover the traditional establishments that municipalities seek to strictly limit. Consequently, we would not recommend changing the definition of adult entertainment as proposed.