



1. In 2022, MIB operated a retail store front at 15480 Herriman Boulevard, in Noblesville, Indiana (“Store One”).

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

3. 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.

4. Specifically, the Letter of Determination stated that per UDO, MIB falls under the definition of a “Sex Shop” and is not permitted to operate in the zoning district where it was located in the City.

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

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

7. The BZA was asked to determine, based on the evidence presented, whether MIB’s operations met the City’s definition of “Sex Shop.”

8. At the conclusion of the public meeting, the BZA voted to deny the appeal, based upon the Director’s determination that MIB is a “Sex Shop” as defined in Article 2 of the UDO.

9. The BZA adopted Findings of Fact in support on September 6, 2022.

10. 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]."

*a. State Court Case*

11. 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.<sup>1</sup>

12. 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).

13. 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.

14. The parties fully briefed the matter, and the court dismissed MIB's Petition for Judicial Review on October 10, 2022.

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

16. 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*

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<sup>1</sup> The Court takes judicial notice of Cause No. 29C01-2208-PL-005996 and the filings therein.

17. 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.<sup>2</sup>

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

19. 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.

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

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

22. The parties negotiated and agreed that MIB would be permitted to operate a warehouse/e-commerce facility at a specific location in Noblesville, IN, so long as MIB, Polokoff, and Kissee complied with specific conditions.

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

#### B. MIB's Second Location

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

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<sup>2</sup> The Court takes judicial notice of Cause No. 1:23-cv-00001-TWP-TAB and the filings therein.

25. MIB's Store Two is around the corner from the location of Store One.
26. MIB's Store Two is in the same industrial center where Store One was located.
27. MIB's Store Two is also located in an I-1 zoning district.
28. MIB did not contact the City to seek a variance of use or to file a petition to rezone the property.
29. On June 13, 2024, the City filed a Complaint for Declaratory Judgment against MIB, Polokoff, and Kissee.
30. On June 14, 2024, the City filed a Motion for Preliminary Injunction against MIB, Polokoff, and Kissee.
31. On August 2, 2024, a hearing was held on the City's Motion for Preliminary Injunction.
32. At the August 2, 2024 hearing, MIB co-owner Ryan Polokoff stated all MIB business operations are currently conducted from the Store Two location.

## **II. CONCLUSIONS OF LAW**

33. To prevail on a motion for preliminary injunction, "the moving party must demonstrate the following four elements by a preponderance of the evidence: (1) there exists a reasonable likelihood of success at trial; (2) the remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action; (3) the threatened injury to the movant outweighs the potential harm to the nonmovant from

the granting of an injunction; and (4) the public interest would not be disserved by granting the requested injunction." *701 Niles, LLC v. AEP Ind. Mich. Transmission Co.*, 191 N.E. 3d 931 (Ind. Ct. App. 2022).

34. However, "when the acts sought to be enjoined are unlawful, the plaintiff need not make a showing of irreparable harm or a balance of hardship in his favor." *Sadler v. State ex rel. Sanders*, 811 N.E.2d 936, 953 (Ind. Ct. App. 2004).

35. Thus, the City only need show that (i) it has at least a reasonable likelihood of success at trial by establishing a prima facie case and (ii) the public interest would not be disserved by issuing the injunction. *See Curley v. Lake County Bd. of Elections and Registration*, 896 N.E.2d 24, 33 (Ind. Ct. App. 2008); *Short on Cash.net of New Castle, Inc. v. Dep't of Fin. Insts.*, 811 N.E.2d 819, 823 (Ind. Ct. App. 2004). This is known as the *Per Se Rule*.

36. Based on the evidence presented at the hearing, the City is likely to prevail on the merits of this action.

37. Indiana Code section 36-1-6-4(a)(1) states that, "[a] municipal corporation may bring a civil action as provided in IC 34-28-5-1 if a person: (1) violates an ordinance regulating or prohibiting a condition or use of property."

38. Indiana Code section 36-1-6-4(b)(1) states that, "[a] court may take any appropriate action in a proceeding under this section, including any of the following actions: (1) Issuing an injunction."

39. Without a variance of use or a rezoning, MIB is prohibited from operating its business in all zoning districts, including the I-1 district, where Sex Shops are prohibited in Noblesville.

40. Pursuant to the settlement agreement in the Federal case, MIB is still permitted to operate a warehouse/e-commerce facility at the specific location in Noblesville where the parties agreed, so long as MIB, Polokoff, and Kissee comply with specific conditions.<sup>3</sup>

41. The City has also established that the public interest will not be disserved by the entry of injunctive relief. MIB's Store Two is located close to Cherish Center, a nationally accredited child advocacy group's building. Further, MIB desires to operate in a zoning district where Sex Shops are not permitted by right, MIB, Polokoff and Kissee have the ability to seek a variance of use or file for a rezoning.

42. The City established that MIB's actions are unlawful. MIB has—and continues to—violate Noblesville's UDO by operating a Sex Shop in an I-1 zoning district. Under the *Per Se* Rule, the City is entitled to injunctive relief.

43. Even without the *Per Se* Rule, the City is still entitled to injunctive relief.

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<sup>3</sup> At the August 2, 2024 hearing, it was represented to the Court without objection that the settlement agreement between MIB and the City to resolve the Federal lawsuit permitted MIB to operate its e-commerce business out of a specific warehouse location. It was also represented to the Court without objection that MIB no longer operates the warehouse location. However, because no evidence was presented as to MIB's inability to operate out of the warehouse location, the Court has nothing to contradict the City's assertion that MIB can continue to operate its e-commerce business from the specified warehouse under the requested injunctive relief.

44. The City lacks an adequate remedy at law. Monetary damages cannot compensate the harm caused to Noblesville and its constituents who rely on fair and consistent enforcement of zoning regulations by MIB's disregard of local law and the prior judicial processes. The City spent significant time and resources in 2022 and 2023 litigating the prior state and federal lawsuits against MIB. Months after settling the case, MIB reopened its business in the same zoning district where its first store was located. Monetary damages cannot compensate the City if MIB is permitted to continue operating this business in violation of the law.

45. The balance of harms also favors issuance of injunctive relief. MIB's operation of Store Two is in violation of the law. MIB is permitted to operate a warehouse/e-commerce facility at a specific location in Noblesville, where it can store and ship its items to continue its online business.

### **III. ORDER**


46. IT IS ORDERED, ADJUDGED AND DECREED by the Court that the City's request for a preliminary injunction under Trial Rule 65 is GRANTED. MIB is to immediately cease all operations at the 15529 Stony Creek Way, Suite 101, Noblesville, IN 46060 location.

47. IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that MIB, Polokoff, and Kissee enjoined from reopening this business in any zoning district in Noblesville where Sex Shops are prohibited, unless approved through a



variance of use or a rezoning petition by the City. The Court hereby establishes this Order as a continuance enforcement order for the City, as defined in Indiana Code section 36-7-9-2.

Date: August 8, 2024

  
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Hon. Michael A. Casati  
Hamilton County Superior Court

