



David M. Gold

Bill Analysis
Legislative Service Commission

S.B. 16

127th General Assembly
(As Passed by the Senate)

By initiative

Sen. Amstutz

BILL SUMMARY

- Prohibits a sexually oriented business from remaining open between midnight and 6 a.m., unless the business is covered by a liquor permit that authorizes operation during those hours, in which case it may remain open provided that it does not conduct, offer, or allow any sexually oriented entertainment activity during those hours.
- Prohibits employees of the business, while on the premises of the business and in a state of nudity or semi-nudity, from knowingly: (a) appearing in the view of a patron, unless at least six feet away and on a stage at least two feet off the floor, (b) touching any patron or their clothing, or (c) touching any other person who is nude or seminude while in the view of any patron.
- Prohibits any patron of a sexually oriented business from knowingly touching any employee of the business who is nude or seminude.

CONTENT AND OPERATION

Initiative process

(Ohio Const., Art. II, sec. 1b; R.C. 3501.02--not in the bill)

This bill was proposed by initiative. An initiative petition proposing a law must contain signatures of electors equal to 3% of the total votes cast in the last election for Governor. The petition must be filed with the Secretary of State at least ten days before a session of the General Assembly commences. The Secretary of State must transmit the petition to the General Assembly as soon as it convenes.

If the General Assembly fails to act on the proposal within four months, fails to pass the proposal, or passes an amended version of the proposal, the proponents have 90 days to file a supplementary petition with the Secretary of State demanding that it be put on the ballot. The supplementary petition must contain additional signatures amounting to 3% of the total votes cast in the last election for Governor. The proponents may include in the supplementary petition any amendments that were incorporated into the proposal by either or both houses of the General Assembly. The Secretary of State must submit the proposal to the electors at the next regular or general election.

If the voters approve the proposal, it takes effect 30 days after the election and any different version that was passed by the General Assembly is invalidated. If the voters reject the proposal, any different version that was passed by the General Assembly becomes effective. The Governor may not veto a law that was proposed by petition and approved by the electors.

The proposal

Purpose and findings

The bill declares that the purpose of R.C. Chapter 3768. (substantive provisions of the bill) is to promote the health, safety, and general welfare of the people of Ohio by establishing reasonable regulations to prevent the deleterious secondary effects of sexually oriented businesses (R.C. 3768.03(A)). The provisions of that chapter are to be construed in such a manner that will further this purpose (R.C. 3768.03(C)). The bill states that the regulations the bill establishes in R.C. Chapter 3768. have neither the purpose nor the effect of imposing a limitation or restriction on the content of or reasonable access to any communicative materials, including sexually oriented materials (R.C. 3768.03(A)).

The bill declares that the prohibitions in R.C. Chapter 3768., which the bill enacts, are based upon and justified by numerous decisions of the courts that identify the adverse secondary effects of sexually oriented businesses. The bill states that these decisions, which the bill incorporates by reference, support the following findings made by the bill (1) that sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects such as lewdness, public indecency, prostitution, potential spread of disease, illegal drug use and drug trafficking, personal and property crimes, negative impacts on surrounding properties, blight, litter, and sexual assault and exploitation and (2) that these negative secondary effects constitute a harm the state has a substantial governmental interest in abating or preventing. This substantial governmental interest, the bill states, is independent of any

comparative analysis between sexually oriented and non-sexually oriented businesses. (R.C. 3768.03(B).)

Prohibitions

The bill imposes prohibitions in three areas. The scope of the prohibitions is controlled in significant part by the bill's definitions of terms used in the prohibitions.

(1) The bill prohibits a sexually oriented business from being open between midnight and 6 a.m. However, if a sexually oriented business holds a liquor permit authorizing it to operate between midnight and 6 a.m., it may remain open during those hours, so long as it does not conduct, offer, or allow any sexually oriented entertainment activity during those hours. (R.C. 3768.01(A).)

(2) It also prohibits an employee of a sexually oriented business, while on the premises of the business and while nude or seminude, from knowingly (a) appearing in view of a patron unless the employee is at least six feet away from all patrons and on a stage at least two feet above the floor, (b) touching any patron or any patron's clothing, or (c) touching any other person who is nude or seminude while in view of a patron (R.C. 3768.01(B)(1)). An employee of a sexually oriented business who regularly appears nude or seminude on the premises of the business also may not knowingly be or remaining within six feet of any patron (R.C. 3768.01(B)(3)).

(3) Finally the bill prohibits a patron of a sexually oriented business from knowingly touching any employee of the business while the employee is nude or seminude and from knowingly touching the clothing or costume of any employee of the business while that employee is nude or seminude (R.C. 3768.01(B)(2)).

Penalty

A violation of the prohibition described in (1) above is the offense of "illegally operating a sexually oriented business." A violation of any prohibition described in (2) or (3) above is the offense of "illegal sexually oriented activity in a sexually oriented business." Both offenses are first degree misdemeanors.

Definitions: scope of the prohibitions

A "sexually oriented business" is an adult bookstore or adult video store, an adult cabaret, an adult motion picture theater, a sexual device shop, or a sexual encounter center. However, a business cannot be classified as a sexually oriented business by virtue of showing, selling, or renting materials rated NC-17 or R by the Motion Picture Association of America. (R.C. 3768.02(P).) The "premises" of a sexually oriented business are the real property upon which the business is

located, including all buildings on and appurtenances to the property, such as the sexually oriented business, the grounds, private walkways, and parking lots or parking garages, that are under the ownership, control, or supervision of the "licensee" (R.C. 3768.02(J)).

An "adult bookstore" or "adult video store" is a commercial establishment that has as a significant or substantial portion of its stock in trade or inventory in, derives a significant or substantial portion of its revenues from, devotes a significant or substantial portion of its interior business or advertising to, or maintains a substantial section of its sales or display space for the sale or rental, for any form of consideration, of books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, video cassettes, compact discs, slides, or other visual representations, that are characterized by their emphasis upon the exhibition or description of human genitals, pubic region, or buttocks, or the female breast below a point immediately above the top of the areola, or of intercourse, oral copulation, masturbation, or sodomy, or excretory functions as a part of or in connection with any of these activities (R.C. 3768.02(A), (R), and (S)).

An "adult cabaret" is a nightclub, bar, juice bar, restaurant, bottle club, or other commercial establishment, regardless of whether alcoholic beverages are served, that regularly features persons who appear in a state of nudity or seminudity or live performances that are characterized by the exposure of human genitals, pubic region, or buttocks, or the female breast below a point immediately above the top of the areola, or of intercourse, oral copulation, masturbation, or sodomy, or excretory functions as a part of or in connection with any of these activities (R.C. 3768.02(B), (R), and (S)).

An "adult motion picture theater" is a commercial establishment where films, motion pictures, videocassettes, slides, or similar photographic reproductions are regularly shown to more than five persons for any form of consideration and are characterized by their emphasis upon human genitals, pubic region, or buttocks, or the female breast below a point immediately above the top of the areola, or of intercourse, oral copulation, masturbation, or sodomy, or excretory functions as a part of or in connection with any of these activities (R.C. 3768.02(C), (R), and (S)).

A "sexual device shop" is a commercial establishment that regularly features sexual devices. A pharmacy, drug store, medical clinic, or any establishment primarily dedicated to providing medical or healthcare products or services, or a commercial establishment that does not restrict access to its premises by reason of age, is not to be construed as being a "sexual device shop." (R.C. 3768.02(N).) A "sexual device" is any three-dimensional object designed and marketed for stimulation of the male or female human genitals, anus, or female

breasts, or for sadomasochistic use or abuse of self or others, including devices such as dildos, vibrators, penis pumps, and physical representations of human genital organs. Devices primarily intended for protection against sexually transmitted diseases or for preventing pregnancy are not to be construed as being "sexual devices." (R.C. 3768.02(M).)

A "sexual encounter center" is a business or commercial enterprise that, as one of its principal business purposes, purports to offer for any form of consideration, physical contact in the form of wrestling or tumbling between persons of the opposite sex when one or more of the persons is nude or seminude.

An "employee" is any person who performs any service on the premises of sexually oriented business, on a full-time, part-time, or contract basis, whether or not the person is denominated as an employee, as an independent contractor, as an agent, or otherwise. However, a person who is on the premises of a sexually oriented business exclusively for the repair or maintenance of the premises or for the delivery of goods to the premises is not an "employee" of the business. (R.C. 3768.02(E).)

"Operate" means to cause to function or to put or keep in a state of doing business; an "operator" is any person on the premises of a sexually oriented business who causes the business to function or who puts or keeps the business in operation or who manages the business or exercises overall operational control of the business premises (R.C. 3768.02(G)). (The term "operate" is defined by but not otherwise used in the bill.)

A "patron" of a sexually oriented business is any person who is on the premises of the business. However, an operator or employee of the business or a person who is on the premises exclusively for repair or maintenance of the premises or for the delivery of goods to the premises is not a "patron." (R.C. 3768.01(H).)

"Sexually oriented entertainment activity" is the sale, rental, or exhibition, for any form of consideration, of books, films, video cassettes, magazines, visual images, or live performances that are characterized by an emphasis on the exposure or display of human genitals, pubic region, or buttocks, or the female breast below a point immediately above the top of the areola, or of intercourse, oral copulation, masturbation, or sodomy, or excretory functions as a part of or in connection with any of these activities

A person is "nude" or in a "state of nudity" if the person is showing human male or female genitals, pubic area, vulva, or anus with less than a fully opaque covering or is showing the female breast with less than a full opaque covering of any part of the nipple or areola (R.C. 3768.02(F)). A person is "seminude" or in a

"state of seminudity" if the person is showing the female breast below a horizontal line extending across the top of the areola for the width of the breast or is showing male or female buttocks. The lower portion of the female human breast thus is included, but the cleavage of female human breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel is not to be considered "seminude" so long as the areola is not exposed in whole or in part. (R.C. 3768.02(L).)

"Regularly" means consistently or repeatedly doing an act. (R.C. 3768.02(K).)

"Characterized by" means describing the essential character or quality of an item.

Effect on local regulation of sexually oriented businesses

County, township, and municipal zoning authority, as well as the home rule power that is vested in municipalities, might enable these subdivisions also to regulate sexually oriented businesses. The bill specifies that R.C. Chapter 3768. is not to be construed to pre-empt or prevent counties, townships, and municipalities from adopting or enforcing laws concerning sexually oriented businesses that are as restrictive or more restrictive than the provisions of that chapter (R.C. 3768.03(D)).

Severability

The bill states that R.C. Chapter 3768. and each section, division, and provision of that chapter are hereby declared to be independent such that if any such section, division, or provision, or the application thereof to any person or circumstance, is held to be invalid, the remaining sections, divisions, or provisions and the application of such sections, divisions, or provisions to any person or circumstances other than those to which it is held invalid are not affected thereby. It also declares that such sections, divisions, and provisions would have been enacted independently of such sections, divisions, or provisions so know to be invalid. (Section 2.)

COMMENT

Although attempts at regulating sexually oriented businesses raise constitutional issues relating to free speech, the Federal Court of Appeals for the Sixth Circuit, which covers Ohio, has upheld regulations similar to those contained in the bill. *Déjà Vu of Cincinnati, LLC v. Union Twp. Bd. of Trustees* (2005, 6th Cir.) 411 F.3d 777, cert. *denied* (2006), 546 U.S. 1089 (midnight-to-noon hours-of-operation restriction on adult cabarets that did not serve alcohol);

Déjà Vu of Nashville, Inc. v. Metropolitan Government of Nashville & Davidson County, Tennessee (2001, 6th Cir.) 274 F.3d 377, cert. *denied and motion granted* (2002), 535 U.S. 1073 (three-foot no-touch buffer zone around stage); *DLS, Inc. v. City of Chattanooga* (1997, 6th Cir.) 107 F.3d 403 (requirement that performers remain six feet away from customers, employees, or other entertainers).

HISTORY

ACTION	DATE
Introduced	02-20-07
Reported, S. State & Local Gov't & Veterans Affairs	04-17-07
Passed Senate (24-8)	04-17-07

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