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Mayor Brown and
The City Council
City of Lincoln Park
1355 Southfield
Lincoln, Park, MI 48146

RE: *Ordinances regulating public nudity*

To Mayor Brown and the City Council:

My input and opinion were requested by the City of Lincoln Park on several related issues involving local ordinances regulating public nudity. EXHIBITS 1,2, and 3. In particular, "public nudity" refers to displays by partial or totally nude performers of their breasts, pubic region, or buttocks. A couple of preliminary remarks are in order.

First, the City Council, City Manager, and City Attorney are commended for considering and studying these regulatory issues. This subject is charged with political and emotional energy that frequently exceeds the authority and fiscal resources of a municipality to enact and enforce ordinances.

Second, there is no permanent regulatory solution to adult businesses that sell sex, because the affected businesses and the state of the law continue to evolve. Now there are topless bars, totally nude cabarets, (also known as juice bars), massage parlors, nude photo shops, escort services, and adult book and video stores. A municipality must examine its regulatory system every year or so to determine if the ordinances accurately reflect the desired public policy and are capable of being enforced. This process never really ends.

My understanding of the situation in the City of Lincoln Park is that currently there is an existing juice bar that features totally nude dancers. There is no bar in the City of Lincoln Park that holds a liquor license from the Liquor Control Commission with a topless entertainment permit. A business has acquired some land within the "General Industrial" zoning district and has expressed a desire or plan to open an adult business with or without a liquor license. Presumably this adult business will feature partially nude (topless) dancers or totally nude dancers. In conjunction with a liquor

license, only partially nude (topless) entertainment can be permitted, and only by way of a topless entertainment permit issued by the Liquor Control Commission (the LCC). See MCL 436.1916(3), EXHIBIT 5. Presumably the City Council is exploring and reviewing its regulatory options.

The City of Lincoln Park already adopted the ordinance prohibiting public nudity as authorized by MCL 117.5(h), EXHIBIT 6. Once a municipality has adopted this type of ordinance, the LCC will not issue a topless entertainment permit for a licensed establishment within that municipality. See MCL 436.1916(3), EXHIBIT 5. Section 680.10, *Prohibition of Public Nudity*, EXHIBIT 1, also can be used to close down existing businesses featuring live nude entertainment, but the ordinance has not been used that way to date in Michigan. Specifically, ordinances like Section 680.10 based on MCL 117.5(h), and its township and village corollaries based on MCL 41.181 and MCL 67.1(aa), have been used primarily to deter businesses from locating within communities enacting these ordinances. To my knowledge, no Michigan municipality has used such an ordinance to shut down an existing adult business that featured live nude entertainers. Or, no Michigan municipality has used the ordinance in that manner and litigated the subject to the point of generating a reported court decision on it. This is the basic regulatory approach taken by many Michigan municipalities that do not engage in the comprehensive regulatory review now in process in the City of Lincoln Park.

Another ordinance under consideration by the Lincoln Park City Council, Section 822.30, *Nudity on Licensed Premises*, EXHIBIT 2, prohibits nudity in any bar licensed by the LCC. Obviously, Section 822.30 would have no impact on businesses that do not serve alcoholic beverages and are not licensed by the LCC.

A third ordinance apparently under consideration is an amendment to Section 822.01, *Definitions*, EXHIBIT 3, which contains proposed definitions of nudity, pornographic, pornography, prurient interest, sadomasochistic abuse, sexual conduct, and sexual excitement. There seemed to be no connection between these proposed definitions and any ordinance provision restricting, prohibiting, or otherwise regulating human behavior. There was no specified connection between the proposed definitions and the Lincoln Park zoning ordinance. There was no penalty clause, or any indication of what conduct was being regulated. **This proposed ordinance is fatally flawed, and should not be adopted.** If there was a purpose in proposing the ordinance definitions, I would need to see what that is, along with the proposed text purporting to regulate or prohibit the human behavior involving the defined terms. I suspect this language was lifted from a more elaborative ordinance aimed at defining and prohibiting the display of graphic photos or videos, and live performances of sexual behavior, in businesses serving alcoholic beverages. This may have been taken from an ordinance or agency regulation developed in another state, like California or New York. It serves no useful purpose in Lincoln Park, without additional supporting regulations.

The primary advantage to Section 822.30 is that similar ordinances were adopted, enforced, and upheld in two separate cases that ended up in the Michigan Court of Appeals: *Jott, Inc v Charter Township of Clinton*, 224 Mich App 513, 569 NW2d 841, EXHIBIT 7, and *Charter Township of VanBuren v Garter Belt Inc*, 258 Mich App 594, 673 NW2d 111, EXHIBIT 8. Both cases involved businesses licensed by the LCC. In *Charter Township of VanBuren v Garter Belt Inc*, the Court of Appeals clearly allowed enforcement of the local ordinance against a business that engaged in LCC permitted topless entertainment prior to adoption of the ordinance. The "grandfather defense" commonly asserted in defense of amended zoning ordinances was not a valid defense against the nudity ordinance. However, there is no current federal court decision that reaches the same conclusions as the Michigan Court of Appeals did in *Jott* and *Charter Township of Van Buren*. The closest decision is *California v LaRue*, 409 US 109; 93 SCt 390; 34 Led 2d 342 (1972), in which the United States Supreme Court upheld the constitutionality of regulations promulgated by the California Department of Alcoholic Beverages that prohibited bars from featuring "the performance of acts, or simulated acts, of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law" and the display of the pubic hair, anus, vulva, or genitals. Absent from the regulation was a ban on topless, or bare breast entertainment. After *LaRue*, the United States Supreme Court questioned its own analysis in *LaRue* when it decided *44 Liquormart Inc v Rhode Island*, 517 US 484; 116 SCt 1495; 134 LE 2d 711 (1996). State court decisions are not the final authority on the validity of ordinances like those under review by the City of Lincoln Park. Indeed, it would be incorrect to assume the ordinance that survived state court challenges also would survive federal court challenges. The state of the law remains unsettled, as can be illustrated by the plurality opinions reached by the United States Supreme Court in *Barnes v Glen Theatre Inc*, 501 US 560; 111 SCt 2456; 115 LE 2d 504 (1991)[1] and *City of Erie v Pap's AM*, 529 US 277; 120 SCt 1382; 146 LE 2d 265 (2000). On the cutting edge of ordinances regulating and prohibiting nudity, the United States Supreme Court has not issued a definitive majority opinion on which municipalities can rely in developing and enforcing their ordinances. Despite the desire of local officials for an ordinance blueprint or template that is certain to pass federal court review, there simply is no such pre-approved ordinance in existence.

There is a 6th Circuit case (in which Michigan is situated) that held Akron's ban on public nudity unconstitutional. *Triplett Grille Inc v City of Akron*, 40 F3d 129 (6th Cir 1994). A copy of the opinion is attached, EXHIBIT 9. The 6th Circuit Court of Appeals found Akron's ordinance unconstitutional because it effected a total ban on public nudity. This was in spite of the fact that the United States Supreme Court allowed an almost identical regulation to survive legal challenges in *Barnes v Glen Theatre Inc*. The holding in *Triplett Grille Inc v Akron* suggests that an ordinance totally banning public

[1] It was the decision in *Barnes v Glen Theater Inc* that prompted Michigan to enact the statutes authorizing municipalities to ban public nudity.

nudity, like Section 680.10, will not survive a well directed constitutional challenge in the federal courts. However, some highly motivated municipality will have to adopt, enforce, and litigate an ordinance like Section 680.10 to obtain a definitive decision.

A more recent federal court decision describing how nudity ordinances are likely to be analyzed is *Ben's Bar Inc v Village of Somerset*, 316 F3d 702 (7th Cir 2003). A copy is attached, EXHIBIT 10, because the opinion includes a survey of the leading cases in the area, as well as a detailed analysis of the Village of Somerset ordinance. [2] **This case should be read by any local elected official who is studying ordinances aimed at regulating nude entertainment.** The Court summarized its analytical approach.

> Based on the road map provided by the Supreme Court in *44 Liquormart*, as described *supra*, we conclude that a liquor regulation prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments is constitutional if: (1) the State is regulating pursuant to a legitimate governmental power, *O'Brian*, 391 U.S. at 377, 88 S.Ct. 1673; (2) the regulation does not completely prohibit adult entertainment, *Renton*, 475 U.S. at 46, 106 S.Ct. 925; (3) the regulation is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments, *Pap's A.M.*, 529 U.S. at 289-91, 120 S.Ct. 1382; and (4) the regulation is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues of communication remain available, see *Alameda Books*, 122 S.Ct. at 1734 (plurality opinion); *id.* at 1739- 44 (Kennedy, J. concurring); *or*, alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. *Pap's A.M.*, 529 U.S. at 296, 301 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part).

The keys to the decision for the City of Lincoln Park's purposes are that the ordinance "does not completely prohibit adult entertainment" and "is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments". The City of Lincoln Park cannot ban nude entertainment because nudity offends the citizens of Lincoln Park. This opinion signals a retreat from the plurality opinions of the United States Supreme Court in *Barnes v Glen Theatre Inc* and *City of Erie v Pap's AM*. Until the issue is heard and decided by the Unites States Supreme Court, it appears that municipalities should regulate nudity in public places without enacting blanket prohibitions on all nude performances, and municipalities should focus on the negative secondary effects of the nude entertainment rather than the content (i.e., nude bodies) of the entertainment.

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[2] Because *Ben's Bar* is a 7th Circuit decision, it is not binding precedent in the 6th Circuit, where Michigan is located, but it is persuasive authority.

It is against this legal and factual backdrop that the City Council of Lincoln Park must decide on the regulatory package to be adopted and enforced against public nudity in Lincoln Park. This becomes a public policy issue. The City Council must determine its public policy and regulatory priorities, and that determination will drive the analysis of the appropriate regulatory package.

For example, if the City Council determines that its number one priority is to ban businesses featuring totally nude live entertainment, then Section 680.10 must be adopted and enforced until a court rules against the City. The ultimate question of enforceability will not be answered until a case aimed at closing an existing business or preventing the opening of an new business is pushed through the Michigan Court of Appeals or the federal courts. The expense of this will be measured in multiples of $10,000. A single difficult case may cost $150,000 or more to litigate.

If the City Council determines that its number one priority is to ban <u>new</u> businesses featuring totally nude live entertainment, then Section 680.10 should be adopted, but enforced only against new businesses attempting to open and operate in Lincoln Park. This approach may create issues of selective enforcement, which might undercut the effectiveness of the ordinance. Again, a single difficult case may cost $150,000 or more to litigate.

If the City Council determines that its number one priority is to ban partially nude entertainment in businesses with liquor licenses, then Section 822.30 should be adopted along with supporting legislative findings to ensure the courts can make the same rulings that were reached in *Jott* and *VanBuren Township*, and in *Ben's Bar*.

The significance of the Court of Appeals decision in *Jott* deserves additional commentary and analysis. The first ten pages of the opinion focus on the zoning ordinance of the Charter Township of Clinton. The Court's reasoning does not apply to the ordinances currently under consideration by the City Council of Lincoln Park. The Court of Appeals directed its attention to the "nudity ordinance" beginning on page 10 (page 536 in the official reporter). The Court of Appeals agreed (with the trial court) that subsections (f) and (g) were unenforceable. Obviously, those subsections should not be adopted by Lincoln Park. Also, the Court of Appeals noted "that ordinance 291-A was enacted in order to eradicate the effects of "undesirable behavior" stemming from a combination of alcohol and nudity." (*Jott*, p14, pp 545-546 in the official reporter.) This suggests that careful legislative findings should be made about the nature of "undesirable behavior" sought to be eradicated by the City Council by adopting a ban on the combination of liquor and nudity in establishments licensed by the LCC. The simple adoption of the basic ordinance language utilized by the Charter Township of Clinton probably won't be sufficient. The ordinance text submitted to me for review does not reflect any pertinent legislative findings, or any subsection on findings and intent. This should be corrected. An example for the City Council to

consider is attached, EXHIBIT 4. It can and should be modified to reflect the circumstances of the City of Lincoln Park, if there is a history of undesirable behavior that has been investigated and reported or documented. It probably should be expanded to include some references to studies on the negative secondary effects of the combination of alcohol and live nude entertainment. More examples are in the *Ben's Bar* opinion.

Some general information and advice about this area of the law may be helpful to the City Council. Municipalities cannot ban adult bookstores or porn shops from locating within the political boundaries. Zoning ordinances that limit adult bookstores, topless bars, and totally nude cabarets to industrial sectors are being questioned. Better planning and zoning results seem to be obtained by requiring adult businesses to locate on major thoroughfares with five traffic lanes or more with well lit parking lots situated in the front of the businesses. Ideally, there will be little or no pedestrian traffic along the roadway. This avoids dark corners and cramped spaces where criminal activity is more likely to occur outside and around the businesses. It also minimizes the number of pedestrians who must walk close to the business storefront.

Studies indicate that clusters of adult business produce real and perceived negative secondary effects, so zoning ordinance provisions should disperse and separate the adult businesses. Also, adult businesses should be separated from bars by 800 to 1500 feet to cut down on inebriated bar customers visiting adult businesses right next door. Leaving only 2 or 3 sites in the city properly zoned for adult businesses will not make it through a court challenge to the zoning ordinance.

Not every topless bar or cabaret featuring totally nude dancers is a public safety problem, but some are. If the City of Lincoln Park has actual regulatory experience with either one of these business types, public safety reports or incidents should be examined to identify the number of crimes or disturbances associated with the business operations in a calendar year, as compared with other problem sites in the City. Then actual data can be used to ascertain the extent of public safety incidents, calls, complaints, crimes, or disturbances associated with various businesses, activities, and events within Lincoln Park. Sometimes there are more calls to sporting events, wedding receptions, or conventional bars than there are to topless bars or totally nude entertainment businesses. This information is useful when developing an overall regulatory and public safety approach that will work in Lincoln Park. The information can be used to augment the legislative findings in support of an ordinance like Section 822.30.

I was asked to explain any potential conflict between the ordinance prohibiting nudity in bars and the ordinance prohibiting nudity generally. The ordinance aimed at nudity in establishments licensed by the LCC is more specific and limited. It has been upheld in two separate court challenges in Michigan, and variations of it have been

upheld in the federal courts. The other ordinance generally prohibiting nudity has not been tested at the Court of Appeals level, but is backed by the Michigan statute authorizing its adoption. The Attorney General may assist in defending constitutional attacks on the statute and an ordinance based on the statute. Both ordinances should produce the same result at the LCC: no more topless entertainment permits will be issued in or for the City of Lincoln Park. Enacting both ordinances may lead a court to question the constitutionality of banning totally nude performances completely. See the opinions in *Triplett* Grille and *Ben's* Bar. This is a question to which there is no precise legal answer right now. Some actual cases will have to be litigated in order to obtain a definitive response from the courts. Enacting the two ordinances will raise questions about what activity the City Council actually intended to prohibit, and actually intended to permit. The resulting uncertainty may lead a reviewing court to strike down one or both ordinances, but it is doubtful that both would be invalidated. Finally, the federal court decisions in *Triplett Grill* and *Ben's Bar* suggest that total bans on public nudity may be struck down until a case is taken all the way to the United States Supreme Court, where the ultimate ruling cannot be predicted with any certainty.

As noted in an even more recent case, *RVS LLC v City of Rockford*, 361 F3d 402 (7th Cir 2004), copy attached, EXHIBIT 11, the court observed that the challenged ordinance might have survived if it applied only to bars and clubs that present nude or semi-nude dancing, quoting from an earlier decision: "Such entertainment has a long history of spawning deleterious effects, including prostitution and the criminal abuse and exploitation of young women, and in most cases a city or state need only carry a minimum burden to demonstrate its interest in regulation of such activity."

This brings review of the subject full circle. The City Council must determine what its regulatory objective is, and then select the ordinance that advances or achieves that objective the best. The basic regulatory options are outlined here.

I. **If the City Council is most concerned with keeping nudity out of businesses licensed by the LCC because of the negative secondary effects of the combination of alcohol and nudity, it should adopt Section 822.30 with appropriate legislative findings and a statement of intent.**

II. **If the City Council is most concerned with closing businesses featuring totally nude live entertainment, then Section 680.10 should be used to close all businesses in violation. This will be an expensive process, with an uncertain outcome. I don't recommend this.**

III. **If the City Council is most concerned with preventing new businesses from opening that feature totally nude live entertainment, then Section 680.10 should be used to prevent such businesses from obtaining zoning approval. A**

complete ban on nude entertainment is open to challenge, because it looks like total exclusion of that form of expression within the City of Lincoln Park.

IV. If the City Council is most concerned with dispersing topless bars, conventional bars, and businesses featuring totally nude live entertainment, the zoning ordinance should be examined and updated to make sure it accomplishes these objectives in a legally valid format. (A relatively recent pair of court decisions involving the City of Grand Rapids, *Executive Arts Studio, Inc v City of Grand Rapids*, 179 F Supp 2d 755 (2001), and *Executive Arts Studio, Inc v City of Grand Rapids*, 227 F Supp 2d 731 (2002), cast doubt over long accepted definitions and standards. More work would be required to do this correctly.)

V. If the City Council is unable to agree on regulatory objectives and public policy priorities for the City of Lincoln Park, or the City Council simply wants to do as much as it can to regulate adult businesses and the associated negative secondary effects without great risk and litigation expense, then I recommend a three step approach:

a) adopt Section 822.30 with appropriate legislative findings and a subsection on intent, and

b) obtain professional review of the Lincoln Park zoning ordinance as it applies to adult entertainment businesses, and

c) repeal Section 680.10 at the same time Section 822.30 is adopted, and wait for a test case by which the enforceability of ordinances like Section 822.30 is determined by a Michigan or federal appellate court.

I would be pleased to work with the City of Lincoln Park, if needed, on any or all of the outlined options. Special attention should be given to legislative findings. I could attend a City Council session to assist in the discussion of this subject, which often leads to multiple questions about what can and should be regulated.

Very truly yours,

Eric D. Williams

enc: EXHIBITS 1 through 11