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THE CITY OF KEY WEST

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To: The City Commission for the City of Key West
From: Ronald J. Ramsingh, City Attorney
Meeting Date: January 11, 2024
Agenda Item: Amendment to Ch. 18 entitled "Businesses" to create new regulations regarding obscene and vulgar materials in storefronts.
Sponsor: Commissioner Wardlow
Co-Sponsors: Commissioners Carey, Lopez, Weekley, Hoover, Mayor Johnston

REVISED COVER MEMO

Action Statement:

The proposed ordinance amendment seeks to create a new Article in Ch. 18 "Businesses" to require obscene, vulgar, and sexually oriented materials to be removed from storefronts where they can be seen by minors and placed in locations that are not visible from the public rights of way. It also makes it unlawful to sell such materials to minors, and requires signage warning patrons of the content therein.

Background:

In recent years, there has been a steady increase in materials displayed on storefronts and in store windows that are considered obscene and vulgar and obscene. Although generally protected by first amendment regulations, courts have upheld regulations of obscene and vulgar materials in very limited circumstances.

When a regulation seeks to limit free speech under the First Amendment, the courts will look to whether the regulation is content based. If it is content neutral, the courts will analyze whether the regulation is a valid time, place, and manner restriction. If it is content based, the regulation must pass the "strict scrutiny test" which requires the government to prove that there exists a compelling governmental interest requiring regulation, and that the regulation is narrowly tailored to meet those interests. This regulation is content based since it investigates the content of the message to determine if it is in violation or not.

The City Commission will need to take evidence on the record and establish that the needs of the community are a legitimate governmental interest and seek input from staff to establish that the ordinance proposed is the most narrowly tailored approach to address the concern.

Under this proposal, “Merchandise”, “Obscene”, “Vulgar”, and “Sexually Oriented Materials” are defined as follows:

- *Merchandise* means, without limitation, any banner, button, clothing (including hats), figurine, game, greeting card, magnet, photograph, postcard, novelty item, poster, sculpture, souvenir, sticker, towel or similar item, whether or not the item is offered for sale.
- *Obscene* means the status of material which:
 - (i) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
 - (ii) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
 - (iii) Taken as a whole, lacks serious literary, artistic, political, or scientific value.
 - (iv) The breastfeeding of a child shall not be considered Obscene in any circumstance.
- *Sexually oriented merchandise* means any merchandise which graphically depicts or describes human or animal sexual activities or bodily organs. This shall include any depiction or description, by pictorial representation or language, of any sexual intercourse; masturbation; sadomasochistic abuse; sexual penetration with an inanimate object; sodomy; bestiality; uncovered genitals, buttocks, or female breast; defecation or urination; covered genitals in an obvious state of sexual stimulation or arousal; or the fondling or other erotic touching of genitals, the pubic region, buttocks or female breasts.
- *Vulgar* material means any grossly offensive language or pictorial representations of words printed on merchandise that is considered a public nuisance. Vulgar language includes words or expressions that are used to denigrate and insult one's racial or ethnic background, gender or sexual orientation. Vulgar material can also portray sexual or excretory organs or activities in a way that is patently offensive but does not meet the definition for obscenity.

These definitions are derived from Ch. 847 of Florida Statutes, with guidance from the Federal Communications Commission (FCC).

It is important to note that this ordinance does not ~~and cannot~~ regulate pure verbal speech ~~such as vulgar or profane speech, which is equally prevalent in storefronts~~. However, there are some instances that “hate speech” can be penalized as an enhancement, or when it incites violence but on a state level. That being said in 1989, several Duval merchants sued a t-shirt shop on Duval St. for profane, vulgar, and obscene materials that were displayed in the storefront. Judge Lester granted an injunction in 89-935-CA-11 and forced the storeowner to remove the materials from public view and forced the store owner to display a sign warning patrons of the materials.

Enforcement:

The proposed ordinance has a 6-month educational period after passage, then a one-time written warning before enforcement by the Code Compliance Special Magistrate. Each visible item will be considered a separate violation and subject to a \$250 fine for first violation and up to a \$500 fine for subsequent violations, plus \$250 in court costs per case.

Additionally, most of these displays are considered Outside Displays in the historic district that must obtain approval from HARC, and subject to enforcement from Code Compliance:

Sec. 106-51. - Prohibited.

The outdoor display of merchandise in the historic zoning districts of the city is prohibited unless an exception is granted by the historic architectural review commission, as provided in section 106-52. Merchandise shall mean any good, food, or beverages, or product or sample or likeness of any good, food, or beverages, or product offered for sale by a business. Outdoor display shall mean the placement of merchandise on the exterior of a building or structure, including, but not limited to a wall, roof, overhang, entranceway, porch, or window, or within a required setback area. For a cart, booth, kiosk, or arcade, outdoor display shall mean the placement of merchandise, either freestanding or by draping it, on the exterior or beyond the vertical plane of the cart, booth, kiosk, or arcade. In no event shall outdoor display be permitted in the public right-of-way. The prohibitions of this section shall not apply to the display of vehicles, bicycles, and/or mopeds where these vehicles are offered for rental or sale or for plant sales. This division shall not apply to art festivals or other special events duly permitted by the city commission.

Procurement/Financial:

The proposed amendment has no impact on the City's procurement processes or finance. To the extent that businesses will need to relocate some merchandise to other parts of their stores, there could be a minor financial impact to businesses. However, this ordinance is not a complete ban on such materials. It is a requirement to display them in places not visible from the right of way.

Options:

1. Pass the proposed ordinance. Obscene, Vulgar, and Sexually Oriented Merchandise will be prohibited from being displayed where they are visible from the public right of way.
2. Deny the proposed ordinance. Obscene, Vulgar, and Sexually Oriented Merchandise will continue to be permitted to be displayed where visible to passersby.