

# NEW BUFFALO TOWNSHIP

## PLANNING COMMISSION

### MOTION

#### NOI, LLC – GENTLEMEN’S CLUB

Quincy White moves, seconded by \_\_\_\_\_, that the New Buffalo Township Planning Commission recommend that the New Buffalo Township Board **deny** the application of NOI, LLC (hereafter “NOI” or “Applicant”) for a Special Land Use Permit for an Adult Entertainment Business, specifically a nightclub with topless dancers, on the grounds that, as set forth below, the nightclub would not meet the criteria required for a Special Land Use under the New Buffalo Township Zoning Ordinance and has not fulfilled the requirements to apply for a license under the Township of New Buffalo Sexually Oriented Business Ordinance (the “SOB” Ordinance).

#### Findings of fact and conclusions of law:

- 1) The Clerk has sent out proper notice for a meeting at New Buffalo High School. A quorum was present at the meeting. The meeting was continued for two weeks at the same place.
- 2) The Property is owned by Lakeshore LLC, which has joined NOI in the Application.

- 3) The Planning Commission finds that major and sex-related crime rates have substantially increased in the vicinity of adult businesses such as this and that there is no reason to believe this would be different here. This finding is supported by a Site Security Survey by the Berrien County Sheriff's Department dated June 11, 2008, entitled "Information on Crime Rates/Crimes involving Sexual Orientated Businesses" as well as numerous land use studies from different cities by the National Law Center for Children and Families and other materials supplied by the Citizens for Community Values, Inc. This view was echoed by dozens of letters and statements during the Public Hearing.
- 4) The Township has two Ordinances that regulate enterprises such as this. One is the Township Zoning Ordinance, in effect since December 1, 2000. Topless dancing meets the definition of a regulated Adult Entertainment Business in Section 15.7A2k. The other is the SOB Ordinance passed on February 19, 2008, and effective 30 days thereafter. An establishment featuring topless dancers is an Adult Cabaret and therefore a Sexually Oriented Business under Sections 2C & 2P of the SOB Ordinance.
- 5) The Zoning Ordinance regulates Special Land Use Permits. The SOB Ordinance goes further requiring licenses for operators and employees and establishing detailed restrictions on certain activities.

6) The parcel is zoned C-2 Highway Commercial. Under the Zoning Ordinance Adult Entertainment Businesses are permitted in C-2 (and I Industrial) with a Special Land Use Permit. Under Section 15.4A the Township Board may approve a Special Land Use Request only if all of the following general standards are met:

**A. The intended use fails to meet the first general standard. Recognizing that the First Amendment to the U.S. Constitution gives a topless dancehall the right to exist, the Commission finds that the proposed site on LaPorte Road is particularly unsuitable and that there are other sites in the Township that would satisfy the requirements of the Zoning Ordinance. LaPorte Road is the access road to New Buffalo from the South. Indeed it leads past an exit from I-94, past the road leading to the new casino, directly into the City where, with a name change to Whittaker, it becomes the main street. As New Buffalo has grown as a resort community, development has extended southward on LaPorte. Recent development has included family hotels (Best Western, Super Inn, Holiday Inn) and restaurants extending beyond the road to the casino (McDonald's, Dominic's Restaurant, The Pub). A site plan for a fourth hotel has been filed with the Building Department. Also in the works is a 42-acre mixed-use commercial and residential planned unit**

**development. This is far more development than any other area in the Township. Careful nurturing of the LaPorte Road corridor is vitally important to the future of New Buffalo. A topless dancehall is neither harmonious nor compatible with a Holiday Inn or a McDonald's. It will change the essential character of LaPorte Road. No one will want to build a resort business next to it. Crime will increase, spreading outward from the "Gentleman's Club". The Commission finds that a topless dancehall on LaPorte Road is a serious threat to the future development of New Buffalo as a resort community. It would be at the tip of the arrow of the Southward expansion ( The Pub is only 450 feet away.) and would seriously impede expansion or stop it entirely. There are other sites in the Township which would satisfy the 300+ foot requirements of the Zoning Ordinance without the adverse effects generated on LaPorte Road including, without limitation, in the Industrial District at the Southwest end of the Township.**

- B. The second general standard is not met because adequate water and sewer are not yet available.
- C. The third general standard is met because the use will not create detrimental traffic, noise, smoke, fumes, glare or odor. If properly shaded and on

for at least one hour after closing, the night lighting in the parking area would be in compliance with the Zoning Ordinance.

- D. The fourth general standard is not met. In no way does a topless dance emporium represent an improvement to the use or character of the property or the surrounding area. As discussed above, it would harm the use, the character and the future development of the LaPorte Road corridor.**
- E. The fifth general standard is met because the site plan demonstrates compliance with the standards in Section 15.7A3.
- F. The sixth general standard is not met because the proposed use is not consistent with the New Buffalo Township Master Plan. The Master Plan defines the Township as “diverse, resort community” (p.1) and states the goal of industrial/commercial development as being “appropriate for a resort community” (p.28). A topless dancehall is not appropriate for a resort community. It breeds crime. It makes the surrounding land less desirable. The Master Plan does not justify it. It is in the Zoning Ordinance only as a result of its rights under the First Amendment to the Constitution and can operate as an SOB only to the extent those rights protect it.**

7) NOI's application for a Special Land Use Permit was filed on February 15, 2008, four days before the passage of the SOB Ordinance. Applicant, by its Attorney Mark A. LaRose, argues firmly that this is sufficient to create a prior non-conforming use, which would bar consideration of the application under the SOB Ordinance. See his letter dated March 18, 2008, to David Peterson et al. and his similarly addressed letter the next day citing two cases. After consultation with an attorney and its own research, the Commission finds this wrong as a matter of law. The landmark case is City of Lansing v. Dawley, 247 Mich. 394, 396, 225 N.W. 500 (1929) in which the Michigan Supreme Court upheld the applicability of a new ordinance even though defendant had obtained a building permit, ordered plans, paid for a survey, torn down an old barn and moved an old house before the ordinance was enacted. The Court held that even this was not enough to create a prior right. There have been at least nine cases in accord since then. Perhaps closest in point, Franchise Realty Interstate Corp. v. Detroit, 368 Mich. 276, 118 N.W.2d 258 (1962) holds that when the application for a permit is pending and rezoning takes place before the permit is issued, no vested rights accrue. Attorney LaRose's cases are nonpersuasive. Suffice it to say that in each case it is the municipality, not the applicant, who won.

8) Nor can NOI avoid the SOB Ordinance by recourse to the Michigan Zoning Enabling Act. Section 208. (1) of the Act provides in short that "If the use... is lawful

at the time of enactment ..., then that use may be continued ...” There is no “use” here, just an application for a permit for a use.

- 9) Neither the Township nor the Commission agreed to the concession proposed in the LaRose March 18 letter, supra, that the proceedings be limited to the Zoning Ordinance.
- 10) Accordingly, the Commission finds the SOB Ordinance applicable to NOI’s application. If a Special Land Use Permit were to issue, the application must include all information, photographs and fees required by Sections 4 & 6 of the Ordinance for the applicant and any hired employees. Applicant must comply with all sections of the SOB Ordinance except the first Section 13 B. Restrictions and requirements very similar to those in the SOB Ordinance were upheld against a First Amendment challenge just four weeks ago by the Sixth Circuit Court of Appeals in Sensation, Inc. et al v. City of Grand Rapids, et al Nos. 06-2168/2508/2510; 07-1504 (May 20, 2008).
- 11) No level III wetlands assessment has been received from the MDEQ.
- 12) Contrary to Applicant’s statement, the name, The Gentlemen’s Club, has strong sexual connotations, as demonstrated by the overwhelmingly negative public reaction to the term. The name must be changed.

13) As Applicant points out, to the South of the proposed site, just over the Indiana State line, are a smoke shop and a fireworks store, both located to serve Michigan customers while taking advantage of Indiana's laxer laws and lower taxes. The Commission has been unable to ascertain whether a topless dancehall could not also operate over the border nor has it finally determined whether there is a possible location in the Township under the SOB Ordinance. Accordingly the Commission makes no finding at this time as to the enforceability of Section 13B of the SOB Ordinance, but reserves the right to do so in the future.

Conditions:

As the Commission is recommending that the Special Land Use Permit be denied, no Conditions are imposed under Section 15.4B of the Zoning Ordinance. Should a Permit issue by order of court, action by the Township Board, Applicant's selection of a satisfactory site or any other reason, the Planning Commission reserves the right to impose a set of conditions including, without limitation, permit from the Liquor Commission and SOB license from the Township Board and, at the Sheriff's suggestion, all parking in front rather than in back.