

EMERGENCY ORDINANCE NO. 2560

AN EMERGENCY ORDINANCE OF THE CITY OF MONTROSE, COLORADO, FOR THE PRESERVATION OF HEALTH, PEACE, OR SAFETY, DECLARING ZONING IN PROGRESS AND ENACTING A TEMPORARY MORATORIUM TO PROHIBIT THE FILING, ACCEPTANCE, SALES TAX LICENSURE, OR ANY OTHER OFFICIAL ACTION FOR THE ESTABLISHMENT OF ANY NEW OR RELOCATION OF EXISTING ADULT GAMING ARCADE USES WITHIN THE CITY LIMITS OF THE CITY OF MONTROSE; PROVIDING THAT THE MORATORIUM SHALL BE IN EFFECT FOR A PERIOD WHICH SHALL TERMINATE AT THE EARLIEST OF THE CITY'S ADOPTION OF AN UPDATE TO TITLE 4 CHAPTER 4, ZONING REGULATIONS OF THE CITY OF MONTROSE, TITLE 4, CHAPTER 14 ADULT BUSINESS REGULATIONS, AND/OR TITLE 5 BUSINESS REGULATIONS OF THE CITY OF MONTROSE OR THE EXPIRATION OF ONE HUNDRED EIGHTY (180) DAYS FROM DATE OF PASSAGE OF THIS ORDINANCE; PROVIDING FOR LEGISLATIVE FINDINGS, INTENT, AND PURPOSE; PROVIDING FOR A DEFINITION OF THE USE OF ADULT GAMING ARCADES FOR THE PURPOSES OF THIS ORDINANCE; PROVIDING REPEALING CLAUSES; DECLARING AN EMERGENCY AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the City of Montrose is a home rule municipal corporation operating under adopted charter pursuant to § 6 of Article XX of the Colorado Constitution; and

WHEREAS, Article XVIII, §§2 and 9 of the Colorado Constitution regulates unlicensed gaming, and authorizes limited gaming only within the commercial districts in municipal limits of Central, Black Hawk and Cripple Creek in the State of Colorado; and

WHEREAS, opinions from the Colorado Office of the Attorney General have evaluated a set of facts involving attempted expansions of gambling via electronic means such as online gambling and on-site server-based sweepstakes cafes using encoded cards with a cash value and have determined said uses to be contrary to Colorado state law in the absence of a state constitutional amendment expanding the definition of limited gaming in Colo. Const. Art. XVIII, §9: CO AG Opinion No. 13-02 (Dec 13, 2013); CO AG Opinions 14-03 (Oct. 9, 2014); and

WHEREAS, the Colorado Supreme Court has recognized the authority of a home rule municipality to enact regulation of gambling as a matter of local concern, in *Woolverton v City and County of Denver*, 361 P.2d 982, 988-990 (Colo. 1961), *overruled on other grounds by, Vela v People*, 484 P.2d 1204 (Colo. 1971); and

WHEREAS, the City of Montrose has exercised this authority in its history to deem

it unlawful and to set criminal penalties for “any person to play at any game whatsoever for any sum of money or other property of value, or to make any bet or wager for any sum of money or other property of value upon the result of such game[,]” and to prohibit allowing minors to engage in same, (Montrose City Ord. 122, passed September 11, 1918); and

WHEREAS, the City’s Business and Zoning Regulations are a matter of local control and purposed to promote the public health, safety, and welfare; and

WHEREAS, the City’s Zoning and Business Regulations are updated from time to time; and

WHEREAS, there are now existing within the jurisdiction boundaries of the City of Montrose establishments that are engaged in the business of providing access to and the use of video gaming machines that accept money and/or tokens from patrons and pay monetary prizes that may fit the legal definition of slot machine, gambling device, and/or simulated gambling device prohibited under Colorado state law; and

WHEREAS, the businesses engaged in this activity referred herein as Adult Gaming Arcades sited within the jurisdictional boundaries of the City of Montrose have had secondary, negative impact upon neighboring business, the community and the public in the form of increased crime, to wit: illegal drug usage; illegal drug distribution; public intoxication; violent crime and increased calls for service at and around their locations from the Montrose Police Department; and

WHEREAS, a temporary moratorium on all new establishments not in existence or the relocation of existing establishments as of the effective date of this Ordinance, and on the acceptance of applications for, the process of, and the issuance of any permit, site plan approval, use tax licensure, sales tax licensure or any other official action of the City of Montrose permitting or having the effect of permitting Adult Gaming Arcades will allow time for the City Attorney’s Office, Montrose Police Department, City Manager’s Office, and/or other relevant legal authorities to conclude a review of existing establishment(s) and will help prevent prospective business operators from opening new businesses within the city limits that could be determined to be illegal simulated gambling establishments or otherwise prohibited; and

WHEREAS, this moratorium or zoning in progress ordinance is being enacted to provide the City staff with sufficient time to evaluate the use referred to herein as Adult Gaming Arcades; and

WHEREAS, after evaluation of the uses referred to hereinabove, City staff may deem it appropriate to develop land development regulations and business licensing regulations to define the use of ‘Adult Gaming Arcade,’ to regulate licensure and hours of permissible operation by such uses, and to specify particular zoning districts where said

uses may operate either as uses by right or as conditional uses or as non-conforming, prohibited uses under the code; and

WHEREAS, the City Council of the City of Montrose determines that it is necessary to impose a temporary, one-hundred-eighty-day (180) moratorium commencing on the date of passage of this ordinance to allow sufficient time for the conclusion of review; and

WHEREAS, the City Council of the City of Montrose has determined that the changes within this ordinance to the Municipal Code will further the health, safety, and welfare of the people of the City of Montrose; and

WHEREAS, Montrose City Council is adopting this Emergency Ordinance pursuant to its Home Rule Authority provided under the Colorado Constitution, Article XX, Section 6, and the Montrose City Charter, Article II, Section 8, which conveys police power authority to act for the benefit of and preservation of public property, health, peace, or safety within the City limits; and

WHEREAS, it is imperative to accomplish these amendments with all deliberate speed.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MONTROSE, COLORADO that:

The following Section is added to Title 4, Chapter 14 Adult Business Regulations, of the Official Code of the City of Montrose, Colorado, including an amendment to Section § 4-14-1, and a new Section § 4-14-10. Title 4, Chapter 14, Section 10 is hereby added (§ 4-14-10), to read in full as follows:

4-14-1 Definitions

The following words, terms and phrases, when used in this Chapter, shall have the meanings ascribed to them in this Section, except where the context clearly indicates a different meaning:

Adult arcade means any commercial establishment to which the public is permitted or invited where, for any form of consideration, one or more still or motion picture projectors, slide projectors, or similar machines, or other image or virtual reality producing machines, for viewing by five or fewer persons per machine at any one time, are used regularly to show films, motion pictures, video cassettes, slides, or other photographic, digital or electronic reproductions describing, simulating or depicting specified sexual activities or specified anatomical areas.

Adult bookstore, adult novelty store, or adult video store means a commercial establishment that, as one of its principal business purposes, offers for sale or rental for any form of consideration any one or more of the following:

- (A) Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations, however produced, that depict or describe specified sexual activities or specified anatomical areas; or
- (B) Instruments, devices, or paraphernalia which are designed for use in connection with specified sexual activities.

Adult cabaret means a nightclub, bar, restaurant, concert hall, auditorium or other commercial establishment that features:

- (A) Persons who appear nude or in a state of nudity or seminudity; or
- (B) Live performances that are characterized by the exposure of specified anatomical areas or by the exhibition of specified sexual activities.

Adult Gaming Arcade means any business location, including a private club, that is owned, leased, or otherwise possessed, in whole or in part, by a person or by that person's partners, affiliates, subsidiaries, agents, or contractors which features (i) slot machine(s), (ii) gambling device(s), (iii) simulated gambling device(s), or (iv) any mechanical, electrical, video, electronic, or other device, contrivance or machine which after insertion or conveyance of a coin, debit card, credit card, cash, token or similar object or upon payment of any required consideration whatsoever by a player, is available to be played or operated, and which, whether by reason of the skill of the player or application of the element of chance, or both, may deliver or entitle the player operating the machine to receive monetary compensation and/or redeemable game credits, or any other thing of value. This definition expressly includes 'fish game' 'fish game table' 'fish game gambling table' however denominated that consists of a tabletop electronic display with one or more stations featuring buttons, joysticks, or other control(s) that delivers to the player cash, cash premiums, redeemable game credits or any other thing of value for successful play, whether the redeemable payout is made automatically from the machine or from an employee of the business location. This definition expressly excludes any business location which features bona fide amusement devices that pay nothing of value, cannot be adjusted to pay anything of value, provide only unredeemable free games, or provide only tickets redeemable for nonmonetary prizes consisting of toys or novelties of nominal value; crane games; coin-operated music machines; or any bona fide amusement device authorized within restaurants by Colorado Revised Statute § 44-3-103(47).

Adult motel means a hotel, motel or similar commercial establishment that offers accommodations to the public for any form of consideration and provides patrons with closed-circuit television transmission, films, motion pictures, video cassettes, slides, or

other media productions, however produced, which are characterized by the depiction or description of specified sexual activities or specified anatomical areas, and which commercial establishment has a sign visible from the public right-of-way which advertises the availability of this adult type of media production.

Adult motion picture theater means a commercial establishment that is distinguished or characterized by the showing, for any form of consideration, of films, motion pictures, video cassettes, slides, or similar photographic reproductions, on more than 100 days per year, that have an "X" rating or that have an emphasis on depicting or describing specified sexual activities or specified anatomical areas.

Adult theater means a theater, concert hall, auditorium, or similar commercial establishment that, for any form of consideration, regularly features persons who appear in a state of nudity or live performances which are characterized by an emphasis on exposure of specified anatomical areas or by specified sexual activities.

Commercial establishment means an establishment that may have other principal business purposes that do not involve the depicting or describing specified sexual activities or specified anatomical areas and still be categorized as a sexually oriented business. Such other business purposes will not serve to exempt such commercial establishments from being categorized as a sexually oriented business so long as one of its principal business purposes is the offering for sale or rental for consideration the specified materials that depict or describe specified sexual activities or specified anatomical areas. The term "commercial establishment" includes clubs, fraternal organizations, social organizations, civic organizations or other similar organizations with paid memberships.

Crane Game means an amusement machine that, upon insertion of a coin, bill, token, or similar object, allows the player to use one or more buttons, joysticks, or other controls to maneuver a crane or claw over a nonmonetary prize, toy, or novelty, none of which shall have a cost of more than twenty-five dollars, and then, using the crane or claw, to attempt to retrieve the prize, toy, or novelty for the player.

Employee means a person who works or performs in and/or for a sexually oriented business, regardless of whether or not said person is paid a salary, wage, or other compensation by the operator of said business.

Establishment of a sexually oriented business means and includes any of the following:

- (A) The opening or commencement of any such business as a new business;
- (B) The conversion of an existing business into a sexually oriented business;
- (C) The addition of a different sexually oriented business to any other existing sexually oriented business; or
- (D) The relocation of a sexually oriented business.

Foyer means an architectural element of a building that consists of an entry hall or vestibule that is completely enclosed and contains one door to provide access to areas outside of the building and a separate door to provide access to areas inside of the building.

Gambling Device means any device, machine, paraphernalia, or equipment that is used or usable in the playing phases of any professional gambling activity, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine; except that the term does not include a crane game.

Manager means an operator, who is employed by a sexually oriented business to act as a manager or supervisor of employees or is otherwise responsible for the operation of the business.

Nudity or state of nudity:

- (A) The appearance of human bare buttock, anus, male genitals, female genitals, or the areola or nipple of the female breast; or
- (B) A state of dress which fails, opaquely and fully, to cover human buttocks, anus, male or female genitals, pubic region, or areola or nipple of the female breast.

Nude model studio means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided for money or any form of consideration to be observed, sketched, drawn, painted, sculpted, photographed, or similarly depicted by other persons.

Operator means includes the owner, custodian, manager, operator, or person in charge of any sexually oriented business.

Peep booth means a room, semi-enclosure or other similar area located within a sexually oriented business wherein a person may view representations of specified anatomical areas or specified sexual activities.

Person means an individual, proprietorship, partnership, corporation, limited liability company, association, or other legal entity.

Principal business purpose means any establishment, having as a substantial or significant portion of its stock in trade the items listed in Subsections (A) and (B) of the definition of adult bookstore, adult novelty store, or adult video store in this Section and having on the premises at least 30 percent of the establishment's display space occupied by the display of the items described therein.

Principal owner means any person owning, directly or beneficially:

- (A) Any membership or partnership interest in a limited liability company or limited liability partnership if such person has any legal control or authority over the management or operation of the entity; or

- (B) In the case of any other legal entity, five percent or more of the ownership interests in the entity, except for shareholders, but including such shareholders who are corporate officers or directors or who otherwise have any legal control or authority over the management or operation of the entity.

Public park means an area of land owned by a governmental entity or private association and intended to be used for recreational purposes, including any such land that contains no improvements and is intended only for open space purposes, and including any such land that is intended for use only for pathway purposes.

Sexually oriented business means an adult arcade, adult bookstore, adult novelty shop, adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, peep booth or nude model studio. The definition of sexually oriented business shall not include an establishment where a medical practitioner, psychologist, psychiatrist, or similar professional person licensed by the State of Colorado engages in medically approved and recognized sexual therapy, or a college, junior college or other institution which houses an adult model studio for artistic or educational purposes.

Seminude or seminudity means a state of dress in which clothing covers no more than the genitals, pubic region, and areola of the female breasts, as well as portions of the body covered by supporting straps or devices, which supporting straps or devices are used to support or enable the wearing of such clothing.

Simulated Gambling Device means a mechanically or electronically operated machine, network, system, program, or device that is used by an entrant and that displays simulated gambling displays on a screen or other mechanism at a business location, including a private club, that is owned, leased, or otherwise possessed, in whole or in part, by a person conducting the game or by that person's partners, affiliates, subsidiaries, agents, or contractors; except that the term does not include bona fide amusement devices, as authorized in Colorado Revised Statute § 44-3-103 (47), that pay nothing of value and cannot be adjusted to pay anything of value. "Simulated gambling device" includes: **(I)** A video poker game or any other kind of video card game; **(II)** A video bingo game; **(III)** A video craps game; **(IV)** A video keno game; **(V)** A video lotto game; **(VI)** A video roulette game; **(VII)** A pot-of-gold; **(VIII)** An eight-liner; **(IX)** A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols; **(X)** An electronic gaming machine, including a personal computer of any size or configuration that performs any of the functions of an electronic gaming machine; **(XI)** A slot machine, where results are determined by reason of the skill of the player or the application of the element of chance, or both, as provided by Article XVIII, § 9(4)(c) of the Colorado constitution; and **(XII)** A device that functions as, or simulates the play of, a slot machine, where results are determined by reason of the skill of the player or the application of the element of chance, or both, as provided by Article XVIII, § 9(4)(c) of the Colorado constitution. **(b)** "Simulated gambling device" does not include any pari-mutuel totalisator equipment that is used for pari-mutuel wagering on live or simulcast racing events and that has been approved by the director of the division of

racing events for entities authorized and licensed under article 32 of title 44 of the Colorado Revised Statutes.

Slot machine means any mechanical, electrical, video, electronic, or other device, contrivance, or machine which, after insertion of a coin, token, or similar object, or upon payment of any required consideration whatsoever by a player, is available to be played or operated, and which, whether by reason of the skill of the player or application of the element of chance, or both, may deliver or entitle the player operating the machine to receive cash premiums, merchandise, tokens, redeemable game credits, or any other thing of value other than unredeemable free games, whether the payoff is made automatically from the machines or in any other manner; except that the term does not include a crane game or vintage slot machine models introduced on the market in 1984, does not contain component parts manufactured in 1984 or thereafter and is not used for gambling purposes or limited gaming purposes.

Specified anatomical areas means as used herein means and includes any of the following:

- (A) Human genitals, pubic region, buttocks, anus or female breasts below a point immediately above the top of the areola, that are not completely and opaquely covered; or
- (B) Human male genitals in a discernibly turgid state even if completely and opaquely covered.

Specified criminal acts means sexual crimes against children, sexual abuse, sexual assault, or crimes connected with another sexually oriented business, including, but not limited to, distribution of obscenity, prostitution, or pandering.

Specified sexual activities means includes any of the following:

- (A) The fondling or other intentional touching of human genitals, pubic region, buttocks, anus or female breasts;
- (B) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;
- (C) Masturbation, actual or simulated;
- (D) Human genitals in a state of sexual stimulation, arousal, or tumescence; or
- (E) Excretory functions as part of or in connection with any of the activities set forth in Subsections (A) through (D) of this definition.

4-14-10 Adult Gaming Arcades

- (A) Legislative Declaration.** The Montrose City Council hereby adopts and incorporates the above recital clauses herein by reference in this Ordinance, finds the recitals as true and correct, and to constitute the legislative findings of the City

in support of the following ordaining sections. It is the purpose and intent of this Ordinance to promote the health, safety, morals, and general welfare of the residents and businesses of the City by affording time for City staff to conduct analysis of any impact from Adult Gaming Arcades, whether such uses are legal and, if so, can be appropriately sited within the city limits of the City of Montrose with appropriate regulation, or whether such uses are or should be prohibited.

(B) Imposition of Moratorium. A moratorium period is hereby declared on all new establishments not in existence or the relocation of existing establishments as of September 21, 2021, constituting Adult Gaming Arcades, Slot Machine, Gambling Device and Simulated Gambling Device from the effective date of this Ordinance, September 21, 2021, for the period of one hundred eighty (180) days to March 20, 2022 (inclusive), or until further action of the City Council ending or modifying this moratorium, whichever occurs first. Such further action shall be taken by resolution by the City Council accordingly. No applications pertaining to sales and use tax, amendments to the official zoning map, site development, liquor license, sign permit or building permit, any development permit, or renewal or transfer of any of the aforementioned shall be accepted for review by the City of Montrose for the moratorium period as defined herein.

(C) Repeal. This section (4-14-10) is repealed, effective March 20, 2022.

Being informed from the written documentation and oral testimonies, the City Council hereby determines that an emergency exists impacting the public health, safety and welfare, and warrant this moratorium as described to take effect immediately upon the effective date of this Ordinance _____, so that no new establishments engaged in Adult Gaming Arcade use as defined locate or existing establishments engaged in Adult Gaming Arcade use relocate within the municipal limits of the City of Montrose. Therefore the Council hereby finds that this Ordinance is necessary to the immediate preservation of the public peace, health, and safety, and this Ordinance shall be effective immediately upon adoption in accordance with Section 8, Article II of the Charter, and shall be published within ten (10) days, or as soon thereafter as possible.

This Ordinance shall be deemed severable. Should any phrase, term, section, or provision of this Ordinance be declared by a court of competent jurisdiction to be invalid or unlawful, the remainder of the Ordinance shall remain in full force and effect.

You will please take notice that the Montrose City Council will hold a hearing upon the above Ordinance and the question of its passage on first reading on Tuesday, the 21st day of September, 2021, at the hour of 4:00 p.m. at the Elks' Civic Building in Montrose, Colorado.

INTRODUCED, READ and ADOPTED on this 21st day of September, 2021.

Douglas Glaspell, Mayor

David Frank, Mayor Pro Tem

Barbara Bynum, City Council

David Reed, City Council

Anthony Russo, City Council

ATTEST:

Lisa DelPiccolo, City Clerk