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STAFF COMMENTS

PLANNING BOARD MEETING
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BODY ART ORDINANCE AMENDMENT/S

Request from the City Council Ordinance Committee for Recommendation from the Planning Board

Overview of Request

The New Bedford City Council Ordinance Committee has forwarded the attached proposed language as an amendment to its existing Body Art Ordinance. The Planning Board is asked to review the language submitted and offer its recommendation.

Summary of Existing Ordinance

The existing ordinance addressing body art (tattoos) is largely found within Sections 4200-4267 within the city's chapter 9 Comprehensive Zoning Ordinance. The existing ordinance language includes six major sections:

- Where such uses may occur via special permit from the Zoning Board of Appeals, hours of operation, the ZBA's authority in issuing such special permits (Sec. 4210),
- The requirement for separation of distances between similar uses (Sec. 4220),
- The way in which a radius used in the separation of distances may be calculated (Sec. 4230),
- A section which remains "reserved" (Sec. 4240),
- Screening (Sec. 4250) and
- Application requirements (Sec. 4260).

Background

In September 2014, an applicant for a body art establishment [Valerie Garnett and Venessa Kollars] appeared before the ZBA and was granted a special permit with conditions for their proposed business at 29 Union Street. One of the conditions set forth by the ZBA in its decision stipulated that "the interior be completely screened from the street".

Staff is of the understanding that conversations between the owner and City Councilors regarding the screening condition—and a subsequent interest in modifying the zoning ordinance to remove the screening requirements as they currently exist.

Changes Proposed

The following changes have been proposed by City Council and drafted by its attorney, David Geratowski. They are intended to modify the language of the existing ordinance to address screening and related elements of the ordinance with which the Council has expressed concerns. Staff commentary is offered with each section for the Board's consideration.

PROPOSED LANGUAGE	STAFF COMMENT
<p>SECTION 1</p> <p>Section 4212 of Chapter 9 of the Code of Ordinances is hereby amended by striking said Section in its' entirety and inserting, in place thereof, the following Section:</p> <p>4212 Zoning Board Authority. The Zoning Board of Appeals shall have the authority to issue special permits in accordance with Sections 4200 through 4267 and shall have the authority to impose any reasonable conditions for maintaining and ensuring the health, safety and welfare of the general public except that no conditions shall be imposed that require screening that is more restrictive than the screening requirements pursuant to Sections 4250 through 4252. The Zoning Board may impose more restrictive screening conditions upon a finding that a body art establishment violated the provisions of Sections 4250 through 4252.</p>	<p>This language now says the ZBA <i>can't</i> impose conditions that require screening more restrictive than that which exists in Sections 4250 (which is a section title, only), Section 4251 (which is reserved) and Section 4252 for which new language is proposed. Because the new Section 4252 provides specific language as to what must be screened (see below) this proposed language effectively <i>reduces</i> the blanket screening currently necessitated under the existing ordinance.</p> <p>The final sentence of this Section, while somewhat awkward, does give the ZBA authority to exceed screening requirements if the Zoning Enforcement Officer finds that an establishment approved under this ordinance violates the specific screening cited in 4252. To this point, the City Solicitor's Office notes: "...while further refinement would be necessary, the Board could impose conditions that result in the expiration of the Special Permit upon a violation of §4250 - §4252 and require periodic review to determine if any violations have occurred. "</p> <p>Staff finds that special permit ordinances must include adequate standards for guiding the SPGA so the inclusion of such a "restriction" is, as a zoning amendment, appropriate.</p> <p>The Board may wish to note that in striking the existing Section 4212 in its entirety, the ZBA would no longer be a required (under this section) to provide written notice to the City's Board of Health and Police Department within 5 days of the granting of a special permit for body art establishments and the provision compelling the ZBA to hold a "duly advertised public hearing prior to granting a special permit" would similarly be struck. These provisions are addressed elsewhere in the ordinance and Massachusetts General Law.</p>
<p>SECTION 2.</p> <p>Chapter 9 of the Code of Ordinances is hereby amended by inserting, after Section 4212.2, the following Sections:</p> <p>4212.3 A body art establishment or affected persons of any reasonable conditions imposed by the Zoning Board of Appeals pursuant to this Ordinance shall have the right to request clarification of any of the terms of such conditions by submitting the language that requires clarification and reasoning for requesting such clarification.</p>	<p>Sections 4212.3 and 4212.4 are both new sections in their entirety. While 4212.3 would provide the means by which one could seek clarification of any terms of conditions created by the ZBA's decision, Section 4212.4 provides for an appeal process from "any enforcement decision" the Building Commissioner related to ZBA conditions made related to the body art ordinance. Both 4212.3 and 4212.4 provide authority for the imposition of a fee not to exceed \$50 for any ZBA review under these sections.</p> <p>Staff notes that the Zoning Enforcement Officer (staff is unclear as to why "<i>Building Commissioner</i>" is used throughout the ordinance) is authorized to interpret the zoning code extending to decisions of the ZBA. If that's the case the Board may wish to raise this point in its recommendation/comments to the Council.</p>
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Changes Proposed; *continued*

PROPOSED LANGUAGE	STAFF COMMENT
<p>SECTION 2.</p> <p>The Board of Appeals may set a fee for such requests not to exceed \$50.</p> <p>4212.4 A body art establishment or affected persons may appeal any enforcement decision of the Building Commissioner related to this Ordinance or related to any reasonable conditions imposed by the Board of Appeals to the Board of Appeals. The Board of Appeals may set a fee for such requests not to exceed \$50.</p>	<p>The Board may also wish to note that the \$50 maximum fee stipulated under both of these sections is inadequate to cover any legal advertising and administrative costs. In light of this, the Board may wish to recommend language that provides greater flexibility such as “not to exceed the established fee for special permit application” or similar.</p>
<p>SECTION 3.</p> <p>Chapter 9 of the Code of Ordinances is hereby further amended by striking section 4252 in its entirety and inserting, in place thereof, the following Section:</p> <p>4252.2 Any work or business being carried on in a body art establishment licensed pursuant to the provisions of Sections 4200 through 4267 that requires the exposure of a person’s genitals, pubic areas, buttocks or the breasts of the female shall be completely and appropriately screened in a manner that prevents any visual access to any person situated at the exterior of the establishment or to any person on the interior who has not explicitly consented to visual access prior to acquiring such visual access.</p>	<p>Section 4252.2 provides the specific language referenced in these staff comments under Section 1. It references body parts for which screening is required but, by doing so, effectively permits unscreened operation for many traditional tattoo areas (arms, neck, legs, etc.).</p> <p>Staff’s only concern here is that the proposed language regarding interior visual access is nearly unenforceable or at best, unlikely. Regardless, staff recommends retaining this language as it is, in the long run, better to have this so as to provide the ability of protecting the public good than not.</p>
<p>SECTION 4.</p> <p>This Ordinance shall take effect in accordance with the provisions of Chapter 40A of the General Laws.</p>	<p>Perfunctory language.</p>

Although the existing Section 4260 addressing application requirements is not addressed in the proposed ordinance language, the Board may wish to consider its appropriateness within the zoning ordinance. Staff would argue that the inclusion of this section stipulating what an application for a special permit for a body art establishment must include more appropriately belongs on the application and within the established protocols for ZBA applications. Best practices typically dictate that specifics like this are better left out of zoning ordinances.

The City Solicitor's Office offered the following on this point: *"The application section is a minimum requirement which includes information that is not requested in the ZBA Special Permit application. This requirement is in addition to information required of all Special Permit applicants. I don't have a problem with this requirement but the Board may certainly consider requesting that it be deleted if that's what [is] recommended."*

Comments from Other Departments

Review comments from the Conservation Commission were received and noted that they had "...no comment on this proposed amendment. It does not pertain to any State or Local Wetland Protection Laws, Ordinances or Regulations."

Additional comments from other departments were not received as of the date of this report.

Master Plan

Staff did not find any instance where the provision of body art establishments is specifically addressed within the Master Plan or the extent to which such establishments may operate. The Board may wish to consider, however, that the "unscreening" of windows opens up the public view and provides more interaction and interest along pedestrian corridors, creating more vital and engaging public spaces.

Final Considerations¹

The proposed ordinance revisions will achieve that which the City Council has expressed an interest in doing: remove every type of body art establishment activity from existing screening requirements and instead, specify only specific body parts that would require activity screening. The Board must consider whether this proposed change would be inconsistent with the city's Master Plan and vision.

¹ Of note: regardless of whether this ordinance amendment is passed and adopted by City Council, the Commissioner of Inspectional Services notes that the owners at 29 Union Street must still screen their operation as required by a previously-existing ZBA decision. Should the ordinance be amended, the owner would have the ability to return to the ZBA in the future for a modification of that decision to permit them to be in compliance with the new ordinance with diminished screening requirements.