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250 Attachment 2

Town of Lumberland

Appendix A

Section A. Findings of Fact Regarding § 250-35 (Adult-Oriented Businesses).

The Town Board is familiar with the issues raised by adult-oriented businesses throughout the country. Based on evidence and studies concerning the impacts or secondary effects of adult-oriented businesses on the surrounding community, as presented in judicial decisions such as, but not limited to, *City of Erie v. Pap's A.M. d/b/a "Kandyland,"* 529 U. S. 277 (2000); *Barnes v. Glen Theater, Inc.,* 501 U.S. 560 (1991); *City of Renton v. Playtime Theaters, Inc.,* 475 U.S. 41 (1986); *Young v. American Mini Theaters, Inc.,* 427 U.S. 50 (1976); *Stringfellow's of New York, Ltd. v. City of New York,* 671 N.Y.S.2d 406 (1998); *City of New York v. Stringfellow's of New York,* 725 N.Y. 2d 617 (2001); *Town of Islip v. Caviglia,* 73 N.Y. 2d 544 (1989); and *Grunberg v. Town of East Hartford,* 736 F. Supp. 430 (D. Conn. 1989), *aff d.* 901 F.2d 297 (2d Cir. 1990) (affirming judgment on basis of District Court opinion), and on studies conducted by other communities, including without limitation New York City, New York (1994); Seattle, Washington (1993); Seattle, Washington (1989); Village of Scotia, New York (1999); Town and Village of Ellicottville, New York (1998); Town of Islip, New York (1980); and Indianapolis, Indiana (1984), and from publications such as "Report to the American Center for Law and Justice on the Secondary Impacts of Sex Oriented Businesses," produced by Peter Hecht, Ph.D. of the Environmental Research Group, and "Adult Uses and the First Amendment: Zoning and Non-Zoning Controls on the Use of Land for Adult Businesses," by Steve McMillen of Pace University Law School, and also on the findings from the Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (1989, State of Minnesota), the Town Board finds that:

1. Adult-oriented businesses are unavoidably associated with unlawful, unhealthy and detrimental activities ancillary to the constitutionally protected speech activities of such businesses.
2. Employees of adult-oriented businesses engage in or may be requested to engage in sexual behavior as a result of the type of business by which they are employed.
3. People present in the vicinity of an adult-oriented business are often assumed by third parties to be engaged in, or amenable to, the types of unlawful, unhealthy and detrimental activities ancillary to such businesses. As a result, such persons are subjected to unwanted advances or attention by persons frequenting such adult-oriented business.
4. People who choose not to frequent adult-oriented businesses tend to avoid areas in which such businesses locate. As a result, areas in which adult-oriented businesses locate often become "dead zones," i.e., areas in which owners of non-adult-oriented businesses tend to choose not to locate in the first instance, or choose to migrate away from, because of diminished pedestrian traffic due to the presence of adult-oriented businesses.

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5. Because non-adult-oriented businesses tend not to locate near, or migrate away from, adult-oriented businesses, the presence of one such business tends to attract other adult-oriented businesses into the dead zone, thereby increasing the pace and intensity of the unlawful, unhealthy and detrimental activities unavoidably associated with such businesses and contributing to the blighting of the area surrounding such businesses. The smaller the municipality, the larger the effects of a dead zone because the zone encompasses a larger percentage of the community's businesses than a similar zone would in a larger municipality.
6. Sexual acts occur at adult-oriented businesses, especially those which provide enclosed rooms, booths or other cubicles for viewing of films, videos or live sex shows, thereby creating unhealthy and unsanitary conditions within the premises of such businesses.
7. The constitutionally protected speech activities presented at adult-oriented businesses often encourage sexual activities, thereby creating unhealthy and unsanitary conditions.
8. Some patrons frequent adult-oriented businesses for the purpose of engaging in specified sexual activities within the premises of such businesses, thereby creating unhealthy and unsanitary conditions within the premises of such businesses.
9. Communicable diseases may be spread by specified sexual activities, including but not limited to transmission of the human immunodeficiency virus (HIV) and the contraction of the acquired immunodeficiency syndrome (AIDS), Hepatitis B and venereal diseases. Venereal diseases, HIV, AIDS and Hepatitis B, as well as other communicable diseases spread by specified sexual activities, are serious health concerns to local communities.
10. Sanitary conditions in some adult-oriented businesses are unhealthy, in part, because the activities conducted there are unhealthy, and, in part, because of the unregulated nature of the activities engaged in by some patrons of such businesses and the failure of some business owners and operators to self-regulate those activities and maintain the business premises.
11. Numerous studies and reports have determined that various bodily fluids are found in certain areas of adult-oriented businesses, particularly where persons view, in enclosed rooms, booths or other cubicles, adult materials or entertainments characterized by an emphasis on nudity or specified sexual activities or specified anatomical areas.
12. Prohibiting the viewing in enclosed rooms, booths or other cubicles of adult materials or entertainments characterized by an emphasis on nudity or specified sexual activities or specified anatomical areas is the least restrictive means available of effectuating the legitimate and content-neutral legislative goal of preventing adult-oriented businesses from being operated and used in an unhealthy, unsafe and unsanitary manner facilitating the transmission of communicable diseases or otherwise degrading the public welfare, health, comfort and safety. Further, such a prohibition imposes a relatively minor imposition on the operating prerogatives of the owners of adult-oriented businesses compared to other means, such as: mandating adult-oriented businesses inspect such cubicles and directing the frequency and form of such inspections; requiring adult-oriented businesses to hire

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employees whose duties are dedicated to monitoring such cubicles; and conducting increased numbers of police and public health and safety inspections of such businesses.

13. Adult-oriented businesses have operational characteristics which should be reasonably regulated in order to protect the substantial governmental concerns raised by the various findings herein while permitting patrons and owners of such businesses to engage in constitutionally protected speech activities.
14. The presence of adult-oriented businesses is associated with declining property values.
15. The presence of adult-oriented businesses is associated with increased crime rates against both property and persons.
16. Children and teenagers are more likely to be exposed to graphic sexual images because of the presence of adult-oriented businesses.

Section B. Purposes and Intent Regarding § 250-35.

The purposes and legislative intent underlying the Town Board's passage of § 250-35 of this chapter are as follows: (a) to control the documented adverse secondary effects that are ancillary to adult-oriented businesses, including attraction of transients; parking and traffic problems; increased crimes against persons and property; loss of business for surrounding non-adult-oriented businesses; (b) to maintain property values; (c) to prevent crime; (d) to safeguard the commercial viability of currently existing non-adult-oriented businesses; (e) to restrict minors' inadvertent exposure to graphic sexual images; (f) to preserve and protect public hygiene, health and sanitation; and (g) to maintain the general welfare, health, comfort and safety of Town residents, visitors, and businesses. The Town's intent in regulating adult-oriented businesses is not to restrict constitutionally protected speech activities but rather to provide constitutionally sufficient alternate avenues for persons to engage in such activities in a manner consistent with the Constitutions of the United States and New York State while addressing the unlawful, unhealthy and detrimental activities typically ancillary to such speech and ameliorating these secondary effects on the peace, good order, commercial viability and safety of Town residents and non-adult-oriented businesses.

Section C. Findings of Fact Regarding Article X (Explicitly Prohibited Uses).

The Town Board determines and finds that:

1. Lumberland is part of the scenic Upper Delaware River region. Lumberland takes great pride in and assigns great value to its rural residential character and historic and scenic and other natural resources. The hydrological features in Lumberland are abundant and interconnected. They include rivers, streams, aquifers, lakes, reservoirs and wetlands. The purity of the drinking water that flows from the wells through the faucets all over the Town is dependent on the purity of these water bodies and the ability to adequately recharge the groundwater.

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2. Maintaining the quality of water resources within the Town is critical to protecting the natural environment of the Town, the general health and welfare of Town residents, and the local economy.
3. Preservation of the Town's irreplaceable historic and recreation sites, high-quality scenic and other natural assets, air quality and water quality, and priceless and unique character is of significant value to the inhabitants of the Town and to the tourists who visit here.
4. The Town's rich natural and visual environment is a valuable asset that creates a sense of identity and well-being for residents of the area. Preserving and protecting the recreation, scenic and other natural resources of the Town is important for both a healthy environment and vibrant economy. Aesthetic issues are real and evoke strong reactions from people. They deeply affect the way people feel about a place.
5. Allowing the activities prohibited by §§ 250-74 and 250-75 of the chapter would impair the existing character of the Town because by their very nature such activities have the potential to produce a combination of negative impacts upon the environment and people living in or in proximity to the communities in which they are located. Such negative impacts may include, without limitation, traffic, noise, vibrations, fumes, damage to roadways, degradation of water quality, degradation of air quality, decreased availability of affordable housing, damage to and loss of agricultural lands and soils, damage to and loss of open space, natural areas, and scenic views, decreased recreational opportunities, and damage to the tourism industry.
6. If one or more of the activities prohibited by §§ 250-74 and 250-75 of the chapter are conducted within the Town, traffic generated thereby could be hazardous or inconvenient to the inhabitants of the Town and could be dangerous to pedestrians (especially children), cyclists, and motorists, and could result in traffic congestion that could delay emergency response times for medical emergencies, fires and accidents. Roads are a critical public resource and constitute a major investment of the public's money. The Town is not in a position to bear the high costs associated with the road use impacts that accompany many of the activities prohibited by §§ 250-74 and 250-75 of the chapter. Accidents involving heavy trucks have greater potential for death than those involving smaller vehicles. Increased truck traffic increases air pollution and noise levels and decreases the quality of life and property values for those living nearby.
7. Allowing one or more of the activities prohibited by §§ 250-74 and 250-75 of the chapter to be conducted within the Town could negatively impact the recreational and tourism industries within the Town and could impair the Town's ability to attract additional recreation-based and tourism-related businesses.
8. If one or more of the activities prohibited by §§ 250-74 and 250-75 of the chapter are conducted within the Town, the air pollution, dust and odors generated thereby (whether on site or by truck traffic to and from the proposed site of such activities) could be hazardous or inconvenient to the inhabitants of the Town. Air pollution is a known hazard to the public health.

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9. Allowing one or more of the activities prohibited by §§ 250-74 and 250-75 of the chapter to be conducted within the Town could negatively impact the quality of water resources within the Town. Water pollution is hazardous to the public health. If a domestic water source is contaminated, remediation is time- and cost-intensive and may not restore the water resource to a quality acceptable for domestic use.
10. If one or more of the activities prohibited by §§ 250-72 and 250-73 of the chapter are conducted within the Town, noise, vibrations and light pollution typically caused by such activities could be hazardous or inconvenient to the inhabitants of the Town. Noise, traffic congestion, nighttime lighting, and vibrations can have negative effects on human health and wildlife.
11. The creation, generation, keeping, storage or disposal of Natural Gas and/or Petroleum Extraction, Exploration or Production Wastes (as that term is defined at § 250-10 of the chapter) within the Town could have a negative impact on the public health, safety and welfare of the inhabitants of the Town.
12. The high costs associated with the disposal of Natural Gas and/or Petroleum Extraction, Exploration or Production Wastes (as that term is defined at §250-10 of the chapter) have in other localities resulted, and could in our Town result, in persons seeking to avoid such costs by depositing such material along roadways, in vacant lots, on business sites, in the private dumpsters of others, or in other unauthorized places. Such activities could pose a hazard to the public health, safety, and welfare of the inhabitants of the Town.
13. The explicit proscription of the activities prohibited by §§ 250-74 and 250-75 of the chapter is a legitimate goal of land use laws. There is no question that exclusion of specified industrial uses is a legitimate goal of such laws:

As the United States Supreme Court stated in *Town of Belle Terre v. Borass*, 416 U.S. 1 (1974):

The concept of public welfare is broad and inclusive. . . . The values that it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the [local] legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. 416 U.S. at 6.

And see also *Matter of Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y. 2d 668 (1996), where the Court of Appeals, New York State's highest court, evaluated a claim that a town's prohibition of mining throughout the town was in effect unconstitutional "exclusionary zoning," and held as follows:

We have never held, however, that the . . . ["exclusionary zoning"] test, which is intended to prevent a municipality from improperly using the zoning power to keep people out, also applies to prevent the exclusion of industrial uses. A municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police

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power to prevent damage to the rights of others and to promote the interests of the community as a whole. 87 N.Y. 2d at 683, 684. (emphasis added)

Section D. Purposes and Intent Regarding Article X.

1. Purposes. Article X of this chapter is enacted so as to take proactive steps to protect and preserve the quality of the Town's air and water and scenic, recreational and historic resources, and to protect and promote the health, safety and welfare of the Town and its present and future residents. Without limiting the generality of the foregoing, this chapter is intended and is declared by the Town Board to:
 - (a) promote the purposes of planning and land use regulation by, among other things, preserving the roads and fire, police, and other emergency response services in the Town;
 - (b) promote the health, safety and welfare of the Town, its present and future inhabitants by protecting them from the adverse public nuisance and/or land use impacts and effects that could result if the activities prohibited by §§ 250-74 and 250-75 of this chapter were allowed to be conducted within the Town;
 - (c) protect the Town's priceless and unique character, the preservation of which is of significant value to the inhabitants of the Town and the tourists who visit here, by protecting it from the adverse public nuisance and/or land use impacts and effects that could result if the activities prohibited by §§ 250-74 and 250-75 of this chapter were allowed to be conducted within the Town; and
 - (d) Protect the Town's irreplaceable historic, water quality, air quality, scenic and other natural resources, by protecting them from the adverse public nuisance and/or land use impacts and effects that could result if the activities prohibited by §§ 250-74 and 250-75 of this chapter were allowed to be conducted within the Town.
2. Declaration of intent.
 - (a) Exercise of police power. Article X of this chapter is a police power, public nuisance and land use law, designed to establish and provide for general land use regulation, environmental protection, public safety, prevention of increased traffic congestion, protection of rural and agricultural resources, preservation of the character of the Town, protection of air quality, protection of water resources quality, prevention of noise and disturbance, protection against diminished property values, and protection of the public from nuisance and/or land use effects and impacts, resulting from the activities prohibited by §§ 250-74 and 250-75 of this chapter.
 - (b) Prohibition against specified solid wastes. Article X of this chapter also intends to regulate, in a manner consistent with law, including without limitation, NY ECL § 27-0711, and conducive to the health and welfare of the citizens of the Town, the dumping, discharging, injection and disposal of materials herein defined as Natural Gas and/or

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Petroleum Extraction, Exploration or Production Wastes (as that term is defined at § 250-10 of the chapter) on lands and in bodies of water within the Town.

- (c) Protection of private drinking water supplies. Article X of this chapter is intended to protect drinking water supplies and is intended to supplement and enhance and is not intended to impinge upon the Safe Drinking Water Act and the Underground Injection Control Programs administered by the Environmental Protection Agency.
- (d) Matters of local concern. Article X of this chapter is intended to and is hereby declared to address matters of local concern, and it is declared that it is not the intention of the Town Board to address matters of statewide concern.
- (e) Negative externalities. Article X of this chapter is intended and is hereby declared to impose conditions and restrictions on the use of property that are directly related to and incidental to the use of that property, and such conditions and restrictions are aimed at minimizing or precluding the adverse impact on the Town that could result from an inappropriate use of the property that could otherwise adversely affect the comfort, peace, enjoyment, health and safety of the surrounding land.
- (f) Land use control. Article X of this chapter is intended to act as and is hereby declared to exercise the permissive “incidental control” of a police power law that is concerned with the broad area of land use planning and the physical use of land and property within the Town, including the physical externalities associated with certain land uses, such as negative impacts on roadways and traffic congestion and other deleterious impacts on a community. This chapter is not intended to regulate the operational processes of any business. This chapter is a law of general applicability and is intended to promote the interests of the community as a whole.

Section E. Authority Regarding Article X.

Article X of this chapter is intended to be consistent with and is adopted pursuant to the authority granted to the Town Board of the Town of Lumberland under the New York State Constitution and the Laws of the State of New York, including but not limited to the following authorities: New York State Constitution Article IX, § 2(c)(ii)(6), (10); Municipal Home Rule Law § 10(1)(i); Municipal Home Rule Law § 10(1)(ii)(a)(6), (11), (12), and (14); Municipal Home Rule Law § 10(1)(ii)(d)(3); Municipal Home Rule Law § 10(2); Municipal Home Rule Law § 10(3); Municipal Home Rule Law § 10(4)(a) and (b); Statute of Local Governments § 10(1), (6), and (7); Town Law § 64 (17-a), (20-b) and (23); Town Law § 130(5), (6), (7), (8), (11), (14), (15) and (23); Town Law § 135; Town Law Article 16 (Zoning & Planning) inclusive; Environmental Conservation Law § 17-1101, § 27-0711; and New York State Law, Public Health Law § 228 (2) and (3).