

ARTICE 546
Public Nudity

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CROSS REFERENCES
Refer to Section 1 of this article.

546.01 FINDINGS OF FACT AND LEGISLATIVE DETERMINATIONS.

- a) The Town Council of the Town of Nutter Fort, West Virginia (the "Council"), is aware that local governments may, by virtue of the twenty-first (21st) amendment to the United States Constitution, regulate and prohibit various forms of actual and simulated Nude and sexual conduct, and the depiction thereof, within and around Establishments Dealing in Alcoholic Beverages; and,
- b) The Council is aware that local governments may prohibit the exposure of certain body parts in and around Establishments Dealing in Alcoholic Beverages; and,
- c) The Council wishes to regulate nudity and sexual conduct in and around Establishments Dealing in Alcoholic Beverages; and the Council is aware of evidence from other communities that indicates that nudity and sexual conduct, coupled with alcohol in Public Places, begets undesirable behavior, and that prostitution, attempted rape, rape, and assault have occurred and have the potential for occurring in and around Establishments Dealing in Alcoholic Beverages where Nude and sexual conduct is permitted; and,
- d) The Council wishes to protect against similar conditions to the end that they not occur in the Town of Nutter Fort at or around Establishments Dealing in Alcoholic Beverages; and,

- e) The Council desires to prohibit the public display of Nude conduct and sexual behavior or the simulation thereof in and around Establishments Dealing in Alcoholic Beverages; and,
- f) The Council finds and determines that there are increasing incidents of nudity in Public Places other than Establishments Dealing in Alcoholic Beverages and in places readily visible to the public; and,
- g) The Council finds and determines that Persons who choose to appear Nude in Public Places are engaging in conduct which often serves to impose their nudity on others who do not seek it out, who are not able to reasonably avoid observing it, and who may be offended or distressed thereby; and,
- h) The Council desires to protect and preserve the unique character of the Town of Nutter Fort as a family oriented place to visit, live, or locate for families, tourists and businesses; and,
- i) The Council finds and determines that appearing Nude in Public Places is contrary to the general societal disapproval that the people of the Town of Nutter Fort have of persons appearing Nude among strangers in Public Places; and,
- j) The Council finds and determines that the mere appearance of Persons in the Nude in Public Places generally increases incidents of prostitution, sexual assaults and batteries, attracts other criminal activity to the community, encourages degradation of women and other activities which break down family structures, such as adverse secondary effects of Persons in the Nude in Public Places supported generally by testimony presented and evidence considered by the Council, including, but not limited to, the following reports, studies, and judicial opinions concerning the adverse secondary effects of adult uses on a community:
 - (1) Findings of the County Planning Commission for the County of New York, dated January 26, 1977.
 - (2) Report on Zoning and Other Methods of Regulating Adult Establishments in Amarillo [Texas], dated September 13, 1977.
 - (3) Northend Cinema, Inc. v. Seattle, 90 Wash. 2d 709, 585 P.2d 1153 (1978).
 - (4) Regulation of Criminal Activity and Adult Businesses, County of Phoenix, Arizona, May, 1979.
 - (5) Report to the County Planning Commission and County Board of County Commissioners from the Planning Department of the County of Beaumont, Texas, dated September 14, 1982.

- (6) Legislative Report on an Ordinance Amending Section 28-73 of the Code of Ordinances of the County of Houston, Texas; Providing for the Regulation of Sexually Oriented Commercial Enterprises, Adult Bookstores, Adult Movie Theater and Massage Establishments; and Making Various Provisions and Findings Relating to the Subject, a report prepared by the Committee on the Proposed Regulation of Sexually Oriented Businesses, dated 1983.
- (7) Adult Entertainment Businesses in Indianapolis, an analysis prepared by the Department of Metropolitan Development, dated February, 1984.
- (8) Adult Entertainment Business in Oklahoma County, A Survey of Real Estate Appraisers, a report prepared by the Community Development Department of Oklahoma County, Oklahoma, dated March 3, 1986.
- (9) Summary of land use studies on secondary effects of adult uses conducted by Garden Grove, California; Whittier, California; Cleveland, Ohio; and Los Angeles, California.
- (10) California v. LaRue, 409 U.S. 109 (1972); Barnes v. Glen Theater, Inc., 501 U.S. 560 (1991); City of Erie v. Paps AM, Case No. 98-1161 (U.S. Sup. Ct., March 29, 2000); and,

k) The Council finds and determines that without regulation, public nudity constitutes harmful conduct and occurs in a manner which is incompatible with the normal primary activity of a particular place at a particular time; and,

l) The Council's sole intent in enacting this ordinance is to prohibit the conduct of being Nude in Public Places and to suppress the adverse secondary effects such nudity generates, the Council nevertheless recognizes that there may be instances wherein appearing Nude in a Public Place may be expressive conduct incidental to and a necessary part of the freedom of expression that is protected by United States or West Virginia constitutional provisions; and,

m) A requirement that dancers don opaque covering sufficient to cover the Buttocks and the Breasts as such portions of the human anatomy are defined in this ordinance does not deprive the dance of whatever erotic message, if any, it may convey, but simply makes such message, if any, slightly less graphic and imposes only an incidental limitation on the message; and,

n) It is the intent of the Council to protect and preserve the public health, safety, welfare and morals of the Town of Nutter Fort by restricting, to the full extent allowed by the United States and West Virginia constitutions, the act of being Nude to places which are not frequented by the public and places which are not readily visible to the public; and,

- o) Nutter Fort is essentially a rural-suburban community without the sophistication and urbanity of a large metropolitan area; and,
- p) The Council finds and determines that the average person applying contemporary Nutter Fort community standards would find that the public nudity prohibited by this ordinance, if allowed, when taken as a whole (i) appeals to the prurient interests and (ii) lacks serious literary, artistic, political, and scientific value; and,
- q) Non regulation of persons appearing nude in Public Places within Nutter Fort may encourage commercial Entities and other Entities and Persons to advertise outside of Nutter Fort and the State of West Virginia by billboard, radio, print and other media the availability of nudity in Public Places within Nutter Fort and thus encourages in influx into Nutter Fort of Persons seeking (i) to observe and/or participate in such nudity and (ii) to participate in the disorderly, harmful, and illegal conduct that is associated therewith, thereby increasing injuries and damages to the citizens of this county who will be victims of such increased disorderly, harmful, and unlawful conduct; and,
- r) Competitive commercial advertising and/or exploitation of nudity encourages escalation of Nude and lewd conduct within the competing commercial establishments exploiting such conduct and thereby increases the adverse effects upon public order and public health; and,
- s) The Council finds and determines that the prohibitions contained herein are the most reasonable and minimal restrictions required so as to regulate conduct which is adverse to public order, health, morality, and decency within Nutter Fort when such conduct takes place at locations where the public is present or is likely to be present or where such conduct would be readily visible to the public; and,
- t) The passage of this ordinance is necessary to preserve the basic character of the Town of Nutter Fort; and,
- u) The Council is aware that States may regulate the conduct of appearing Nude in Public Places, see Barnes v. Glen Theater, Inc., 115 L. Ed2d 504, 111 S.Ct. 2456 (1991), and City of Erie v. Paps AM, Case No. 98-1161 (U.S. Sup. Ct., March 29, 2000); and,
- v) The Council is not hereby prohibiting nudity in truly private places or prohibiting nudity which is protected by United States or West Virginia constitutional provisions; and,
- w) The Council finds and determines that the express exemptions contained in Section 8 of this ordinance provide adequate protection to Persons who, without such express exemptions, might otherwise be prevented or discouraged by the ordinance from exercising constitutionally protected rights; and,

x) The Council finds and determines that this ordinance is consistent with its current comprehensive plan.

546.02 INTENT.

It is the intent of this Ordinance to protect and preserve the health, safety, welfare, and morals of the citizens of Nutter Fort by prohibiting a person from intentionally or recklessly appearing or being nude, or causing another person to appear to be nude, in a public place and in other places which may reasonably be expected to be observed by the public within the Town of Nutter Fort except:

- (a) when such person appears nude in a place provided or set apart for nudity provided:
 - (1) such person is nude for the sole purpose of performing the legal function(s) that is customarily intended to be performed within such place provided or set apart for nudity
 - (2) such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity, or:
- (b) when the conduct of being nude can not legally be prohibited by this ordinance:
 - (1) because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a guise or pretense utilized to exploit nudity for profit or commercial gain and as such is protected by the United States or West Virginia Constitution
 - (2) because it is otherwise protected by the United States or West Virginia Constitution.

546.03 DEFINITIONS.

For the purpose of this Article, the following words and phrases shall have the meanings respectively ascribed to them by this Section:

- (a) Alcoholic Beverages: All distilled spirits and all beverages containing one-half of 1 percent or more alcohol by volume of the standard ethyl alcohol in the beverage and comparing it with the volume of the remainder of the ingredients as though said remaining ingredients were distilled water.
- (b) Breast: A portion of the human female mammary gland (commonly referred to as the female breast) including the nipple and the areola (the darker colored area of the breast surrounding the nipple) and an outside area of such gland wherein such outside area is:

- (1) reasonably compact and contiguous to the areola and
- (2) contains at least the nipple and the areola and 1/2 of the outside surface area of such gland

(c) Buttocks: (For a short general description see the last sentence of this subsection.) The area at the rear of the human body (sometimes referred to as the gluteus maximus) which lies between two imaginary straight lines running parallel to the ground when a person is standing, the first or top such line being 1/2 inch below the top of the vertical cleavage of the nates (i.e., the prominence formed by the muscles running from the back of the hip to the back of the leg) and the second or bottom such line being 1/2 inch above the lowest point of the curvature of the fleshy protuberance (sometimes referred to as the gluteal fold), and between two imaginary straight lines, one on each side of the body (the "outside line"), which outside lines are perpendicular to the ground and to the horizontal lines described above and which perpendicular outside lines pass through the outermost point(s) at which each nate meets the outer side of each leg. Notwithstanding the above, buttocks shall not include the leg, the hamstring muscle below the gluteal fold, the tensor fascia latae muscle or any of the above-described portion of the human body that is between either

- (1) the left inside perpendicular line and the left outside perpendicular line
- (2) the right inside perpendicular line and the right outside perpendicular line

For the purpose of the previous sentence, the left inside perpendicular line shall be an imaginary straight line of the left side of the anus

- (1) that is perpendicular to the ground and to the horizontal lines described above
- (2) that is 1/3 of the distance from the anus to the left outside line, and the right inside perpendicular line shall be an imaginary straight line on the right side of the anus
 - A. that is perpendicular to the ground and to the horizontal lines described above and
 - B. that is 1/3 of the distance from the anus to the right outside line. (The above description can generally be described as covering 1/3 of the buttocks centered over the cleavage for the length of the cleavage.)

(d) Entity: Any proprietorship, partnership, corporation, association, business trust, joint venture, joint-stock company or other for profit and/or not for profit organization.

(e) Establishment Dealing In Alcoholic Beverages: Any business, commercial or other establishment (whether for profit or not for profit and whether open to the public at large or where entrance is limited by cover charge or membership requirement) including those licensed by the State for sale and/or service of alcoholic beverages, and any bottle club; hotel; motel; restaurant; night club; country club; cabaret; meeting facility utilized by any religious, social fraternal or similar organization; business, commercial or other establishment where a product or article is sold, dispensed, served or provided with the knowledge, actual or implied, that the same will be, or is intended to be mixed, combined with or drunk in connection or combination with an alcoholic beverage on the premises or curtilage of said business, commercial or other establishment; or business, commercial or other establishment where the consumption of alcoholic beverages is permitted. A premises, or portions thereof such as hotel rooms used solely as a private residence, whether permanent or temporary in nature, shall not be deemed to be an Establishment Dealing In Alcoholic Beverages.

(f) Nude: Any person insufficiently clothed in any manner so that any of the following body parts are not entirely covered with a fully opaque covering:

- (1) The male or female genitals, or
- (2) The male or female pubic area, or
- (3) The female breast (see the last sentence in this subsection f), or
- (4) The buttocks. Attire which is insufficient to comply with this requirement includes, but is not limited to, G-Strings, T-Backs, dental floss and thongs.

Body paint, body dyes, tattoos, liquid latex whether wet or dried, and similar substances shall not be considered opaque covering. Each female person may determine which 1/4 of her breast surface area (see definition of Breast) contiguous to and containing the nipple and the areola is to be covered.

(g) Person: Any living human being aged ten years of age or older.

(h) Places Provided Or Set Apart For Nudity: Shall mean enclosed single sex public restrooms, enclosed single sex functional shower, locker and/or dressing room facilities, enclosed motel rooms and hotel rooms designed and intended for sleeping accommodations, doctor's offices, portions of hospitals, and similar places in which nudity or exposure is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein. This term shall not be deemed to include places where a person's conduct of being nude is used for his or her profit or where being nude is used for the promotion of business or is otherwise commercially exploited.

(i) Public Place: Any location frequented by the public, or where the public is present or likely to be present, or where a person may reasonably be expected to be observed by members of the public. Public Places include, but are not limited to, streets, sidewalks, parks, beaches, business and commercial establishments (whether for profit or not for profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle clubs, hotels, motels, restaurants, night clubs, country clubs, cabarets, and meeting facilities utilized by any religious, social fraternal or similar organization. Premises or portions thereof such as hotel rooms, used solely as a private residence, whether permanent or temporary in nature shall not be deemed to be a Public Place.

546.04 LEGISLATIVE FINDINGS.

In addition and supplemental to the findings and determinations contained in Section 1 hereof, it is hereby found by the Council, acting in its legislative capacity for the purpose of regulating the conduct of appearing nude in public places and for the purpose of regulating nudity and other conduct in establishments dealing in alcoholic beverages, that, considering what has happened in other communities, the acts prohibited in Section 546.04 hereinbelow encourage or create the potential for the conduct of prostitution, attempted rape, rape, and assault in and around establishments dealing in alcoholic beverages; that actual and simulated nudity and sexual conduct, coupled with the consumption of alcoholic beverages in public places, begets and has the potential for begetting undesirable and unlawful behavior; that sexual, lewd, lascivious, and salacious conduct among patrons and employees within establishments dealing in alcoholic beverages results in violation of law and creates dangers to the health, safety, morals, and welfare of the public and those who engage in such conduct; and, it is the intent of Section 546.04 of this ordinance to specifically prohibit nudity, gross sexuality and the simulation thereof in establishments dealing in alcoholic beverages.

546.05 NUDITY, SEXUAL CONDUCT PROHIBITED IN ESTABLISHMENTS DEALING IN ALCOHOLIC BEVERAGES

The following prohibitions and criteria shall apply within existing and/or newly created Establishments Dealing In Alcoholic Beverages and the curtilage thereof:

- (a) No person shall knowingly, intentionally or recklessly appear or cause another person to appear Nude, or expose to public view his or her genitals, pubic area, vulva, or buttocks, or any simulation thereof;
- (b) No female person shall knowingly, intentionally or recklessly expose, or cause another female person to expose her breasts or any simulation thereof to public views;
- (c) No person or entity maintaining, owning, or operating an establishment dealing in alcoholic beverages shall encourage, allow or permit any person to appear nude or to expose to public view his or her genitals, pubic area, vulva, anus, or any portion of the

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buttocks or simulation thereof. This section shall be violated if any portion of the buttocks is visible from any vantage point;

(d) No person or entity maintaining, owning, or operating an establishment dealing In alcoholic beverages shall encourage, allow or permit any female person to expose her breasts or any simulation thereof to public view;

(e) No person shall engage in and no person or entity maintaining, owning, or operating an establishment dealing in alcoholic beverages shall encourage, allow or permit any sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, lap dancing, straddle dancing, any sexual act which is prohibited by law, touching, caressing, or fondling of the breasts, buttocks, anus, or genitals, or the simulation thereof;

(f) The prohibitions of this Section 546.04 shall not apply when a person appears nude in a place provided or set apart for nudity provided

- (1) such person is nude for the sole purpose of performing the legal function(s) that is customarily intended to be performed within such place provided or set apart for nudity and
- (2) such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity.

(g) Each female person may determine which 1/4 of her breast surface area (see definition of Breast) contiguous to and containing the areola is to be covered.

(h) This Section 546.04 shall not be deemed to address photographs, movies, video presentations, or other non live performances.

546.06 NUDITY PROHIBITED IN PUBLIC PLACES.

It shall be unlawful for any person to knowingly, intentionally, or recklessly appear, or cause another person to appear, nude in a public place or in any other place which is readily visible to the public, except as provided in Section 546.06. It shall also be unlawful for any person or entity maintaining, owning, or operating any public place establishment to encourage, suffer or allow any person to appear nude in such public place, except as provided in Section 546.06.

546.07 EXEMPTIONS.

The prohibitions of Section 546.05 of this ordinance shall not apply:

(a) When a person appears nude in a place provided or set apart for nudity provided:

- (1) such person is nude for the sole purpose of performing the legal function(s) that is customarily intended to be performed within such place provided or set apart for nudity

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- (2) such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity, or;
- (b) When the conduct of being nude can not legally be prohibited by this ordinance
 - (1) because it constitutes a part of a bona fide live communication, demonstration or performance by a person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a mere guise or pretense utilized to exploit the conduct of being nude for profit or commercial gain and as such is protected by the Untied States or West Virginia Constitution or
 - (2) because it is otherwise protected by the United States or West Virginia Constitution.
- (c) When the conduct of being nude is solely confined to a mother who is breast feeding her baby in any location, public or private, where the mother is otherwise authorized to be, irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the breast feeding, provided that the body parts specified in Section 546.02(f)(1), (2) or (4) are not exposed.

546.08 ENFORCEMENT AND PENALTIES.

Any person or Entity violating any of the provisions of this ordinance shall be prosecuted in the same manner as misdemeanors are prosecuted. Such violations shall be prosecuted in the name of the State of West Virginia in a court having jurisdiction of misdemeanors by the Prosecuting Attorney thereof and, upon conviction, shall be punished by a fine not to exceed \$500.00 or by imprisonment in the County jail not to exceed 60 days or by both such fine and imprisonment. Each incident or separate occurrence of an act that violates this ordinance shall be deemed a separate offense.

546.09 INJUNCTIVE RELIEF.

In addition to the procedures provided herein, establishments dealing in alcoholic beverages that are not in conformity with these requirements shall be subject to appropriate civil action in the court of appropriate jurisdiction for abatement.

546.10 TERRITORY EMBRACED.

All territory within the legal boundaries of the Town of Nutter Fort shall be embraced by the provisions of this ordinance.

546.11 SEVERABILITY.

It is declared to be the intent of the Town Council of the Town of Nutter Fort that if any section, subsection, clause, sentence, phrase or provision of this Ordinance is for any reason held unconstitutional or invalid, the invalidity thereof shall not affect the validity of the remaining portions of this Ordinance.

(Passed 1-20-04)

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