

FAILED

COUNCIL BILL NO. 5917

ORDINANCE NO. 3417

ORDINANCE

AN ORDINANCE ADOPTING A NEW CHAPTER 5.86, AMENDING SECTION 18.08.060, AND REPEALING AND REENACTING CHAPTER 9.12 OF THE MANITOU SPRINGS MUNICIPAL CODE CONCERNING SEXUALLY ORIENTED BUSINESSES

WHEREAS, the City Council finds and determines that sexually oriented businesses produce adverse secondary effects on the public health, safety and welfare;

WHEREAS, such adverse secondary effects include increased rates of certain crimes, including prostitution, robbery, assault, theft, loitering, pandering and public intoxication, the spread of sexually transmitted diseases, the debasement of both men and women, a decrease in property values for surrounding properties, and noise, parking and traffic problems;

WHEREAS, such adverse secondary effects occur most often in the areas immediately surrounding such businesses;

WHEREAS, the City Council, in enacting this ordinance, expressly relies on the findings of the 10th Circuit Court of Appeals in *Z.J. Gifts D-2, LLC v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998), *reversed on other grounds at* 311 F.3d 1220 (10th Cir. 2002), *reversed at* 541 U.S. 774 (2004), and *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272 (10th Cir. 2002), concerning the adverse secondary effects of sexually oriented businesses on communities in Colorado and elsewhere;

WHEREAS, the City Council, in enacting this ordinance, expressly relies on the findings of the United States Supreme Court in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *Boos v. Barry*, 485 U.S. 312 (1988), concerning the adverse secondary effects of sexually oriented businesses on surrounding areas; and

WHEREAS, to reduce the adverse secondary effects caused by sexually oriented businesses in the City, the City Council deems it appropriate and necessary to amend its current regulations and to adopt new regulations for sexually oriented businesses.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MANITOU SPRINGS, COLORADO, THAT:

Section 1: Title 5 of the Manitou Springs Municipal Code is hereby amended by the addition of a new Chapter 5.86, which shall read as follows:

**Chapter 5.86
Sexually Oriented Businesses**

5.86.010 Purpose.

The purpose of this Chapter is to promote and protect the public health, safety and welfare by regulating sexually oriented businesses through the establishment of reasonable and uniform

regulations to reduce the adverse secondary effects of sexually oriented businesses within the City. This Chapter is not intended to limit or restrict the content of any communicative materials,

including sexually oriented materials. This Chapter is not intended to restrict or deny access by adults to sexually oriented materials protected by the First Amendment of the United States Constitution or Article II, § 10 of the Colorado Constitution or to deny access of distributors or exhibitors of sexually oriented entertainment to their intended market. Finally, this Chapter is not intended to condone or legitimize the distribution of obscene material.

5.86.20 Definitions.

For purposes of this Chapter, the following terms shall have the following meanings, unless the context indicates otherwise:

“Adult arcade” means any commercial establishment in which the public is permitted or invited where, for any form of consideration, one (1) or more motion picture projectors, slide projectors, image or virtual reality producing machines or similar machines, for viewing by five (5) or fewer persons per machine at any one time, are used regularly to show films, motion pictures, video cassettes, slides, digital images, electronic reproductions or photographs describing, simulating or depicting specified sexual activities or specified anatomical areas.

“Adult store” means any commercial establishment which, as one of its principal business purposes, offers for sale or rent for any form of consideration one or more of the following: (1) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides, compact discs, digital video discs (DVDs), digital images or other visual representations which are characterized by their emphasis on the depiction or description of specified sexual activities or specified anatomical areas; or (2) instruments, devices or paraphernalia designed for use in connection with specified sexual activities.

“Adult cabaret” means a nightclub, bar, restaurant or similar commercial establishment which, for any form of consideration, regularly features live performances which are characterized by the exposure of specified anatomical areas or by the exhibition of specified sexual activities.

“Adult motion picture theater” means a commercial establishment which is characterized by the showing, for any form of consideration, of films, motion pictures, video cassettes, slides, compact discs, digital video discs (DVDs), digital images or other visual representations that have an emphasis on depicting or describing specified sexual activities or specified anatomical areas.

“Adult theater” means a theater, auditorium or similar commercial establishment which, for any form of consideration, regularly features live performances which are characterized by an emphasis on exposure of specified anatomical areas or specified sexual activities.

“Convicted” means having been found guilty by a judge or a jury or entering a guilty plea or a plea of *nolo contendere*, and includes deferred judgments, deferred sentences, deferred adjudications and plea bargains, whether or not an appeal of such conviction is pending; excluding any conviction overturned or vacated by appeal or other force of law.

“Employee” means a person who works or performs work or service in or for a sexually oriented business on a full-time, part-time or contract basis, with or without compensation, regardless of whether such person is designated as an employee, independent contractor, agent, volunteer or any

other status; excluding any person on the premises for repair or maintenance of the premises or for delivering or removing tangible personal property to or from the premises.

“Licensed premises” means the building or structure in which a licensed sexually oriented business is operating.

“Sexually oriented business” means an adult arcade, adult store, adult cabaret, adult motion picture theater or adult theater, except an establishment where a medical practitioner, psychologist, psychiatrist or similar professional licensed by the State of Colorado engages in approved and recognized sexual therapy.

“Specified anatomical areas” means any of the following: (1) human genitals, pubic region, buttocks, anus or female breasts below a point immediately above the top of the areola, which are not completely and opaquely covered; or (2) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

“Specified crime” means and includes the following crimes committed under the penal or criminal code of any municipality, county, state or country: sex crimes against children; sexual abuse; sexual assault; possession or distribution of child pornography; distribution of an illegal controlled substance; prostitution, promotion of prostitution or pandering; and organized crime if such organized crime is committed within the premises of a sexually oriented business in the City or elsewhere.

“Specified sexual activities” means any of the following:

1. Fondling or other intentional touching of human genitals, pubic region, buttocks, anus or female breasts;
2. Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation and sodomy;
3. Masturbation, actual or simulated; or
4. Human genitals in a state of sexual stimulation or arousal; human excretory functions as part of or in connection with any of the activities set forth in subsections (1) through (4) hereof.

5.86.030 Licenses required.

All sexually oriented businesses in the City shall be licensed as set forth in this Chapter, and it shall be unlawful for any person to operate a sexually oriented business in the City without a valid operator license provided for in this chapter and a valid business license pursuant to this title.

5.86.040 Operator license application.

A. Applicants for a sexually oriented business operator license shall submit a written application to the City Clerk which includes the following:

1. The name, address, telephone number and date of birth of the applicant and, if applicable, each of its officers, partners, directors and registered agents;
2. The trade name of the applicant and copies of all documents recording the trade name, including the trade name affidavit;

3. The name of any other sexually oriented business in which any officer, director or partner has a financial interest;
4. The address of the premises to be licensed;
5. If the applicant is a corporation, copies of the articles of incorporation, bylaws and last annual report;
6. Copies of documents demonstrating that the applicant has a legal right to possession of the premises to be licensed;
7. A sketch, drawing or diagram drawn to scale and showing the configuration of the premises, including total floor area to be occupied by each sexually oriented business; and
8. The type or types of sexually oriented business proposed, such as an adult store, adult cabaret, adult theater or adult motion picture theater; and

B. Each application shall be verified and acknowledged to be true by the applicant or the managing partner, president or other officer having the authority to sign for the applicant.

5.86.050 Background investigations.

A. Upon receipt of a completed application, the City Clerk shall perform a background investigation of the applicant and its officers, directors and partners, and the information contained in the application.

B. The City Clerk may investigate any fact related to any of the criterion set forth in this Chapter that may be relevant to determine the eligibility of the applicant for a sexually oriented business license.

C. The City Clerk may seek and obtain the assistance of law enforcement agencies in conducting the background investigation.

D. The background investigation shall be completed within forty-five (45) days of receipt of the completed application.

5.86.060 Issuance or denial.

A. Within ten (10) days of the completion of the background investigation, the City Clerk shall either issue the sexually oriented business operator license or issue a written statement of denial. The license or statement of denial shall be sent via United States mail, postage prepaid, to the applicant at the address provided on the application. The City Clerk shall issue the license unless one or more of the following is true:

1. The applicant has not paid all required fees under this Chapter;
2. The applicant or any of its officers, directors or partners is under eighteen (18) years of age;
3. The applicant is not qualified to conduct business under applicable state or federal law or City ordinances;

4. The applicant has knowingly provided false information to the City on an application for a sexually oriented business license;
5. The location of the proposed sexually oriented business does not comply with the location requirements set forth in the City's zoning ordinance;
6. The premises in which the sexually oriented business is proposed to be located does not comply with applicable City ordinances, such as the building code, electrical code or fire code;
7. The applicant is delinquent in the payment of any taxes owed to the City; or
8. The applicant or any of its directors, officers or partners has been convicted of a specified crime in the two (2) years preceding the date of the application; or

B. Within ten (10) days of the date of a written statement of denial, the applicant may submit a written request that the City Clerk schedule a public hearing before the City Council on the application. The hearing shall be held at the next regularly scheduled City Council meeting occurring at least ten (10) days after receipt of the written request.

C. At the hearing, the applicant may present additional evidence, either documentary or through witness testimony, which is relevant to the applicant's eligibility for a sexually oriented operator license.

D. At the conclusion of the hearing or within ten (10) days thereafter, the City Council shall either order that the City Clerk issue the sexually oriented operator license, or issue a written order denying the application for the sexually oriented operator license.

E. If the City Council denies the application for a sexually oriented operator license, the City Council's decision shall be final, subject to judicial review pursuant to Rule 106(a)(4) of the Colorado Rules of Civil Procedure.

5.86.070 Term of license; renewal.

A. All sexually oriented operator licenses issued under this Chapter shall be valid for one (1) year from the date of issuance, unless revoked or suspended as provided in this Chapter.

B. Written application for renewal of a sexually oriented operator license shall be filed with the City Clerk at least sixty (60) days prior to the expiration of the current license, together with the applicable annual license fee. If no application for renewal is timely filed, the licensee has waived its option to renew the license and must re-apply for a new license.

C. Applications for renewal shall include the same information as an original application, except as the City Clerk deems redundant.

D. The procedures for renewal license applications shall be the same as the procedures for new license applications.

5.86.080 License nontransferable.

A sexually oriented operator license issued under this Chapter is nontransferable. By way of example but not limitation, a new sexually oriented operator license shall be required upon: the sale, lease or sublease of the sexually oriented business or the licensed premises; the transfer by sale, exchange or similar means of a controlling interest in the sexually oriented business; or the establishment of a trust, gift, or similar legal device which transfers ownership or control of the sexually oriented business or the licensed premises, other than transfer by bequest or other operation of law upon the death of the person possessing ownership or control.

5.86.090 Suspension and revocation.

A. The City Clerk may suspend or revoke any sexually oriented operator license issued under this Chapter if the City Clerk receives reliable information to establish that:

1. A nuisance is being maintained on the licensed premises;
2. The licensed premises are unsanitary as certified by the El Paso County Department of Health;
3. The licensed premises are unsafe as certified by the City's building official, the fire marshal or the fire chief;
4. The licensee has knowingly permitted on the licensed premises: the possession, sale or use of illegal controlled substances; any specified sexual activity; or prostitution;
5. The licensee or any of its officers, directors, partners or employees has been convicted of a specified crime during the term of the license; or
6. The licensee knowingly provided false information on an application for a sexually oriented business license or renewal of such a license.

B. At least twenty (20) days before the City Clerk suspends or revokes any sexually oriented operator license, the City Clerk shall provide written notice to the licensee, via United States mail, postage prepaid, to the address provided on the most recent application, of the allegations supporting the suspension or revocation.

C. During the twenty (20) day period, the licensee may file a written request for a stay of the suspension or revocation pending a public hearing before the City Council on the allegations to support the suspension or revocation.

D. The public hearing shall be held at the next regularly scheduled City Council meeting at least ten (10) days after receipt of the request.

E. At the hearing, the applicant may present additional evidence, either documentary or through witness testimony, which is relevant to the suspension or revocation.

F. At the conclusion of the hearing or within ten (10) days thereafter, the City Council shall order that the sexually oriented operator license be suspended for a period of time not to exceed one hundred eighty (180) days, or that the license be revoked, or that no action be taken with respect to the license.

G. If the City Council orders suspension or revocation, the City Council's decision shall be final, subject to judicial review pursuant to Rule 106(a)(4) of the Colorado Rules of Civil Procedure.

H. Any revocation of a sexually oriented operator license shall be grounds for the revocation of the city-issued business license.

5.86.100 General regulations.

A. All licensed premises shall comply with all applicable City regulations and ordinances, including but not limited to the building code, fire code, electrical code, and zoning regulations. All sexually oriented businesses shall comply with City business license requirements per this Code.

B. Every sexually oriented business license issued under this Chapter shall be displayed in a conspicuous place on the licensed premises in a clear cover or frame, and shall be available for inspection at all times by the public.

C. All licensed premises shall be maintained in a clean and sanitary condition, and shall be cleaned at least once daily and more frequently when necessary.

D. Trash and garbage shall not be permitted to accumulate in any licensed premises or on the property outside any licensed premises.

E. All materials, devices and novelties offered by a sexually oriented business which depict specified sexual activities or specified anatomical areas shall be displayed so that they cannot be seen by anyone other than customers who have entered the licensed premises.

F. No alcohol may be served, consumed, or possessed on the licensed premises of a sexually oriented business.

5.86.110 Dance and entertainment requirements.

A. An adult cabaret or adult theater at which employees dance shall have one or more stages or similar structures specially designed for dancing, which shall be constructed in accordance with applicable building code regulations, and located inside the licensed premises. Employees shall dance only upon such stage or structure.

B. When an employee dances on a structure which is designed to hold not more than two (2) persons, the structure shall be level, of sturdy construction and securely fastened to the floor or wall during dance performances. Steps and handrails shall be required on all such stages and structures where the platform on which the employee dances is more than eight inches (8") above the surface upon which the structure rests.

C. Any adult cabaret or adult theatre shall have one or more separate areas designated in the diagram submitted as part of the application as a stage for the licensee or employees to perform as

entertainers. Entertainers shall perform only upon the stage, and the stage shall be fixed and immovable.

D. No seating for the audience shall be permitted within three feet (3') of the edge of any stage, and no members of the audience shall be permitted upon any stage or within three feet (3') of the edge of any stage.

5.86.120 Lighting requirements.

A. When the occupant capacity of any licensed premises, as determined by the fire department, is at least fifty persons, such licensed premises shall have electric, battery-operated emergency lights using reliable storage batteries properly maintained and charged.

B. The interior portion of a licensed premises to which patrons are permitted access shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place at an illumination of not less than two (2) foot-candles as measured at the floor level. It shall be the duty of the licensee and employees present on the premises to ensure that the illumination described above is maintained at all times that any patron is present on the premises.

5.86.130 Hours of operation.

It is unlawful for a sexually oriented business to be open for business or for the licensee or any employee of a licensee to allow patrons upon the licensed premises on any Monday through Saturday between 2:00 a.m. and 10:00 a.m.; and on any Sunday between 12:00 a.m. and 12:00 p.m.

5.86.140 Age restrictions.

A. It is unlawful for a licensee to admit or permit the admission of any person under eighteen (18) years of age into any sexually oriented business.

B. It is unlawful for any person to sell, barter, give, rent, or offer for sale, barter gift, or rent to any person under eighteen (18) years of age any service, material, device or thing sold or offered for sale by any adult store or adult motion picture theater.

C. Employees of any sexually oriented business shall be at least eighteen (18) years of age.

5.86.150 Conduct.

A. No licensee or employee shall encourage or knowingly permit any person on or within the licensed premises to touch, caress or fondle the genitals, pubic region, buttocks, anus or breasts of any person.

B. No licensee or employee shall knowingly fail to immediately report to the police department any criminal conduct or violation of any City ordinance or state or federal law, rule or regulation that occurs on or within the licensed premises.

C. No person shall engage in specified sexual activities on or within a licensed premises.

D. No licensee or employee mingling with patrons or serving food or drinks shall be unclothed or in such attire, costume or clothing so as to expose to view any specified anatomical area.

E. No employee shall receive tips from patrons except as provided herein. A licensee that desires to provide for tips from its patrons shall establish one or more boxes or other containers to receive tips. All tips for employees shall be placed by patrons into the tip box. The licensee shall post one or more signs to be conspicuously visible to patrons in letters at least one inch (1") high to read as follows: "All tips are to be placed in tip box and not handed directly to the entertainer. Any physical contact between the patron and the entertainer is strictly prohibited."

5.86.160 Inspection.

Every licensee shall permit law enforcement officers and any other federal, state, county or City agency in the performance of any function connected with the enforcement of this Chapter and normally and regularly conducted by such agency, to inspect the licensed premises for the purpose of ensuring compliance with this Chapter, at any time the licensed premises is occupied or open for business.

5.86.170 Employee Identification.

Each licensee shall provide to the City Clerk, in writing, the full name, any aliases, date of birth, and the current address and telephone number of every employee of the licensee within five (5) days of employment.

5.86.190 Regulations not exclusive.

Nothing contained in this Chapter shall limit the effectiveness or applicability of any other provision of this Code to any sexually oriented business.

5.86.200 Penalties.

A. It shall be unlawful for any person, corporation or other entity to violate any provision of this Chapter, and any such violation shall be subject to the Section 1.01.100 of the City Municipal Code.

B. In the event of violation of any of the terms and regulations set forth herein, the City may obtain equitable relief, including injunctive relief, to require compliance with the provisions hereof. In the event the City is successful in obtaining injunctive or other equitable relief, the costs and attorney fees incurred by the City in such action shall be awarded to the City in addition to any other relief.

C. Nothing contained herein shall preclude the City from enforcing the suspension and revocation provisions of this Chapter in addition to simultaneously or subsequently prosecuting alleged violations of this Chapter under this Section.

Section 2: Section 18.08.060 of the Manitou Springs Municipal Code is hereby amended by the addition of a new subsection D, which shall read as follows:

D. Sexually oriented businesses.

1. Sexually oriented businesses shall be allowed as a Permitted Use and only be located within the Commercial Zone district under the location criteria provided below.
2. The following regulations shall apply to sexually oriented businesses:
 - a. Sexually oriented businesses shall be located:
 1. A minimum of five hundred feet from any property on which there is a:
 - i. Church; or
 - ii. Public library; or
 - iii. State-licensed child day care facility; or
 - iv. School or educational facility, whether public or private, serving persons under eighteen years of age (this distance limitation shall not apply to property owned by an educational institution or school unless an actual school building is located on the property); or
 - v. Retail or medical marijuana establishment; or
 - vi. Liquor store; or
 - vii. Any other sexually oriented business.
 2. Not within any building or structure that contains a residential or lodging unit.
 3. Not on a lot abutting Manitou, Park, Canon, or Ruxton Avenues, El Paso Blvd., or Beckers Lane.
 4. Not upon any City of Manitou Springs owned property.
 - b. The distance separation described in this section shall be computed by direct measurement, in a straight line without regard to intervening structures, from the nearest property line of the land used for the above purposes to the nearest property line of the property upon which the sexually oriented business is located.
 - c. Each sexually oriented business shall be operated from a permanent location. No sexually oriented business shall be permitted to operate from a moveable, mobile or transitory location.
 - d. Sexually explicit advertisements or promotional displays for sexually oriented businesses shall not be visible from pedestrian ways, walkways or other public areas.
 - e. Sexually oriented businesses shall obtain a license pursuant to Chapter 5.86 of the Code.

Section 3: Chapter 9.12 of the Manitou Springs Municipal Code is hereby repealed and reenacted to provide as follows:

Chapter 9.12 INDECENT, OBSCENE, OR IMMORAL CONDUCT

9.12.010 Prostitution - Keeping place of prostitution.

It is unlawful for any person to have, or exercise control over the use of, any place which offers seclusion or shelter for the practice of prostitution and to perform any one or more of the following acts:

- A. Knowingly granting or permitting the use of such place for the purpose of prostitution; or
- B. Permitting the continued use of such place for the purpose of prostitution after becoming aware of facts or circumstances from which he or she could reasonably know that the place is being used for purposes of prostitution.

9.12.020 Prostitution - Solicitation.

It is unlawful for any person to solicit another for the purpose of prostitution, or to arrange or offer to arrange a meeting of persons for the purpose of prostitution, or to direct another to a place knowing such direction is for the purpose of prostitution.

9.12.030 Indecent exposure or behavior.

Other than as permitted by Chapter 5.86, no person shall knowingly appear in any public place in a nude state or state of undress such that the genitals or buttocks of either sex are exposed.

9.12.040 Gambling prohibited - Seizure of devices.

No person shall play for money or other valuable thing in any game with cards, dice, billiards or with any other article, instrument or thing whatsoever which may be used for the purpose of playing or betting upon or winning or losing any money or any other thing of value nor shall bet upon any game others may be playing. No person shall keep a gambling house or in any building or other place used or occupied by himself or herself or his or her agent, procure or permit any person to frequent or form together to play for money or other valuable thing at any game nor shall keep or rent any such place for any such purpose. The chief of police may seize or cause to be seized any instrument, device or thing used for the purpose of gambling (or by owning or using such money,) or other property or thing of value which may be lost or won. All such instruments, devices or things shall be demolished or destroyed as the mayor directs.

Section 4: If any article, section, paragraph, sentence, clause or phrase of this ordinance is held to be unconstitutional or invalid for any reason, such decision shall not affect the validity or constitutionality of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance and each part or parts hereof irrespective of the fact that any one part or parts be declared unconstitutional or invalid.

Section 5: The repeal or modification of any provision of Manitou Springs Municipal Code by this ordinance shall not release, extinguish, alter, modify or change in whole or in part any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such provision. Each provision shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings and prosecutions for enforcement of the penalty, forfeiture or liability, as well as for the purpose of sustaining any judgment, decree or order which can or may be rendered, entered or made in such actions, suits, proceedings or prosecutions.

Section 6: This ordinance is deemed necessary for the protection of the health, welfare and safety of the community.

Section 7: This ordinance shall take effect five (5) days after final approval and adoption on second reading.