

STATE OF INDIANA ) IN THE HAMILTON CIRCUIT COURT  
 ) SS:  
COUNTY OF HAMILTON ) CAUSE NO.: \_\_\_\_\_

MIB, LLC, )  
Petitioner/Appellant, )  
 )  
v. )  
 )  
BOARD OF ZONING APPEALS )  
FOR THE CITY OF NOBLESVILLE, )  
INDIANA, et. al., )  
Respondent/Appellee. )

**VERIFIED PETITION FOR JUDICIAL REVIEW**

Comes now the Petitioner/Appellant, MIB, LLC (“MIB”), by counsel, and files its Verified Petition for Judicial Review of the decision made by the Board of Zoning Appeals for the City of Noblesville, Indiana (“BZA”) on August 1, 2022. In its support of its Verified request, MIB states as follows:

1. This Verified Petition for Judicial Review is filed pursuant to the requirements as set forth in Indiana Code §36-7-4-1600 *et. seq.* to challenge the decision of the BZA entered on August 1, 2022, as a result of a public hearing that occurred on that date (the “Hearing”).
2. MIB is an Indiana limited liability company, whose principal place of business is 14715 Macduff Drive, Noblesville, Indiana, 46062, and which is operating its only location at 15480 Herriman Boulevard, Noblesville, Indiana, 46060.
3. The BZA is the board whose decision is being appealed. The BZA’s address is 16 S. Tenth Street, Noblesville, Indiana, 46060.
4. At the Hearing, the City of Noblesville presented evidence to the BZA through and by Denise Aschleman, Senior Planner, and Beth Copeland, City Attorney.

5. At the Hearing, the BZA received evidence from MIB, through and by the undersigned and manager of MIB, Ryan Polokoff; the BZA also received testimony from one of MIB's suppliers, and several remonstrators.

6. Prior to the Hearing, the BZA was presented with a packet of information from the City of Noblesville, many pages of letters of support and remonstrance, and MIB's appeal, including a narrative statement providing case law supporting MIB's position, which documents were made a part of the record at the Hearing.

7. The Hearing occurred pursuant to the Noblesville Ordinances, as an appeal from a Letter of Determination from Caleb Gutshall, Director Planning and Development, Noblesville, Indiana, issued on or about April 26, 2022. *See* Exhibit "A" attached hereto and incorporated herein.

8. In the April 26, 2022 letter, the City of Noblesville determined that MIB was in violation of two (2) definitions found in Article 2 of the Unified Development Ordinances ("UDO"); specifically stating that MIB was a sex shop, selling sexually oriented toys and/or novelties ("Determination"). *Id.*

9. Pursuant to the instructions provided along with the Determination, on May 27, 2022, MIB filed its appeal of the Determination with the BZA.

10. The Hearing was the next procedural step, and last administrative remedy available to MIB.

11. At the Hearing, the BZA determined that MIB is a sex shop, even though the evidence presented by the City of Noblesville, remonstrators, and MIB showed that the business is not a sex shop and is not in violation of the two (2) definitions found in Article 2 of the

Unified Development Ordinances (“UDO”); specifically stating that MIB was a sex shop, selling sexually oriented toys and/or novelties.

12. The formal letter containing the opinion of the BZA from the Hearing is attached hereto and incorporated herein as Exhibit “B.”

13. During the Hearing, the BZA board members were concerned with the location of MIB and the fact that due to this “issue” everyone knows where it is. This is not MIB’s fault, nor is it grounds to determine that MIB is a sex shop.

14. Pursuant to Indiana Code §36-7-4-1603(a)(1), MIB has Standing for its request for Judicial Review as it is an entity to whom the zoning decision is specifically directed. Additionally, pursuant to subsection (a)(2)(A), MIB further qualifies as it is aggrieved by the BZA decision issued on August 1, 2022, when MIB participated in the public hearing and presented relevant evidence.

15. MIB has exhausted all of its administrative remedies available through the BZA, and the BZA’s decision is being challenged in this appeal. Indiana Code §36-7-4-1604(a).

16. This Verified Petition for Judicial Review is filed within the time period as required by Indiana Code §36-7-4-1605.

17. Contemporaneous with the filing of this Verified request, MIB is requesting the record from the Hearing held on August 1, 2022.

18. Noting for the record that a court reporter was present and transcribed the Hearing; the transcript will be provided to the Court along with the full record provided by the BZA.

19. MIB is not a sex shop.

20. MIB is an FDA registered establishment, selling items that can be purchased with Health Savings Account (HSA) funds, Flexible Spending Account (FSA) funds, and other items.

21. In Exhibit A, the City of Noblesville notes that no more than five percent of the establishment's stock in trade may consist of sexually oriented toys or novelties, and no more than five percent of its gross public floor area may be devoted to the display of sexually oriented toys or novelties.

22. The UDO defines sexually oriented toys or novelties as "instruments, devices, or paraphernalia designed as representations of human genital organs or female breasts, or designed or marketed primarily for use to stimulate human genital organs".

23. Therefore, the City of Noblesville failed to meet its burden because MIB does not sell, and does not intend to sell sexually oriented toys or novelties.

24. The City of Noblesville objected to how MIB chooses to tag itself on social media posts, and presented definitions found in the Urban Dictionary and Wikipedia to determine that MIB is a sex shop.

25. Where and how MIB chooses to advertise is protected by the United States Constitution. MIB, much like other retailers like Party City, Victoria's Secret, Walmart, simply shows what products are available. Products are not advertised as sexual in nature, because they are not sexually oriented toys or novelties.

26. The BZA's decision in fact, purely speculates regarding the use of products sold by MIB, in the privacy of a purchaser's home; this is not the standard provided in the UDO or other Noblesville ordinances to determine if an establishment is or is not a sex shop.

27. MIB does not market any of its merchandise primarily for genital stimulation, nor does it sell products primarily designed for genital stimulation.

28. For example, as a registered FDA establishment, MIB sells a variety of adult diapers. Adult diapers are not a product primarily designed for genital stimulation, nor are they marketed by MIB for that use.

29. In Indiana, land use ordinances “must be precise, definite, and certain in expression to inform both the landowner and the municipality to act with assurance and authority regarding local land use decisions”. *T.W. Thom Const., Inc. v. City of Jeffersonville*, 721 N.E. 2d 319, 327 (Ind. Ct. App. 1999).

30. Ordinances must be construed to favor the free use of land and are not extended by implication. *Id.*

31. In this case, the BZA extended the ordinance, without relying on law or facts, leading to government overreach, based upon speculation.

32. Certainly, a city is given broad authority in legislating an ordinance but once adopted, such ordinance must be narrowly construed. *Yater v. Hancock County Planning Comm'n*, 614 N.E.2d 568, 574 (Ind. Ct. App. 1993).

33. By construing diapers, costumes, and accessories as sexually oriented toys or novelties, the BZA expressly disregarded Indiana law by extending the construction of the ordinance through broad implication.

34. There is no evidence to support the notion that MIB operates in violation of the ordinance. Such assumption amounts to pure speculation. *See Wright v. Northrop*, 621 N.E.2d 1142, 1146 (Ind. Ct. App. 1993) (reversing zoning board's decision where “[t]he findings made by the [b]oard amounted to little more than speculative conclusions by the members”).

35. Importantly, under Indiana law, “[t]he only determination to be made by” the BZA should be whether MIB is “in conformity with the requirements of the zoning ordinance.”

*Metro Bd. of Zoning Appeals of Marion Cty. v. Shell Oil Co.*, 395 N.E.2d 1283, 1285 (Ind. Ct. App. 1979).

36. The BZA is duty-bound to make findings of fact tailored to address specific facts presented to it. *Town of Munster Bd. of Zoning Appeals v. Abrinko*, 905 N.E.2d 488, 491-92 (Ind. Ct. App. 2009).

37. The specific facts presented clearly demonstrate that MIB operates lawfully and respectfully within the meaning of the ordinances. The BZA is impeding MIB's right to commerce, and judging the business based upon speculations concerning what purchasers do with the products in the privacy of their own homes, instead of applying the language of the ordinance as written.

38. MIB has incurred significant attorney's fees for fighting the government overreach endorsed by the BZA, and requests that the Court order a reasonable amount of attorney's fees in this matter.

39. MIB has suffered pecuniary loss from the BZA's arbitrary, capricious, abuse of discretion and unlawful enforcement of a definition within an ordinance. The BZA exceeded its statutory authority basing its opinion on unlawful speculation, and therefore, MIB is also seeking damages for its pecuniary loss in this case.

WHEREFORE, MIB, LLC, by counsel, requests that this Court conduct a Judicial Review of all documents provided to the BZA, review the record from the public hearing, review the transcription from the public hearing, find that MIB was harmed by the BZA's decision pursuant to Indiana Code §36-7-4-1614, set aside the zoning decision and compel the decision that was unlawfully withheld to allow MIB to continue to operate, as it has, at its current

location; order a reasonable award of attorney's fees, damages for pecuniary losses, and for all other remedies due and just in the premises.

I AFFIRM UNDER THE PENALTIES FOR PERJURY, THAT THE FOREGOING REPRESENTATIONS ARE TRUE.

Ryan Polokoff

Ryan Polokoff  
MIB, LLC

Respectfully submitted,

:/s/ Silvia B. Miller

Silvia B. Miller, #23684-49

### **CERTIFICATE OF SERVICE**

I hereby certify that the above was electronically filed by means of the Court's Electronic Filing System (IEFS) on August 9, 2022.

I further certify that a copy of the foregoing was served upon the following individuals by Courier on the same date of filing:

Mike Field  
Chairperson  
Noblesville City Hall  
16 S. 10<sup>th</sup> Street  
Noblesville, IN 46060

David Burtner  
Vice - Chairperson  
Noblesville City Hall  
16 S. 10<sup>th</sup> Street  
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Member  
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Caleb Gutshall  
Director Planning and Development  
Noblesville City Hall  
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Noblesville, IN 46060

I further certify that a courtesy copy of the foregoing was forwarded to the following counsel:

Jon Hughes – via IEFS and [jhughes@boselaw.com](mailto:jhughes@boselaw.com)

Beth Copeland – via IEFS and [BCopeland@taftlaw.com](mailto:BCopeland@taftlaw.com)

*/s/ Silvia B. Miller*

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