

At a Regular Session of the County Commission of Kanawha County, West Virginia, held at the Courthouse, thereof, on the 27th day of February, 2003, the following order was made and entered:

Board of Appeals Ordinance of 2003

The following motion was offered by HENRY C. SHORES, commissioner:

The County Commission of Kanawha County, West Virginia, does hereby adopt the Board of Appeals Ordinance of 2003 to become effective immediately upon adoption. A copy of the Ordinance is attached hereto and made a part hereof.

The adoption of the foregoing motion has been moved by HENRY C. SHORES, commissioner, and duly seconded by W. KENT CARPER, commissioner, the vote thereon was as follows:

W. Kent Carper, President	<u>AYE</u>
Henry C. Shores, Commissioner	<u>AYE</u>
David Hardy, Commissioner	<u> </u>

WHEREUPON, W. Kent Carper, President, declared said motion duly adopted and it is therefore ADJUDGED and ORDERED that motion be and the same is hereby adopted.

W. Kent Carper
W. Kent Carper, President

Henry C. Shores
Henry C. Shores, Commissioner

David Hardy
David Hardy, Commissioner

Approved by: AMS
County Attorney

Board of Appeals Ordinance of 2003

Section 1. Title.

The Ordinance shall be known as the Board of Appeals Ordinance of 2003.

Section 2. Purpose.

The purpose of the Ordinance is to establish the Board of Appeals under chapter eight, article twenty-four, section's fifty-one *et seq.* of the Code of West Virginia of 1931, as amended.

Section 3. Authority.

The authority to enact the Ordinance is established under chapter eight, article twenty-four, sections fifty-one *et seq.* of the Code of West Virginia of 1931, as amended.

Section 4. Definitions.

Section 4.1 "Board of Appeals" shall mean the public body of persons established by the County Commission under chapter eight, article twenty-four, section fifty-one of the Code of West Virginia of 1931, as amended.

Section 4.2 "County" shall mean the County of Kanawha, State of West Virginia.

Section 4.3 "Effective Date" shall mean the date on which the Ordinance is enacted by the County Commission of the County, or a subsequent date that is fixed in the Ordinance as the effective date thereof.

Section 4.4 "Person" shall mean any individual, or any corporation, limited liability company, general partnership, limited partnership, joint venture, limited liability partnership, trust, estate or any other legal entity that is duly organized or existing and authorized to transact business in the State of West Virginia.

Section 4.5 "Planning Commission" shall mean the public body of persons established by the County Commission under chapter eight, article twenty-four, section six of the Code of West Virginia of 1931, as amended.

Section 4.6 "Planning Officer" shall mean the individual whom the County Commission has charged with the enforcement of any ordinances of the County enacted pursuant to chapter eight, article twenty-four of the Code of West Virginia of 1931, as amended.

Section 5. Establishment

As of the Effective Date, the Board of Appeals shall be established in accordance with chapter eight, article twenty-one, sections fifty-one *et seq.*, of the Code of West Virginia of 1931, as amended.

Section 6. Membership and Organization.

Section 6.1 Members of the Board of Appeals shall be appointed pursuant to chapter eight, article twenty-one, sections fifty-one of the Code of West Virginia of 1931, as amended, and this Ordinance.

Section 6.2 The Board of Appeals shall comprise five individual persons to be appointed by the County Commission. Each member of the Board of Appeals shall be individuals who are freeholders and residents of the County. At least three of the members of the Board of Appeals shall be residents of the County for at least ten (10) years preceding the times of their respective appointments. No member of the Board of Appeals shall be a member of the Planning Commission nor shall any member hold other elective or appointive office of the County. Members of the Board of Appeals shall serve without compensation but may be reimbursed for all reasonable and necessary expenses actually incurred in the performance of their official duties.

Section 6.3 Upon creation of the Board of Appeals, the members shall be appointed for the following terms:

- (a) One for a term of one year;
- (b) Two for a term of two years; and
- (c) Two for a term of three years.

The terms shall expire on the first day of January of the first, second and third year, respectively, following their appointments. Thereafter, as each term expires, each new appointment shall be for a term of three years.

Section 6.4 If a vacancy occurs, by resignation or otherwise, among the members of the Board of Appeals, the County Commission shall appoint a new member for the unexpired term thereof.

Section 6.5 At its first meeting of each year, the Board of Appeals shall elect a president, vice-president and a secretary from among its members. The vice-chairman shall have the power and authority to act as chairman during the absence of the chairman. The Planning Officer or his designee may serve as the transcribing secretary of the meetings or hearings of the Board of Appeals upon the majority vote of all of the members of the Board of Appeals.

Section 7. General Procedures; Quorum; Official Action.

Section 7.1 The Board of Appeals shall adopt such rules and rules of parliamentary procedure to carry out its duties under the terms of the Ordinance.

Section 7.2 The Board of Appeals shall keep minutes of its proceedings, records of all official actions and shall record the vote on all actions taken. All minutes and records shall be filed in the Kanawha County Planning and Development Office and shall be public records.

Section 7.3 The Board of Appeals shall make written findings and written conclusions within thirty (30) days of the conclusion of any hearing required hereunder.

Section 7.4 A majority of the members of the Board of Appeals shall constitute a quorum.

Section 7.5 No action of the Board of Appeals shall be official and effective unless authorized and voted upon by a majority of all of the members of the Board of Appeals.

Section 8. Powers and Duties.

Section 8.1 The Board of Appeals shall:

(a) Hear and determine appeals from and review any order, requirement, decision or determination made by the Planning Commission or Planning Officer made with respect to a premises charged with the enforcement of ordinances under chapter eight, article twenty-four, sections thirty-nine through fifty-eight of the Code of West Virginia of 1931, as amended;

(b) Permit and authorize exceptions to the district rules and regulations of any ordinance only in the classes of cases or in particular situations as specified in any ordinance under which such exceptions are created;

(c) Hear and decide special exceptions to the terms of any ordinance upon which the Board of Appeals is required to act under the ordinance with respect to a premises; and

(d) Authorize, upon application in specific cases, such variance from the terms of any ordinance as will not be contrary to public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

1. In granting any variance, the Board of Appeals may prescribe appropriate conditions and safeguards in conformity with the ordinance.

2. In granting any variance, if circumstances merit it, the Board of Appeals shall grant such a variance only to the extent as such circumstances merit. No variance greater or broader than the circumstances merit shall be valid or enforceable.

3. Under no circumstances shall the Board of Appeals grant a variance to allow a land use not permitted under the terms of an ordinance, or any use expressly or by implication prohibited by the terms of the ordinance.

4. For purposes of this Section 8, "hardship" shall not mean economic or financial hardship that arises from the decisions, actions or inactions made by the applicant with respect to the premises in issue.

Section 8.2 In exercising its powers and authority under Section 8(a), (b) or (c), the Board of Appeals may reverse or affirm, in whole or in part, or may modify the order, requirement, decision or determination appealed from, as in its opinion ought to be done in the premises, and to this end shall have all the powers and authority of the official or body from whom or which the appeal is taken.

Section 9: Stay of Work

When an appeal has been taken and filed with the Board of Appeals, all proceedings and work or prohibited uses on the premises in issue shall be stayed by written notice from the Planning Officer and sent to the owner of the premises by certified mail or personal service unless the Planning Officer or the Planning Commission from whom or which the appeal is taken shall certify to the Board of Appeals that by reason of facts stated in a certificate that a stay would cause imminent peril to life or property. If such a certificate is filed, proceedings or work on the premises shall not be stayed except by a restraining order that may be granted by the Kanawha County Circuit Court upon application or petition thereof on notice to the Planning Officer or the Planning Commission from whom or which the appeal was taken and the owners of the premises and on due cause shown.

Section 10: Procedure for an Appeal from an Administrative Decision.

Section 10.1 An appeal taken from any order, requirement, decision or determination made by the Planning Officer charged with the enforcement of an ordinance shall be filed with the Board of Appeals on a form prescribed by the Planning Officer. The Planning Officer in his reasonable discretion may accept written appeal in lieu of a completed form for good cause and so long as the written appeal substantially complies with the ordinance. The appeal shall specify the reasons for the appeal and shall be made within thirty (30) calendar days of the original action in question.

Section 10.2 The appeal shall include a list of the names and addresses of the owners of properties located within two hundred fifty (250) feet of the premises in issue, as of record in the office of the Kanawha County Assessor. The premises also shall be included in the affected area. The appellant shall submit the tax maps and parcel numbers corresponding to such

properties together with stamped and addressed envelopes for each of the names and address of such property owners. If the list includes a lot within a subdivision, the appellant must submit the name of the president for that subdivision's homeowners association along with a stamped and addressed envelope for that individual.

Section 10.3 The Planning Officer shall publish a legal advertisement describing the appeal in one or more local newspapers of general circulation no fewer than thirty (30) days before the scheduled public hearing before the Board of Appeals. The prepared envelopes to persons entitled to notice under Section 10.2 shall be mailed at the same time the legal advertisement is submitted to the newspaper for publication.

Section 10.4 The Board of Appeals shall timely hold a duly scheduled public hearing on the appeal.

Section 10.5 If the Board of Appeals upholds the administrative decision in issue, the administrative decision shall stand and the Board of Appeals shall deny relief. The Board of Appeals shall notify the appellant thereof by mail and shall notify the appellant of the right to appeal the decision to the Kanawha County Circuit Court within thirty (30) days of the written decision.

Section 10.6 If the Board of Appeals reverses or modifies the administrative decision, the appeal stands as approved by the Board of Appeals. The Board of Appeals shall notify the appellant thereof by mail and shall notify the appellant of the right to appeal the decision to the Kanawha County Circuit Court.

Section 11. Procedure for Applying for a Variance.

Section 11.1 An application for a variance from the terms of the ordinance shall be filed with the Board of Appeals, a form prescribed by the Planning Officer. The variance request shall specify the reasons for the variance and plainly state the basis therefor.

Section 11.2 The variance application shall include a list of the names and addresses of the owners of properties located within two hundred fifty (250) feet of the premises in issue, as of record in the office of the Kanawha County Assessor. The premises also shall be included in the affected area. The applicant shall submit the tax maps and parcel numbers corresponding to such properties together with a stamped and addressed envelope for each of the names and addresses of such property owners. If the list includes a lot within a subdivision, the appellant must submit the name of the president for that subdivision's homeowners association along with a stamped and addressed envelope for that individual.

Section 11.3 The Planning Officer shall publish a legal advertisement describing the variance application in one or more local newspapers of general circulation no fewer than thirty (30) days before the scheduled public hearing before the Board of Appeals. The prepared envelopes to persons entitled to notice under Section 11.2 shall be mailed at the same time the

legal advertisement is submitted to the newspaper for publication. The Planning Officer shall post a notice of the public hearing on a conspicuous place on the premises at the cost of the applicant.

Section 11.4 The Board of Appeals shall timely hold a duly scheduled public hearing on the variance.

Section 11.5 If the Board of Appeals denies the variance application, the board of Appeals shall notify the applicant thereof, by mail, and shall notify the applicant of the right to appeal the decision to the Kanawha County Circuit Court within thirty (30) days of the written decision.

Section 12. Public Hearings.

Section 12.1 Before deciding any case of appeal or for a variance filed with the Board of Appeals, the Board of Appeals shall hold a public hearing. At the hearing, any party may appear in person, by agent or by attorney. The Board of Appeals shall fix a reasonable time for the hearing.

Section 12.2 Both the legal advertisement and the mailed notices discussed shall include at least the name of the appellant or the applicant, the time and place of the hearing, and the nature of the action to be considered.

Section 12.3 Notices of public hearings that satisfy all the requirements pursuant to the Ordinance shall be deemed adequate notice.

Section 13. Fees.

Section 13.1 An application or appeal filed with the Board of Appeals shall be accompanied by a filing fee of _____ Dollars (\$ _____ .00).

Section 14. Appeal from a Decision of the Board of Appeals.

Section 14.1 Any decision or order of the Board of Appeals shall be subject to review by certiorari.

Section 14.2 Any person or persons jointly or severally aggrieved by any decision or order of the Board of Appeals may present to the Kanawha County Circuit Court a petition duly verified, setting forth that such decision or order is illegal in whole or in part, and specifying the grounds of the alleged illegality. The petition shall be presented to the Kanawha County Circuit

Court no fewer than thirty (30) days after the date of the written decision of the Board of Appeals:

Section 15. Severability.

If any clause, paragraph, subparagraph, section or subsection of the Ordinance shall be held to be invalid or unconstitutional by any court of competent jurisdiction, the remainder of the Ordinance shall not be affected thereby, but shall remain in full force and effect.

At a Regular Session of the County Commission of Kanawha County, West Virginia, held at the Courthouse, thereof, on the ____ day of February, 2002, the following order was made and entered:

Board of Appeals Ordinance of 2003

The following motion was offered by _____, commissioner:

The County Commission of Kanawha County, West Virginia, does hereby adopt the Board of Appeals Ordinance of 2003 to become effective immediately upon adoption. A copy of the Ordinance is attached hereto and made a part hereof.

The adoption of the foregoing motion has been moved by _____, commissioner, and duly seconded by _____, commissioner, the vote thereon was as follows:

November 4, 2002 Kent's Letter to Brian Kastick [Cabinet Secretary, WV Dept Tax and Revenue] reg issuance of license in light of Moratorium

November 12, 2002 Fire Marshall's Report on Re-Inspection

November 21, 2002 Brian Kastick's Letter to Thomas Keeley requesting policy to notify County Commission or any applications in Kan Co

November 22, 2002 Kanawha-Charleston Health Department fax to Susan of Permit issued to Diamond Cabaret on October 28, 2002 also attached letter to Tom Keeley showing the name change and that the certificate was no longer valid.

Kent's Letter to James Felsen [Kan-Chas Health Dept] asking for Inspection of facilities

Ken's letter to Thomas Keeley registering a formal complaint for violations by Diamond Cabaret

November 25, 2002 Reply Letter to Kent from James Felsen showing last inspection was October 31, 2002

January 27, 2003 Voluntary surrender of License to the Alcohol Beverage Control Administration
No further applications were filed with ABCA

February 12, 2003 Susan Blakes Letter to Cease and Desist

February 21, 2003 Mark White's hand written note to Dan Blue reg. His wish to appeal to the Board of Appeals

Susan Blakes Letter describing the violation and fines.

February 24, 2003 Susan's Letter to Mark White stating the lack of description of the basis of his appeal
Original given to Denys Harrington

Letter to Honorable Ronald D. Lawson reg. Suit filed by Conner Enterprises vs. Thomas Keeley and Kanawha County, WV adding plaintiffs, opposing motion to dismiss etc.

February 27, 2003 Fax from Mark White to Susan stating the establishment had been operating and providing nude dancing since August of 2002

Kent's Letter to Sterling Lewis, Fire Marshall reg. deficiencies cited on the property used by Diamond Cabaret

March 4, 2003 Connor Enterprises, Inc d/b/a Diamond Cabaret and Mark White vs. Thomas Keeley, Alcohol Beverage Control Commission and Kanawha County
Motion to add Defendant Brian Propst

March 26, 2003 Susan Blakes letter to Mark White notifying him of the date of appeal

? When was Connor Enterprise, Inc in WV
 ? When were they first given a license to operate a business
 ? Did change of name negate their alcohol license

October 18, 2002 Kent's Memo to Dan Blue [County Mgr] asking for final ordinance for adoption

 Kent's Letter to Sterling Lewis [Fire Marshall] reg. Violations

 Kent's Letter to Thomas Keeley [Alcohol and Beverage Control Adm. Commissioner] reg. Asking for revocation of license due to Violation of "Hurricane Nick's operating under "Diamond Cabaret" and that a public hearing be made when the new name would be applying for a license.

October 20, 2002 Building Permit Application by Brian Propst [signed by Randel Withrow?]

October 21, 2002 Building Permit issued to Brian Propst

 Kent's Memo to Susan Blake [Planning Director] to have Task Force to review proposed ordinance before Commission meeting 10/29/02.

 Fire Marshall's Report showing violations an remedies.

October 23, 2002 Fax to Susan Blake from Amy Shouldis [Exec. Paralegal for Alcohol and Bev Control Adm.] reg Notice of Public Hearing reg. Conner Enterprises, Inc d/b/a Hurricane Nicks scheduled for October 29, 2002

 Kent's Letter to Thomas Keeley reg. 10/29/02 public hearing and attaching the Fire Marshall's Report

October 24, 2002 Memo from Phyllis Gatson [Kan County Assessor] to Kent reg. effects of Adult Entertainment on property values

 Kent's Letter to Thomas Keeley req. info on diminished property values be made part of 10/29/02 meeting.

October 28, 2002 Brian Propst of Conner Enterprises, Inc. requested and was granted a name change by Kan-Chas Health Dept from Hurricane Nicks to Diamond Cabaret
 [former permit and ASSOCIATED CERTIFICATE are no longer Valid]

October 29, 2002 **90 Day Moratorium on Location of Exotic Entertainment Facilities 2002**

 Letter from Lewis, Glasser, Casey & Rollins, LLP to Thomas Keeley regarding Moratorium

 Public Hearing by Alcohol and Beverage Control Adm. at Tyler Mountain Fire Station

October 30, 2002 Kanawha Charleston Health Departments letter to Thomas Keeley announcing the name change request by Brian Propst and stating the former Certificate was no longer valid.

October 31, 2002 Kent's Letter to Thomas Keeley reg. Passage of Moratorium and that it should disallow them to convert their Sports Bar to Adult Entertainment facility.

 Conner Enterprises d/b/a Diamond Cabaret and Brian Propst vs. Thomas Keeley, Alcohol and Beverage Control Commission

 Sheriff's report on Investigation requested by Susan Blake

 Second Letter from Lewis, Glasser, Casey & Rollins, LLP to Thomas Keeley regarding Moratorium

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