Date of Council Meeting: September 21, 2015

TOWN OF LEESBURG
TOWN COUNCIL WORKSESSION

Subject: Regulation and Zoning of Adult-Oriented Merchandise

Staff Contact: Barbara Notar, Town Attorney
Chris Murphy, Zoning Administrator

Council Action Requested: None at this time. Work session discussion only.

Staff Recommendation: None.

Commission Recommendation: Not Applicable.

Fiscal Impact: Not applicable.

Work Plan Impact: This is dependent upon Council action. If Town Council initiates a text amendment to the Zoning Ordinance to include use restrictions for adult-oriented merchandise, it will require staff time and resources to draft new ordinance sections as the Zoning Ordinance does not currently regulate adult-oriented uses or merchandise sales.

Executive Summary: In response to complaints from residents and visitors about the window display, and the visibility of adult-oriented merchandise within a shop in the historic district, the Town Council has asked whether: 1) The shop is violating any Town ordinances especially in relation to juveniles who may be able to see the merchandise from the window; and 2) If it is possible to legally restrict the sale of adult-oriented and/or sexually-oriented merchandise within the Town. As more fully explained below, the shop is not violating any Town ordinances including those aimed at protecting juveniles, and it is possible to amend the Zoning Ordinance to include text which will restrict the areas where adult-oriented merchandise can be sold. However, the current shop would be considered a pre-existing nonconforming use, and therefore, not subject to the new regulations so long as it remains in its current location.

Background: Recently, the Town Council has received emails from persons complaining of the window displays of a shop located in the historic district, and the possible ability of juveniles to observe adult-oriented merchandise sold inside the shop. The shop has been located in the historic district since December 2010. The Town Council requested information on whether this shop is violating any Town ordinances especially in terms of the ability of juveniles to observe the adult-merchandise from the street; and whether the

Town can restrict the sale of this merchandise by amending the Town's Zoning Ordinance. Since the store's opening, the Leesburg Police Department has not issued any warnings, tickets or summonses to the store for failing to check identification of minors or permitting minors in the store.

1) **Is the shop violating any Town ordinances especially those protecting juveniles?**

The Town's ordinance prohibiting the sale or display of obscenity to juveniles is enabled by Code of Virginia §§ 18.2-390 and 18.2-391. The language in the Town Code and State Code is verbatim, and both reflect the current law of obscenity as it has been interpreted by the United States Supreme Court.[1] The Town Code states:

> ***Sec. 24-280. - Unlawful acts.***
>
> *(a) It shall be unlawful for any person knowingly to sell, rent or loan to a juvenile, or to knowingly display for commercial purpose in any manner whereby juveniles may* ***examine and peruse****:*
> ***(1) Any picture, photography, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles****; or*
> *(2) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in subsection (a)(1) of this section, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to juveniles.*
> *However, if a person uses services of an Internet service provider or an electronic mail service provider in committing acts prohibited under this subsection, such*

[1] The U.S. Supreme Court established the test that judges and juries use to determine whether matter is obscene in three major cases: *Miller v. California*, 413 U.S. 15, 24-25 (1973); *Smith v. United States*, 431 U.S. 291, 300-02, 309 (1977); and *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987). The three-pronged *Miller* test is as follows:

1. Whether the average person, applying contemporary adult community standards, finds that the matter, taken as a whole, appeals to prurient interests (*i.e.*, an erotic, lascivious, abnormal, unhealthy, degrading, shameful, or morbid interest in nudity, sex, or excretion);
2. Whether the average person, applying contemporary adult community standards, finds that the matter depicts or describes sexual conduct in a patently offensive way (*i.e.*, ultimate sexual acts, normal or perverted, actual or simulated, masturbation, excretory functions, lewd exhibition of the genitals, or sado-masochistic sexual abuse); and
3. Whether a reasonable person finds that the matter, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Internet service provider or electronic mail service provider shall not be held responsible for violating this subsection.
(b) It shall be unlawful for any person knowingly to sell to a juvenile an admission ticket or pass, or knowingly to admit a juvenile to premises whereon there is exhibited a motion picture, show ***or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by juveniles not admitted to any such premises.***
(c) It shall be unlawful for any juvenile falsely to represent to any person mentioned in subsection (a) or (b) of this section, or to his agent, that such juvenile is 18 years of age or older, with the intent to procure any material, set forth in subsection (a) of this section, or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b) of this section.
(d) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (a) or (b) of this section or to his agent, that he is the parent or guardian of any juvenile, or that any juvenile is 18 years of age, with the intent to procure any material set forth in subsection (a) of this section, or with the intent to procure such juvenile's admission to any motion picture show or other presentation, as set forth in subsection (b) of this section.
(e) No person shall sell, rent, or loan any item described in subsection (a) of this section to any individual who does not demonstrate his age in accordance with the provisions of Code of Virginia, § 18.2-371.2(C). *A person or separate retail establishment who violates this subsection shall be liable for a civil penalty not to exceed $100.00 for a first violation, a civil penalty not to exceed $200.00 for a second violation, and a civil penalty not to exceed $500.00 for a third or subsequent violation.*

The definitions for the terms used in the above ordinance can be found in Code of Virginia §18.2-390 and Town Code § 24-27:

- "Nudity" means a state of undress so as to expose the human male or female genitals, pubic area, buttocks, breasts with less than a fully opaque covering, or the depiction of covered or uncovered male genitals in a discernibly turgid state.
- "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or breast.
- "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

- "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.
- "Harmful to juveniles" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominantly appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

In Commonwealth v. American Booksellers Ass'n., Inc., 236 Va. 168 (1988) the Supreme Court of Virginia discussed the term **"perusal"** as it relates to juveniles and Code of Virginia § 18.2-391:

> "Perusal goes well beyond casual examination. 'Peruse' is defined: 'to examine or consider or survey with some attention and typically for the purpose of discovering or noting one or more specific points: look at or look through fairly attentively: go through: STUDY…READ…to read through or read over with some attention and typically for the purpose of discovering or noting one or more specific points…." Webster's Third New International Dictionary 1688 (1976).The 1985 amendment (of Code of Virginia § 18.2-391) was aimed at detailed examination of the kinds embraced in the foregoing definition, not the casual examination available to a customer who simply surveys the labels, jackets, or dustcovers of books displayed on a bookseller's shelves. We therefore conclude that the statute was aimed not at the method chosen by the bookseller to display his wares for sale, but at the opportunity he may afford to juveniles to take off the shelves books which they are unable to buy, and to read them in the store." Id.

A legal analysis reveals that the shop is not violating either Town or Virginia codes. First, case law dictates that there must be a depiction of sexually explicit nudity, sexual conduct or sadomasochistic abuse. Sexual toys do not fall within any of these categories. Secondly, the statute requires the examination and perusal of objects which are harmful to juveniles. Simply passing by a window display on the sidewalk, even if peering into the windows, does not rise to the level of examination or perusal contemplated by the Virginia Supreme Court. The obscenity statutes are criminal in nature and therefore, in order to convict an individual of this offense, each and every element of the crime must be proven beyond a reasonable doubt.

2) May the Town regulate the sale of adult-oriented merchandise by limiting the zoning districts for which the use can occur?

The Town's Zoning Ordinance does not currently regulate what is specifically sold by any particular business in operation within the Town under the use designation of "retail". Currently, retail is permitted by right in the B-1, B-2, B-3 and B-4 Zoning Districts. If the Town Council wishes to consider the regulation of retail uses that specialize in the sale of "adult-oriented and/or sexually-oriented" merchandise, it could limit such uses to specific zoning districts in the Town.

In Virginia, the cities of Harrisonburg and Manassas have adopted specific regulations pertaining to adult-oriented and/or sexually-oriented type businesses. In both localities, such uses are limited to specific zoning districts. In Harrisonburg, "Adult Business" is limited to the B-2 General Business District with use standards and special exception approval required. In Manassas, "Sexually Oriented Business" is limited to the I-1 and I-2 zoning districts as a by-right use with use standards.

The Harrisonburg and Manassas regulations are modeled after similar regulations and were found to be constitutional in the United States Supreme Court decision of the City of Erie v. Pap's A. M., 529 U.S. 277 (2000), and cases that followed. Non-obscene sexual and erotic expression is afforded some First Amendment protection. Therefore, content-neutral time, place and manner restrictions are valid, and are subject to constitutional intermediate scrutiny in that they must be narrowly tailored in order to address a substantial government interest. The predominant purpose of these types of ordinances is to combat the negative secondary effects associated with adult businesses. If the Town Council desires to initiate a Zoning Ordinance text amendment, staff suggests that the Town model its ordinance after the Harrisonburg and Manassas ordinances.

Finally, any existing business in place as of the date of the adoption of a new ordinance prohibiting that use in the district would qualify as a pre-existing nonconforming use and be permitted to stay and remain in operation in accordance with Article 16 of the Zoning Ordinance entitled, "Nonconforming Uses".