

REVISED MEMORANDUM

**CITY OF SAN ANTONIO
OFFICE OF THE CITY ATTORNEY
CITY COUNCIL AGENDA MEMORANDUM**

CONSENT AGENDA
ITEM NO. **25**

TO: Mayor and City Council

FROM: Martha Sepeda, Acting City Attorney

SUBJECT: An Ordinance Approving a Settlement Agreement in the Lawsuit Styled
Allstars et al v. City of San Antonio; Civil Action No. SA-03-CA-356-FB, In
the United States District Court for the Western District of Texas, San
Antonio Division

DATE: May 5, 2005

SUMMARY AND RECOMMENDATIONS

This ordinance approves a settlement agreement in Civil Action No SA-03-CA-356-FB, *Allstars, et al v. City of San Antonio*. This settlement constitutes an agreement of the parties (several sexually oriented businesses and the City of San Antonio) to amend Ordinance No 100190, also known as the "Human Display Ordinance". If Council approves this settlement agreement, the City Attorney's Office will prepare and present to Council an amendment to the Human Display Ordinance no later than June 2, 2005.

Staff recommends approval of the attached settlement agreement.

BACKGROUND INFORMATION

The case arises from a lawsuit where several Human Display establishments (sexually oriented businesses) sought to invalidate the City of San Antonio's Human Display Ordinance on constitutional grounds. Pursuant to order of United States District Judge Fred Biery, representatives from the City of San Antonio entered into mediation with the industry and reached a preliminary agreement subject to City Council approval. Council has discussed these matters in executive session several times.

POLICY ANALYSIS

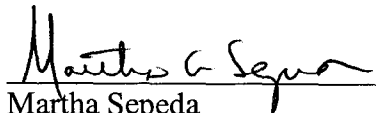
Passage of this ordinance to approve the settlement agreement will resolve the issues in this lawsuit. The City retains all major features of the current Human Display Ordinance regulating these establishments including: the Three-Foot rule, badges to identify entertainers and managers, lighting requirements, permitting requirements, and line-of-sight requirements.

FISCAL IMPACT

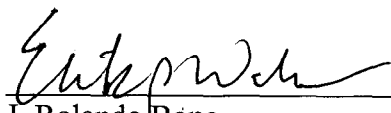
The costs of monitoring compliance, performing criminal background checks, and issuing badges will be offset by the fees charged to performers and businesses. These fees and expenses have already been included in the fiscal budget for 2004-2005.

COORDINATION

This has been coordinated with the Finance Department, San Antonio Police Department and City Attorney's Office.



Martha Sepeda
Acting City Attorney



J. Rolando Bono
Interim City Manager

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SETTLEMENT AGREEMENT

Re: Civil Action No. SA-03-CA-356-PB; *Allstars, et al v. City of San Antonio*;
United States District Court, Western District of Texas, San Antonio Division

The following constitutes the agreement of the parties, acting by and through counsel, for the settlement -- subject to approval by the City Council of San Antonio -- of the litigation pending, as above referenced, regarding the Human Display Ordinance of the City of San Antonio:

1. OWNERSHIP CULPABILITY

- Criminal culpability of owners based upon violations of employees will be eliminated. Owners will, however, remain culpable for their own, personal violations.
- To apply for, obtain and maintain a Human Display Permit, an establishment must designate a representative owner or group of owners with a minimum 35% ownership interest in the operation of the Human Display Establishment as "Owner-Operator" to be responsible and culpable under the permitting provisions of the ordinance. Language in other sections of the ordinance will need to be redrafted to reflect this change.

2. CONDITIONS FOR PERMIT SUSPENSION/REVOCAION

- The conditions set forth in Section 21-407(a) are to be changed from 3 to 4 offenses, each occurring on a separate date, within the requisite time periods for each type of permit.
- Only acts occurring after the effective date of the amending ordinance enacted in settlement of this cause shall be counted toward the cumulative totals presently referenced under Section 21-407(2)(c) and (3)(b) of the ordinance for the revocation or suspension of permits. The amending ordinance shall take effect ninety (90) days after its adoption.

3. ADMINISTRATIVE APPEAL

- The standard of review upon appeal to a Hearing Officer of a suspension or revocation of any permit required under the ordinance shall be *de novo*. The standard of judicial review of a decision of the Hearing Officer upon appeal to the District Court shall be under the substantial evidence rule.
- Upon appeal of a suspension or revocation of any permit required under the ordinance, it shall be within the authority of the Hearing Officer to uphold the suspension or revocation, overturn the suspension or revocation, or order a 60-day suspension of the permit.
- When a Human Display Permit issued to a designated Owner-Operator is subject to revocation upon a second violation of the conditions set forth in Section 21-407(a)(2), the Hearing Officer will have the discretion whether to revoke or suspend the permit based upon consideration of the severity of the underlying offenses.

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4. MINIMUM LIGHTING REQUIREMENTS

Minimum lighting level will change from three (3) foot-candles to one (1) foot-candle.

5. TEMPORARY ENTERTAINER PERMITS

- Temporary Entertainer Permits, valid for one week (any 7-day period), with a maximum of four such permits per calendar year per entertainer and a limit of 12 per calendar year per Human Display Establishment will allow featured entertainers to perform in a permitted Human Display Establishment for a fee of \$50 per permit.
- Prior to 3 p.m. on the last business day on or before the first performance by the Temporary Entertainer, the Manager of the Human Display Establishment shall cause to be delivered to the Police Department the completed permit application form with the requisite fee. If the photo identification and signature of the Temporary Entertainer are not available at that time, those items shall be faxed or delivered to the Police Department and vouched for by the Manager prior to the time of the first performance by the Temporary Entertainer.
- A Temporary Entertainer Permit shall be tied to the sponsoring Human Display Establishment and is not transferable among Human Display Establishments.
- To obtain a Temporary Entertainer's Permit, the featured performer must present a valid, current state identification card or driver's license, United States Military Identification card, or an unexpired U.S. passport, indicating a residence address outside of Bexar County, Texas.

5. PERMITS & PORTABILITY

- Permits for Entertainers and Floor-Managers shall be portable to allow individual permit-holders to work in multiple Human Display Establishments during the pendency of the permit without acquiring separate permits. Only one (1) permit fee will be charged for such a permit. (This shall not apply to Temporary Entertainer Permits.)
- The permit worn by an Entertainer shall display the Entertainer's photograph and her identification number assigned by the City.

6. MANAGER PERMITS

- At least one current, valid, non-suspended Manager's Permit will be required to be in effect at all times for each Human Display Establishment.
- The Manager shall be responsible for insuring that each Entertainer and Floor-Manager holds a valid permit.
- Upon completion and submission of an application, a person may hold a Temporary Manager's Permit which shall be valid for 10 days or until the issuance of a Manager's Permit, whichever first occurs.
- A Manager while on duty shall wear a badge clearly identifying him or her as the "Manager" and each Floor-Manager shall, likewise, each wear a badge clearly identifying him or her as a

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"Floor-Manager." The badge may contain a photograph of the permit-holder and his or her identification number assigned by the City, but shall not display the name of the permit-holder.

7. EXCEPTION REPLACES AFFIRMATIVE DEFENSE

The affirmative defense provision shall be eliminated for Entertainers and replaced by an exception so that it is the same as for managers and owners under the ordinance.

8. APPLICATION FORMS

Application forms for all permits will comport with the requirements of the ordinance so that the Chief of Police does not have discretion to inquire of permit applicants about additional information, but only to make follow-up inquiries to insure the information contemplated under the ordinance is complete and accurate. The application forms shall also require: name; address; a valid, current state identification card or driver's license, United States Military Identification card, or an unexpired U.S. passport; and social security number, if issued. The City shall draft the application forms.

9. CONFIGURATION/LINE OF SIGHT

Provisions regarding configuration of doors, including glass and locks, to ensure the business offices and other specified areas of the Human Display Establishments are not subject to the line of sight requirements and other technical requirements which have been discussed and agreed upon by the parties will be redrafted by the City.

10. "EMPLOYEE"

The definition of the term "employee" will be redrafted to exclude providers of legitimate accounting services, legal services, and deliverers of goods for immediate use by establishment operations (not including goods for use by entertainers) and premises maintenance services for the Human Display Establishment.

11. OFFENSE - TOUCHING THE BREAST OF ANOTHER

The definition of "specified sexual activities" will be changed to include the term "of another" after the term "female breast."

12. GENERAL SETTLEMENT ISSUES

- Each party will bear its own costs and attorneys' fees.
- Upon acceptance of this Agreement by the San Antonio City Council, the parties will move the Court to approve same and dismiss this cause with prejudice to the reassertion by Plaintiffs of any claim or action for injunctive or declaratory relief with respect to the ordinance (whether in its present or previous form), or any claim for damages, attorney fees or costs in connection therewith. The right to assert the legality or constitutionality of the

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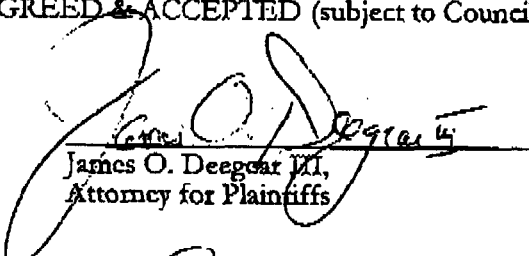
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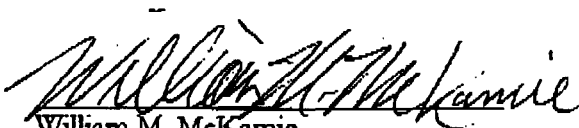
ordinance as a defense in any proceeding is reserved to Plaintiffs, and the Court herein is making no findings as to the constitutionality of the ordinance in question (whether in its present or previous form) or as it may be amended.

- The City shall promptly and reasonably draft terms for the amended ordinance.
 - Prior to submission to City Council for approval, the redrafted ordinance shall be presented to the Magistrate Judge for review and comment with respect to its conformity with the terms of this of this Agreement.
 - The ordinance, as amended in accordance with this Agreement, will not take effect for ninety (90) days during which period permit applications will occur and the Human Display Establishments will have time both to educate their employees and entertainers, and to make any necessary changes to their facilities.
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- Confidentiality of permit information and records shall be governed by the applicable provisions of the Texas Public Information Act, Texas Attorney General Opinions, and the *Northwest Enterprises* case.

AGREED & ACCEPTED (subject to Council approval):


James O. Deegear III,
Attorney for Plaintiffs

Date: April 28, 2005


William M. McKamie,
Attorney for Defendant

Date: 4-27-05