



CITY OF RAPID CITY

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MEMORANDUM

TO: Common Council

FROM: Carla Cushman, Assistant City Attorney

DATE: September 18, 2017

RE: Appeal of 17UR017 Conditional Use Permit to allow a Sexually-Oriented Business

At its meeting on August 24, Planning Commission approved a conditional use permit for a sexually-oriented business at 1141 Deadwood Avenue, Suite 7. The CUP applicant is David Eliason, who wishes to open an adult novelty and bookstore called Dick and Jane's Naughty Spot. An appeal of the CUP approval was filed by Black Hills Taekwondo, also called Karate for Kids, located at Suite 4 of 1161 Deadwood Avenue.

As I discuss in detail below, staff do not believe that Karate for Kids is an educational facility under the ordinance that would require a 1000 foot buffer from any sexually-oriented business. The memo goes on to provide information about the constitutional protections for adult businesses that apply to this CUP application.

Sexually Oriented Business Zoning Ordinance

The zoning code regulates sexually oriented businesses (SOBs) in RCMC 17.50.186 and requires a conditional use permit for all such businesses.¹ The zoning code defines sexually oriented businesses (SOBs) as "An adult entertainment center, adults-only bookstore, adult novelty store, adult video store, or adults-only motion picture theater whose inventory, merchandise, or

¹ The City also requires a business license for adult oriented businesses (AOBs), pursuant to RCMC Chapter 5.70. In these types of situations, individuals are directed to obtain the CUP before obtaining a business license. The City has one current AOB license issued to Valkyrie Books, located at 1028 East North Street.

performances are characterized by a preponderance of nudity, sexual conduct, sadomasochistic abuse, and/or sexual excitement.” *RCMC 17.50.186.B.8*. SOBs are conditional uses, and they cannot operate within 1000 feet of any property with residential zoning or property in the Central Business District. SOBs must also be located more than 1000 feet from churches and religious buildings, educational facilities, public parks and recreational areas, bike paths, convention centers, fairgrounds, museums, and theaters. *See RCMC 17.50.186.D.1*. The ordinance’s 1000 foot buffer zone around these residential and public uses eliminates significant portions of the City from potential use as an SOB. Using GIS data, we have determined that areas on Deadwood Avenue appear to be available to sexually-oriented businesses.

Additionally, the ordinance requires that windows shall be covered and opaque, and it prohibits merchandise or pictures of the products that are visible from outside the business. Finally, it is a misdemeanor to allow a person under the age of 18 years into an adult oriented business. *RCMC 5.70.170*.

Educational Facilities

As mentioned above, the ordinance provides for a 1000 foot buffer around educational facilities. Karate for Kids is contending that it is an educational facility and that the 1000 buffer applies to this application, requiring denial of the CUP. Karate for Kids points to its “longstanding curriculum, instructors, and homework assignments on the principles taught within the facility” as support for its claim, and it provide examples of this curriculum and materials. *See Appeal at page 2 and at Exhibits 3 and 4*.

When the CUP application was received, staff discussed whether or not the 1000 foot buffer applied to Karate for Kids. We concluded that Karate for Kids is *not* an educational facility within the ordinance, so the buffer does not apply.

The ordinance defines educational facilities in this way:

A public or private educational facility including but not limited to child day care facilities, nursery schools, preschools, kindergartens, elementary schools, private schools, intermediate schools, junior high schools, middle schools, high schools, vocational schools, secondary schools, continuation schools, special education schools, junior colleges, and universities; school includes the school grounds, but does not include facilities used primarily for another purpose and only incidentally as a school[.]

RCMC 17.50.186.D.1.b. While the ordinance does not specifically define “educational facilities,” it says that educational facilities include, but are not limited to, (1) day care facilities and (2) fifteen types of schools.

We can rely on our common sense as well as the examples given after the general term in deciding how broadly to define “educational facilities.” This list of educational facilities can be distinguished from businesses like Karate for Kids in the following ways:

- A. *Formality and oversight.* The state and federal governments do not consider commercial businesses like Karate for Kids to be educational facilities that fall within their regulations and oversight. In contrast, the state oversees child care programs with more than 12 children, and schools are highly regulated by both state and federal governments. *See SDCL Chapter 26-6 (Child care centers) and A.R.S.D. 67:42:03 (Family Day Care Homes); SDCL Title 13 Education (enacting laws for teacher certification, school attendance, curriculum, and school services as well as laws governing vocational schools and universities).* For example, state regulations require school attendance for students in primary and secondary school, with limited exceptions. While Karate for Kids may voluntarily submit to guidelines of independent bodies or obtain certifications by independent bodies, it would be misleading to say that the voluntary educational component of Karate for Kids’ program is equivalent to the formality and regulatory oversight of the educational facilities described in the ordinance. Any educational component in Karate for Kids’ programming is not mandated, and the business could remove its educational components at their own discretion.
- B. *Purpose.* The ordinance describes facilities whose primary purpose is clearly educational. A business that offers karate classes to children is primarily commercial and recreational in nature, even if the program has a component that is educational or supportive of children’s educations. Notably, the last statement in the ordinance excludes from schools those “facilities used primarily for another purpose and *only incidentally as a school.*” While the ordinance is a little confusing in the way it mixes the terms schools and educational facilities, it would read the ordinance far too broadly to conclude that businesses which are only incidentally educational and which are used primarily for another purpose are “educational facilities” that require a buffer zone. If that is the case, then any business which happens to offer a class may claim that it is an “educational facility” within the ordinance, and certainly any business that works with children could make the same claim.
- C. *Treatment in the zoning code.* The descriptions in the zoning code for residential neighborhoods discuss residential uses as well as “noncommercial, recreation, religious and *educational facilities*” that “are normally required to provide a balanced and attractive residential area.” *RCMC 17.44.010; see also RCMC 17.10.010, 17.12.010.* In those zoning districts, family day care centers, elementary and high schools, and child care centers are permitted and conditional uses. A commercial enterprise such as Karate for Kids is not allowed in these residential zoning districts.
- D. *Permanence.* The types of uses that require the 1000 foot buffer are uses which are largely permanent in nature and which cannot possibly move to another location if an

unwanted neighbor moves in. Generally, schools and churches are located in specialized buildings built for their unique purpose, and a school building will almost certainly be used as a school for the life of the building. Given this permanent nature, it is unrealistic to think that a school could relocate to a different location if a sexually-oriented business opened next to their facilities. The same is not true for Karate for Kids, which could operate within any number of other commercial buildings in the City.

- E. *Length of time.* Children and students attend day care facilities and schools for a significant length of time, and day care facilities and schools will likely have children on the site all day for a majority of the year. In contrast, a child may visit a recreational facility like Karate for Kids for as little as an hour a week, and it is unlikely that children are present in the Karate for Kids facility for the lengths of time that schools are occupied by their students.

The ordinance does not require a buffer zone around any use which may happen to have children on the premises, but instead limits the buffer zone to those educational facilities which have high intensity use by children and students. Common sense leads to the conclusion that the ordinance should not be read so broadly that it includes any program for children or any program with an educational component. Karate for Kids is not an educational facility as contemplated by the sexually-oriented business ordinance, and the 1000 foot buffer zone should not be applied to this situation to deny the CUP.

First Amendment Protections for Adult Businesses

In a case concerning the zoning of an adult movie theater, the U.S. Supreme Court said, “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 64 (1976). This means that ordinances which (in intention or in effect) prevent or limit adult or sexually-oriented uses may be impermissible restrictions on the First Amendment. However, cities can impose time, place, and manner regulations upon sexually-oriented businesses without running afoul of the First Amendment, so long as “the ordinance [1] is justified without reference to the content of the regulated speech, [2] is designed to promote a substantial government interest, and [3] allows reasonable alternative avenues for communication.” *Jake’s, Ltd., Inc. v. City of Coates*, 284 F.3d 884, 886 (8th Circuit 2002). Since Rapid City’s ordinance is a time-place-manner ordinance, which regulates when, where, and how a sexually-oriented business may operate, it would be evaluated under this standard.

The first two concerns are met if the regulation is justified not as one that regulates the speech itself but instead regulates the negative secondary effects of adult businesses. Because a city violates the Constitution if it outlaws these businesses entirely due to their sexual nature, the City’s focus in reviewing them needs to relate to decreasing the negative secondary effects of these types of establishments. *Jake’s*, 284 F.3d at 887. Rapid City’s buffer zone around

churches, parks, educational facilities, and residences demonstrates the intention to buffer these types of uses from any secondary effects of adult businesses.

The third requirement – that an ordinance leave open reasonable alternative avenues of communication – means that a City cannot so restrict adult businesses as to effectively zone them out the entire City. This requirement looks at “whether a local government has effectively denied prospective adult business owners a reasonable opportunity to open and operate their enterprise within the city.” *Young v. City of Simi Valley*, 216 F.3d 807, 817 (9th Cir. 2000); see also *Northshor Experience, Inc. v. City of Duluth, MN*, 442 F.Supp.2d 713, 721-22 (D. Minn. 2006) (striking down ordinance which had buffer zones from 500 feet to 2800 feet from protected uses).

If you have any questions, please free to contact me at 394-4140 or email me at carla.cushman@rcgov.org.