

TOWN ORDINANCE No. # 1998-8 B.K.G.

ORDINANCE NO. 1998-06-01 - 98-01

A JOINT ORDINANCE OF THE TOWN OF NASHVILLE AND THE COUNTY OF BROWN RELATING TO SEXUALLY ORIENTED BUSINESSES; ESTABLISHING DISTANCE REQUIREMENTS AND PROVIDING FOR REGULATION OF SEXUALLY ORIENTED BUSINESSES AND EMPLOYEES.

WHEREAS, the Nashville Town Council and the Brown County Commissioners are aware that sexually oriented businesses may desire to locate within the Town of Nashville or in the County of Brown, and that such businesses require special supervision for public safety and health reasons in order to protect and preserve the health, safety and welfare of the patrons of such businesses as well as citizens of the town and county; and

WHEREAS, the County and Town have conducted an extensive review of land use studies concerning the secondary effects of sexually oriented businesses in other cities including, but not limited to, Garden Grove, California (1991); Phoenix, Arizona (1979); Minneapolis, Minnesota (1980); Houston, Texas (1983); Indianapolis, Indiana (1984); Amarillo, Texas (1977); City of Los Angeles, California (1977); Cleveland, Ohio (1977); Austin, Texas (1986); Seattle, Washington (1989); Oklahoma City, Oklahoma (1986); Beaumont, Texas (1982); Whittier, California (1978); and

WHEREAS, from review of other cities' studies and their own surveys and testimony from its citizens there is convincing documented evidence that sexually oriented businesses, because of their very nature, have a deleterious effect on both existing businesses around them and the surrounding residential areas adjacent to them, causing among other adverse secondary effects, increased crime and downgrading of property values; and

WHEREAS, it is recognized that sexually oriented businesses due to their nature, have serious objectionable operationable characteristics, particularly when they are operating in close proximity to each other, thereby contributing to crime, lower property values, blight and downgrading the quality of life in the adjacent area; and

WHEREAS, the Town Council and the County Commissioners find that sexually oriented businesses are frequently used for unlawful sexual activities including prostitution and sexual liaison of a casual nature; and

WHEREAS, increased crime and unhealthy conduct tend to accompany, concentrate around and be aggravated by sexually oriented businesses including but not limited to prostitution, pandering, exposing minors to harmful materials, possession and distribution of obscene materials and child pornography, possession and sale of controlled substances and violent crimes against persons and property; and

WHEREAS, concern over sexually transmitted diseases, including AIDS, is a legitimate health concern of the Town and County which demands reasonable regulation of sexually oriented businesses in order to protect the health and well being of the citizens; and

WHEREAS, the Town Council and County Commissioners have considered in part, each of the following matters:

- (a) Areas within close walking distance of single and multiple family dwellings should be free of sexually oriented business uses;
- (b) Areas where children could be expected to walk, patronize, or frequent to be free of sexually oriented business uses;
- (c) Sexually oriented business uses should be located in areas of the Town and County which are not in close proximity to residential uses, churches, parks, camps that cater to children or families, or other public facilities and schools;
- (d) The image of the Town of Nashville and the County of Brown as a pleasant attractive place to reside will be adversely affected by the presence of sexually oriented business uses in close proximity to residential land uses, churches, parks and other public facilities, and schools;
- (e) Sexually oriented business land use should be regulated by zoning to separate it from other dissimilar uses just as any other land use should be separated from uses with characteristics different from itself;
- (f) Residents of the Town of Nashville and the County of Brown and persons who are non-residents but use the Town of Nashville and County of Brown for shopping and other commercial needs will move from the community or shop elsewhere if sexually oriented business land uses are allowed to locate in close proximity to the areas where those persons shop, residential uses, churches, parks and other public facilities, and schools;
- (g) Merchants in the commercial area of the Town of Nashville and County of Brown are concerned about the adverse impact and the character and quality of the Town of Nashville and County of Brown in the event that sexually oriented business land uses are located within close proximity to residential uses, churches, parks, and other public facilities, and schools, and that such locations will reduce retail trade at commercial uses in the vicinity, thus reducing property values and tax revenues to the Town of Nashville and the County of Brown; and that such adverse effects on property values and business would cause the loss of some commercial districts within the Town of Nashville and County of Brown leading to further deterioration of the commercial quality of the Town of Nashville and County of Brown;
- (h) No evidence has been presented to show that location of sexually oriented business within the Town of Nashville or the County of Brown will improve the commercial viability or quality of life of the community; and

WHEREAS, zoning and other police power regulations are legitimate reasonable means of accountability to insure the operators of sexually oriented businesses comply with reasonable regulations and are located in places which minimize the adverse secondary effects which, according to numerous studies, naturally accompany the operation; and

WHEREAS, the Town and County recognize the possible harmful effects on children and minors exposed to the effects of such businesses and the deterioration of respect for family values, and the avoidance of such businesses which necessitate children walking through or visiting in the immediate neighborhood of such businesses; and

WHEREAS, the Town Council and County Commissioners find that there would be a deterioration in the quality of businesses which chose to operate in and around such sexually oriented businesses; and

WHEREAS, the Town Council and County Commissioners desire to minimize and control these adverse secondary effects and thereby protect the health, safety and welfare of the citizens; protect the citizens from increased crime; preserve the quality of life; preserve the property values and the character of surrounding neighborhoods and businesses, deter the spread of blight and protect against the threat to health from the spread of communicable and social diseases; and

WHEREAS, the Town Council and County Commissioners have considered the decisions of the United States Supreme Court regarding local regulation of sexually oriented businesses, including but not limited to, Young v. American Mini-Theaters, Inc., 427 U.S. 50 (1976) reh. denied 429 U.S. 873; Renton v. Playtime Theaters, 475 U.S. 41 (1986) reh. denied 475 U.S. 1132; FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990); and Barnes v. Glen Theatre, 501 U.S. , 111 S.Ct. 2456 (June 21, 1991); and City of National City v. Wiener, et al, 3 Cal.4th 832 (1992) (as modified Jan. 21, 1993). Topanga Press, Inc., et al v. City of Los Angeles, 93 D.A.R. 3585 (March 22, 1993) 93 D.A.R. 5261 (as amended Apr. 27, 1993); and

WHEREAS, it is not the intent of this ordinance to suppress any speech activities protected by the First Amendment, but to enact a content neutral ordinance which addresses the adverse secondary effects of sexually oriented businesses; and

WHEREAS, it is not the intent of the Town Council and County Commissioners to condone or legitimize the distribution of obscene material, and the Council and Commissioners recognize that state law prohibits the distribution of obscene materials and expects and encourages state and local enforcement officials to enforce state obscenity statutes against such illegal activities in the Town of Nashville and the County of Brown.

NOW THEREFORE, the Town Council of the Town of Nashville and the County Commissioners of the County of Brown do ordain as follows:

SECTION 1. PURPOSE AND INTENT. It is the purpose and intent of this Ordinance to regulate sexually oriented businesses to promote the health, safety, morals, the general welfare of the citizens of the Town of Nashville and County of Brown and to establish reasonable and uniform regulations to prevent any deleterious location and concentration of sexually oriented businesses within the Town and County, thereby reducing or eliminating the adverse secondary effects from such sexually oriented businesses. The provisions of this ordinance have neither the purpose or effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent or effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market.

SECTION 2. DEFINITIONS. For the purposes of this ordinance, certain terms and words are defined as follows:

- A. "Specified Sexual Activities" are: (i) human genitals in a state of sexual stimulation or arousal; (ii) actual or simulated acts of human masturbation, sexual intercourse or sodomy; or (iii) fondling or other erotic touching of human genitals, public region, buttock, anus or female breasts.

- B. "Specified anatomical areas" are (i) less than completely and opaquely concealed: (a) human genitals, public region (b) human buttocks, anus, or (c) female breasts below a point immediately above the top of the areola; or (ii) human male genitals in a discernibly turgid state, even if completely and opaquely concealed.

- C. "Sexually oriented businesses" are those businesses defined as follows:
 - (1) "Adult arcade" means an establishment where, for any form of consideration, one or more still or motion picture projectors, slide projectors, or similar machines, or other image producing machines, for viewing by five or fewer persons each, are regularly used to show films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas".

 - (2) "Adult Bookstore", "Adult Novelty Store", or "Adult Video Store" means a commercial establishment which has a significant or substantial portion of its stock-in-trade, has more than 10% of its total square footage of floor area or in excess of 50 square feet of floor area or derives twenty-five percent (25%) or more of its revenues to the sale or rental of any form of consideration, of any one or more of the following:

- (a) Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas";
 - (b) Instrument, devices, or paraphernalia which are designed for use or marketed primarily for stimulation of human genital organs or for sadomasochistic use or abuse of themselves or others.
 - (c) An establishment may have other principal business purposes that do not involve the offering for sale, rental or viewing of materials depicting or describing "specified sexual activities" or "specified anatomical areas", and still be categorized as adult bookstore, adult novelty store, or adult video store. Such other business purposes will not serve to exempt such establishments from being categorized as an adult bookstore, adult novelty store or adult video store so long as one of its principal business purposes is offering for sale or rental, for some form of consideration, the specified materials which depict or describe "specified anatomical areas" or "specified sexual activities".
 - (d) Regardless of the percentage of revenues from adult materials defined herein, any business which devotes any portion of its interior business space or advertising for any form of consideration or viewing of any of the adult materials defined herein shall be considered to be an "Adult Bookstore", "Adult Novelty Store" or "Adult Video Store" as defined by and governed by this ordinance.
3. "Adult cabaret" means a nightclub, bar, restaurant "bottle club", or similar commercial establishment, whether or not alcoholic beverages are served, which regularly features: (a) persons who appear semi-nude or in a state of semi-nudity; (b) live performances which are characterized by the exposure of "specified anatomical area" or the performance of "specified sexual activities" or by pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas".
4. "Adult motel" means a motel, hotel or similar commercial establishment which: (a) offers public accommodations, for any form of consideration, which provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical area" and which advertises the availability of this sexually oriented type of material by means of a sign visible from the public right-of-way, or by means of any off-premises advertising including but not limited to, newspapers, magazines, pamphlets or leaflets, radio or television, or (b) offers a sleeping room

- for rent for a period of time less than ten (10) hours; or (c) allows a tenant or occupant to sub-rent the sleeping room for a time period of less than ten (10) hours.
5. "Adult Motion picture theater" means a commercial establishment where films, motion pictures, video cassettes, slides or similar photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas" are regularly shown for any form of consideration.
 6. "Adult theater" means a theater, concert hall, auditorium, or similar commercial establishment which, for any form of consideration, regularly features persons who appear in a state of seminudity or live performances which are characterized by exposure of "specified anatomical areas" or by "specified sexual activities".
 7. "Escort Agency" means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its business purposes for a fee, tip, or other consideration.
 8. "Massage parlor" means any place where, for any form of consideration or gratuity, massage, alcohol rub, administration of fomentations, electric or magnetic treatments, or any other treatment manipulation of the human body which occurs as a part of or in connection with "specified sexual activities", or where any person providing such treatment, manipulation, or service related thereto, exposes his or her "specified anatomical areas". The definition of sexually oriented businesses shall not include the practice of massage in any licensed hospital, nor by a licensed hospital, nor by a licensed physician, surgeon, chiropractor or osteopath, nor by any nurse or technician working under the supervision of a licensed physician, surgeon, chiropractor or osteopath, nor by trainers for any amateur, semiprofessional or professional athlete or athletic team or school athletic program.
 9. "Nude or Semi-Nude Model Studio" means any place where a person, who regularly appears in a state of seminudity is provided for money or any form of consideration to be observed, sketched, drawn, painted, sculpted, photographed, or similarly depicted by other persons.
 10. "Sexual encounter establishment" means a business or commercial establishment that, as one of its primary business purposes, offers for any form of consideration, a place where two or more persons may congregate, associate, or consort for the purposes of "specified sexual activities" when one or more of the persons is semi-nude. The definition of sexually oriented businesses shall not include an establishment where a medical practitioner, psychologist, psychiatrist, or similar professional person licensed by the state engages in medically approved and recognized sexual therapy.

D. "Public building" means any building owned, leased or held by the United States, the state, the county, the town, any special district, school district, or any other agency or political subdivision of the state or the United States, which building is used for governmental purposes.

E. "Public park" or "recreation area" means public land which has been designated for park or recreational activities including but not limited to a park, playground, nature trails, swimming pool, reservoir, athletic field, basketball or tennis courts, pedestrian/bicycle paths, open space, wilderness areas, or similar public land within the town or county which is under the control, operation, or management of the town or county park and recreation authorities.

F. "Religious institution" means any church camp, church, synagogue, mosque, temple or building which is used primarily for religious worship and related religious activities.

G. "School" means any public or private educational facility including, but not limited to, child day care facilities, nursery schools, preschools, kindergartens, elementary schools, primary 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.

H. "Person" means an individual, proprietorship, partnership, corporation, association, or other legal entity.

I. "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, massage parlor, sexual encounter establishment, escort agency or semi-nude model studio.

J. "Residential District or Use" means a single family, duplex, townhouse, multiple family, retirement home, mobile home park or campground as defined in the Nashville and Brown County Zoning ordinances.

K. "Escort" means a person who, for any form of consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.

SECTION 3. ESTABLISHMENT AND CLASSIFICATION OF BUSINESSES REGULATED.

The establishment of a Sexual Oriented Business shall be permitted only in the appropriately designated zoning category and shall be subject to the following restriction:

No person shall cause or permit the establishment of any of the following sexually oriented business, as defined above, within 1,000 feet of another such business or within 1,000 feet of any religious institution, school, boys' club, girls' club, or similar existing youth organization, or public park or public building, or within 1,000 feet of any property zoned for residential use or used for residential purposes, and sexually oriented businesses are classified as follows:

- (1) adult arcade
- (2) adult bookstore, adult novelty store or adult video store
- (3) adult cabaret
- (4) adult motel
- (5) adult motion picture theater
- (6) adult theater
- (7) massage parlor
- (8) sexual encounter establishment
- (9) escort agency,
- (10) or nude model studio.

SECTION 4. MEASUREMENT OF DISTANCE. As regarding Section 3, paragraph A, distance between any two sexually oriented businesses shall be measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of each business. The distance between any sexually oriented business and any religious institution, public or private elementary or secondary school, boys club, girls club, or similar existing youth organization, or public park or public building or any properties zoned for residential use or used for residential purposes shall also be measured in a straight line, without regard to intervening structures or objects from the nearest portion of the building or structure used as part of the premises where the sexually oriented business is conducted, to the nearest property line of the premises of a religious institution, public or private elementary or secondary school, boys club, girls club, or similar existing youth organization, or public park or public building or any properties zoned for residential use or used for residential purposes.

SECTION 5. LOCATION OF SEXUALLY ORIENTED BUSINESSES. The Town of Nashville and County of Brown's Zoning Ordinance shall designate those areas in which sexually oriented businesses are permitted and this ordinance shall govern their location and land use. In addition, any sexually oriented business shall be subject to the following restrictions:

(1) A person commits an infraction if he operates or causes to be operated a sexually oriented business within 1,000 feet of: (a) any religious institution; (b) any school; (c) the boundary of any residential district; and (d) a public park adjacent to any residential district; (e) public building; (f) a property line of a lot devoted to residential use; or (g) a boys club, girls club, or similar existing youth organization.

(2) A person commits an infraction if he operates or causes to be operated a sexually oriented business within 1,000 feet of another such business, which will include, any adult arcade, adult book store, adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, massage parlor or any sexual encounter establishment.

(3) A person commits an infraction if he causes or permits the operation, establishment, or maintenance of more than one sexually oriented business within the same building, structure.

SECTION 6. INJUNCTION. A person who operates or causes to be operated a sexually oriented business in violation of this ordinance's location restrictions is subject to a suit for injunction as well as prosecution for the criminal violation. Such violation shall be punishable by a fine of \$1,000.00. If any injunction must be sought, attorneys fees and costs will be assessed at the discretion of the Court against the sexually oriented business.

SECTION 7. INSPECTION.

A. Any and all sexually oriented business as defined hereinabove shall permit representatives of Law Enforcement, the County Health Department, and the Fire Department to inspect the premises of a sexually oriented business for the purpose of insuring compliance with the law, at any time it is occupied or open for business.

B. Any and all sexually oriented business shall be inspected to the same extent as all other businesses are inspected and any record of the sexually oriented business shall be made available to the public the same as other businesses' records are made available to the public.

C. It shall be unlawful and a person who operates a sexually oriented business, or his/her agent or employee commits an infraction if he/she refuses to permit such lawful inspection of the premises at any time that it is occupied or open for business.

SECTION 8. MINORS

A person commits an infraction if he/she operates or causes to be operated a sexually oriented business and knowingly or with reasonable cause to know, permits, suffers, or allows:

- A. Admittance of a person under eighteen (18) years of age to the business premises;
- B. A person under eighteen (18) years of age to remain at the business premises;
- C. A person under eighteen (18) years of age to purchase goods or services at the business premises; or
- D. A person who is under eighteen (18) years of age to work at the business premises as an employee.

SECTION 9. ADVERTISING REGULATIONS.

A. It shall be unlawful and a person commits an infraction if he/she operates or causes to be operated a sexually oriented business, and specifically advertises the presentation of any activity prohibited by any applicable State statute or local ordinance.

B. It shall be unlawful and a person commits an infraction if he/she operates or causes to be operated a sexually oriented business, and displays or otherwise exhibits the materials and/or performances at such sexually oriented business in any advertising which is visible outside the premises. This prohibition shall not extend to advertising of the existence or location of such sexually oriented business.

C. The permittee shall not allow any adult entertainment to be visible outside the premises.

D. All off-street parking areas and premise entries of the sexually oriented business shall be illuminated from dusk to dawn with a lighting system which provides an average maintained horizontal illumination of one (1) foot candle of light on the parking surface and/or walkways. This required lighting level is established in order to provide sufficient illumination of the parking areas and walkways serving the sexually oriented business for the personal safety of patrons and employees and to reduce the incidence of vandalism and criminal conduct. The lighting shall be shown on the required sketch or diagram of the premises.

E. Nothing contained in this Section of the Ordinance shall relieve the operator(s) of a sexually oriented business from complying with the requirements of the Town of Nashville and County of Brown, commonly known as the Sexually Oriented Business Ordinance, as it may be amended from time to time, or any subsequently enacted Town or County ordinance or regulations.

SECTION 10. HOURS OF OPERATION.

A. It shall be unlawful and a person commits an infraction if he/she operates or causes to be operated a sexually oriented business, and allows such business to remain open for business, or to permit any employee to engage in a performance, solicit a performance, make a sale, solicit a sale, provide a service, or solicit a service, between the hours of 12:00 midnight and 12:00 noon of any particular day or to permit any employee to engage in a performance, solicit a performance, make a sale, solicit a sale, provide a service, or solicit a service accept pursuant to Indiana laws pertaining to alcoholic beverages.

B. It shall be unlawful and a person commits an infraction if, working as an employee of a sexually oriented business, said employee engages in a performance, solicits a performance, makes a sale, solicits a sale, provides a service, or solicits a service between the hours of 12:00 midnight and 12:00 noon of any particular day.

SECTION 11. NUDITY AT SEXUALLY ORIENTED BUSINESSES NOT OFFERING FOR SALE ALCOHOLIC BEVERAGES SUBJECT TO PROHIBITION PURSUANT TO THE U.S. SUPREME COURT DECISION IN BARNES v. GLEN THEATER INC.

A. The United States Supreme Court decision in Barnes v. Glen Theater, Inc., 501 U.S. 111 S.Ct. 2456, (June 21, 1991) which upheld the rights of cities to prohibit live public exposure of a person's private parts, specifically applies to sexually oriented businesses, including said businesses where no alcoholic beverages are sold, served, or consumed at the premises.

B. Public nudity is prohibited within the Town of Nashville and County of Brown, including any sexually oriented business. Any sexually oriented business which is found in violation of this section may be enjoined from operation and shall be subject to the sanctions as provided in Section 12.

SECTION 12: CIVIL PENALTIES AND ADDITIONAL LEGAL, EQUITABLE, AND INJUNCTIVE RELIEF.

In addition to whatever penalties are applicable under the State of Indiana Penal Code, if any person willfully fails or refuses to obey or comply with or violates any of the provisions of this Ordinance, such person, upon a judicial determination of such offense, shall be punished by a fine not to exceed Two Thousand Dollars (\$2000.00), in the discretion of the Court. Each violation or non-compliance shall be considered a separate and distinct offense. Further, each day of continued violation or noncompliance shall be considered as a separate offense.

Nothing herein contained shall prevent or restrict the Town of Nashville or the County of Brown from taking such other lawful action in any court of competent jurisdiction as is necessary to prevent or remedy any violation or non-compliance. Such other lawful actions shall include, but shall not be limited to, an equitable action for injunctive relief or an action at law for damages.

All remedies and penalties provided for in this Section shall be cumulative and independently available to the Town and County and the Town and County shall be authorized to pursue any and all remedies set forth in this Section to the full extent allowed by law. This Ordinance may be enforced by the Town Council, the County Commissioners or the County Plan Department as well as by the Town Attorney, County Prosecutor, County Attorney, Plan Department Attorney or by such other attorney selected by the Town, the County or the County Plan Commission

SECTION 13.

IMMUNITY FROM PROSECUTION. The Town of Nashville,

County of Brown and their designees, the Nashville Town Marshall's Office and the Brown County Sheriff's Department and all other departments and agencies, and all other Town and County officers, agents and employees, charged with enforcement of State and local laws and ordinances shall be immune from prosecution, civil or criminal, for reasonable, good faith trespass upon a sexually oriented business while acting within the scope of authority conferred by this Ordinance.

SECTION 14.

SEVERABILITY. If any section, subsection or clause of

this Ordinance shall be deemed to be unconstitutional or otherwise invalid, the validity of the remaining section, subsection and clauses shall not be effected thereby.

SECTION 15.

CONFLICTING ORDINANCE REPEALED. All ordinances or

parts of ordinances in conflict with the provisions of this ordinance are hereby repealed.

SECTION 16.

EFFECTIVE DATE. This ordinance shall be in full force and

effect from and after its passage and promulgation.

This 18th day of Jun

PASSED AND ADOPTED BY THE TOWN COUNCIL OF THE TOWN OF NASHVILLE AND THE COMMISSIONERS OF THE COUNTY OF BROWN THIS 1st DAY OF June, 1998.

ATTEST:

Brenda K. Young
Brenda K. Young

Joan K. Quigley yea nay abstain
Joan K. Quigley, Council President

Gerald Alexander yea nay abstain
Gerald Alexander, Councilmember

Charles A. Smith yea nay abstain
Charles Smith, Councilmember

Drafted by the Town Attorney
Ben S. Hoff III

Ben S. Hoff III
Ben S. Hoff III

Bruce Williams yea nay abstain
Bruce Williams, Councilmember

Leo Dreske yea nay abstain
Leo Dreske, Councilmember

ATTEST:

Kathi S. Smith
Brown County Auditor

James Gredy yea nay abstain
James Gredy, Commissioner

Randall Snyder yea nay abstain
Randall Snyder, Commissioner

James R. Crane yea nay abstain
James Crane, Commissioner