

STATE OF INDIANA)	IN THE HAMILTON SUPERIOR COURT
) SS:	
COUNTY OF HAMILTON)	CAUSE NO.:

CITY OF NOBLESVILLE and the)
PLANNING AND DEVELOPMENT)
DIRECTOR FOR THE CITY OF)
NOBLESVILLE, INDIANA,)
)
Petitioners,)
)
v.)
)
MIB, LLC, RYAN POLOKOFF, and)
SABINE KISSEE,)
)
Respondents.)

COMPLAINT FOR DECLARATORY JUDGMENT AND REQUEST FOR INJUNCTION

Petitioners City of Noblesville and the Planning and Development Director for the City of Noblesville, Indiana (“City”), by counsel, for its Complaint for Declaratory Judgment against Respondents MIB, LLC, Ryan Polokoff, and Sabine Kissee (“MIB”), state and allege as follows:

Introduction and Nature of Action

1. In 2022, the City of Noblesville Planning and Zoning Director made a determination that MIB is a Sex Shop as defined in the Noblesville Unified Development Ordinance (“UDO”) and, therefore, cannot operate within an I-1 Zoning District in the City. MIB appealed that decision first to the Noblesville Board of Zoning Appeals (“BZA”), then to the Indiana Trial Court, and then collaterally attacked the decision at the United States District Court for the Southern District of Indiana. MIB lost at every turn, which means the Director’s determination is final—MIB is a Sex Shop as defined in the Noblesville Unified UDO.

2. Now, two years later in 2024, MIB has, without permission, reopened its Sex Shop in the exact same I-1 Zoning District in the City. This sex shop is in direct violation of the Director's April 2022 determination.

3. This is a Declaratory Judgment action to obtain a declaration from this Court that MIB and its owners, Ryan Polokoff and Sabine Kisse, are prohibited from operating this, or any similar, business in any Noblesville zoning district where sex shops are prohibited (including, but not limited to, the I-1 Zoning District). The Noblesville BZA affirmed the Director's determination on August 1, 2022, and established that MIB is a Sex Shop, as defined in the Noblesville UDO. MIB appealed that decision in both state and federal court, and the City was successful in both lawsuits. By opening a second location in the same zoning district where the first was located, MIB is deliberately disregarding the Director's determination, the BZA's affirmation of that determination, and both lawsuits that followed. The City now seeks a declaration from this Court that MIB, as a Sex Shop, cannot legally operate its business in any Noblesville zoning district where sex shops are prohibited.

Jurisdiction and Venue

4. The City of Noblesville, Indiana is a political subdivision of the State of Indiana.

5. The Noblesville BZA is an official agency of the City and derives its authority from Ind. Code 36-7-4-901, *et seq.*

6. Caleb Gutshall is and has been at all relevant times the Director of Planning and Development for the City of Noblesville.

7. The Director of Planning and Development for the City of Noblesville is the City's Enforcement Authority, per Noblesville UDO.

8. MIB, LLC is an Indiana Limited Liability Company, which at all times relevant to this action, has maintained its business premises and conducted business in Noblesville, Indiana.

9. Ryan Polokoff is the manager for MIB, LLC.

10. Sabine Kisse is a member of MIB, LLC.

11. This Court has jurisdiction under Indiana Trial Rule 4.

12. Hamilton County is the preferred venue under Indiana Trial Rule 75(A)(5).

Facts

I. MIB's First Sex Shop Location

13. In 2022, MIB operated a retail Sex Shop and store front at 15480 Herriman Boulevard, in Noblesville, Indiana ("Store One").

14. Store One was located in the I-1 zoning district.

15. On or about April 26, 2022, MIB received a Letter of Determination from the Noblesville Director of Planning and Development, Caleb Gutshall, stating the City had determined that MIB was in violation of Article 2 of the Noblesville UDO. Specifically, the Letter of Determination stated that per the plain language in the UDO, MIB was a "Sex Shop" and not permitted to operate in the zoning district where it was located in the City. (Ex. A.)

16. MIB disagreed with that determination and filed an appeal.

17. On August 1, 2022, the Noblesville BZA held a public meeting on MIB's appeal of the Letter of Determination.

18. The BZA received evidence from a Noblesville Senior Planner, Noblesville's attorney, and MIB's attorney.

19. The BZA also received testimony from those in support of the appeal and those against.

20. The BZA was asked to determine, based on the evidence presented, whether MIB's operations met the City's definition of "Sex Shop."

21. At the conclusion of the public meeting, the BZA voted to deny the appeal.

22. The BZA determined that based on the evidence presented, MIB's operations met the City's definition of "Sex Shop" and at a subsequent meeting, adopted Findings of Fact in support. (Ex. B.)

23. On August 8, 2022, the Director confirmed in a letter to MIB that the BZA had denied its appeal. The letter reiterated to MIB that the BZA had upheld the Director's determination that MIB's use of the property "fall[s] under the Sex Shop land use classification . . . based upon the definition of 'Sex Shop' included in [the UDO]." (Ex. C.)

A. State Court Case

24. On or around August 9, 2022, MIB filed a Verified Petition for Judicial Review of the BZA's decision in the Hamilton County Circuit Court, Cause No. 29C01-2208-PL-005996.¹ (Ex. D.)

25. MIB was statutorily required to file the BZA record (or a request for an extension) on or before September 8, 2022. *See* Ind. Code § 36-7-4-1613 (2022).

26. On September 9, 2022, the Noblesville BZA moved to dismiss MIB's Petition for Judicial Review on the grounds that MIB did not timely file a copy of the hearing record.

¹ The City requests the Court take judicial notice of Cause No. 29C01-2208-PL-005996 and the filings therein.

27. The parties fully briefed the matter, and the court dismissed MIB's Petition for Judicial Review on October 10, 2022. (Ex. E.)

28. MIB did not appeal that dismissal order to the Indiana Court of Appeals or the Indiana Supreme Court.

29. Accordingly, the BZA's decision to affirm the Director's determination that MIB is a Sex Shop is final and conclusive.

B. Federal Court Case

30. On January 1, 2023, MIB filed a Complaint for Temporary Restraining Order, Injunction and Damages, and Demand for Jury Trial in the Southern District of Indiana under Cause No: 1:23-cv-00001-TWP-TAB.² (Ex. F.)

31. The City filed a motion to dismiss the federal case, arguing MIB's claims were precluded under *res judicata*.

32. On August 24, 2023, that court held that MIB's "claims in this action are [] barred by the doctrine of claim preclusion," and granted the City's motion, dismissing the case with prejudice. (Ex. G.)

33. MIB filed a notice of appeal with the Seventh Circuit Court of Appeals.

34. In lieu of litigating the matter further, the parties entered into a settlement, and the federal appeal was voluntarily dismissed.

35. The Southern District of Indiana's decision was not vacated.

² The City requests the Court take judicial notice of Cause No. 1:23-cv-00001-TWP-TAB and the filings therein.

36. Accordingly, the federal court action confirms that the BZA's decision to affirm the Director's determination that MIB was and is a Sex Shop is final and conclusive.

37. The federal court's order also conclusively establishes that MIB is precluded by *res judicata* from challenging that decision any further.

II. MIB's Second Sex Shop Location

38. On June 3, 2024, MIB announced it reopened its Sex Shop in Noblesville at a new location—15529 Stony Creek Way, Suite 101, Noblesville, IN 46060 ("Store Two").

39. MIB's Store Two is around the corner from the location of Store One.

40. MIB's Store Two is in the same industrial center where Store One was located.

41. MIB's Store Two is also located in an I-1 zoning district.

42. MIB did not contact the City to seek a variance of use or to file a petition to rezone the property.

COUNT I: Declaratory Judgment

43. The City incorporates and restates the allegations in the preceding paragraphs.

44. MIB is—and has conclusively been determined to be—a Sex Shop, as defined by the Noblesville UDO.

45. MIB is bound by that prior conclusive determination.

46. The Director sent a Letter of Determination to MIB on or about April 26, 2022, that stated that per the plain language in the Noblesville UDO, MIB was a "Sex Shop" and not permitted to operate in the zoning district where it was located in the City. (Ex. A.)

47. MIB appealed that determination.

48. The Noblesville BZA held a public hearing on August 1, 2022 and affirmed the Director's Determination that MIB is a Sex Shop and is prohibited from operating its business in an I-1 zoning district.

49. MIB appealed that decision to the Hamilton County Circuit Court and lost.

50. Therefore, the Director's determination is final.

51. MIB is prohibited from operating its business in all zoning districts where Sex Shops are prohibited in Noblesville.

52. MIB's Store Two violates the Director's determination.

53. These same parties litigated this matter a second time in the Southern District of Indiana in 2023.

54. MIB's federal case was dismissed under the doctrine of claim preclusion.

55. MIB was then—and is still today—precluded under *res judicata* from challenging the Director's determination and the Noblesville BZA's August 1, 2022 decision.

56. As such, the City seeks the following declarations from this Court:

a. MIB, Polokoff, and Kissee are bound by the Director's April 2022 determination that its business is a Sex Shop, as defined by the Noblesville UDO;

b. MIB, Polokoff, and Kissee are prohibited from operating its Store Two;

c. MIB, Polokoff, and Kissee are prohibited from operating its business in all I-1 zoning districts in Noblesville; and

d. MIB, Polokoff, and Kissee are prohibited from operating its business in all zoning districts in Noblesville where Sex Shops are not a permitted use.

COUNT II: INJUNCTIVE RELIEF

57. The City incorporates the preceding paragraphs by reference as if fully restated here.

58. The City seeks an injunction prohibiting MIB, Polokoff, and Kissee from continuing to operate its business at its Store Two location at 15529 Stony Creek Way, Suite 101, Noblesville, IN 46060.

59. The Director sent a Letter of Determination to MIB on or about April 26, 2022, that stated that per the plain language in the Noblesville UDO, MIB was a “Sex Shop” and not permitted to operate in the zoning district where it was located in the City. (Ex. A.)

60. The Noblesville BZA affirmed the Director’s determination and conclusively affirmed that MIB is a Sex Shop under the definitions in the Noblesville UDO.

61. As such, MIB, Polokoff, and Kissee are prohibited from operating its business in the I-1 zoning district, which is where Store Two is located.

62. The City has more than a reasonable likelihood of success at trial.

63. The City has no adequate remedy at law because MIB’s use of the Property is in violation of the Noblesville BZA’s decision and will have significant negative effects on the City, the neighboring properties, and its residents who work and live there.

64. MIB’s continued operation will cause irreparable harm.

65. The threatened injury to the City outweighs the potential harm to MIB from the granting of the injunction.

COUNT III: CODE ENFORCEMENT

66. The City incorporates the preceding paragraphs by reference as if fully restated here.

67. Indiana Code section 36-7-4-1014 states, in relevant part, "The ... enforcement official designated in the zoning ordinance may bring an action under IC 36-1-6 to enforce any ordinance adopted or action taken under this chapter."

68. Indiana Code section 36-7-4-1014(f) states, in relevant part, that, "If the designated enforcement official is successful in an action brought under this section, the respondent shall bear the costs of the action. A change of venue from the county may not be granted in such an action."

69. The City, pursuant to Indiana Code section 36-7-4-1014, brings this action to enforce the provisions of its UDO and to enforce the prior action that was taken under Indiana Code to cease MIB's operations in a zoning district where Sex Shops are prohibited.

70. MIB's Store Two is in violation of Noblesville's UDO.

71. MIB's Store Two is in violation of the Director's April 2022 Letter of Determination, which was affirmed by the BZA and is a final decision.

72. The City has already litigated this matter twice.

73. The actions of MIB, Polokoff, and Kissee are intentional and egregious.

74. The Court has the authority, pursuant to Indiana Code section 36-1-6-4(b), to take the following action for violations of City ordinances:

- (1) Issuing an injunction.
- (2) Entering a judgment.
- (3) Issuing a continuous enforcement order (as defined in IC 36-7-9-2).
- (4) Ordering the suspension or revocation of a license.
- (5) Ordering an inspection.

- (6) Ordering a property vacated.
- (7) Ordering a structure demolished.
- (8) Imposing a penalty not to exceed an amount set forth in IC 36-1-3-8(a)(10).
- (9) Imposing court costs and fees in accordance with IC 33-37-4-2 and IC 37-5.
- (10) Ordering a defendant to take appropriate action to bring a property into compliance with an ordinance within a specified time.
- (11) Ordering a municipal corporation to take appropriate action to bring a property into compliance with an ordinance in accordance with IC 36-1-6-2

Ind. Code § 36-1-6-4.

75. The Court should order MIB, Polokoff, and Kissee responsible for all costs incurred by the City to enforce the Director's April 2022 determination. *See* Ind. Code § 36-7-4-1014(f).

76. Additionally, the Court should order penalties against MIB, Polokoff, and Kissee, in accordance with Section 2 of Appendix A to the Noblesville UDO, which provides as follows:

Violations of the provisions of this Ordinance or failure to comply with any of its requirements, including violations of conditions and safeguards established in connection with grants of variances, conditional uses, or planned developments shall constitute a common nuisance. Any person convicted of violating this Ordinance shall be fined three hundred dollars (\$300.00) and not more than two thousand five hundred dollars (\$2,500) for a first violation, and not less than five hundred dollars (\$500) and not more than seven thousand five hundred dollars (\$7,500) for subsequent violations. Each day of any violation or non-compliance shall constitute a separate and distinct violation of this Ordinance. In addition, any person convicted of violating this Ordinance shall be required to pay all costs and expenses, including the City and Department's attorneys' fees, related to adjudicating the offense.

See Exhibit D – Appendix A Schedule of Fees, Charges, and Expenses.

PRAYER FOR RELIEF

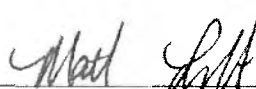
WHEREFORE, the City respectfully requests that this Court:

- (1) Issue judgment in its favor and against MIB, Polokoff, and Kissee;
- (2) Declare MIB's operation of its retail store at 15529 Stony Creek Way, Suite 101, Noblesville, IN 46060 to be in violation of the Noblesville BZA's August 1, 2022 decision;
- (3) Declare MIB to be estopped under *res judicata* from operating its business at 15529 Stony Creek Way, Suite 101, Noblesville, IN 46060;
- (4) Declare MIB to be estopped under *res judicata* from operating its business in all zoning districts where Sex Shops are prohibited in Noblesville;
- (5) Declare Polokoff and Kissee to be estopped under *res judicata* from operating this business in all zoning districts where Sex Shops are prohibited in Noblesville;
- (6) Issue an injunction ordering MIB to immediately cease all operations at the 15529 Stony Creek Way, Suite 101, Noblesville, IN 46060 location;
- (7) Issue an injunction ordering MIB, Polokoff, and Kissee to not open this business in any zoning district in Noblesville where Sex Shops are prohibited;
- (8) Issue a continuous enforcement order against MIB to prohibit it from opening its business in any zoning district in Noblesville where Sex Shops are prohibited;
- (9) Issue a continuance enforcement order against MIB, Polokoff, and Kissee prohibiting MIB, Polokoff, and/or Kissee from operating any business that is similar to MIB in any zoning district in Noblesville where Sex Shops are prohibited;
- (10) Award penalties, reasonable attorney's fees and costs, pursuant to Indiana Code section 36-7-4-1014(f) and Section 2 of Appendix A to the Noblesville UDO; and

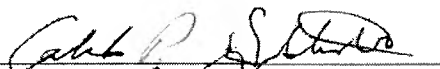
(11) Award all other just and proper relief.

VERIFICATION

I affirm under the penalty of perjury that the above and foregoing statements are true to the best of my knowledge.



Matt Light, Deputy Mayor



Caleb Gutshall, Director

Dated: June 13, 2024

Respectfully submitted,

/s/ Beth A. Copeland

Beth A. Copeland, 25581-49
Taft Stettinius & Hollister LLP
One Indiana Square, Suite 3500
Indianapolis, Indiana 46204-2023
P: (317) 713-3500 / F: (317) 713-3699
bcopeland@taftlaw.com

Counsel for Petitioners