



75514

**DATE:** March 24, 2015

**TO:** Board of Supervisors

**FROM:** Kirk Girard, Acting Director

**SUBJECT:** Report on Adult Uses from April 15, 2014 Board Referral

**RECOMMENDED ACTION**

Under advisement from April 15, 2014 (Item No. 14): Receive report from Department of Planning and Development relating to potential amendments to the Zoning Ordinance establishing additional regulations regarding alcohol sales, adult uses, and private rooms in bars and entertainment establishments, and provide policy direction to Administration regarding potential Zoning Ordinance amendments. (Department of Planning and Development)

**FISCAL IMPLICATIONS**

No impact to the General Fund from receipt of the report.

**CONTRACT HISTORY**

Not Applicable

**REASONS FOR RECOMMENDATION**

- 1) This report responds to the April 15, 2014 referral (“Referral”) from the Board of Supervisors requesting a report back through HLUET evaluating potential amendments to the zoning ordinance establishing additional regulations related to alcohol sales, adult uses, and private rooms in bars and entertainment establishments.
- 2) The Referral requests that the Administration evaluate if the Zoning Ordinance should be amended to (a) require commercial establishments selling alcohol to obtain a use permit, (b) expand the definition of adult uses – adult entertainment establishment to include establishments where activities such as lap dancing, pole dancing and cage dancing occurs regardless of the state of dress, and (c) require that private rooms within bars and entertainment establishments have minimum size requirements.

- 3) This report presents research regarding these three topics, including an evaluation of similar regulations in nearby cities and counties.
  
- 4) The Administration recommends that the County not pursue amendments to the Zoning Ordinance regarding the requirement for a use permit for the sale of alcohol in commercial establishments, the expansion of the definition of adult uses-adult entertainment establishment to address clothed activities, and the establishment of minimum sizes for private rooms in bars and entertainment establishments.
  - a. Sale of alcohol by commercial establishments. The permitting requirements established by the California Department of Alcohol and Beverage Control (ABC) provide sufficient regulatory oversight of alcohol sales. The Administration believes that a new County requirement of a use permit for all commercial establishments selling alcohol would be duplicative of this oversight. In addition, the requirement for a use permit to sell alcohol may create new regulatory requirements for the County's wineries, conflicting with the policy intent of the Wineries Ordinance adopted by the Board of Supervisors in 2012, which was intended to reduce land use regulations for small wineries.
  
  - b. Expanding the definition of *adult uses – adult entertainment establishment* to include establishments that have lap dancing, pole dancing and cage dancing regardless of the state of dress. The Administration believes that a zoning ordinance amendment to address these clothed activities would necessitate more thorough analysis and could have unintended consequences. The expanded definition could unintentionally apply to traditional nightclubs or fitness facilities that teach "exotic" dancing, preventing these facilities from establishing in many areas of the County, due to the siting restrictions for adult uses in the Zoning Ordinance. In addition, in order to expand the definition of *adult uses - adult entertainment* as described in the Referral, the County will need to demonstrate that there are harmful secondary effects from the clothed activities to be regulated by the adult uses definition. The County would need to present studies and data showing how these clothed activities result in negative secondary impacts, such as increased rates of crime, prostitution, human trafficking, or problems with noise. The Referral notes the potential for prostitution to exist within bars that have clothed dancing, such as lap, pole, or caged dances. Additional research in support of a proposed ordinance amendment should include complaint or arrest records from the Sheriff regarding illegal activities at establishments where clothed activities has occurred.

c. Minimum sizes for private rooms in bars and entertainment establishments. Given the many types of private banquet rooms or other rooms that exist within bars and entertainment establishments, the selection of a specific minimum room size designed to prevent illegal activities such as prostitution without inadvertently preventing the existence of other rooms used for a legitimate business purpose would be difficult to implement and enforce. Currently, bars, restaurants and entertainment establishments may have banquet rooms designed for parties of many different sizes, and also have rooms such as offices and storage areas. Based on the definition of a private room, a minimum size standard could have unintended consequences by preventing businesses from having smaller rooms used for legitimate business purposes.

5) If the HLUET Committee or Board of Supervisors intends to provide greater regulatory oversight over bars and entertainment establishments that are not defined as “adult uses” under the current Zoning Ordinance, the Administration suggests alternative approaches. For example, if the intent is to prevent illegal activity or conduct, such as prostitution or human trafficking, at existing or new establishments, the County could establish a reasonable licensing program for operators and employees, similar to the permitting requirements that currently apply to massage establishments per the County Ordinance Code (Section B22). Such a licensing program would assist in ensuring that these businesses are run in a manner consistent with the health, safety and welfare of its patrons. It would capture both existing business and any new business.

If the intent is to address potential impacts on adjacent neighborhoods from nighttime activities from bars and entertainment establishments, the County could amend the Zoning Ordinance to require a use permit for a bar or entertainment establishment that operates during the late night (for example, between the hours of 10 pm to 2 am). A similar land use requirement is used in the City of San José for businesses with late night operating hours.

Amendments to the Zoning Ordinance imposing additional land use regulations on bars and entertainment establishments (including adult entertainment establishments) would apply to new establishments or establishments seeking to modify an existing permit.

6) If the Board directs the Administration to pursue any amendments to the Ordinance Code, staff will initiate preparation of the Ordinance revisions as directed, and conduct public outreach before returning a draft Ordinance revision to the Board.

## **CHILD IMPACT**

Receipt of the report will have no/neutral impact on children and youth.

## **SENIOR IMPACT**

Receipt of the report will have no/neutral impact on seniors.

## **SUSTAINABILITY IMPLICATIONS**

Receipt of the report will have no/neutral sustainability implications.

## **BACKGROUND**

### **April 15, 2014 Referral**

On April 15, 2014, the Board of Supervisors adopted a Referral directing the Administration to report to the Board of Supervisors through the HLUET Committee with recommendation on whether the County Zoning Ordinance should be amended as follows:

- a. To require a use permit for all commercial uses that sell alcohol.
- b. To amend the definition of "Adult Use-Adult Entertainment Establishment" in the Zoning Ordinance to include activities such as lap dancing, pole dancing, cage dancing, etc. (regardless of state of dress).
- c. To amend the Zoning Ordinance to require a minimum area for private rooms in bars and entertainment establishments.

The Board referral references the proliferation of "bikini bars" in San Jose and includes as an attachment a KPIX news report that states that many bikini bars offer lap dances and can feature nudity by waitresses.<sup>1</sup>

The function of the County's Zoning Ordinance is to establish regulations over land uses in unincorporated Santa Clara County. Among its specified purposes, the Zoning Ordinance is intended "[t]o minimize adverse effects on the public resulting from the inappropriate creation, location, use or design of building sites, buildings, land uses, parking areas, or other forms of land development by providing appropriate standards for development." Under the Zoning Ordinance, a Use Permit is required for land uses "of greater intensity and have more potential for off-site and adverse environmental impacts" Therefore, the Zoning Ordinance, and land use regulations in general, are intended to govern the potential impacts between a land use and the built environment, natural environment, and the community as a whole. Land use regulations and use permits are not intended to govern the conduct of persons utilizing the use so long as that conduct does not adversely impact the surrounding environment or community.

## **Research and Staff Recommendation**

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<sup>1</sup> If a Bikini Bar was to feature nude or semi-nude dancers and was located in unincorporated County it would be required to obtain a use permit as an adult entertainment establishment. If it operated without a required land use permit then the County could pursue closure of the bikini bar on the grounds that it is an unpermitted use.

The Administration has conducted research and provided a separate recommendation for each portion of the Board referral, which is set forth below.

### Alcohol Sales

The Referral requests an evaluation on requiring a use permit for all commercial establishments selling alcohol. The Zoning Ordinance does not currently require all commercial establishments selling alcohol to obtain a use permit. For example, uses classified as Bars or Restaurants within commercial zoning districts must obtain a land use approval called “Architectural and Site Approval” that does not specifically evaluate the sale of alcohol. The Department recommends, based on research and analysis, that no amendments be made to the Zoning Ordinance requiring a use permit for all commercial establishments selling alcohol.

Planning staff conducted research of adjacent jurisdictions as to whether commercial establishments selling alcohol must obtain a use permit. The research showed that a use permit is required for commercial establishments selling alcohol in some jurisdictions. For example, in Santa Clara County, the cities of San José and Cupertino require a use permit, and Contra Costa County also requires a use permit.

In considering a Zoning Ordinance amendment requiring a use permit for commercial establishments selling alcohol, HLUET should consider the following:

- Impact on Wineries. In December 2012, the Board of Supervisors adopted modifications to the County’s Zoning Ordinance for wineries. These modifications, referenced upon adoption as the “Wineries Ordinance”, were intended to reduce land use regulations on small to medium sized wineries to promote growth of this local agricultural tourism industry. If the County were to adopt the requirement that any commercial establishment selling alcohol obtain a use permit, many small to medium sized wineries in Santa Clara County that intend to allow tastings or the on-site sale of wine may be subject to obtaining a Use Permit.
- Availability of Commercially Zone Land. The majority of unincorporated County land is within the rural areas, and the opportunity to establish commercial establishments (such as bars and entertainment establishments) is limited to urban unincorporated pockets (i.e., Alum Rock, Burbank). These areas are designated for future annexation into the adjacent cities and are subject to petition for annexation into an adjacent city when a new business is established adjacent to city limits. Consequently, under this structure the majority of urban areas with a commercial zoning designation that allow commercial establishments will eventually be annexed into the cities such as San Jose.
- Regulatory Oversight of Alcohol by the State Department of Alcohol and Beverage Control (ABC). ABC regulates the production, distribution and sale of alcohol within California. Under ABC’s regulations, any commercial establishment that sells alcohol for on-site or off-site consumption is required to obtain an ABC license. ABC

approval is also required when there is a change in ownership and change in the type of alcohol sold at a commercial establishment. ABC licensing process considers a variety of factors related to health, safety, and welfare, including the moral character of the business owner selling alcohol. For example, the ABC considers the proximity of proposed alcohol sales to schools, churches, and residential areas, and can deny the issuance of a permit if it finds that alcohol sales will negatively effect human welfare due to proximity to these areas.

Any zoning ordinance amendment to require use permits for all commercial establishments selling alcohol would apply only to new businesses that serve alcohol because existing uses would likely be grandfathered in. The change would not apply to businesses that currently sell alcohol and are not required to have a use permit, so long as they (1) retain the same type of liquor license within a license classification; and (2) are operated continuously without substantial change in mode or character of operation.

#### Adult Uses-Adult Entertainment Establishment Definition

The Referral requests that the Administration consider amendments to the Zoning Ordinance to expand the definition of *adult uses-adult entertainment establishment* to include activities such as pole dancing, cage dancing and lap dances regardless of state of dress. An Adult Entertainment Establishment<sup>2</sup> is a subset of the Adult Use Definition within the Zoning Ordinance, defined as

An establishment regularly used for the presentation or exhibition or featuring of topless or bottomless dancers, strippers, or any entertainers regularly displaying specified anatomical areas for observation by patrons or customers.

A specified anatomical area is defined as:

(a) Less than completely and opaquely covered human genitals, pubic region, buttock and female breast below a point immediately above the top of the areola; or, (b) human male genitals in a discernibly turgid state.

Currently, any pole dancing, cage dancing, and lap dancing where the dancers are nude or semi-nude is classified as an adult use-adult entertainment establishment under the Zoning Ordinance. What the ordinance does not currently address as an adult use-adult entertainment establishment is pole dancing, cage dancing, and lap dancing where the dancer is *clothed*.

Nude or semi-nude dancing and other forms of adult entertainment involve expressive activities that enjoy at least limited freedom of speech protection under both the United

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<sup>2</sup> Under the Zoning Ordinance, adult uses-adult entertainment establishment are permitted in commercial and industrial zoning districts subject to a use permit and must comply with siting findings (4.10.020) that require that the adult use not be located within 1,000 feet of a residential or agricultural zone, school, or any other adult use.

States and California constitutions. Thus, any law regulating such businesses must be tailored in a way that does not unduly restrict such protected activities. This means the regulation must further an important or substantial interest of government, the regulation is unrelated to the suppression of protected speech, and the restriction of activity is not broader than necessary to achieve the legitimate and substantial government interest. The overarching goal of adult use-adult entertainment establishment regulations is to address the negative secondary impacts (i.e, crime, noise) and not to regulate them in such a manner that they cannot operate because of the nature of the activities undertaken at such establishments.

Expanding the definition of adult use-adult entertainment establishment to include establishments whose entertainers engage in activities such as lap dancing, pole dancing, and cage dancing when clothed would subject these *clothed* establishments to the regulatory requirements for adult uses-adult entertainment establishments. The types of businesses intended to be regulated by the adult uses-adult entertainment establishment classification are those businesses whose purpose is to sell or display matter that is *sexually explicit*.

Consequently, expanding the adult entertainment establishment definition to include *clothed* establishments could have the unintended consequence of encompassing businesses such as fitness clubs, nightclubs, or bars where pole dancing, lap dancing, or cage dancing occurs, but arguably not in a setting or manner that is specifically sexually explicit.

Given the free speech protections afforded adult uses, if the definition of adult use-adult entertainment establishment is expanded to include pole dancing, cage dancing, and lap dancing where the dancer is clothed, the County would need to show that the regulation furthers an important or substantial interest of government, it is unrelated to the suppression of protected speech, and the regulation of clothed dancers is not broader than necessary to achieve the legitimate and substantial government interest. To show this the County would need evidence demonstrating that facilities where *clothed* lap dancing, pole dancing, and cage dancing establishments are the cause of negative secondary impacts such as increased crime. This could include data and studies showing increased rates of crime, prostitution, human trafficking, or problems with noise, taking into account information from arrest records, complaints, and investigations performed by the Sheriff's office.

Planning staff conducted research of adjacent jurisdictions to evaluate the definition of adult uses. Staff found that most jurisdictions include an adult use definition that is similar or the same as the County. This includes the City of San Jose, where adult entertainment establishments are defined as containing "topless and bottomless dancers..." A few neighboring jurisdictions, such as Contra Costa County, and San Francisco County, define other types of adult use establishments, such as adult cabarets and adult hotels. However, in defining the types of activities that occur within these establishments, the cities or counties use a similar adult use definition which focuses on the nude or semi-nude state of the dancers or "specified sexual activities". Staff could not find any examples of a defined "adult use" in these jurisdictions that included "cage dancing", "pole dancing", or "lap dancing" regardless of state of dress.

During the preparation of this report Planning Staff requested feedback from the Sheriff's office regarding a potential Zoning Ordinance amendment to expand the definition of adult

use – adult entertainment establishments to encompass clothed “cage dancing”, “pole dancing” or “lap dancing”. At the time this report was completed, Planning staff had not yet received a response.

### Private Rooms

The Referral seeks the Administration to evaluate the creation of a minimum size for private rooms in bars and entertainment establishments. The intent of this minimum room size would be to ensure that private rooms are not sized to facilitate or allow for private lap dances or illegal activity such as prostitution.

Bars and entertainment establishments contain various private rooms, including those designated for banquet / dining functions or other supportive functions such as offices or storage rooms. It would be difficult to establish a minimum private room standard that effectively discourages illegal activities without allowing for rooms within commercial establishments that are used for a legitimate purpose (such as offices, storage, banquet room).

In conducting research of other nearby jurisdictions, Planning staff did not find any examples of a minimum private room size within Bars and Entertainment establishments.

### **CONSEQUENCES OF NEGATIVE ACTION**

The HLUET Committee and or Board will not accept the report. Staff will provide a new report or otherwise proceed as directed by the HLUET Committee or the Board of Supervisors.

### **STEPS FOLLOWING APPROVAL**

If the Board directs the Administration to pursue any amendments to the Ordinance Code, staff will initiate preparation of the Ordinance revisions as directed, and conduct public outreach before returning a draft Ordinance revision to the Board.

### **LINKS:**

- Linked To: 71317 : 71317
- Linked To: 71367 : 71367

### **ATTACHMENTS:**

- April 15, 2014 Board Referral \_ Adult Uses (PDF)
- Research - regulations from nearby jurisdictions (PDF)
- HLUET supplemental memo - modification in staff recommendation (PDF)