

IN THE CLARKSVILLE TOWN COURT
STATE OF INDIANA

TOWN OF CLARKSVILLE

vs.

CAUSE NO. 10I01-0810-OV-576
10I01-0905-OV-214

JOSHUA JANTZEN

ORDER ON MOTION TO DISMISS

This matter having come before the Court upon the Defendant's Motion to Dismiss, and the Court having reviewed the pleadings of the parties, the amicus brief, and the oral arguments of the parties, does now FIND, ORDER AND ADJUDGE as follows:

1. The Town of Clarksville ("Town") enacted Ordinance 2005-G-03 to regulate sexually oriented businesses.
2. Ordinance 2005-G-03 provides for the regulation of sexually oriented businesses in a variety of ways, including licensing requirements for employees, hours of operation, interior construction, location and distance from other entities.
3. The Defendant, Joshua Jantzen, is an employee of Theatair X, which both parties agree is a sexually oriented business. Theatair X has been in business for over forty (40) years.
4. The Town issued citations to Jantzen for alleged violations of Ordinance 2005-G-03, specifically for violating the ordinance's hours of operation section, and sections regarding the interior construction and lighting of the business.
5. The Defendant filed a Motion to Dismiss arguing that the ordinance was improperly enacted and is unconstitutional, both as drafted and as applied, and that it cannot be saved by a severability clause.

6. The Defendant argued and the Town conceded that the procedural requirements of the statutes providing for the enactment and amendment of zoning statutes must be adhered to in order for such ordinance to be valid. Additionally, the Town agreed that those portions of Ordinance No. 2005-G-03 regarding location and distance requirements are zoning regulations.
7. I.C. 36-7-4-405 requires advisory plan commissions to make recommendation to the municipal legislative body for zoning laws and changes. The Town also acknowledged that Ordinance No. 2005-G-03 was not presented to the Town's advisory plan commission for review and recommendation prior to enactment by the Town Council, and it conceded that the portion of the ordinance regarding the location of sexually oriented businesses (Section 13) is invalid.
8. Zoning is the division of a municipality or other local community into districts and the regulation of buildings and structures according to their construction *and the nature and extent of their use, or the regulation of land according to its nature and uses.* (Emphasis added). 30 I.L.E. Zoning § 1. pg.579 (2008). The defendant contends that the ordinance is a zoning ordinance and is entirely void rather than just Section 13.
9. For purposes of determining whether a particular ordinance is a zoning ordinance, "use" refers to not *how* the property is used but what *type* of land use was permitted. (Emphasis added). See *City of Carmel v. Martin Marietta Materials*, 383 NE2d 781 (Ind. 2008). An ordinance may be found to be a zoning ordinance not because it regulates the use of land but because it dictates what type of land use is permitted and where. See *id.*
10. The Court has reviewed several state and federal decisions which have examined the validity of various ordinances regulating sexually oriented businesses. While there are

variations in their provisions, one seemingly universal characteristic of such ordinances is that they employ both what type of land use was permitted and where (zoning), along with how the businesses could operate. Such is the case here.

11. The Town argues that just because Section 13 was adopted incorrectly and was not enacted as a zoning ordinance, all remaining sections that are not related to zoning issues are still valid as a result of the severability clause contained in the ordinance. Thus, it maintains that the remainder of the ordinance without Section 13 is valid and enforceable.
12. The existence or non-existence of a severability clause is only one indication of legislative intent. *Its presence or absence is not binding on a court in determining whether a statute should be enforced after the excision of unconstitutional portions. Indiana Ed. Employment Relations Bd. v. Benton Comm. School Corp. (1977), 266 Ind. 491, 510, 365 N.E. 2d 752, 761-62 (Emphasis added).* ("The presence of a severability clause is an indication of legislative intent, although it is not binding on courts.") (internal citations omitted); *id.* (noting that these principles apply equally to locally enacted ordinances as statutes).

"In ascertaining legislative intent the entire statute and the object sought to be obtained must be considered 'If one provision of an enactment is invalid and the others valid, the latter are not affected by the void provision, unless they are plainly dependent upon each other, and so inseparably connected that they cannot be divided without defeating the object of the statute.' ... 'where the provisions of an act are mutually connected with, and dependent on, each other, warranting the belief that the Legislature intended them to operate as a whole, the invalidity of part of an act renders invalid all provisions which are thus dependent, connected, or integral. If, after the

elimination of an invalid part of an act, the remainder is not complete, the whole act is void.' *State v. Gilbert (1966), 247 Ind. 544, 350-51, 219 N.E. 2d 892, 895-96.*

However, "in the final analysis, the [issue of legislative intent as to severability] come(s) down to the aforementioned ultimate test, i.e., would the Legislature have passed the valid portion without the invalid had it known of the invalidity." *Benton, 266 Ind. At 507-508, 365 N.E.2d at 760.*

13. With regard to whether or not the Town would have adopted the ordinance had it been presented without the invalid features, the Court believes that answer is dependent on whether the provision omitted is one which regulates the use of the land or what type of land use was permitted at what location. In other words, the Court believes the Town may very well have passed Ordinance 2005-G-03 without one or more of the hours of operations, public nudity or escort agency regulations, etc. On the other hand, the Court believes it extremely doubtful that the Town would have passed the ordinance without the location restrictions (zoning) here conceded to be invalid. If the Town were to do so, there would be no prohibition in the location of a sexually oriented business within five hundred (500) feet of a residential zone, church, schools, parks, etc. In fact, § 117.05(A) would mandate the enforcement officer to issue a license in one of such locations in the absence of one of the prohibited conditions therein being present. Such a result would be clearly contrary to the very purpose for which the ordinance was enacted.
14. The licensing requirements contained in § 117.05(A) also suggest to the Court that the Town intended for all provisions of the ordinance to be mutually dependent and to operate as a whole in order to regulate sexually oriented businesses. Specifically, §

117.05(A)(7) is dependent on location restrictions in a zoning district in prohibiting the enforcement officer in issuing a license.

15. Based on the foregoing, the court concludes that Ordinance 2005-G-03 was enacted to provide a comprehensive response to what the Town perceived to be the negative effects of having a sexually oriented business within its community. Furthermore, the Court believes that the intent of the board in adopting the ordinance was that the provisions of the ordinance operate as a whole in order to achieve its stated purpose, and when the location regulations are eliminated from the ordinance, the remaining provisions are incomplete.
16. In sum, because the Court believes that the Town would not have adopted the ordinance without the regulation of what type of land use would be permitted and where, and that the provisions of the ordinance were intended to operate as a whole, the Court finds the ordinance is void in its entirety. Given the Court's conclusion, it is unnecessary to address the constitutionality of the ordinance.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss is hereby granted.

IT IS FURTHER ORDERED that the citations charging violations of the provisions of Ordinance 2005-G-03 are dismissed.

Dated this 25th day of January, 2010.


ROBERT L. BENNETT, SPECIAL JUDGE
CLARKSVILLE TOWN COURT

cc: Joan Henderson
Christopher Sturgeon
H. Louis Sirkin