

ORDINANCE 401

AN ORDINANCE PROHIBITING PUBLIC NUDITY

PURSUANT to SDCL: 9-19-3, 9-29-1, 9-29-9 & 9-29-13 and consistent with the purpose of creating and maintaining a safe, noninjurious environment for the public welfare and health of the residents of Box Elder and their children, the Box Elder City Council desires to ban public nudity in an effort to control adverse effects that could be caused by; appearing in public in a state of nudity, preserve the quality of urban life, prevent crime, prevent prostitution, prevent sexual harassment, protect Box Elder's retail trade, and, preserve the property values and character and quality of neighborhoods and commercial districts for the residents of Box Elder, and

WHEREAS, the existence of sexually transmitted diseases is a legitimate health concern of Box Elder that demands reasonable regulation of public nudity in order to protect the health and well-being of the residents of Box Elder, 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 secondary effects of public nudity, and

WHEREAS, this Ordinance hereby repeals Ordinance 350 and Ordinance 354, and

WHEREAS, it is the purpose of this ordinance to promote the health, safety and general welfare of the citizens of the City of Box Elder. Similarly, it is not the intent nor effect of this section to restrict or deny access by adults to adult oriented entertainment to their intended market, unless otherwise restricted by law.

NOW, THEREFORE, BE IT ORDAINED BY THE BOX ELDER CITY COUNCIL AS FOLLOWS:

Section 1: PURPOSE.

The purpose of this Ordinance is to prohibit public nudity in order to protect the general health, safety and welfare of the citizens of the City of Box Elder. The City of Box Elder does hereby ordain that it is in the best interest of the public health, safety and general welfare of the people of the City of Box Elder that public nudity does hereby constitute a public nuisance.

Section 2: FINDINGS OF THE CITY COUNCIL.

The Box Elder City Council makes the following findings regarding the need to ban public nudity. The findings are based upon the experiences of other cities who conducted various studies, where appearing in a state of nudity was permitted, as studied by the City Council. Additionally, the City Council also based its findings on the United States Supreme Court

Decisions of City of Renton v. Playtime Theatres, 475 U.S. 41, City of Erie v. Pap's A.M., 529 U.S. 277 and Young v. American Mini Theatres, Inc. 427 U.S. 50.

(A). Public nudity can contribute to an increase in criminal activity in the area in which public nudity is displayed, taxing city crime-prevention programs and law enforcement services, as well as causing increased costs for prosecution services.

(B). Appearing in a state of nudity can increase the risk of exposure to communicable diseases including but not limited to Acquired Immune Deficiency Syndrome (AIDS) for which there is currently no cure. Experiences of other cities indicate that businesses allowing the display of public nudity can facilitate the spread of communicable diseases by virtue of the design and use of the premises, thereby endangering not only the patrons of such establishments but also the general public.

(C). The risk of criminal activity and/or public health problems can be minimized through a content-neutral ban on public nudity.

Section 3: CONCLUSIONS OF THE CITY COUNCIL.

In direct furtherance of the substantial goals of public health, safety, and welfare, the City Council adopts the following regulations, recognizing that it has a great interest in the promotion of health and the prevention of criminal activity. It is not the intent of this Ordinance to inhibit the freedom of speech component of expressive conduct; instead, this Ordinance represents a balancing of competing interests: reduced criminal activity through the prohibition of public nudity versus the protected rights of expressive conduct. Thus, this Ordinance is designed to alleviate undesirable social problems and secondary effects that accompany appearing in a state of nudity without curtailing the constitutionally protected expression.

Section 4: COMMITTING A PUBLIC NUISANCE; EXCEPTION.

(A) A person who knowingly or intentionally does any of the following in a public place commits a public nuisance:

- (1) Engages in sexual intercourse;
- (2) Appears in a state of nudity; or
- (3) Fondles the genitals of himself, herself or another person.

(B) The prohibition set forth in subsection (A) (2) hereof shall not apply to:

- (1) Any child under ten years of age; or
- (2) Any individual exposing a breast in the process of breast feeding an infant under two years of age.

Section 5: DEFINITIONS.

As used in this Ordinance, certain terms are defined as follows:

(A) "Nudity" or "Appearing in a state of nudity" means the showing of the human male or female genital, pubic area or anus with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which devices simulates and gives the realistic appearance of nipples and/or areola.

(B) "Public place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such place of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms, or halls limited to specific members, restricted to adults, or to patrons invited to attend, whether or not an admission charge is levied.

Section 6: ABATEMENT OF NUISANCES AUTHORIZED.

In addition to the specific penalties provided in this Ordinance and Ordinance #308, it is hereby declared that any building, portion of a building, or enclosed place regularly used for the prohibited display of public nudity is a public nuisance, subjecting the owner, proprietor or other operator thereof to any and all actions authorized by the Laws of South Dakota for the abatement of public nuisances, including, but not limited to the procedures set forth in Box Elder City Ordinance #308.

Section 7: CONSTRUCTION AND SEVERABILITY.

It is the intention of the City of Box Elder that the provisions of this Ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free speech, free expression, due process, equal protection or other fundamental rights consistent with the purposes of this article. Should a court of competent jurisdiction determine that any part of this article, or any application or enforcement of it is excessively restrictive of such rights or liberties, then such portion of the article, or specific application of the article, shall be severed from the remainder, which shall continue in full force and effect.

Section 8: PENALTY.

Whoever violates any provision of this Ordinance, either by commission of appearing in a state of nudity, or by the promotion or maintenance of public nudity as property owner, proprietor or manager of a business and said violator fails to discontinue the public nuisance upon lawful request by the Box Elder Police Department, the failure to obey the request shall be deemed a Class 2 Misdemeanor, failure to obey a police officer.

Section 9: FILING.

The City Finance Officer shall file copies of the Ordinance in their office, which copies shall be available for inspection by any person(s) during regular office hours.

Section 10: PUBLICATION.

The City shall publish the title of this Ordinance and the Ordinance in the official newspaper of the City with notice that a printed copy of the Ordinance is available for inspection by any person during regular office hours at the office of the City Finance Officer.

Section 11: EFFECTIVE DATE.

This Ordinance shall take effect upon its passage and publication.

Be It Ordained that this Ordinance shall become effective in accordance to law.



Seal:

Attest:

Cindy (Anderson) Schickert

Cindy (Anderson) Schickert
Finance Officer

Vern Klenzle

Vern Klenzle
Mayor

First Reading: *September 16, 2003*
Second Reading: *October 7, 2003*
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