

## **204.1 Adult Bookstore or Adult Entertainment Taverns Ordinance**

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### **SECTION I – FINDINGS**

Town of Berry represented in its Board of Supervisors, finds as follows:

- A. The presentation of entertainment featuring presentation of sexual activity and nudity in exchange for payment of money is part of a large and expanding sex trade and industry which commercializes human sexuality in a fashion which is degrading to women and men. The commercial sex trade is a global enterprise in which many thousands of people, some unwilling and many motivated by poverty or drug addiction, become enmeshed.
- B. The sex trade depicts human sexuality in a manner which undermines the nuclear family and thereby, undermines the very foundation of society itself. Pornography and live sex presentations may interfere with the development of healthy sexual interactions and undermine the family bonds which strengthen and maintain all civic and social institutions.
- C. However, the town also recognizes that, as interpreted by the U.S. Supreme Court, the First Amendment of the United States Constitution protects the rights of individuals to offer and to partake of certain forms of sexually-oriented entertainment. The Town of Berry, in adopting regulations does not seek to interfere with the right of individuals to offer or to attend adult entertainment, or to sell, purchase or use adult-themed merchandise beyond the extent permitted by law. Further, in all procedures under these regulations, Town of Berry intends that adult businesses be afforded the full protection of due process.
- D. Town of Berry has been advised through publications, studies and information compiled by the Wisconsin Towns Association and other organizations that adult entertainment may, without proper regulations of the time, place and manner in which it is provided, create undesirable secondary impacts on the community. The regulations herein are founded on the experience of other communities, public hearing testimony and findings in reported cases which have sustained regulation of adult entertainment.

- E. Town of Berry is also concerned with the rights of those individuals in Town of Berry who do not choose to present or attend adult entertainment or to purchase adult merchandise. These individuals have constitutionally protected rights to privacy and security in their property. These concerns cannot and do not justify forbidding the expression of protected speech. But, the broader community does have an interest in maintaining order and preventing negative effects on the community from any business which will generate substantial customer volume, automobile traffic and impacts on neighboring properties yet preserve the right to engage in protected ideas or entertainment. These concerns warrant exercise by the town of its police powers to assure that the exercise of First Amendment rights is not conducted to the detriment of the rights of others.
- F. In order to assure that adult bookstores or adult entertainment taverns may operate without adversely impacting the community, and, therefore, to make it possible for individuals to exercise their First Amendment rights, Town of Berry finds that it is necessary and appropriate to adopt a licensing ordinance which allows the town to assure that adult bookstores or adult entertainment taverns are operated in a fashion which does not cause unacceptable impacts on the rights of others.

## **SECTION II – DEFINITIONS**

For the purpose of this section, the following words and phrases shall mean:

- A. **Adult Entertainment Taverns.** An adult entertainment tavern is any establishment, including private clubs, whether or not licensed to sell fermented malt beverages or intoxicating liquor for consumption on premises pursuant to Wisconsin Statutes Chapter 125, which is used for or offers performances or exhibitions by live entertainers which are distinguished or characterized by an emphasis on exposure to or a view of human genitals, the human pubic area, buttocks or anus; or a female's vulva or breasts below the top of the areola; or male genitals, whether or not in a discernibly turgid state, even if opaquely covered; or which includes or emphasizes acts or simulated acts of erotic touching, sexual intercourse, masturbation, flagellation, sodomy, bestiality, necrophilia, sadomasochistic abuse, fellatio, cunnilingus, or the simulation of any sexual acts prohibited by Wisconsin Statutes.
- B. **Adult Bookstore.** An adult bookstore is any business, building, structure or place whose predominant purpose is selling magazines, books, videos, computer software, pay per view videos, audio programs which are distinguished or characterized by an emphasis on exposure to or a view of human genitals, the human pubic area, buttocks or anus; or a female's vulva or breasts below the top of the areola; or male genitals, whether or not in a discernibly turgid state, even if opaquely covered; or which includes or emphasizes acts or simulated acts of erotic touching, sexual intercourse, masturbation, flagellation, sodomy, bestiality, necrophilia, sadomasochistic abuse, fellatio, cunnilingus, or the simulation of any sexual acts prohibited by Wisconsin Statutes, or which sells materials other than clothing designed or intended primarily for use in achieving or enhancing sexual gratification, but does not include live performances or the presence of nude entertainers.
- C. **Adult Entertainment.** Shall mean presentations or programming distinguished or characterized by an emphasis on exposure to or a view of human genitals, the human pubic area, buttocks or anus; or a female's vulva or breasts below the top of the areola; or

male genitals, whether or not in a discernibly turgid state, even if opaquely covered; or which includes or emphasizes acts or simulated acts of erotic touching, sexual intercourse, masturbation, flagellation, sodomy, bestiality, necrophilia, sadomasochistic abuse, fellatio, cunnilingus, or the simulation of any sexual acts prohibited by Wisconsin Statutes.

- D. Booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises. Shall mean any area separated, set off, divided, demarcated or isolated by walls, screens, plants, structures, fixtures or equipment, from the remaining bar room or rooms. The phrase “booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises” does not mean enclosures which are private offices used by the owners, managers, or persons employed on the premises for attending to the tasks of their employment.
- E. Board. The board of Town of Berry.
- F. Operator. Any person, partnership, corporation, or other entity operating, managing, renting, conducting, maintaining or owning any adult bookstore or adult entertainment tavern.
- G. Location. A parcel of real estate.
- H. On-Demand Video System. Any machine, terminal, display, device or instrumentality which will show or present video adult entertainment if money or other form of payment is made.

### **SECTION III – LICENSE REQUIRED**

- A. Except as provided in Subdivision D below, from and after the effective date of this ordinance, no adult bookstore or adult entertainment tavern shall be operated or maintained in the town without first obtaining a license to operate issued by the town.
- B. A license may be issued only for one adult entertainment bookstore or one adult entertainment tavern at each location. Each adult entertainment tavern or adult bookstore requires a separate license.
- C. No license or interest in a license may be transferred to any person without approval of the town, including transfers by sale of stock in a corporation or membership interests in an LLC or partnership interests which have the effect of changing more than twenty-four percent of the original ownership interest, measured cumulatively from the commencement of the business.
- D. All adult entertainment taverns and adult bookstores existing at the time of the passage of this ordinance must submit an application for a license within sixty days of the passage of this ordinance. Such a pre-existing establishment may continue to operate while the license application and any review thereof is pending before the town or a court of record. If an application is not received within such sixty-day period, or the denial of such an initial license is ultimately sustained on review, then such existing adult bookstore or adult entertainment tavern shall cease operations immediately.

### **SECTION IV – APPLICATION FOR LICENSE**

- A. Any person desiring to secure a license shall make application to the Town Clerk. The application shall be filed with the Town Clerk. A copy of the application shall be distributed promptly by the clerk to the Town Chairperson, the Town Board, the Zoning Administrator, the Dane County Sheriff and to the applicant. The Sheriff will be

requested to perform a background check on the applicant, its principal officers and shareholders or owner. The Clerk shall reject any application whose applicants fail to sign a written release of information authorizing the background check.

- B. The application for a license shall include a form provided by the Town Clerk. An applicant for a license interested directly in the ownership or operation of the business shall furnish the required information under oath. The application shall include a signature block in which the applicant verifies that the applicant has read this ordinance, understands its requirements or has asked for interpretation of any requirements which the applicant does not understand. The application materials shall include the form and the following additional information:
1. Name, address and business phone number, fax number and email.
  2. Written proof that the individual is at least eighteen years of age.
  3. The address of the adult entertainment bookstore or adult entertainment tavern to be operated by the applicant.
  4. If the applicant is a corporation, limited liability company or partnership, the application shall specify the name of the business entity, the date and state of incorporation, the name and address of the registered agent, and the names and addresses of all owners of the entity, stating their respective percentages of ownership.
  5. The names and contact phone numbers of individuals who may be contacted at any time, 24 hours per day, to respond to concerns of an immediate nature about operations at the adult bookstore or adult entertainment tavern which require an immediate response.
  6. Sufficient documentation and supporting materials to demonstrate that the establishment meets and will meet all requirements of this ordinance, including floor plans, photographs or sketches of signage and other features subject to the regulations of this ordinance and operational plans showing how the applicant plans to meet the requirements of this ordinance.
- C. The Clerk shall, within three business days of receiving the application, review the application, with assistance of town staff and officials, to determine whether the application is complete and the proper fee has been paid. If the application is complete and the fee has been paid, the Clerk shall call a special meeting of the Town Board to be held within the seven working day period following determination that an application is complete.
- D. A license shall be issued automatically unless the Town Board, within thirty days after the date the application is referred to the Board by the Clerk, determines that there are grounds upon which the license may be denied. The Board shall review the application and determine whether the proposed adult bookstore or adult entertainment tavern meets the requirements of this ordinance.
- E. Whenever an application is denied, a license is not renewed or is proposed to be revoked, the Town Clerk shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within ten days of receipt of notification of denial, a public hearing shall be held within ten days thereafter before the Town Board. If a public hearing is requested, it shall be held within ten days thereafter before the Town Board.
- F. The Town Board shall make a determination on the suspension or revocation of the license within ten days of the scheduled public hearing and shall provide notification of the

determination in writing to the licensee within five days of the determination. The notification shall contain reasons for the suspension and/or revocation of the license.

- G. Judicial review by certiorari may be sought within thirty days of a decision issued pursuant to Wisconsin Statutes Chapter 68. If a licensee makes a timely appeal of the Board's determination to suspend or revoke a license, no suspension or revocation shall be effective until a final decision is rendered pursuant to Wisconsin Statutes Chapter 68.
- H. Failure or refusal of the applicant to provide any information requested in the course of investigation of the application shall be grounds for administrative denial thereof by the Town Clerk, provided that the applicant shall have been given written notice that failure to provide specified information will result in denial of the application.

## **SECTION V – STANDARDS FOR ISSUANCE OF LICENSE**

To receive a license to operate an adult bookstore or adult entertainment tavern, the applicant and the proposed adult bookstore or adult entertainment tavern must meet the following standards, respectively:

- A. Standards related to the applicant. The applicant must meet all the following standards:
  - 1. The applicant, in the case of a sole proprietorship, all partners in the case of a partnership, and all shareholders in the case of a corporation, or members of a limited liability company, must meet be at least eighteen years of age.
  - 2. The applicants may not have any criminal convictions which reasonably relate to the applicant's suitability to manage an establishment which may require the ability to maintain crowd control and the protection of entertainers and patrons.
  - 3. The applicant may not have been involved in the operation as owner or part owner of any adult bookstore or adult entertainment tavern whose license has been revoked or application for a license denied within the past five years.
- B. Standards related to the site and building of an adult bookstore. The applicant must demonstrate that the property and the building of an adult bookstore can meet the following physical standards:
  - 1. The property shall have at least one parking stall for every two patrons it is capable of seating or serving at its maximum safe fire limit.
  - 2. The building shall have a determined safe fire limit for occupancy calculated by the Fire Department based upon the square footage and physical characteristics of the building. The occupancy limit shall be communicated to patrons and employees by signs posted at the entrance and in the facility.
  - 3. No area of the building may be made available for customers, patrons for the private viewing of any adult entertainment.
  - 4. All portions of the building except rest rooms and areas which are off limits to patrons shall be accessible to and from aisles and public areas of the adult entertainment tavern and shall be unobstructed by any door, lock or other control-type devices.
  - 5. The lighting level of each booth, room or cubicle shall be a minimum of twenty foot candles at all times as measured from the floor.
  - 6. There shall be a video monitoring system by which the operator can continuously monitor activities outside the building but on the property and any parking areas.
  - 7. The establishment may not have flashing lights or decorative lighting other than non-intrusive illumination of parking lots, walk ways and entrances.

8. The interior of the establishment shall not be visible from the exterior, including at times when entry doors are open.
  9. The establishment shall place waste receptacles near the entrances to the tavern to discourage carrying any litter out of the building.
  10. The signage for the establishment may not include any depictions of nudity, and may refer to the establishment only as an "adult specialties" store. Other wording may be used if it is not of an overtly sexual nature.
  11. The establishment shall be sound-insulated if necessary so that sound levels controlled to the levels specified in this ordinance.
  12. If the facility has viewing booths, occupancy of the booths shall be limited to one person at a time. There shall be solid walls or partitions between each booth without any holes. The facility shall inspect and, as necessary, clean the booth between each use.
  13. The facility may not, at the point of the real estate nearest, be within 2,500 feet of a school, church, park, health care institution, youth camp or another adult bookstore or an adult entertainment tavern.
- C. Standards related to adult entertainment tavern.
1. The level of sound audible at the property line of the establishment may not exceed 70 decibels from 12 noon to 10 p.m. or 60 decibels from 10 p.m. to 12 noon.
  2. The property shall have at least one parking stall for every two patrons it is capable of seating or serving at its maximum safe fire limit.
  3. The building shall have a determined safe fire limit for occupancy calculated by the Fire Department based upon the square footage and physical characteristics of the building. The occupancy limit shall be communicated to patrons and employees by signs posted at the entrance and in the facility
  4. No area of the building may be made available for customers, patrons for the private viewing of any adult entertainment.
  5. All portions of the building except rest rooms and areas which are off limits to patrons shall be accessible to and from aisles and public areas of the adult entertainment tavern and shall be unobstructed by any door, lock or other control-type devices.
  6. The lighting level of each booth, room or cubicle shall be a minimum of ten foot candles at all times as measured from the floor.
  7. There shall be a separate entrance for employees which shall be locked to prevent unauthorized access from the outside.
  8. There shall be separate rest rooms and changing rooms for performers, entertainers and employees of the tavern.
  9. There shall be a video monitoring system by which the operator can continuously monitor activities outside the building but on the property and any parking areas.
  10. The establishment may not have flashing lights or decorative lighting other than illumination of parking lots, walk ways and entrances
  11. The interior of the establishment shall not be visible from the exterior, including at times when entry doors are open
  12. The establishment shall place waste receptacles near the entrances to the tavern to discourage carrying any litter out of the building

13. The signage for the establishment may not include any depictions of nudity, and may refer to the establishment only as a “Gentleman’s Club,” “Burlesque Club,” or similar wording not of an overtly sexual nature
  14. The establishment shall be sound-insulated, and sound levels controlled to the levels specified in this ordinance.
  15. The facility may have neon signs and other signs if they are provided by manufacturers of alcoholic beverages.
  16. The facility may not, at the nearest point of the real estate parcel on which it is located, be within 2,500 feet of a school, church, park, health care institution, or another adult entertainment tavern or an adult bookstore.
- D. Alternative security arrangements for small establishments. As used in this section, the term “small establishment” means an adult entertainment tavern which offers adult entertainment performances of five hours or less on three evenings per week or less and no more than seventy-five times per year. A small establishment may submit a plan for use of security personnel or other crowd control systems in lieu of complying with the requirements of Subsection C, 7, 8 and 9.

## **SECTION VI – ACTIVITIES PROHIBITED AT EITHER ADULT ENTERTAINMENT TAVERNS OR ADULT BOOKSTORES**

- A. No patron of the establishment may engage in any type of sexual activity, ejaculate or engage in an act of sexual gratification while in the establishment or its parking areas.
- B. Patrons of the establishment may not be in a motor vehicle, other than a charter bus, taxi or contracted tour vehicle with a driver on board, which is located on the premises of the establishment for more than two minutes. A person with a disability who requires more time to enter or exit a vehicle is exempt from this regulation.
- C. Patrons of the establishment may not be in a motor vehicle which is located on the premises of the establishment, or parked within five hundred feet of the facility, with an employee or contractor of the establishment.
- D. Patrons of the establishment may not be allowed to congregate with employees or entertainers.
- E. Patrons may not remain on the premises of the building or any property owned or leased by any owner or partner of the owner of the adult entertainment bookstore or tavern for more than five minutes after exiting the building, except that they may remain on any patio, porch or outside service area which is part of the licensed area for service of alcohol beverages, or part of the approved area of the establishment provided that the operator maintains an orderly operation of that outside area.
- F. The establishment shall cease admitting patrons at such time as all off-street parking is full.

## **SECTION VII – FEES**

A license fee of \$1,500 is required to apply for an adult entertainment license. There shall be an annual renewal fee of \$750. The fees have been determined in an amount which is sufficient to recover a portion of the costs which the town will incur in reviewing license applications.

## **SECTION VIII – DISPLAY OF LICENSE**

The license shall be displayed in a conspicuous public place in the adult bookstore or adult entertainment tavern.

#### **SECTION IX – RENEWAL OF LICENSE**

- A. Every license issued pursuant to this ordinance shall terminate on June 30 of each year, unless sooner revoked, and must be renewed before operation is allowed on July 1. Any operator desiring to renew a license shall make application to the Town Clerk. The application for renewal must be filed not later than sixty days before the license expires. The application for renewal shall be filed in quadruplicate with the Town Clerk. A copy of the application for renewal shall be distributed promptly by the Town Clerk to the Sheriff, the County Health Department and to the operator. The application for renewal shall be upon a form provided by the Town Clerk and shall contain such information and data given under oath or affirmation as is required for an application for a new license as to any changes in the establishment's operations or physical setting.
- B. If the Sheriff's Department, County Health Department, Zoning Administrator or Clerk are aware of any information bearing on the operator's qualifications, that information shall be filed in writing with the Town Clerk.

#### **SECTION X – REVOCATION OF LICENSE**

- A. The town shall revoke a license for any of the following reasons:
  - 1. Discovery that false or misleading information or data was given on any application or material facts were omitted from any application.
  - 2. The operator or any employee of the operator violates any provision of this section or any rule or regulation adopted by the Town Board pursuant to this chapter. However, that in the case of a first offense by an operator where the conduct was solely that of an employee, the penalty shall not exceed a suspension of thirty days if the Board shall find that the operator had no actual or constructive knowledge of such violation and could not by the exercise of due diligence have had such actual or constructive knowledge.
  - 3. The operator, at any time, becomes ineligible to obtain a license.
  - 4. Any cost or fee required to be paid by this chapter is not paid.
  - 5. Any intoxicating liquor or fermented malt beverage is served by the operator or consumed with knowledge of the operator on any premises of an adult bookstore or adult entertainment tavern not licensed pursuant to Wisconsin Statutes Chapter 125.
  - 6. Any controlled substance forbidden by Wisconsin Statutes Chapter 161, is used, sold or given away on the premises of the adult entertainment tavern or adult bookstore with knowledge of the operator or its employee.
- B. The town, before revoking or suspending any license or permit, shall give the operator at least ten working days written notice of the charges against the operator and the opportunity for a public hearing before the Town Board. If a public hearing is requested, it shall be held within ten working days thereafter before the Board. The Board shall make a determination on the suspension or revocation of the license within twenty days of the scheduled public hearing and shall provide notification of the determination in writing to the licensee within five days of the determination. The notification shall contain reasons for the suspension and/or revocation of the license. Appeal of the written determination of the Board to revoke or suspend a license shall be by judicial review by

certiorari, which shall be sought within thirty days of a decision. If a licensee makes a timely appeal of the Board's determination to suspend or revoke a license, no suspension or revocation shall be effective until a final decision is rendered.

- C. The transfer of an adult entertainment tavern or adult bookstore or purported transfer of a license or any interest in a license by the holder thereof without approval of the town shall automatically and immediately revoke the license. If the holder of an adult entertainment tavern license proposes to transfer the alcohol beverage license, the proposed holder of the alcohol beverage license must obtain an adult entertainment tavern license before continuing to provide adult entertainment. The term "transfer" as used in this paragraph shall include any sale of partial ownership interests in a corporate license holder.
- D. Any operator whose license is revoked shall not be eligible to receive a license for one year from the date of revocation. No location or premises for which a license has been issued shall be used as an adult bookstore or adult entertainment tavern for one year from the date of revocation of the license.

#### **SECTION XI – OPERATOR RESPONSIBILITY**

- A. Every act or omission by an employee constituting a violation of the provisions of this ordinance shall be deemed the act or omission of the operator if such act or omission occurs, either with the authorization, knowledge or approval of the operator or as a result of the operator's negligent failure to supervise the employee's conduct, and the operator shall be punishable for such act or omission in the same manner as if the operator committed the act or caused the omission.
- B. Any act or omission of any employee constituting a violation of the provisions of this ordinance shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or renewed.
- C. No employee of an adult establishment shall allow any minor to loiter around or to frequent an adult bookstore or adult entertainment tavern or to allow any minor to view any activity allowed in an adult bookstore or adult entertainment tavern.
- D. The operator shall maintain the premises in a clean and sanitary condition at all times.
- E. Security personnel, protocols and resources which are shown to be sufficient to keep order in the tavern and the surrounding property.
- F. The applicant must have sufficient personnel that the individuals licensed to serve alcoholic beverages will not be required to leave the bar at any time in order to handle security problems or other situation
- G. The operator shall insure compliance of the establishment and its patrons with the provisions of this ordinance.
- H. Any tavern, restaurant, club or other facility open to the public which shows films rated NC-17 or films which fall within the definition of adult entertainment, or which has an On-Demand Video System may not show the film or locate the On Demand Video System in any room or place which is open to persons under the age of eighteen. Any separate room or area established for an On Demand Video System shall be monitored by the establishment operator.

#### **SECTION XII – PATRON RESPONSIBILITY**

- A. No person shall at any time engage in sexual activities, including but not limited to intercourse, fellatio, masturbation, cunnilingus, manual manipulation of the genitals of another, or use of a vibrator or insertion of an object into the anus, vagina or glans of another person, or cause any bodily discharge or litter associated with sexual activity while in the tavern or the property or parking area associated with the tavern.
- B. No person shall remove, destroy, or deface any signs or posters, or destroy or deface any information, brochures, or pamphlets, whether supplied by the Health Department or posted by the operator.
- C. No person shall damage or deface any portion of the building.

### **SECTION XIII – ENFORCEMENT**

It shall be the duty of the Town Chairperson to administer and enforce the provisions of this ordinance. The operator shall afford the town reasonable access to the premises to inspect the same and verify that the tavern meets the requirements of this ordinance. Every licensed premise shall be inspected at least once per calendar year.

### **SECTION XIV – PENALTY**

- A. In addition to the revocation, suspension or nonrenewal of any license issued under this ordinance, any person found to be in violation of any provision of this ordinance shall be subject to a forfeiture of not less than \$100 nor more than \$500 and in the case of an operator shall result in the suspension or revocation of any license up to one year.
- B. Each violation of this ordinance shall be considered a separate offense, and any violation continuing more than one day shall be considered a separate offense.
- C. The Town Board hereby finds that any ongoing violation of the provisions of this ordinance is a threat to the peace and good order of the town for which monetary penalties alone are not a sufficient remedy. Therefore, injunctive relief may be issued by a court if the harm to the community from continued violation of the ordinance outweighs the expressive character of the activity sought to be enjoined and the violator shall reimburse the town for all costs of such litigation, including the town's actual reasonable attorney and expert witness fees.

### **SECTION XV – SEVERABILITY**

If any provision of this ordinance is deemed invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the other provisions of the same. The Town Board directs that all ambiguities in this ordinance be construed in favor of permitting the maximum degree of expression to protect First Amendment activity which is consistent with maintenance of public order, health and safety.

### **SECTION XVI – EFFECTIVE DATE**

This ordinance shall take effect and be in force from and after the day after passage and publication as required by law.

Dated this 17<sup>th</sup> day of September, 2018

Published: September 27, 2018

Posted: September 20, 2018

Brenda Kahl, Clerk/Treasurer

Anthony Varda, Chairperson

Jeff Davis, Supervisor  
Joe Kruchten, Supervisor

Michael Statz, Supervisor  
Duane Haag, Supervisor