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January 12, 2011

Hon. Thomas Nelson, Mayor
City of Lead, South Dakota

and the City Commissioners,
Mr. Les Roselles
Mr. Casey Borsch
Ms. Rose Burns
Mr. Nick Krebs

Re: Proposed Ordinance #1004-11

Dear Mayor Nelson and Commissioners:

I am an attorney working with a coalition of concerned citizens formed in response to the Commission's consideration of the proposed ordinance on adult entertainment and nude dancing. I have had the opportunity by this time to provide some preliminary information to Commissioners Borsch and Burns on behalf the Citizens For a Safe Community ("CFSC"). In advance of the next Commission meeting and the second reading of the proposed ordinance, I am corresponding with you to address CFSC's concerns and to provide additional reports, studies, and cases on the regulation of sexually oriented or adult entertainment businesses.

On behalf of CFSC, I thank you for taking the time to consider the passage of an ordinance intended to preserve the community standards of Lead. I also appreciate your recognition that adult entertainment businesses require special supervision from the public agencies of Lead in order to protect and preserve the health, safety, morals, and welfare of the patrons and employees of the businesses as well as the citizens of Lead.

The City Administrator, Mike Stahl, has made the attempt to survey local ordinances in South Dakota in presenting the proposed ordinance. However, I believe that the Commission would be well served in recognizing that the regulation of adult entertainment businesses is a complex issue deserving of careful analysis and deliberation of documented studies, reports, and court decisions. Also, testimony of experts and community members would be advisable prior to a decision. This is no small undertaking. CFSC is concerned, first and foremost, that the Commission is moving the process along too quickly without due and proper consideration of all the facts, data, documented evidence, and testimony. Consequently, it is our hope and our request that the motion under consideration be defeated – or at least tabled on the motion of one of the Commissioners – to allow appropriate opportunity to receive and consider materials bearing on the decision.

Mr. Tom Nelson

January 12, 2011

Page 2

It appears to be a recurring statement that there is no evidence that the activity of sexually oriented businesses (SOB's) or adult entertainment businesses results in adverse secondary effects to the community. This simply is not true. Legislatures, local governmental bodies, and courts across the country recognize that adult entertainment establishments, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, cause increased crime, particularly in the overnight hours, and downgrade property values, so much so that content-neutral regulation of the activity is routinely adopted and affirmed.

In support of the statement I have just made, I am submitting to you a CD which contains the following materials for your consideration in advance of the January 18 meeting:

- a. 6 US Supreme Court decisions;
- b. 9 other significant court decisions;
- c. 27 Land Use Studies totaling 1,004 pages, along with a summary by the National Law Center;
- d. 8 other studies and testimonies; and,
- e. 4 sample ordinances.

These materials are being provided as convincing document evidence of adverse secondary effects. The volume and credibility of such evidence is simply overwhelming. I respectfully suggest that time is required for the Commission to formally receive and consider these and other materials, data, and testimony.

In providing the enclosed sample ordinances, I offer other alternatives for an ordinance by the City of Lead. The proposed ordinance under consideration is a meager effort to regulate SOB or adult entertainment activity. A more sensible approach is called for and available.

Concerning another contention raised at the last Commission meeting, nude dancing is a form of expressive conduct protected by the First Amendment of the U. S. Constitution. Nevertheless, in accordance with Supreme Court precedent, laws regulating adult entertainment businesses are treated as if they were content neutral. The Supreme Court has stated that "government restrictions on public nudity . . . should be evaluated under the framework set forth in [*United States v. O'Brien*] [391 U.S. 367 (1968)], for content-neutral restrictions on symbolic speech," because the "state's interest in preventing harmful secondary effects is not related to the suppression of expression." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000).

Consequently, the Commission is entitled, indeed, required to consider adverse secondary effects in adopting an ordinance regulating this type of activity. On review, a court would determine whether the enacted ordinance: (i) was within the Commission's constitutional power;

Mr. Tom Nelson
January 12, 2011
Page 3

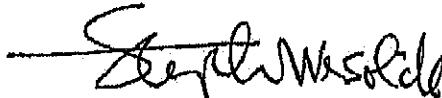
(ii) furthered a substantial governmental interest that is; (iii) unrelated to the suppression of speech, and whether (iv) the provisions pose only an incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest. While the actions by the Commission implicate significant First Amendment rights which necessarily must be balanced with the standards and welfare of the community, it is a misunderstanding that adult entertainment or SOB's enjoy constitutional protection from any regulation. That simply is not the case.

I also request that the Commission consider how exactly the City will monitor and enforce the "specified criminal activity" and other prohibited conduct in the proposed ordinance, and at what cost. Law enforcement authorities across the country are faced with the challenge of conducting vice operations, often times undercover, to ensure that the undesirable activity is not occurring in these establishments. These enforcement activities are costly. Further, minimal regulations such as "buffer zones" between dancers and patrons, restrictions against "VIP" or private rooms, and even licensing of employees (along with operators), are necessary to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation.

These most important issues deserve a deliberate and careful analysis by the Commission. To rush any ordinance through without proper consideration of all pertinent evidence, data, and testimony – especially where there is no direct guidance provided by the state legislature – is a mistake. It is for this reason that the Citizens For a Safe Community have asked me to correspond with you, to submit the enclosed materials for your consideration, to address you at the next meeting, and to request your "no" vote on the current proposed ordinance or, alternatively, a motion to table. This request is made with the desired outcome of a reasonable, enforceable and sensible ordinance regulating SOB and adult entertainment activity in the community.

I appreciate your consideration of this correspondence and the enclosed materials. I remain available to assist the Commission in any way possible at no cost to the City of Lead.

Sincerely,



Stephen J. Wesolick

/lja
Enclosure

c: Mr. Mike Stahl, City Administrator (w/encl.)
c: Mr. Reed Richards, Esq. (w/encl.)



Nude dancer ordinance faces more hurdles

JANUARY 19, 2011 9:00 PM • AMANDA FRIAR JOURNAL STAFF

Nude dancers will not be performing anytime soon at the Wild Thing Saloon in Lead.

On Tuesday night, the Lead City Commission voted 3-2 to allow nude dancing at the downtown bar, but the ordinance will not become law until at least 20 days after a legal announcement is published.

Opponents of the ordinance can submit petitions calling for a referendum on the issue within those 20 days. Should enough signatures be submitted -- at least 5 percent of the town's registered voters must sign, which would be 112 signatures -- the measure would go to a public vote, which likely would be in April.

If the city ordinance is referred, the bar couldn't offer nude dancing until after an election, when voters would have the final say on the ordinance.

Attorney Stephen Wesolick of Rapid City is confident the city commission's vote will be overturned by voters. Wesolick represents Citizens for a Safer Community, a group organized to oppose the ordinance.

"She's going to profit from obscenity," he said Wednesday, referring to the bar's owner. "She's profit from exploitation and perhaps prostitution," he said. "We're going to do what we can to generate enough interest in the ordinance to defeat a measure and put in place an adequate ordinance. We're looking for a responsible regulation."

Valerie Meiners, who owns the Wild Thing and sought the ordinance, said the opponents of nude dancing are overreacting.

"It's not like we're selling anything nasty," she said Wednesday. "It's fun. It's really fun. I don't know what all the fuss is about, but maybe I just wasn't taught to have a problem with naked skin."

In the meantime, the Wild Thing is closed until the issue is resolved.

"It's the economical thing to do," Meiners said. "It doesn't really make enough money for us to want it to be open without dancers."

According to a member of Citizens for a Safer Community, the group is well on its way to getting enough signatures.

"We're just waiting for the protocol of it being announced so it's done in the way it needs to be done, and then it will be circulated and signed, and it will go to a vote," said group member Lori Messner, the owner of Angel Hair Salon, which is across the street from the Wild Thing.

Wesolick, who represented the group at Tuesday night's meeting, said the organization is not entirely opposed to exotic dancing or other adult-oriented businesses. The group, however, opposes the ordinance's language and said it does not have enough provisions to ensure security and safety for the town's residents.

"We're not standing in opposition to exotic dancing," he said. "We've been through this before, and what's been said is that we've documented through numerous and compelling studies and reports and data that was presented to the commission that there are negative impacts on the community."

Messner said the city commission should have taken more time to study the packet of information provided by Citizens for a Safer Community that included 27 land-use studies, six U.S. Supreme Court decisions, nine other court decisions and four sample ordinances.

"What's really sad about this is that we're not as much an enemy as they think," she said. "We know it's going to a vote. We were hoping the city would slow up and do research."

Messner expressed concerns that girls as young as 16 would be dancing in the bar.

Meiners said that claim is totally unfounded.

"The rumor that we're going to get them off the street is not true," she said. "There are a lot of stories around here. I'm pretty sure we would be in jail if we did that."

Meiners said the bar would hire dancers through booking agencies and free dancers. They also plan to hire male dancers, who bring a different style of dancing to the stage.

"They have to be well done," she said. "Girls can get away with a little bit more than guys. I don't know how to explain it. It's a whole different atmosphere."

Messner said she does not know anybody who supports nude dancing in Lead.

"I have not talked to anybody that's for it," she said. "Maybe I run with a different class of people, but I have not in my business ever heard anybody who's for it."

If enough signatures are gathered on petitions, the commission could either put the measure to a vote on the municipal election ballot April 12 or hold a special election. Lead City Administrator Mike Stahl said, however, that he does not expect the commission to hold a special election.

"Elections cost money; they cost time, and they've got one coming," he said. "So, why have a special one when one's shortly to follow?"