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MEMORANDUM

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TO: HON. WAYNE C. BOOTH, SUPERVISOR
TOWN BOARD MEMBERS

FROM: JEFFREY S. SCULLEY, ASSISTANT ATTORNEY FOR THE TOWN

RE: SECONDARY EFFECTS STUDIES AND THE POTENTIAL USE OF
SAME, IF WARRANTED, AS BASIS TO REGULATE POSSIBLE
HARMFUL SECONDARY EFFECTS OF ADULT OR SEXUALLY
ORIENTED USES IN THE TOWN OF NEWBURGH, NEW YORK
OUR FILE NO. 800.1(B)(2)(2012)

DATE: JANUARY 31, 2012

The adopted Town of Newburgh Comprehensive Plan Update includes an Action Plan for planning and zoning that lists over thirty items. Among those listed action items is a recommendation that the possible “negative secondary effects” of “adult uses” should be examined and, if warranted, that zoning definitions and regulations be established. The purpose of this memorandum is to provide legal guidance to the Town Board with regard to the conduct of the recommended examination.

Adult or sexually oriented uses (“SOUs”), such as adult book/video stores and establishments providing adult entertainment are constitutionally protected under the first and fourteenth amendments to the federal constitution, as well as the New York State constitution, because the owners and customers of SOUs are engaged in protected free expression. As such, governments may not regulate SOUs based on the content or viewpoint of the speech activities engaged by the owners and their patrons.

However, the Supreme Court has held that a municipality may via its zoning ordinance or local law attempt to mitigate harmful secondary effects which the municipality’s governing body may determine are caused by SOUs. These secondary effects include increased crime, reduced property values and diminished quality of life. In other words, a municipality may enact a zoning ordinance restricting, although not banning, SOUs to certain locations provided the sole purpose of such restrictions is

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mitigation of secondary effects. Such an ordinance or local law must be a valid regulation on the time, place and manner in which an SOU operates rather than a restriction on the content or viewpoint of the SOUs or their customers.

Although optimal, it is not constitutionally required that a municipality conduct or commission its own study or generate its own evidence that SOUs cause harmful secondary effects. Rather, a municipality may rely on studies and evidence prepared and collected by other governmental bodies, provided that the municipality “reasonably believed” that such studies or evidence were relevant to the problem it sought to address. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986).

We have reviewed numerous secondary effects studies and have attached several for the Board’s consideration. The attached studies have been forwarded for the Board for several reasons. First, we believe an argument can be made that each is sufficiently similar to the Town’s situation as to make the studies appropriate for the Board to rely on if it decides to regulate SOUs by amending the Town Code. Second, many of the studies have served as bases for other municipality’s zoning amendments which have survived court-challenge. This increases the likelihood that such studies will provide a sufficient basis to support a decision to amend the Town Code, should the Board ultimately decide to do so. Third, the studies are based on the collection of new data, rather than being a simple restatement and summary of prior studies. Fourth, the annexed studies are based on several different types of data, including, crime incident reports, surveys of real estate appraisal professionals and opinion polling data of municipal residents. Fifth, we have included only those studies which employ what we judge to be methodologically sound design (we have excluded, for example, those studies based on anecdotal evidence, which fail to support their conclusions with specific statistical evidence or utilize study and control groups).

Please note, depending on the nature of any possible zoning amendment entertained by the Board, additional studies may be forwarded for the members’ consideration.

Massage parlors and spas providing unlicensed services to patrons, collectively, adult physical culture establishment (“APCE”), may also be regulated as part of a comprehensive amendment to the Town Code designed to mitigate the secondary effects of SOUs. However, the regulation of APCEs does not implicate free expression concerns. Indeed, municipal ordinances which amortize and terminate operating APCEs and prohibit such uses in the future have been upheld. See, *e.g., Wigginess Inc. v. Fruchtman*, 482 F.Supp. 681 (S.D.N.Y. 1979), *affirmed*, 628 F.2d 1346 (2nd Cir. 1980), *cert. den.* 449 U.S. 842 (1980). Consequently, the Town may include APCEs in a potential amendment designed to address the possible harmful secondary effects of SOUs, but, unlike SOUs, the Town may also proscribe future APCEs and provide for the amortization of such existing uses.

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The Board members should each familiarize themselves with the attached studies. This is essential so that the members may have a factual basis on which to form a possible "reasonable belief" that the studies are relevant to the issues confronting the Town due to SOUs. Although perhaps tedious, I advise that each Board member and the Supervisor review the studies personally. If a potential zoning amendment is ultimately challenged, the Town's position will be strengthened when discovery reveals that the Board did not simply rely on the advice of counsel in making the legislative findings supporting the amendment, but that they actually read and considered the annexed studies. I suggest that each member note on the studies memorializing when they reviewed each. I also suggest a session where the Board and the Supervisor may discuss the studies with, and question, counsel.

There is no way to "bullet-proof" an ordinance regulating SOUs. It is possible to minimize the risk of a SOU successful challenging and invalidating such an ordinance. This starts with the Board's review of the studies which it will have to consider and, perhaps, ultimately, rely upon, in order to regulate the potential harmful secondary effects of SOUs. In considering these studies, the members should always bear in mind that the goal of any regulation of SOUs is not to limit the constitutionally protected speech engaged in by such entities and individuals, but mitigating the harmful secondary effects of such uses.

cc: Hon. Andrew J. Zarutskie, Town Clerk
John P. Ewasutyn, Planning Board Chairman
Grace Cardone, Zoning Board of Appeals Chairwoman
Gerald Canfield, Code Compliance Supervisor
David Smith, AICP, VHB Engineering, Surveying and Landscape Architecture, P.C.

INDEX OF SECONDARY EFFECTS STUDIES
 SUBMITTED TO THE TOWN BOARD
 OF THE TOWN OF NEWBURGH
 JANUARY 31, 2011

STUDY	DATE REVIEWED	TOWN BOARD MEMBER'S INITIALS
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)	_____	_____
EFTECTS OF ADULT ENTERTAINMENT BUSINESSES ON RESIDENTIAL NEIGHBORHOODS (OFFICE OF THE CITY ATTORNEY, CITY OF EL PASO)	_____	_____

SURVEY OF TEXAS APPRAISERS
SECONDARY EFFECTS OF
SEXUALLY-ORIENTED
BUSINESSES ON
MARKET VALUES

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