

**ORDINANCE NO. 2014-294**

**AN ORDINANCE AMENDING SECTIONS 28-1, 28-946, 28-948, 28-949, AND 28-950 OF THE CODE OF ORDINANCES OF THE CITY OF WACO, TEXAS, RELATING TO DEFINITIONS AND LOCATIONS OF SEXUALLY ORIENTED BUSINESSES WITHIN THE CITY OF WACO, MCLENNAN COUNTY, TEXAS; TO PRESERVE AND PROTECT THE PUBLIC HEALTH, SAFETY, AND WELFARE; PROVIDING FOR SEVERABILITY; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH; PROVIDING A SAVINGS CLAUSE; PROVIDING FOR INCLUSION IN THE CODE; PROVIDING FOR A PENALTY; PROVIDING FOR AN EFFECTIVE DATE; AND FINDING AND DETERMINING THAT THE MEETING AT WHICH THIS ORDINANCE IS PASSED IS OPEN TO THE PUBLIC AS REQUIRED BY LAW.**

**WHEREAS**, sexually oriented businesses require special supervision from the public safety agencies of the City in order to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the citizens of the City; and

**WHEREAS**, the City Council finds that sexually oriented businesses, as a category of establishments, are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature; and

**WHEREAS**, there is convincing documented evidence that sexually oriented businesses, as a category of establishments, have deleterious secondary effects and are often associated with crime and adverse effects on surrounding properties; and

**WHEREAS**, the City Council desires to minimize and control these adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from crime; preserve the quality of life; preserve the character of surrounding neighborhoods and deter the spread of urban blight; and

**WHEREAS**, certain sexually oriented products and services offered to the public are recognized as not inherently expressive and not protected by the First Amendment, *see, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990) (escort services and sexual encounter services); *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1195 (10th Cir. 2003) (“On its face, the Ordinance applies to all ‘sexually oriented businesses,’ which include establishments such as ‘adult motels’ and ‘adult novelty stores,’ which are not engaged in expressive activity.”); *Sewell v. Georgia*, 233 S.E.2d 187 (Ga. 1977), *dismissed for want of a substantial federal question*, 435 U.S. 982 (1978) (sexual devices); and

**WHEREAS**, there is documented evidence of sexually oriented businesses, including adult bookstores and adult video stores, manipulating their inventory and/or business practices to avoid regulation while retaining their essentially “adult” nature, *see, e.g., Taylor v. State*, No. 01-01-00505-CR, 2002 WL 1722154 (Tex. App. July 25, 2002) (noting that “the nonadult video

selections appeared old and several of its display cases were covered with cobwebs”); *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, Civil Action No. 99-N-1696, Memorandum Decision and Order (D. Colo. March 31, 2001) (finding retail adult store’s “argument that it is not an adult entertainment establishment” to be “frivolous at best”); *People ex rel. Deters v. The Lion’s Den, Inc.*, Case No. 04-CH-26, Modified Permanent Injunction Order (Ill. Fourth Judicial Circuit, Effingham County, July 13, 2005) (noting that “the accuracy and credibility” of the evidence on inventory in adult retail store was suspect, and that testimony was “less than candid” and “suggested an intention to obscure the actual amount of sexually explicit material sold”); *City of New York v. Hommes*, 724 N.E.2d 368 (N.Y. 1999) (documenting manipulation of inventory to avoid adult classification); and

**WHEREAS**, the manner in which an establishment holds itself out to the public is a reasonable consideration in determining whether the establishment is a sexually oriented business, *see, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 261 (1991) (Scalia, J., concurring in part and dissenting in part) (“[I]t is most implausible that any enterprise which has as its constant intentional objective the sale of such [sexual] material does not advertise or promote it as such.”); *East Brooks Books, Inc. v. Shelby County*, 588 F.3d 360, 365 (6th Cir. 2009) (“A prominent display advertising an establishment as an ‘adult store,’ moreover, is a more objective indicator that the store is of the kind the Act aims to regulate, than the mere share of its stock or trade comprised of adult materials.”); *see also Johnson v. California State Bd. of Accountancy*, 72 F.3d 1427 (9th Cir. 1995) (rejecting First Amendment challenge to statute which used the phrase “holding out” to identify conduct indicative of the practice of public accountancy, but did not ban any speech); *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2010) (O’Scannlain, J., concurring) (concluding that whether an entity “holds itself out” as religious is a neutral factor and that factor helps to ensure that the entity is a *bona fide* religious entity); and

**WHEREAS**, the City intends to regulate such businesses as sexually oriented businesses through a narrowly tailored ordinance designed to serve the substantial government interest in preventing the negative secondary effects of sexually oriented businesses; and

**WHEREAS**, the City’s regulations shall be narrowly construed to accomplish this end; and

**WHEREAS**, the City recognizes its constitutional duty to interpret and construe its laws to comply with constitutional requirements as they are announced; and

**WHEREAS**, with the passage of any ordinance, the City and the City Council accept as binding the applicability of general principles of criminal and civil law and procedure and the rights and obligations under the United States and Texas Constitutions, Texas Code, and the Texas Rules of Civil and Criminal Procedure; and

**WHEREAS**, it is not the intent of this ordinance to suppress any speech activities protected by the U.S. Constitution or the Texas Constitution, but to enact legislation to further the content-neutral governmental interests of the City, to wit, the controlling of secondary effects of sexually oriented businesses.

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF WACO:**

1. That Section 28-1 of the Code of Ordinances, City of Waco, Texas, is hereby amended by amending the definition of *Sexually oriented businesses* (with sub-parts) to read as follows:

*Sexually oriented business* means an adult bookstore or adult video store, an adult cabaret, an adult motion picture theater, a semi-nude model studio or nude model studio, or a sex paraphernalia store as those terms are defined in section 20-2 of the Code of Ordinances, City of Waco, Texas.

2. That Section 28-946 of the Code of Ordinances, City of Waco, Texas, is hereby amended to read as follows:

A person commits an offense if he causes or permits the establishment of a sexually oriented business, as those terms are defined in section 20-2, and such is located within:

- (1) Six hundred feet of any lot used for residential purposes, be it for single-family, duplex, multifamily or HUD-Code manufactured home park or HUD-Code manufactured home subdivision, or within 600 feet of an R zoning district;
- (2) Six hundred feet of any premises of a public or private, elementary or secondary school, institution of higher learning, church, park or public playground;
- (3) Six hundred feet of any other sexually oriented business; or
- (4) Any R, O, C-1 or M district.

3. That Section 28-948 of the Code of Ordinances, City of Waco, Texas, is hereby amended to read as follows:

A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the subsequent location of a public or private, elementary or secondary school, institution of higher learning, church, park, public playground, residential use of R zoning district within 600 feet of such sexually oriented business. The preceding sentence does not apply to a sexually oriented business for which a license to operate, as required by chapter 20, has been finally denied or revoked by the City, but the preceding sentence does apply to a business which is sold and a new license for the new owner obtained without any time period occurring during which a valid license for the business was not in existence.

4. That Section 28-949 of the Code of Ordinances, City of Waco, Texas, is hereby repealed.

5. That Section 28-950 of the Code of Ordinances, City of Waco, Texas, is hereby repealed.

6. **Severability.** This ordinance and each section and provision of said ordinance hereunder, are hereby declared to be independent divisions and subdivisions and, notwithstanding any other evidence of legislative intent, it is hereby declared to be the controlling

legislative intent that if any provisions of said ordinance, or the application thereof to any person or circumstance is held to be invalid, the remaining sections or provisions and the application of such sections and provisions to any person or circumstances other than those to which it is held invalid, shall not be affected thereby, and it is hereby declared that such sections and provisions would have been passed independently of such section or provision so known to be invalid. Should any procedural aspect of this ordinance be invalidated, such invalidation shall not affect the enforceability of the substantive aspects of this ordinance.

7. **Conflicting code provisions repealed.** Any provision(s) in the Code of Ordinances, City of Waco, Texas specifically in conflict with any provision in this ordinance is hereby deemed inoperative and repealed.

8. That nothing in this ordinance shall be constructed to affect any suit or proceeding pending in any court, or liability incurred, or any cause or causes of action acquired or existing, under any act or prior ordinance; nor shall any legal remedy of any character be lost, impaired, or affected by this ordinance.

9. That it is the intention of the City Council and is hereby ordained that the provisions of this ordinance shall become and be a part of the Code of Ordinances of the City of Waco, Texas, and that sections of this ordinance may be renumbered or relettered to accomplish such intention.

10. That it is hereby officially found and determined that the meeting at which this ordinance is passed is open to the public and that public notice of the time, place and purpose of said meeting was given as required by law.

11. That a violation of this ordinance shall be a Class A misdemeanor as provided by Chapter 243 of the Texas Local Government Code, and each day a violation exists shall be a separate offense.

12. **Effective Date.** That this ordinance shall take effect upon its passage as provided by the City Charter of the City of Waco.

**PASSED AND APPROVED:**

**First Reading: May 20, 2014**  
**Second Reading: June 3, 2014**

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Malcolm Duncan Jr., Mayor  
City of Waco, Texas

ATTEST:

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Patricia W. Ervin, City Secretary

APPROVED AS TO FORM & LEGALITY:

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Jennifer Richie, City Attorney