

DRAFT

At a meeting of the Town Board of the Town of Newburgh, held at the Town Hall, 1496 Route 300, in the Town of Newburgh, Orange County, New York on the ___th day of November, 2012 at 7:00 o'clock p.m.

PRESENT:

<u>Wayne C. Booth, Supervisor</u>	RESOLUTION OF SEQR DESIGNATION AND DETERMINATION: ADOPTION OF A PROPOSED LOCAL LAW AMENDING CHAPTER 185 ENTITLED "ZONING" OF THE CODE OF THE TOWN OF NEWBURGH TO PROVIDE FOR THE REGULATION OF ADULT-ORIENTED BUSINESS
<u>George Woolsey, Councilman</u>	
<u>Gilbert J. Piauquadio, Councilman</u>	
<u>Elizabeth J. Greene, Councilwoman</u>	
<u>Ernest C. Bello, Jr., Councilman</u>	

Councilman/woman _____ presented the following resolution which was seconded by Councilman/woman _____.

WHEREAS, the Town Board of the Town of Newburgh has caused Part 1 and Part 2 of a full Environmental Assessment Form (the "EAF") to be prepared and submitted for the proposed adoption of a local law entitled A Local Law Amending Chapter 185 entitled "Zoning" of the Code of the Town of Newburgh to Provide for the Regulation of Adult-Oriented (the "Action"); and

WHEREAS, the Local Law was introduced before the Town Board of the Town of Newburgh in the County of Orange and State of New York on September 17, 2012 and delivered in final form to the members of the Town Board on October 3, 2012; and

WHEREAS, a duly scheduled public hearing in the matter of the adoption of the aforesaid local law was held at the Town Hall at 1496 Route 300 the Town of Newburgh, New York on the 15th day of October, 2012 and the Town Board heard all interested parties on said proposed local law; and

WHEREAS, a duly scheduled and noticed second public hearing in the matter of the adoption of the aforesaid local law was held at the Town Hall at 1496 Route 300 the Town of Newburgh, New York on the 13th day of November, 2012 and the Town Board heard all interested parties on said proposed local law; and

WHEREAS, the Environmental Assessment Form identified the Action as a Type I action under Part 617 of the General Regulations adopted pursuant to Article 8 of the Environmental

Conservation Law ("SEQR") and Chapter 100 entitled "Environmental Quality Review" of the Town of Newburgh Municipal Code; and

WHEREAS, the Town Board, using all due diligence, has identified no other involved agencies, but has identified the following agencies as potentially interested agencies:

the Orange County Planning Department,

the Town of Newburgh Planning Board

the Town of Newburgh Zoning Board of Appeals

; and

WHEREAS, the Town Board has determined that the Action will not affect the farming of lands located in an agricultural district; and

WHEREAS, the Town Board has determined that the Action does not involve a federal agency; and

WHEREAS, on the 17th day of September, 2012, the Town Board determined that the Action is subject to SEQR and is a Type I action under Part 617 of the General Regulations adopted pursuant to SEQR and

WHEREAS, the Town Board authorized the circulation of the EAF and such other information as is appropriate to the identified potentially interested agencies, advising them Town Board's intention to assume the role of Lead Agency for the Action under SEQR and Part 617; and

WHEREAS, the EAF and other appropriate information were forwarded to the Orange County Department of Planning and the Town of Newburgh Planning Board, together with copies of the proposed local law, in accordance with the requirements of the General Municipal Law and the Town of Newburgh Zoning Code and to the Town of Newburgh Zoning Board of Appeals; and

WHEREAS, the Town Board has considered the revisions to the final version of the Local Law and determined that any potential adverse environmental effects of the Action will be reduced by the revisions to the Local Law and accordingly it is unnecessary to reclassify the Action or prepare an amended Environmental Assessment Form; and

WHEREAS, the identified interested agencies were notified of the Town Board's intent to act as the Lead Agency for the Action in a coordinated review; and

WHEREAS, pursuant to Section 617.6(b)(1) of Part 617, "[w]hen a single agency is involved, that agency will be the lead agency when it proposes to undertake, fund or approve a Type

I or Unlisted action that does not involve another agency"; and

WHEREAS, the Action is consistent with the adopted Town of Newburgh Comprehensive Plan Update and is also consistent with the Orange County Comprehensive Plan; and

WHEREAS, recognizing that the impact that an action may have on population patterns or existing community character, with or without a separate impact on the physical environment is a relevant concern in an environmental analysis since the statute includes these concerns as elements of the environment, the Town Board has considered and analyzed information pertaining to those impacts; and

WHEREAS, the Town Board has undertaken further information gathering and these further analyses in recognition that conclusory statements unsupported by empirical or experimental data, scientific authorities or any explanatory information will not suffice as a reasoned elaboration for its determination of environmental significance or nonsignificance; and

WHEREAS, the Town Board has (i) thoroughly reviewed the EAF, and any and all other documents prepared and submitted with respect to this proposed action and its environmental review, and (ii) thoroughly analyzed the potential relevant areas of environmental concern to determine if the proposed action may have a significant adverse impact on the environment, including the criteria identified in 6 NYCRR Section 617.7(c); and

WHEREAS, the Town Board has not identified relevant areas of environmental concern which would lead to a determination that the adoption of the proposed amendment to the Town of Newburgh Zoning Code may have a significant adverse effect on the environment either in the short term, long term or cumulatively given the likely consequences, setting, probability of occurrence, duration, irreversibility, geographic scope, magnitude and the number of people affected.

NOW THEREFORE, BE IT RESOLVED:

1. The Town Board determines that it is the single involved agency for the Action and as it is proposing to directly undertake the Action, declares itself the Lead Agency for the purpose of conducting a review of this Action.
2. The Town Board, acting in its capacity as Lead Agency, does hereby determine that the Action will not have an adverse environmental impact and, accordingly, does issue a negative declaration.
3. The Town Board accordingly determines that an Environmental Impact Statement will not be prepared.

4. The Town Board hereby authorizes the Supervisor to execute and file the relevant section of the Environmental Assessment Form and a Negative Declaration, with such further amendment and modification as may be required to elaborate the Lead Agency's determination herein, in accordance with the applicable provisions of law.
5. The Negative Declaration shall be filed in accordance with the requirements of SEQR and notice submitted for publication in the Environmental Notice Bulletin (ENB) in the prescribed manner.

The question of the adoption of the foregoing resolution was duly put to a vote on roll call, which resulted as follows:

George Woolsey, Councilman voting _____

Gilbert J. Piaquadio, Councilman voting _____

Elizabeth J. Greene, Councilwoman voting _____

Ernest C. Bello, Jr., Councilman voting _____

Wayne C. Booth, Supervisor voting _____

The resolution was thereupon declared duly adopted.

DRAFT

State Environmental Quality Review

NEGATIVE DECLARATION
Notice of Determination of Non-Significance

Project Number N/A

Date , 2012

This notice is issued pursuant to Part 617 of the implementing regulations pertaining to Article 8 (State Environmental Quality Review Act) of the Environmental Conservation Law.

The Town Board of the Town of Newburgh, as lead agency, has determined that the proposed action described below will not have a significant effect on the environment and a Draft Environmental Impact Statement will not be prepared.

Name of Action: Adoption of Local Law Amending Chapter 185 entitled "Zoning" of the Code of the Town of Newburgh to Provide for the Regulation of Adult-Oriented Businesses

SEQR Status: Type I (X)
Unlisted ()

Conditioned Negative Declaration: () Yes
(X) No

Description of Action:

The action consists of the adoption of a proposed local law by the Town Board of the Town of Newburgh. The local law is entitled "A Local Law Amending Chapter 185 Entitled "Zoning" of the Code of the Town of Newburgh to Provide for the Regulation of Adult-Oriented Businesses". At this time the existing land use regulations in the Town do not address adult-oriented business uses. They are not defined, restricted by district, or prohibited. Currently, it would be possible for an adult entertainment business to open wherever a retail establishment, eating and drinking place, restaurant or business park is now allowed. The local law sets forth extensive legislative findings with regard to the harmful secondary effects of adult-oriented businesses on the town.

The local law amends the Town of Newburgh Zoning Code to provide for the regulation of adult-oriented businesses. The Town's intent in regulating adult-oriented businesses is not to restrict constitutionally-protected speech activities but rather to provide constitutionally sufficient alternate avenues for persons to engage in such activities in a manner consistent with the constitutions of the United States and New York State while addressing the unlawful, unhealthy and detrimental activities ancillary to such speech and ameliorating these secondary effects on the peace, good order, commercial viability and safety of Town residents and non-adult-oriented businesses. The findings provide that the regulations are the least intrusive method available to ameliorate the negative secondary effects of adult-oriented businesses within

the Town without infringing on constitutionally-protected speech activities. The primary purposes enumerated by the local law are: 1. to preserve the character and quality of the life of the Town's neighborhoods and business and maintain the viability of the Town's alteration and improvement pursuant to the Comprehensive Plan Update; 2. to ameliorate the documented adverse secondary effects that are ancillary to adult-oriented businesses, including, but not limited to: decreased property values; attraction of transients; parking and traffic problems; increased crimes against persons and property; loss of business for surrounding non-adult-oriented businesses; and deterioration of neighborhoods; 3. to maintain property values; 4. to prevent crime; 5. to safeguard the continued commercial viability of currently existing non-adult-oriented businesses; 6. to insure the continued commercial viability of the Town as a location for new non-adult-oriented businesses; 7. to restrict minors' inadvertent exposure to nudity, specified anatomical areas or specified sexual activities; 8. to preserve and protect public hygiene, health and sanitation; and 9. to maintain the general welfare, health, comfort and safety of Town residents and businesses.

An adult-oriented business is defined by the local law to include the use of a building, structure, or property for a business which includes the regular offering, for economic gain or other consideration, of adult materials or adult entertainment as a substantial or significant portion of its stock-in-trade for the purposes of sale, rental, lease, trade, gift or display of such adult materials or adult entertainment, including any restaurant, nightclub, bar, tavern, eating and drinking place or establishment, arcade, theater, video store, motel, hotel, or any other establishment that regularly offers, for economic gain or other consideration, adult entertainment, a retail store that offers adult materials as that term is defined in the proposed local law and any massage establishment. The local law amends Section 185-10 of the Zoning Code to provide that a use meeting the definition of "adult-oriented business" shall additionally be subject to the supplementary regulations contained in a new Article XVI of the Zoning Code.

The local law also includes definitions of "adult materials", "adult entertainment", "employee", "financial expenditures", "nudity", "massage establishment", "non-adult materials", "non-adult entertainment", "sensitive site", "substantial or significant portion" (which includes a 10 percent interior square footage "safe harbor" exception) and "zoning board of appeals." Massage establishment are defined as establishments having a fixed place of business where massages are administered for pay, including but not limited to massage parlors, sauna baths and steam baths, but with the exception of (i) hospitals, nursing homes, medical clinics, or the offices of a physician, surgeon, chiropractor, osteopath, or duly licensed physical therapists, occupational therapists, or duly licensed massage therapists; (ii) barber shops, beauty salons or nail salons in which massages are administered only to the scalp, face, neck or shoulders; (iii) health clubs or fitness facilities and recreational membership clubs which have facilities for physical exercise, such as tennis courts, racquet ball courts, ice skating rinks, or exercise rooms, and which do not receive their primary source of revenue through the administration of massages. The local law provides that massage establishments shall not be a permitted use within the Town of Newburgh.

The local law provides that adult-oriented business other than massage establishments are permitted to be situated within the B (Business), IB (Interchange Business) or I (Industrial) Zoning Districts, but no adult-oriented business shall be located within 1,000 feet of the property line of any sensitive site or of any boundaries of the RR, AR, R1, R2 or R3 residential zoning districts. Sensitive sites are defined as churches, synagogues, mosques or other places of worship, schools, child or day nursery facilities, public or semi-public parks or recreational facilities in existence as of September 15, 2012. Additionally, no adult oriented business shall be located within 500 feet of any other adult-oriented business. The map annexed hereto as Exhibit A shows those areas in which adult-oriented businesses may be situated consistent with these restrictions. There are approximately 10.17 square miles within the B; IB and I Districts. The areas within these districts outside the 1,000' buffer are approximately 4.22 square miles, or approximately 41%. Of this, approximately 666 acres are zoned B or IB. Taking into account the 500 foot separation requirement between adult-oriented businesses, approximately 264.5 acres of the B and IB zoned properties could be used for adult-oriented businesses, or approximately 40% of the 666 acres. See the map annexed hereto as Exhibit B. Each circle, which is 500 feet in diameter, represents an approximation of the separation requirement and is equivalent to approximately 4.5 acres. Circles with an X in the middle are those which were excluded from calculation of acreage given that they were located primarily within the right of way of roads. In the I District, a Business Park may include restaurants and retail outlets accessory to certain other uses, which may fall within the definition of adult-oriented business.

The following additional regulations will apply: no adult-oriented business shall be established or permitted in any building of which any part is used for residential purposes; no residential use shall be established in a building of which any part is used as an adult-oriented business; adult-oriented businesses shall conform to applicable bulk and supplemental regulations for the zoning districts and the appropriate classification of permitted use or use subject to site plan review by the Planning Board; no more than one adult-oriented business permitted under this section shall be established on a zoning lot; the total interior square footage open to the general public of any adult-oriented business shall not exceed, 10,000 square feet; signs and displays shall not depict or describe specified sexual activities, specified anatomical areas or nudity; signs and displays visible from the outside of an adult-oriented business may be illuminated or composed of lighted material such as neon but shall not feature flashing illumination; during the period that an adult-oriented business is occupied, it shall be illuminated by sufficient natural or non-flashing artificial light to permit safe ingress and egress to and from the premises; each adult-oriented business offering entertainment consisting of live performances shall maintain adequate security during hours of operation to ensure the public peace and order, to employ not less than one uniformed security guard per every 50 or fewer patrons on the premises and not less than two uniformed security guards for over 50 patrons.

Any establishment in existence or which has obtained vested rights to exist prior to the effective date of the local law which (a) has made financial expenditures for the purpose of

operating or to commence operating an adult-oriented business and (b) falls within the definition of an adult-oriented business; and (c) is not in conformity with the requirements of the new Article shall either conform to the requirements of the new Article or terminate its operation as an adult-oriented business within 2 years following the effective date of the local law or, if later, the date of issuance of a certificate of occupancy for a use which includes an adult-oriented business, or such later date as later provided. Such nonconforming uses shall not be increased, enlarged, extended, or altered within the 2 year period or any extension thereof, except that the use may be changed to a conforming use. The Zoning Board of Appeals of the Town of Newburgh shall have the power to hear and decide applications submitted to the Board for the continuation of a non-conforming adult-oriented using the same procedures by which it hears applications for use and area variances. The Board, may permit an adult-oriented business subject to termination to continue for a limited period of time beyond the two-year period not to exceed three additional years, provided that: (a) an application is made by the owner of such adult-oriented business to the Board at least one hundred and twenty (120) days prior to the date on which such business must terminate; and (b) the Board shall find, in connection with such adult-oriented business, that: (i) the owner of such a business had made, prior to the non-conformity, substantial financial expenditures related to such business; (ii) the owner has not recovered substantially all of such financial expenditures; and (iii) the period for which such business may be permitted to continue is the minimum period sufficient for the owner of such business to recover substantially all of such financial expenditures. The applicant shall bear the burden of proving by substantial evidence each item via competent expert and/or scientific testimony supported by reliable documentary proof, including audited financial data, regarding the subject adult-oriented business.

Should any nonconforming adult-oriented business cease operation for a period exceeding 6 consecutive months within the amortization period or at any other time, the adult-oriented business shall be deemed to terminate its nonconforming status and shall not be continued or reopened at the location unless the adult-oriented business is in full conformity with the provisions of the new Article.

Under the local law, the following shall not be permitted on the premises of any adult-oriented business within the Town of Newburgh: 1. appearance by a person knowingly or intentionally engaging in specified sexual activities; or 2. the use of sound amplification equipment to amplify a description or discussion of nudity, specified anatomical areas or specified sexual activities if: (a) such description or discussion is audible beyond the exterior of the structure from which the description or discussion originates; or (b) such description or discussion is amplified in a public place.

Violations of the new Article are subject to enforcement and penalties as provided for in Code Section 185-52 and in case any adult-oriented business or massage establishment is operating or has been established in violation of this section or any regulations made under authority conferred hereby, the Town Board of the Town of Newburgh or, with its approval, the

Building and Code Enforcement Officer or other proper official, in addition to other remedies, may institute any appropriate action or proceedings to prevent, correct or abate such violation

Location: (Include street address and the name of the municipality/county. A location map of appropriate scale is also recommended.)

Town of Newburgh, Orange County, New York. (town-wide)
See map annexed as Exhibit A

Reasons Supporting This Determination:

(See 617.6(g) for requirements of this determination; See 617.6(h) for Conditioned Negative Declaration)

The lead agency has considered the action and reviewed the environmental assessment form and other supporting information and documents, including comments and written and electronic submissions it received from the public and any other comments from agencies to which the local law was submitted for comment, including the Town of Newburgh Planning Board and the Orange County Planning Department. The action is a Type I action.

The following summarizes the review of impacts:

Land – There are no adverse impacts on land associated with this action. Because the action involves the adoption of Zoning amendments and not direct construction or other physical activity, there are no direct impacts on land. The action will not directly result in any specific building activity. The proposed action will not have a significant adverse environmental impact on any unique or unusual land forms. Accordingly, only indirect impacts require analysis. The Town Board finds that there are no significant unmitigated impacts on land associated with this action.

- **Surface and Groundwater, Drainage and Flooding** – There are no adverse impacts on drainage, surface or groundwater quality, or flooding associated with this action.
- **Air Quality or Resources** – The action would not create any adverse air quality or resource impacts.
- **Wildlife Species and Habitat** – No adverse direct or indirect effects on threatened or endangered species, non-threatened or non-endangered species or habitat would result with

this action.

- **Agricultural Lands** – The action would not create adverse impacts on agriculture or agricultural lands. The local law does not introduce regulations with respect to agricultural uses.
- **Visual and Aesthetic Resources** – No adverse impacts on visual or aesthetic resources in the Town or adjoining areas will result from this action.
- **Historic and Archeological Resources** – There would be no adverse impacts on archeological or historic resources with this action.
- **Open Space and Recreation** – The action would not result in adverse impacts on open space or recreation.
- **Transportation and Traffic** – The action would not create any adverse traffic or transportation impacts.
- **Energy** – The action would not create any adverse impacts on energy.
- **Noise** – No adverse impacts on noise levels would result from the action.
- **Public Health and Safety** – The action would not create adverse public health and safety impacts. The general health, safety, and welfare of the citizens of the Town of Newburgh and non-adult-oriented businesses uses located within, the Town of Newburgh would be promoted by the action. Adult-oriented business uses would be required to meet additional regulatory standards that are intended to mitigate adverse secondary effects.
- **Land Use and Community Character** – There are no significant adverse impacts on land use and community character associated with this action. This action is compatible with the Town's *Comprehensive Plan Update*, as well as the *Orange County Comprehensive Plan*. The locational requirements contained in the proposed Local Law do not unreasonably restrict the establishment or operation of constitutionally protected adult-oriented businesses in the Town of Newburgh, and a sufficient and reasonable number of alternative locations for adult-oriented businesses and avenues for the expression of constitutionally-protected speech activities are provided and available. The U.S. Supreme Court decision in *Renton* requires that the Town provide adult-oriented businesses a reasonable opportunity to open and operate and this action so provides.

Existing establishments and those which have obtained vested rights to exist prior to the effective date of the local law which fall within the definition of adult-oriented business and are not in conformity with the requirements of the Local Law must either conform to the requirements of the new Article or terminate their operations as an adult-oriented business within 2 years following the effective date of the local law or, if later, the date of issuance of a certificate of occupancy for a use which includes an adult-oriented business, or such later date as later provided by the Zoning Board of Appeals which has the authority to extend the period for up to three additional years. Existing establishments falling within the definition of "massage establishment" and those "eating and drinking place" uses which provide adult-oriented entertainment would be affected by these requirements. An establishment which obtained site plan approval but has not yet completed construction will be required to either cease providing adult entertainment or materials as a "substantial or significant portion" of its stock-in-trade at a maximum 5 years following the date of issuance of its certificate of occupancy or to reduce the scope of same to meet the ten percent safe harbor exception contained in the Local Law. The approved use for which site plan approval has been obtained could continue without the adult-entertainment component or meet the safe harbor standard.

As noted in the description of the Action, there are approximately 10.17 square miles within the B, IB and I Districts which are outside the separation requirements of the Local Law, including 666 acres in the B and IB Zones (of which approximately 264.5 acres would be available given the separation requirements between businesses) where existing establishments can relocate the adult-oriented entertainment aspects of their establishments and new adult-oriented businesses may be opened. These include numerous properties, both developed and undeveloped, presently for lease or sale. Additional acreage in the I Zoning District is also located in the Northeast corner of the Town, at the Town of Montgomery boundary and at the Stewart Industrial Park. The Town has not in the past exercised zoning jurisdiction over the Stewart Industrial Park and the adjoining Airport. Water and sewer utilities are accessible by almost all the B and IB Zoning District properties as is a well developed road network.

- **Affordable/Workforce Housing** – The action is not anticipated to increase or decrease opportunities for affordable/workforce housing in the Town. The action, accordingly, would not adversely impact upon affordable or workforce housing.
- **Community Services (including Solid Waste)** – No direct adverse impacts on community services, solid waste collection, and water/utility consumption would result with this action.
- **Other Impacts/Growth-Inducing Impacts/Fiscal Impacts** – The action would not result in any other adverse impacts, including growth-inducing impacts. Base upon the public hearing record, there appears to be no public controversy related to this action.

- SEQR Negative Declaration
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As noted in the Local Law's legislative findings, the Town Board has considered alternatives and determined that the regulations set forth in the local law are the least intrusive method available to ameliorate the negative secondary effects of adult-oriented businesses within the Town without infringing on constitutionally-protected speech activities. The Town Board considered imposing separation restrictions from cemeteries and establishments serving alcoholic beverages, but declined to do so in order to ensure the availability of a sufficient number of commercially-viable sites for the location of adult-oriented businesses within the Town. Similarly, the Town Board considered, but declined, to implement a prohibition on nudity in live adult entertainment offered by adult-oriented businesses as it was determined that such a restriction would impose an unjustified burden on the underlying expressive activity. The Town Board also rejected creating any type of licensing scheme for adult-oriented businesses as the Board believed doing so might create, either on facially or as applied, an unconstitutional system of prior restraint. The Board rejected dedicating additional police resources toward the more aggressive enforcement of existing penal and public nuisance laws, because of both budgetary limitations and to avoid possibly chilling the free-speech activities of law-abiding adult-business owners and their patrons. The Board also considered the no action alternative, but that alternative would leave the negative secondary effects of adult-oriented businesses within the Town unabated.

Based upon a careful and thorough review of the EAF and other supporting documents and information, the Lead Agency finds and determines that the proposed action would not have a significant adverse impact on the natural, built, or social environment (either in the short-term, long-term, or cumulatively) when compared with the criteria set forth in SEQR, 6 NYCRR Part 617.7(c)(1) and any other supporting information. The Lead Agency additionally determines that the facts and circumstances do not call for the preparation of an environmental impact statement.

If Conditioned Negative Declaration, provide on attachment the specific mitigation measures imposed.

For Further Information: Town of Newburgh

Contact Person: Wayne C. Booth, Supervisor, Town of Newburgh

Address: 1496 Route 300
Newburgh, New York 12550

Telephone Number: (845) 564-4552

For Type 1 Actions and Conditioned Negative Declarations, a Copy of this Notice is Sent to:

SEQR Negative Declaration
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Chief Executive Officer, Town of Newburgh; and

1. Town Board of the Town of Newburgh
Town of Newburgh
1496 Route 300
Newburgh, New York 12550

2. Environmental Notice Bulletin
Room 538
20 Wolf Road
Albany, New York 12233-1750

3. Orange County Department of Planning
124 Main Street
Goshen, New York 10924-2124

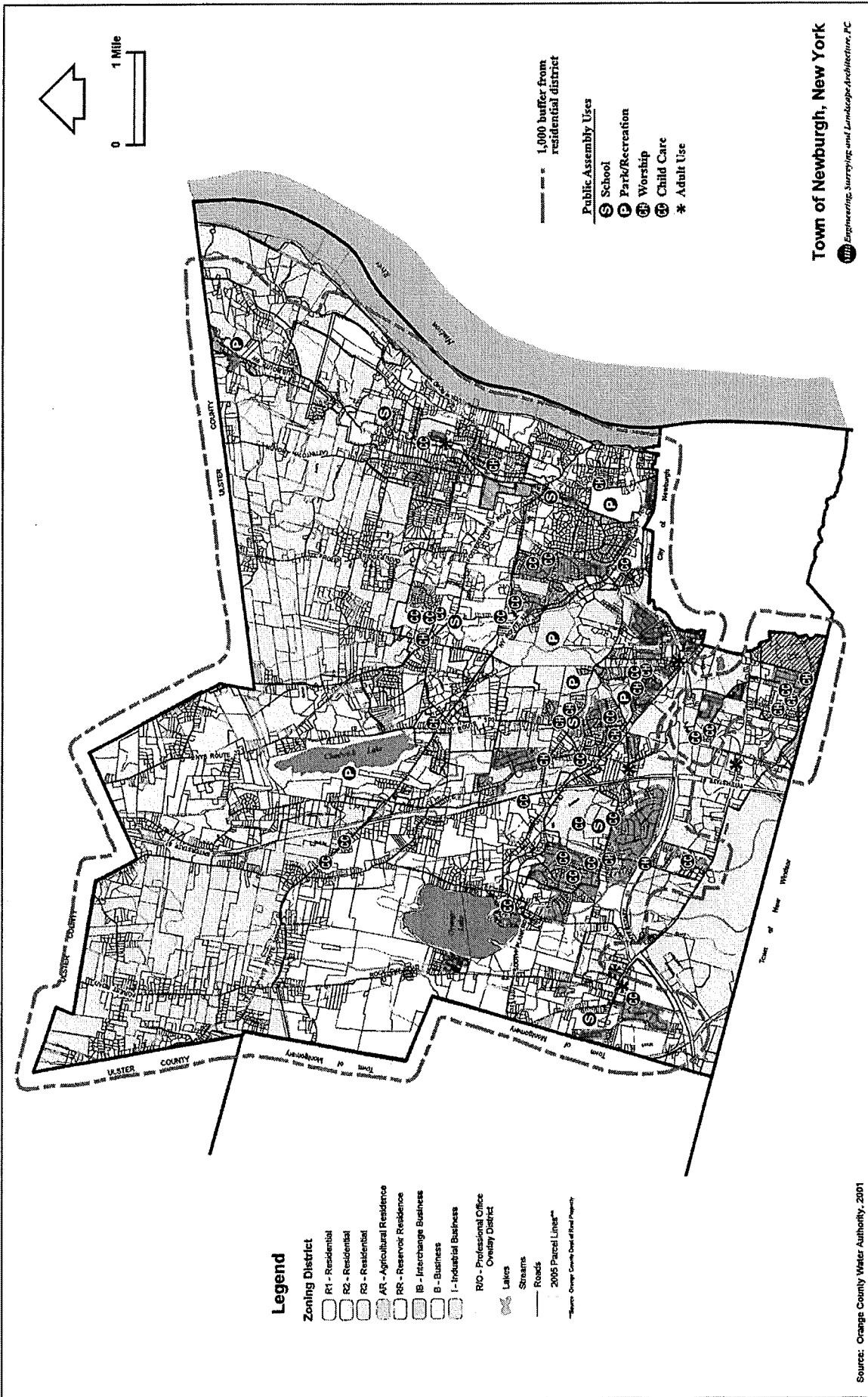
4. Planning Board
Town of Newburgh
308 Gardnertown Road
Newburgh, New York 12550

6. Zoning Board of Appeals
Town of Newburgh
308 Gardnertown Road
Newburgh, New York 12550

Any person who has requested a copy

Environmental Notice Bulletin, Room 538, 50 Wolf Road, Albany, New York 12233-1750

For Unlisted Actions, a Copy of the Negative Declaration Must Only Be Sent to *The Lead Agency*



Legend

Zoning District

- R1 - Residential
- R2 - Residential
- R3 - Residential
- AR - Agricultural Residence
- RR - Reservoir Residence
- IB - Interchange Business
- B - Business
- I - Industrial Business
- RIO - Professional Office
- Orange County

Streams

- Roads
- 2005 Parcel List™
- Town of Newburgh

© 2005 Orange County Department of Planning and Economic Development

1,000 buffer from residential district

Public Assembly Uses

- School
- Park/Recreation
- Worship
- Child Care
- Adult Use

Town of Newburgh, New York

Engineering, Surveying and Landscape Architecture, P.C.

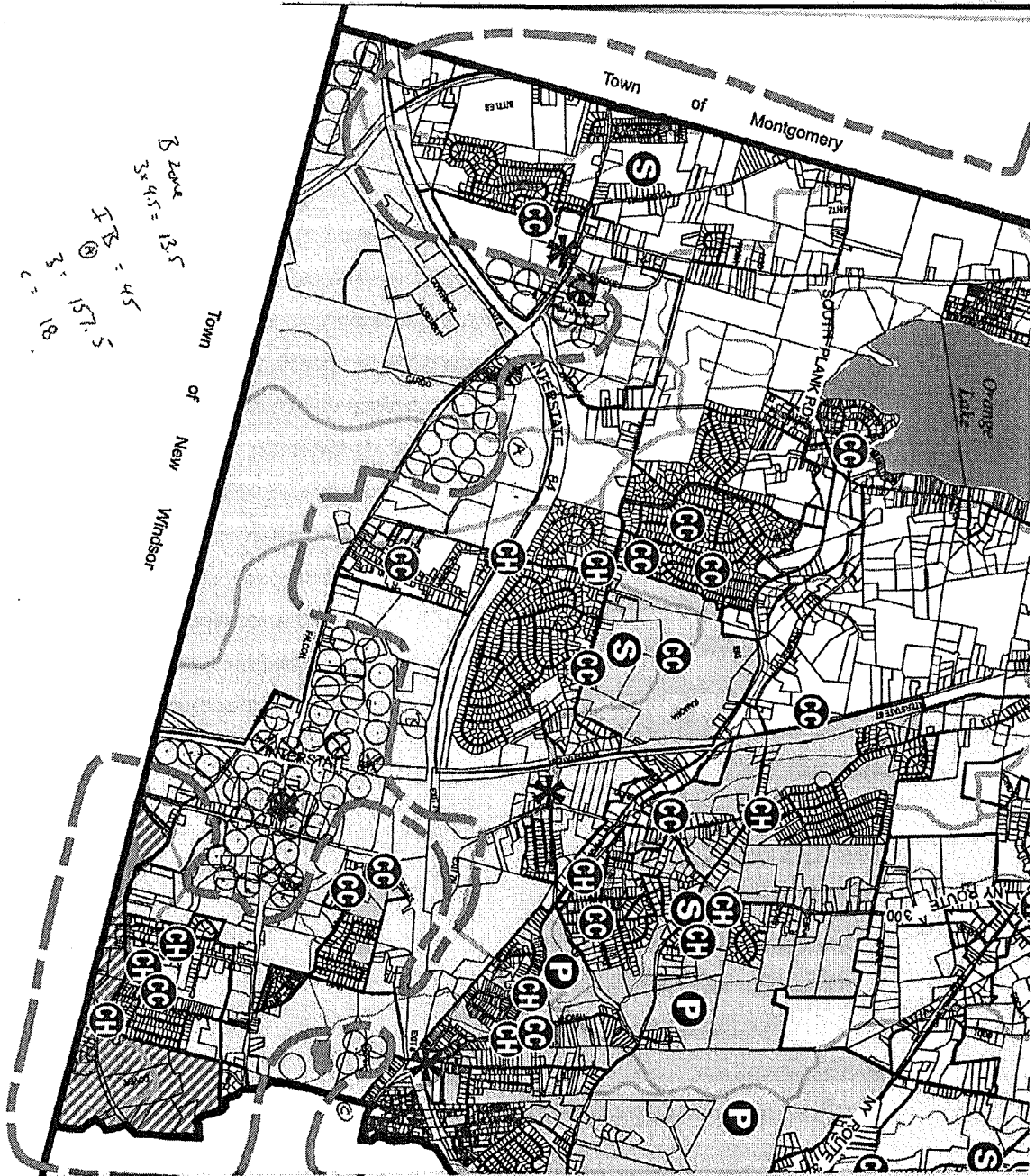


EXHIBIT B

DRAFT

At a meeting of the Town Board of the Town of Newburgh, held at the Town Hall, 1496 Route 300, in the Town of Newburgh, Orange County, New York on the ___th day of November, 2012 at 7:00 P.M., Prevailing Time.

PRESENT:

Wayne C. Booth, Supervisor

George Woolsey, Councilman

Gilbert J. Piaquadio, Councilman

Elizabeth J. Greene, Councilwoman

Ernest C. Bello, Jr., Councilman

RESOLUTION OF ADOPTION
OF LOCAL LAW NO. 6 OF
2012 - AMENDING CHAPTER
185 ENTITLED "ZONING" OF
THE CODE OF THE TOWN OF
TOWN OF NEWBURGH TO
PROVIDE FOR THE REGULATION
OF ADULT-ORIENTED BUSINESSES

Councilman/woman _____ presented the following resolution which was seconded by Councilman/woman _____.

WHEREAS, the Town Board of the Town of Newburgh in the County of Orange and State of New York following due deliberation adopted the Resolution Regarding Secondary Effects Related to the Operation of Adult-Oriented Businesses Preliminary to Possible Drafting of Local Law on September 5, 2012 which is annexed hereto and incorporated herein; and

WHEREAS, a Local Law entitled "Local Law Amending Chapter 185 entitled 'Zoning' of the Code of the Town of Newburgh to Provide for the Regulation of Adult-Oriented Businesses was introduced before the Town Board of the Town of Newburgh on September 17, 2012; and

WHEREAS, the local law in its final form was placed "upon the desks or table" of the members of the Town Board on October 3, 2012; and

WHEREAS, pursuant to resolution of the Town Board, copies of the aforesaid local law were forwarded to the Orange County Department of Planning and the Town of Newburgh Planning Board for their reports in accordance with the provisions of the New York State General Municipal Law and the Town of Newburgh Zoning Code respectively, and to the Town of Newburgh Zoning Board of Appeals; and

WHEREAS, the Town Board of the Town of Newburgh adopted a resolution on the 17th day of September, 2012 ordering a public hearing to be held on the 15th day of October, 2012 at 7:00 o'clock p.m., prevailing time, to hear all interested parties on said proposed local law, designated as Introductory Local Law #7 of the Year 2012 entitled "A Local Law Amending Chapter 185 Entitled "Zoning" of the Code of the Town of Newburgh to provide for the Regulation of Adult Oriented Businesses"; and

WHEREAS, the duly scheduled and noticed public hearing in the matter of the adoption of the aforesaid local law was held at the Town Hall at 1496 Route 300 the Town of Newburgh, New York on the 15th day of October, 2012 at 7:00 o'clock, p.m. and all parties in attendance were permitted to speak on behalf or in opposition of the proposed Local Law or any part thereof; and

WHEREAS, the Town Board of the Town of Newburgh adopted a resolution on the 24th day of October, 2012 reintroducing and ordering a second public hearing to be held on the 13th day of November, 2012 at 7:00 o'clock p.m., prevailing time, to hear all interested parties on said proposed local law, designated as Introductory Local Law #7 of the Year 2012 entitled "A Local Law Amending Chapter 185 Entitled "Zoning" of the Code of the Town of Newburgh to provide for the Regulation of Adult Oriented Businesses"; and

WHEREAS, a notice of Public Hearing and copy of the local law were mailed to the clerks of the municipalities and counties with boundaries within 500 feet of the properties affected by the zoning amendment at least ten days prior to the date of the second public hearing; and

WHEREAS, the duly scheduled and noticed public hearing in the matter of the adoption of the aforesaid local law was held at the Town Hall at 1496 Route 300 the Town of Newburgh, New York on the 13th day of November, 2012 at 7:00 o'clock, p.m. and all parties in attendance were permitted to speak on behalf or in opposition of the proposed Local Law or any part thereof; and

WHEREAS, the Town Board of the Town of Newburgh, acting as lead agency, has duly considered the adoption of said Local Law amending the Town of Newburgh Zoning Code as a Type I Action under the State Environmental Quality Review Act and has duly issued a negative declaration; and

WHEREAS, the Town Board of the Town of Newburgh has duly considered the reports and responses it has received from the Orange County Planning Department, the Town of Newburgh Planning Board and the Town of Newburgh Zoning Board of Appeals in addition to the comments and submissions made at the two Public Hearings; and

WHEREAS, the final version of the Local Law includes revisions intended to address the requests of the Zoning Board of Appeals contained in its review comments; and

WHEREAS, the negative declaration includes an evaluation of the effects from a fully approved Site Plan application directly affected by the change in the Local Law as recommended by the Orange County Planning Department and an evaluation of the availability and suitability of locations for adult-oriented businesses subsequent to the enactment of the Local Law; and

WHEREAS, the Town Board of the Town of Newburgh has additionally given consideration to

1. whether the zoning amendment is consistent with the United States and New York State Constitutions, the Comprehensive Plan of the Town of Newburgh and the Orange County Comprehensive Plan,
2. whether the zoning amendment is no broader than necessary to achieve its purpose,
3. whether the zoning amendment is the least restrictive option available which achieves its purpose,
4. the availability and suitability of locations for adult-oriented businesses subsequent to the enactment of the Local Law, including their accessibility to the general public, the surrounding infrastructure, the likelihood of their ever realistically becoming available and whether the sites are suitable for "some generic commercial enterprise",
5. the availability of alternative avenues via which adult residents of the Town of Newburgh may view the types of constitutionally-protected expressions offered by adult-oriented businesses,
6. possible alternative methods of achieving the purpose of the Local Law,
7. the economic health of the community,
8. the possible effects of the Local Law on constitutionally-protected speech activities and expression.

and finds that the additional regulation of adult-oriented businesses due to their aggregate negative secondary effects on the Town is consistent with both Constitutions and Comprehensive Plans, is no broader than necessary to achieve its purpose; is the least-restrictive option available to achieve its purpose; that there are numerous other commercial locations for adult-oriented businesses which are accessible to the public and served by road and utility infrastructure to locate following the amendment of the Town's Zoning Code, that the availability of high-speed internet access throughout the Town provides an alternate avenue via which Town residents may view the types of constitutionally-protected expressions offered by adult-oriented businesses, and that the local law will promote the general welfare, health, comfort and safety of Town residents and benefit the economic health of the community by ameliorating the current, and preventing or limiting the future, negative secondary effects ancillary to the operation of lawful adult-oriented businesses; and

WHEREAS, the Town Board of the Town of Newburgh, after due deliberation finds it in the best interest of the Town to adopt said Local Law; and

WHEREAS, given the requirements of the Secretary of State with regard to the numbering of adopted local laws, the local law will be designated as Local Law No. 6 of 2012 upon its adoption.

NOW, THEREFORE, BE IT RESOLVED as follows:

1. The Town Board of the Town of Newburgh hereby adopts said Local Law, which is designated as Local Law No. 6 of Year 2012 entitled "A Local Law Amending Chapter 185 entitled 'Zoning' of the Code of the Town of Newburgh to Provide for the Regulation of Adult-Oriented Businesses".
2. The Town Clerk is hereby directed to enter this resolution and said Local Law in the minutes of this meeting and the Local Law Book of the Town of Newburgh and to give due notice of the adoption of said Local Law to the Secretary of State and to the public.
3. A report of final action in the matter of the adoption of said Local Law amending the Zoning Code of the Town of Newburgh shall be delivered to the Orange County Planning Department in accordance with the requirements of the General Municipal Law.

The question of the adoption of the foregoing resolution was duly put to a vote on roll call, which resulted as follows:

George Woolsey, Councilman voting _____

Gilbert J. Piaquadio, Councilman voting _____

Elizabeth J. Greene, Councilwoman voting _____

Ernest C. Bello, Jr., Councilman voting _____

Wayne C. Booth, Supervisor voting _____

The resolution was thereupon declared duly adopted.

**INTRODUCTORY LOCAL LAW NO. 7 OF 2012
A LOCAL LAW AMENDING CHAPTER 185 ENTITLED
"ZONING"
OF THE CODE OF THE TOWN OF NEWBURGH
TO PROVIDE FOR THE REGULATION OF
ADULT-ORIENTED BUSINESSES**

SECTION 1 - TITLE.

This Local Law shall be referred to as "A Local Law Amending Chapter 185 Entitled "Zoning" of the Code of the Town of Newburgh to Provide for the Regulation of Adult-Oriented Businesses."

SECTION 2 - AMENDMENT OF CHAPTER 185 - SECTION 185-10.

A new subsection 185-10D entitled "Adult-oriented businesses is hereby added to Section 185-10 entitled "Utililization of Use Table" of Chapter 185 entitled "Zoning" of the Code of the Town of Newburgh, Orange County, New York to read as follows:

"D. Adult-oriented businesses. A use meeting the definition of "adult-oriented business" contained in §185-67 shall additionally be subject to the supplementary regulations contained in Article XVI of this Chapter."

SECTION 3 - AMENDMENT OF CHAPTER 185 – ADDITION OF NEW ARTICLE XVI.

A new Article XVI entitled "Adult-Oriented Businesses" is hereby added to Chapter 185 entitled "Zoning" of the Code of the Town of Newburgh, Orange County, New York to read as follows:

**"ARTICLE XVI
Adult-Oriented Businesses**

§185-65. Legislative Findings. The Town Board of the Town of Newburgh is familiar with the Town, the location of adult-oriented business within the Town and the issues raised by such business in the Town and throughout the country. Based on the Board's local knowledge, the input of Town residents and business owners obtained during a public input session held on August 14, 2012 2004 and evidence and studies concerning the possible impacts or "secondary effects" of adult-oriented businesses on the surrounding community, as presented in judicial decisions such as, but not limited to, *City of Erie v. Pap's A.M. d/b/a "Kandyland"*, 529 U.S. 277 (2000); *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976); *Stringfellow's of New York, Ltd. v. City of New York*, 671 N.Y.S.2d 406 (1998); *Town of Islip v. Caviglia*, 73 N.Y. 2d 544 (1989) and *Singer v. Town of East Hartford*, 736 F.Supp. 430 (D. Conn.1989), *aff'd* 901 F.2d 297 (2d Cir. 1990) (affirming judgment on basis of district court opinion); and on studies conducted by other communities including, but not limited to, *REPORT*

ON THE SECONDARY EFFECTS OF THE CONCENTRATION OF ADULT USE ESTABLISHMENTS IN THE TIMES SQUARE AREA; STUDY OF POLICE ACTIVITY MILFORD: TESTING FOR NEGATIVE SECONDARY EFFECTS OF ADULT BUSINESS; ADULT BUSINESS -- STUDY (PLANNING DEPARTMENT, CITY OF PHOENIX); ADULT USE STUDY (NEWPORT NEWS DEPARTMENT OF PLANNING AND DEVELOPMENT); RURAL HOT SPOTS: THE CASE OF ADULT BUSINESSES (BY RICHARD McCLEARY); ADULT ENTERTAINMENT BUSINESSES IN INDIANAPOLIS AN ANALYSIS, REPORT ON ADULT ORIENTED BUSINESSES IN AUSTIN (OFFICE OF LAND DEVELOPMENT SERVICES); SURVEY OF FLORIDA APPRAISERS: EFFECT OF LAND USES ON MARKET VALUES; ADULT ENTERTAINMENT STUDY (DEPARTMENT OF CITY PLANNING CITY OF NEW YORK); EFFECTS OF ADULT ENTERTAINMENT BUSINESSES ON RESIDENTIAL NEIGHBORHOODS (OFFICE OF THE CITY ATTORNEY, CITY OF EL PASO); THE SECONDARY EFFECTS DOCTRINE SINCE ALAMEDA: AN EMPIRICAL RE-EXAMINATION OF THE JUSTIFICATION FOR LAWS LIMITING FIRST AMENDMENT PROTECTION (BY CHRISTOPHER SEAMAN and DANIEL LINZAND); and SURVEY OF TEXAS APPRAISERS SECONDARY EFFECTS OF SEXUALLY-ORIENTED BUSINESSES ON MARKET VALUES, the Board finds:

1. Adult-oriented businesses are unavoidably associated with unlawful, unhealthy and detrimental activities ancillary to the constitutionally protected speech activities of such businesses.
2. Employees of adult-oriented businesses engage in or may be requested to engage in sexual behavior as a result of the type of business by which they are employed.
3. People present in the vicinity of an adult-oriented business are often assumed by third parties to be engaged in, or amenable to, the types of unlawful, unhealthy and detrimental activities ancillary to such businesses. As a result, such persons are subjected to unwanted advances or attention by persons frequenting such adult-oriented business.
4. People who choose not to frequent adult-oriented businesses tend to avoid areas in which such businesses locate. As a result, areas in which adult-oriented businesses and massage establishments locate often become "dead zones", *i.e.*, areas in which owners of non-adult-oriented businesses tend to choose not to locate in the first instance, or choose to migrate away from, because of diminished pedestrian traffic due to the presence of adult-oriented businesses and massage establishments.
5. Because non-adult-oriented businesses tend not to locate near, or migrate away from, adult-oriented businesses, the presence of one such business tends to attract other adult-oriented businesses into the dead zone, thereby increasing the pace and intensity of the unlawful, unhealthy and detrimental activities unavoidably associated with such businesses and contributing to the blighting of the area surrounding such businesses. The smaller the municipality, including the Town, the larger the effects of a dead zone because such a zone would encompass a larger proportion of the municipality's businesses as opposed to a similar zone situated in a larger municipality.
6. Due to the small geographical area of the Town of Newburgh, the probability increases that adult-oriented businesses will have substantial effects upon residential areas within the

Town. Further, smaller municipalities, including the Town, are more likely to have fewer days and hours of commercial activity than a larger municipality. This increases the likelihood that an adult-oriented business or massage establishment will have a larger effect on the area in which it is located during the off-hours of non-adult-oriented businesses.

7. Sexual acts, including masturbation, occur at adult-oriented businesses, especially those which provide enclosed rooms, booths or other cubicles for viewing of films, videos or live sex shows, thereby creating unhealthy and unsanitary conditions within the premises of such businesses.

8. Sexual activity is often a secondary effect of the constitutionally protected speech activities presented at adult-oriented businesses, thereby creating unhealthy and unsanitary conditions.

9. Some patrons frequent adult-oriented businesses for the purpose of engaging in specified sexual activities within the premises of such businesses, thereby creating unhealthy and unsanitary conditions within the premises of such businesses as demonstrated by online reports of patrons of adult-oriented businesses located within the Hudson Valley stating that some employees of such businesses provide "extras", *i.e.*, engage in specified sexual activities with patrons in exchange for monetary compensation.

10. Communicable diseases may be spread by specified sexual activities, including, but not limited to, transmission of the human immunodeficiency virus ("HIV") and the contraction of the acquired immunodeficiency syndrome ("AIDS"), hepatitis B and venereal diseases.

11. Venereal diseases, HIV, AIDS and hepatitis B, as well as other communicable diseases spread by specified sexual activities, are serious health concerns in the local community.

12. Sanitary conditions in some adult-oriented businesses are unhealthy, in part, because the activities conducted there are unhealthy, and, in part, because of the unregulated nature of the activities engaged in by some patrons of such businesses and the failure of some business owners and operators to self-regulate those activities and maintain the business premises.

13. Numerous studies and reports have determined that semen and other bodily fluids are found in certain areas of adult-oriented businesses, particularly where persons view, in enclosed rooms, booths or other cubicles, adult materials or entertainments characterized by an emphasis on nudity or specified sexual activities or specified anatomical areas.

14. Adult-oriented businesses have operational characteristics which should be reasonably regulated in order to protect the substantial governmental concerns raised by the various findings herein while permitting patrons and owners of such businesses to engage in constitutionally-protected speech activities.

15. The unregulated presence of adult-oriented businesses is associated with declining property values.

16. The unregulated presence of adult-oriented businesses is associated with increased crime rates against both property and persons.

17. Children and teenagers are more likely to be exposed to graphic sexual images because of the unregulated presence of adult-oriented businesses.

18. Because persons patronizing adult-oriented businesses often travel a significant distance to such businesses these persons tend to not share with Town residents the concerns for the quality of life in the Town. Consequently, persons from outside the Town patronizing such businesses tend to place an inordinate strain on Town services and facilities such as parking, usage of Town streets, and trash collection and removal.

19. The unregulated presence of adult-oriented businesses tends to alter the character of the community in which they are located and quality of life for the residents of such community. The Town is presently in the process of addressing legislative and administrative Action Items recommended by the adoption of the Town's Comprehensive Plan Update in a deliberate process in an effort to alter and improve both the character and quality of life in the Town. The alterations to character and quality of life associated with the unregulated presence of adult-oriented businesses are at odds with the goals of the alteration and improvement the Town is undergoing and, consequently, the failure to properly regulate adult-oriented businesses and massage establishments could undermine this process.

20. The Town's intent in regulating adult-oriented businesses is not to restrict constitutionally-protected speech activities but rather to provide constitutionally sufficient alternate avenues for persons to engage in such activities in a manner consistent with the constitutions of the United States and New York State while addressing the unlawful, unhealthy and detrimental activities ancillary to such speech and ameliorating these secondary effects on the peace, good order, commercial viability and safety of Town residents and non-adult-oriented businesses.

21. The Town has granted a franchise to both Verizon and Time-Warner for the provision of cable television and these franchisees additionally provide high-speed internet services within the Town and such access is available to all Town residents. This universal availability of cable television and high-speed internet access throughout the Town provides additional alternate avenues for residents to view constitutionally-protected adult materials and adult entertainment if they exercise their right to do so.

22. The regulations set forth in this local law are the least intrusive method available to ameliorate the negative secondary effects of adult-oriented businesses within the Town without infringing on constitutionally-protected speech activities. The Town considered imposing separation restrictions from cemeteries and establishments serving alcoholic beverages, but declined to do so in order to ensure the availability of a sufficient number of commercially-viable sites for the location of adult-oriented businesses within the Town. Similarly, the Town considered, but declined, to implement a prohibition on nudity in live adult entertainment offered by adult-oriented businesses as it was determined that such a restriction would impose an unjustified burden on the underlying expressive activity. The Town also rejected creating any type of licensing scheme for adult-oriented businesses as the Board believed doing so might create, either on facially or as applied, an unconstitutional system of prior restraint. Finally, the

Board rejected dedicating additional police resources toward the more aggressive enforcement of existing penal and public nuisance laws, because of both budgetary limitations and to avoid possibly chilling the free-speech activities of law-abiding adult-business owners and their patrons.

23. The studies conducted by other communities that were reviewed by the Board, particularly, but not limited to, the 1994 study prepared by New York City, are applicable to the particular circumstances and experiences of the Town regarding adult-oriented businesses. Although most of the studies reviewed by the Board were conducted by larger municipalities, the studies themselves often focused their factual sampling and analysis on small, discrete areas of the municipality rather than the whole municipality. The relatively small size of the "study areas" in which secondary effects were found to occur is far more analogous to the geographic area of the Town. As such, the experiences and conclusions documented in the secondary effects studies are valid predictors of the effects of adult-oriented businesses within the Town. In order to screen the quality of secondary effects studies considered, the Board reviewed and relied on only those studies that were based on collected data, *e.g.*, crime statistics, property value assessments, etc., rather than on anecdotal statements.

24. The separation of adult-oriented businesses from sensitive sites and the boundaries of residential zoning distances mandated by this local law, and the requirement that such businesses locate in non-residential districts, will ameliorate the negative secondary effects of such businesses by creating a spatial buffer between those portions of the Town most subject to the harms of increased crime, decreased property values, influx of patrons from outside of the Town, late night traffic and parking congestion, noise, unhygienic conditions, and the likely exposure of children and teenagers nudity, specified anatomical areas or specified sexual activities.

25. This local law provides for alternative sites on which adult-oriented business may locate and these sites are both physically and legally available, within the Town's borders. These alternate sites are part of an actual business real estate market within the Town. The local law makes available for adult-oriented businesses approximately forty-one (41%) percent of the total area of the Town open for commercial activity. Applying a 500 foot separation requirement between adult-oriented businesses in addition to separation requirements between adult-oriented businesses and residential zoning district boundaries and sensitive sites, approximately thirty-nine (39%) percent of the land area of the IB Zoning District and 40% of the land area in the B Zoning District outside the latter separation requirements remains available for adult-oriented businesses. These alternate sites have been identified and reviewed and are accessible to the public, have some likelihood of being available for use by adult-oriented businesses, and are suitable for commercial activity as they have access to the necessary public infrastructure required to support a commercial activity, *e.g.*, water, sewage and electrical service, as well as a reasonable ability for patrons to lawfully ingress and egress such sites.

26. Massage establishments are associated with many of the same unavoidably unlawful, unhealthy and detrimental activities associated with adult-oriented business that offer adult materials or adult entertainment.

27. The general welfare, health, comfort and safety of the citizens of the Town will be promoted by the enactment of this section and it is, therefore, necessary to do so.

28. The intent of the Town Board in enacting this Local Law is to ameliorate the negative secondary effects of adult-oriented businesses. The intent of the Board is not to limit constitutionally-protected expressive activity and, to this end, this Local Law is not intended to prohibit the establishment or operation of adult-oriented businesses in compliance with the content-neutral, time, place and manner restrictions established by this enactment.

§185-66. Legislative Purpose. The primary purposes of this Article are as follows:

1. To preserve the character and quality of the life of the Town's neighborhoods and business and maintain the viability of the Town's alteration and improvement pursuant to the Comprehensive Plan Update;

2. To ameliorate the documented adverse secondary effects that are ancillary to adult-oriented businesses as set forth in §185-65 including, but not limited to: decreased property values; attraction of transients; parking and traffic problems; increased crimes against persons and property; loss of business for surrounding non-adult-oriented businesses; and deterioration of neighborhoods;

3. To maintain property values;

4. To prevent crime;

5. To safeguard the continued commercial viability of currently existing non-adult-oriented businesses;

6. To insure the continued commercial viability of the Town as a location for new non-adult-oriented businesses;

7. To restrict minors' inadvertent exposure to nudity, specified anatomical areas or specified sexual activities;

8. To preserve and protect public hygiene, health and sanitation; and

9. To maintain the general welfare, health, comfort and safety of Town residents and businesses.

So as to effectuate these purposes, and based upon the findings set forth in §185-65 such uses shall be subject to the standards and regulations set forth in this section.

§185-67. Definitions: As used in this Article, the enumerated terms shall be defined as follows:

ADULT-ORIENTED BUSINESS - The term "adult-oriented business" shall mean a use of a building, structure, or property for a business which includes the regular offering, for economic gain or other consideration, of adult materials or adult entertainment as a substantial or significant portion of its stock-in-trade for the purposes of sale, rental, lease, trade, gift or display of such adult materials or adult entertainment. For the purposes of this law adult-oriented businesses shall include any restaurant, nightclub, bar, tavern, eating and drinking place or

- (ii) the entertainment includes at least one visual depiction of nudity or specified sexual activities or specified anatomical areas and:
 - (a) the entertainment, when viewed as a whole, presents such depiction for educational or scholarly purposes; and
 - (b) such depiction constitutes less than ten (10) percent of total duration of the entertainment.

EMPLOYEE.— The term “employee” shall mean any person who provides services or any other type of labor, including live performances, on the premises of an adult-oriented business, as such term is defined herein, regardless of the nature of the legal relationship between such person and the adult-oriented business in which such services or labor occur and whether such services or labor are performed for economic gain or other consideration.

FINANCIAL EXPENDITURES - The term “financial expenditures” shall mean any improvements or other capital outlay made by an owner of an adult-oriented business to establish such business, exclusive of the fair market value of the building, structure, and/or property in or on which such business is located at the time of any application pursuant to section 185-75(D) and exclusive of any improvements or other capital outlay unrelated to the offering of adult materials or adult entertainment which renders the use a non-conforming adult-oriented business.

NUDITY - The term “nudity” shall mean the showing of the human male or female genitals, public areas, buttocks, or anus, any part of the nipple or any part of a female breast below a point immediately above the top of the areola with less than a fully opaque covering.

MASSAGE ESTABLISHMENT -

(a) The term “massage establishment” shall mean any establishment having a fixed place of business where massages are administered for pay, including but not limited to massage parlors, sauna baths and steam baths.

(b) Exceptions. The definition provided for under (a) above shall not be construed to include the following:

- (i) Hospitals, nursing homes, medical clinics, or the offices of a physician, surgeon, chiropractor, osteopath, or duly licensed physical therapists, occupational therapists, or duly licensed massage therapists;
- (ii) Barber shops, beauty salons or nail salons in which massages are administered only to the scalp, face, neck or shoulders; or
- (iii) Health clubs or Fitness Facilities and recreational Membership Clubs which have facilities for physical exercise, such as tennis courts, racquet ball courts, ice skating rinks, or exercise rooms, and which do not receive their primary source of revenue through the administration of massages.

establishment, arcade, theater, video store, motel, hotel, or any other establishment that regularly offers, for economic gain or other consideration, adult entertainment, a retail store that offers adult materials as hereinafter defined and any massage establishment.

ADULT MATERIALS -

(a) The term "adult materials" shall include any literature, books, magazines, pamphlets, newspapers, papers, comic books, drawings, articles, computer or other images, motion pictures, films, photographs, digital video discs, video cassettes, slides; or other visual representations, mechanical devices, instruments, clothing or any other writings, materials or accessories which are distinguished or characterized by their emphasis on matter depicted described or related to nudity, specified sexual activities or specified anatomical areas as defined herein.

(b) Exceptions. An item otherwise falling within the definition set forth in (a) shall not be considered to be within such definition if:

- (i) the item is printed matter that does not contain at least one visual depiction of nudity or specified sexual activities or specified anatomical areas; or
- (ii) the item is printed matter containing at least one visual depiction of nudity or specified sexual activities or specified anatomical areas and:
 - (a) the item, when viewed as a whole, presents such depiction for educational or scholarly purposes; and
 - (b) the item is offered for sale by an establishment in which not more than ten (10) percent of the establishment's total interior square footage which is open to the general public is devoted to the sale, rental, lease, trade, gift or display of adult materials.

ADULT ENTERTAINMENT -

(a) The term "adult entertainment" shall include all entertainment in any live or recorded form or format which includes nudity or the depiction or display of specified sexual activities, specified anatomical areas or adult materials, as well as employees of any establishment who, as part of their employment duties, are required to wear costumes or uniforms or engage in live performances, in addition to their non-performance employment duties, where, during any portion of the discharge of their employment duties, such employees are in a state of nudity or depict or describe specified sexual activities or specified anatomical areas as defined herein.

(b) Exceptions. Any entertainment otherwise falling within the definition set forth in (a) shall not be considered to be within such definition if:

- (i) the entertainment does not include at least one visual depiction of nudity or specified sexual activities or specified anatomical areas; or

NON-ADULT MATERIALS - The term "non-adult materials" shall mean any literature, books, magazines, pamphlets, newspapers, papers, comic books, drawings, articles, computer or other images, motion pictures, films, photographs, digital video discs, video cassettes, slides; or other visual representations, mechanical devices, instruments, clothing or any other writings, materials or accessories not within the definition of adult materials.

NON-ADULT ENTERTAINMENT - The term "non-adult entertainment" shall mean all entertainment in any live or recorded form or format not within the definition of adult entertainment.

SENSITIVE SITE - The term "sensitive site" shall mean any one of the following: churches, synagogues, mosques or other places of worship, schools, child or day nursery facilities, public or semi-public parks or recreational facilities in existence as of September 15, 2012.

SPECIFIED ANATOMICAL AREAS - The term "specified anatomical areas" shall include:

- (a) Less than completely or opaquely covered:
 - (i) Human genitals;
 - (ii) Pubic Region;
 - (iii) Buttock; or
 - (iv) Female breast below a point immediately above the top of the areola.
- (b) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

SPECIFIED SEXUAL ACTIVITIES - The term "specified sexual activities" shall include:

- (a) Actual or simulated fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breast;
- (b) Actual or simulated acts of human masturbation, sexual intercourse, contact between the mouth and genitals, contact between the mouth and anus, contact between the mouth and breast;
- (c) Human genitals in a state of sexual stimulation or arousal;
- (d) Actual or simulated sexual acts between humans and animals; or
- (e) Excretory functions as part of or in connection with any of the activities set forth in (a), (b), (c) or (d) above.

SUBSTANTIAL OR SIGNIFICANT PORTION -

(a) General Rule. An establishment that regularly offers, for economic gain or other consideration, adult materials or adult entertainment shall be considered to include adult materials or adult entertainment as a "substantial or significant portion" of its stock-in-trade where only a portion or section of such establishment's area is set aside for the sale, rental, lease, trade, gift or display of adult materials or adult entertainment.

(b) Ten-Percent Safe Harbor Exception. Any establishment that would otherwise be subject to this article that can prove that adult materials are contained, or adult entertainment are permitted to occur, in not more than ten (10) percent of the establishment's total interior square footage which is open to the general public, shall be exempt from the provisions of this article so long as such adult materials are kept out of the reach of minors and the method of operation of such establishment does not permit minors to view nudity, specified sexual activities or specified anatomical areas.

(c) Exception to Ten-Percent Safe Harbor Exception. The ten-percent safe harbor exception otherwise provided for under this definition shall not apply to any establishment possessing one or more of the following features:

- (i) An interior configuration and layout requiring customers to pass through an area of the establishment with adult materials or adult entertainment in order to access an area of the establishment with non-adult materials or non-adult entertainment;
- (ii) One or more individual enclosures where adult materials or adult entertainment are available for viewing by customers;
- (iii) A method of operation requiring customer transactions with respect to non-adult materials or non-adult entertainment to be made in an area in which nudity, specified sexual activities or specified anatomical areas are visible;
- (iv) A method of operation under which non-adult materials or non-adult entertainment are offered for sale only and adult materials or adult entertainment are offered for sale or rental;
- (v) A greater number of different titles of adult materials than the number of different titles of non-adult materials;
- (vi) A method of operation excluding or restricting minors from the establishment as a whole or from any section of the establishment with non-adult materials or non-adult entertainment;
- (vii) A sign advertising the availability of adult materials or adult entertainment which is disproportionate in size relative to a sign advertising the availability of non-adult materials or non-adult entertainment, when compared with: the proportions of adult materials or adult entertainment and non-adult materials or non-adult entertainment offered for sale or rent in the establishment; or the proportions of the establishment's total interior square footage open to the general public

containing adult materials, or in which adult entertainment is permitted to occur, and such square footage containing non-adult materials or in which non-adult entertainment is permitted to occur; or

- (viii) A window display in which the number of products or area of display of adult materials or adult entertainment is disproportionate in size relative to the number of products or area of display of non-adult materials or adult entertainment, when compared with: the proportions of adult materials or adult entertainment and non-adult materials or non-adult entertainment offered for sale or rent in the establishment; or the proportions of the establishment's total interior square footage open to the general public containing adult materials, or in which adult entertainment is permitted to occur, and such square footage containing non-adult materials or in which non-adult entertainment is permitted to occur.

ZONING BOARD OF APPEALS - The terms "Board", "Board of Appeals" and "Zoning Board of Appeals of the Town of Newburgh" shall mean the Zoning Board of Appeals of the Town of Newburgh.

§185-68. Prohibition on Massage Establishments. Massage establishments shall not be a permitted use within the Town of Newburgh.

§185-69. Location of Adult-Oriented Business. An adult-oriented business shall be permitted, in accordance with the requirements of this section, only in the B, IB or I zoning districts as shown on the August 19, 1974, Zoning Map, Town of Newburgh, last amended on June 4, 2012, which accompanies and which, with all explanatory matter thereon, is hereby adopted and made a part of this local law. The exact location of each zoning district boundary is recorded on the Official Zoning Map in the office of the Town Clerk in accordance with § 264 of Town Law and § 185-5 of the Town's Zoning Law.

§185-70. Separation, lot, bulk and parking requirements.

A. Minimum separation requirements.

(a) General provision. No adult-oriented business shall be located within 1,000 feet of the property line of any sensitive site or the boundary lines of the RR, AR, R1, R2 or R3 residential zoning districts.

(b) Separation between adult-oriented businesses. No adult oriented business shall be located within 500 feet of any other adult-oriented business.

B. Measurement.

(a) General provision. For purposes of this section, all distances shall be measured in a straight line, without regard to intervening structures, from the nearest point of the building or structure in which the adult-oriented business is or will be located to the nearest property line of any sensitive site defined in §185-67, or nearest boundary line of any zoning district described in

subsection A of this section, or to the nearest point of the building or structure or part thereof occupied or leased by the adult-oriented business if less than the entire structure is occupied by or proposed to be occupied by an adult-oriented business..

(b) Multi-tenant facility. Where a multi-tenant facility such as a shopping center is involved, measurement shall be made from the most proximate point along the boundary of the leasehold interest of such business or such site rather than the lot line of the facility containing such business or such site.

C. Buildings containing residential uses. No adult-oriented business shall be established or permitted in any building of which any part is used for residential purposes. No residential use shall be established in a building of which any part is used as an adult-oriented business.

D. Bulk, parking and supplemental regulations. Adult-oriented businesses shall conform to applicable , bulk regulations for the B, IB or I zoning districts and the applicable bulk and supplemental regulations set forth in this chapter for the appropriate classification of permitted use or use subject to site plan review by the Planning Board, as such regulations may be enacted or amended from time to time.

E. Limitation per zoning lot. No more than one adult-oriented business permitted under this section shall be established on a zoning lot.

F. Maximum square footage. The total interior square footage open to the general public of any adult-oriented business shall not exceed, in total, 10,000 square feet.

§185-71. Signs and Displays.

A. Signs and displays shall not depict or describe specified sexual activities or specified anatomical areas.

B. Signs and displays shall not depict nudity.

C. Signs and displays visible from the outside of an adult-oriented business may be illuminated or composed of lighted material such as neon but shall not feature flashing illumination.

D. Additional regulations applicable. In addition to the provisions of this section, signs and displays identifying or portraying an adult-oriented business shall be subject to all regulations applicable to signs and displays within the Town of Newburgh in addition to the requirements of this section.

§185-72. Interior and exterior lighting. During the period that an adult-oriented business is occupied, it shall be illuminated by sufficient natural or non-flashing artificial light to permit safe ingress and egress to and from the premises.

§185-73. Live entertainment security. Each adult-oriented business offering entertainment consisting of live performances shall maintain adequate security during hours of operation to

business aspect of the use has been fully amortized, and the use shall terminate on the date specified in the notice.

- (3) The notice of termination shall be sent by certified mail, return receipt requested, to the owner of the real property at the address set forth on the most recent tax rolls of the Town and to any mortgagee at the address set forth on any recorded mortgage.
- (4) In the event that the certified letter is not accepted by the owner, the posting of a copy of the notice on the property and the mailing of a copy by regular mail to the owner's address shall be deemed sufficient notice.

C. Board of Appeals Jurisdiction. The Board of Appeals of the Town of Newburgh shall have the power to hear and decide applications submitted to the Board for the continuation of a non-conforming adult-oriented business made pursuant to this subsection. The Board shall hear and decide such applications using the same procedures by which it hears applications for use and area variances pursuant to New York State Town Law Section 267-A and Town of Newburgh Code Section 185-55 and subject to the same time constraints for rendering a decision. Submissions of such applications to the Board shall be subject to payment of the same fees and costs as are required by the Town of Newburgh from time to time for zoning variance applications. The applicant shall not be required to obtain an order, requirement, decision, interpretation or determination by an administrative official of the town in order to submit an application for continuation.

D. Amortization of Certain Non-Conforming Adult-Oriented Businesses. Notwithstanding subsection A, the Board, may permit an adult-oriented business subject to termination to continue for a limited period of time not to exceed three years beyond the two-year period established in subsection A, for a maximum total of five years, provided that:

- (1) an application is made by the owner of such adult-oriented business to the Board at least one hundred and twenty (120) days prior to the date on which such business must terminate;
- (2) the Board shall find, in connection with such adult-oriented business, that:
 - (a) the owner of such a business had made, prior to the non-conformity, substantial financial expenditures related to such business;
 - (b) the owner has not recovered substantially all of such financial expenditures;
 - (c) the period for which such business may be permitted to continue is the minimum period sufficient for the owner of such business to recover substantially all of such financial expenditures; and
 - (d) without such continuation the owner will not have a reasonable opportunity to recover substantially all of such financial expenditures; and
- (3) in any application for a continuation beyond the two-year period established in Subsection A, the owner shall bear the burden of proving by substantial evidence each item set

forth in Subsection D(2) via competent expert and/or scientific testimony supported by reliable documentary proof, including audited financial data, regarding the subject adult-oriented business.

E. Should any nonconforming adult-oriented business cease operation for a period exceeding six consecutive months within the amortization period or at any other time, the adult-oriented business shall be deemed to terminate its nonconforming status and shall not be continued or reopened at the location unless the adult business is in full conformity with the provisions of this Article.

§185-76. Prohibited Activities. The following shall not be permitted on the premises of any adult-oriented business within the Town of Newburgh:

1. Appearance by a person knowingly or intentionally engaging in specified sexual activities; or
2. The use of sound amplification equipment to amplify a description or discussion of nudity, specified anatomical areas or specified sexual activities if:
 - (a) such description or discussion is audible beyond the exterior of the structure from which the description or discussion originates; or
 - (b) such description or discussion is amplified in a public place.

M. Enforcement and penalties. Violations of this article are subject to enforcement and penalties as provided for in Code Section 185-52 and in case any adult-oriented business or massage establishment is operating or has been established in violation of this section or any regulations made under authority conferred hereby, the Town Board of the Town of Newburgh or, with its approval, the Building and Code Enforcement Officer or other proper official, in addition to other remedies, may institute any appropriate action or proceedings to prevent, correct or abate such violation.

SECTION 4 - TITLES

Any title enumerated under this local law is for organization purposes only and shall not be deemed part of the text of this local law.

SECTION 5 - JUDICIAL REVIEW

Those wishing to challenge the validity of this Article are advised that judicial review of same is available under, *inter alia*, 42 U.S.C. §1983 and Article 78 of the New York Civil Practice Law and Rules.

SECTION 6 - VALIDITY

If any clause, sentence, paragraph, word, section or part of this local law shall be adjudged by any court of competent jurisdiction to be unconstitutional, illegal or invalid, such judgment shall not

ensure the public peace and order. The provisions of this subsection shall require each adult-oriented business offering live performance to employ not less than one uniformed security guard per every 50 or fewer patrons on the premises. For any number of patrons over 50, each adult-oriented business offering live performances shall employ not less than two uniformed security guards. All uniformed security guards shall be employed in accordance with the New York State Security Guard Act of 1992, as may be amended from time to time

§185-74. Non-conforming Buildings or Lots. No non-conforming building or lot shall be used for an adult-oriented business, unless a variance has been obtained from the Zoning Board of Appeals. No existing building, lot or use shall be added to, enlarged, expanded in size or converted for purposes of conducting an adult-oriented business so as to render such building, lot or use non-conforming.

§185-75. Termination and Amortization of Non-Conforming Adult-Oriented Businesses.

A. Termination of Non-Conforming Adult-Oriented Businesses. Any establishment in existence or which has obtained vested rights to exist prior to the effective date of this local law which:

(a) has made financial expenditures for the purpose of operating or to commence operating an adult-oriented business;

(b) falls within the definition of an adult-oriented business; and

(c) is not in conformity with the requirements of this Article shall either conform to the requirements of this Article or terminate its operation as an adult-oriented business within two (2) years following the effective date of this local law or, if later, the date of issuance of a certificate of occupancy for a use which includes an adult-oriented business, or such later date as hereinafter provided. Such nonconforming uses shall not be increased, enlarged, extended, or altered within the two-year period or any extension thereof, except that the use may be changed to a conforming use.

B. Notice of Termination.

(1) Following the effective date of this Local Law, the Building Inspector shall serve a notice of termination upon the owners of the real property and the mortgagee, if any, of any recorded mortgage on real property, notifying them that the operation of the nonconforming adult-oriented business shall terminate on the date specified in the notice. The notice shall further state that the owner or mortgagee, or both, may, within the time period set forth in Subsection C below, file an application with the Zoning Board of Appeals for an extension of the termination date.

(2) If no such application is filed within the time set forth herein, it shall be presumptive proof that the termination date set forth in said notice is reasonable and that the nonconforming adult oriented

affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, word, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

SECTION 7 - EFFECTIVE DATE

This Local Law shall take effect immediately when it is filed in the Office of the New York State Secretary of State in accordance with Section 27 of the Municipal Home Rule Law.

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