

AGENDA ITEM SUMMARY

September 17, 2019

City Council

STAFF

Tyler Marr, Senior Project Manager
Ingrid Decker, Legal

SUBJECT

Second Reading of Ordinance No. 111, 2019, Amending Section 17-142 of the Code of the City of Fort Collins Regarding Public Nudity.

EXECUTIVE SUMMARY

This Ordinance, unanimously adopted on First Reading on September 3, 2019, amends the public nudity City Code provisions to make them consistent with the permanent injunction issued by the United States District Court and agreed to by the City.

In response to Council questions during First Reading about the definition of “public place” in Section 17-142(a)(3), staff has made changes to the Ordinance on Second Reading to clarify the exception for protected activities, to ensure it is clear and includes those activities that would be protected, and to move the exception into Section 17-142(b) with the other exceptions to the prohibition on public nudity. The Ordinance was published on the City website on Tuesday, September 10.

STAFF RECOMMENDATION

Staff recommends adoption of the Ordinance on Second Reading.

ATTACHMENTS

1. First Reading Agenda Item Summary, September 3, 2019 (w/o attachments) (PDF)

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SUBJECT

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EXECUTIVE SUMMARY

The purpose of this item is to amend the public nudity City Code provisions to make them consistent with the permanent injunction issued by the United States District Court and agreed to by the City.

STAFF RECOMMENDATION

Staff recommends adoption of the Ordinance on First Reading.

BACKGROUND / DISCUSSION

In October 2015, the City Council adopted Ordinance No. 134, 2015, amending Section 17-142 of the City Code, which addresses public nudity and prohibits toplessness by females in public places, with certain exceptions. The plaintiffs, a group named Free the Nipple - Fort Collins ("FTN"), and two individuals named Brittany Hoagland and Samantha Six, sued the City in May 2016 challenging Section 17-142 based on claims that it violated the First and Fourteenth Amendments of the U.S. Constitution and the Equal Rights Amendment of the Colorado Constitution. The plaintiffs sought a preliminary injunction against enforcement of Section 17-142 against female toplessness, and District Court Judge Brooke Jackson granted a preliminary injunction based on the Fourteenth Amendment claim in February 2017. He had previously dismissed the First Amendment claim. The City appealed this preliminary injunction decision, and after oral arguments on that appeal in January 2018, the three-judge panel of the U.S. Court of Appeals for the Tenth Circuit issued an order on February 15, 2019, upholding Judge Jackson's preliminary injunction. The ruling cited that the Equal Protection Clause of the US Constitution prohibits Fort Collins and other governments from restricting toplessness in public by females only.

On July 24, 2019, the US District Court made the preliminary injunction permanent. As a result, and in order to remove confusion and delete provisions from City Code that the City has no authority to enforce, staff is bringing forward these Code changes that remove the problematic language. The state statute on public indecency remains in effect. It prohibits exposure of the female breast in a public place where it may be viewed by members of the public, but only if it is done with intent to arouse or to satisfy the sexual desire of any person.

ORDINANCE NO. 111, 2019
OF THE COUNCIL OF THE CITY OF FORT COLLINS
AMENDING SECTION 17-142 OF THE CODE OF THE CITY
OF FORT COLLINS REGARDING PUBLIC NUDITY

WHEREAS, Section 17-142 of the City Code currently prohibits public exposure of the buttocks, genitals, or lower part of the female breast with some exceptions (the “Nudity Ordinance”); and

WHEREAS, in 2016 Free the Nipple – Fort Collins and two individual plaintiffs sued the City in federal district court alleging that the Nudity Ordinance violates their rights of free speech and equal protection under the United States Constitution; and

WHEREAS, in February 2017, the district court enjoined the City from enforcing the Nudity Ordinance to the extent that it prohibits women, but not men, from knowingly exposing their breasts in public, and in February 2019 the Tenth Circuit Court of Appeals affirmed the district court’s order; and

WHEREAS, in July 2019, the City and the plaintiffs stipulated to a permanent injunction enjoining the City of Fort Collins from enforcing the Nudity Ordinance to the extent that it prohibits women, but not men, from knowingly exposing their breasts in public, and the district court entered an order making such injunction permanent; and

WHEREAS, to prevent confusion for residents, visitors and law enforcement about what conduct is or is not prohibited within the City, the City Council finds that it is the best interests of the City to amend the Nudity Ordinance to eliminate the prohibition on exposure of the female breast.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF FORT COLLINS as follows:

Section 1. That the City Council hereby makes and adopts the determinations and findings contained in the recitals set forth above.

Section 2. That Section 17-142 of the Code of the City of Fort Collins is hereby amended to read as follows:

Sec. 17-142. - Public nudity.

(a) No person who is ten (10) years of age or older shall intentionally expose any portion of his or her genitals or buttocks while that person is located:

- (1) In a public right-of-way, in a natural area, recreation area or trail, or recreation center, in a public building, in a public square, or while located in any other public place;
or

(2) On private property if the person is in a place that can be viewed from the ground level by another who is located on public property and who does not take extraordinary steps, such as climbing a ladder or peering over a screening fence, in order to achieve a point of vantage.

(3) As used in this Section, *public place* shall mean a place, regardless of ownership, to which the public or a substantial number of the public has access, and includes but is not limited to highways including sidewalks, transportation facilities, schools, places of amusement, parks, playgrounds, and the common areas of public and private buildings and facilities, and shall not include any theater, concert hall, museum, school or similar establishment to the extent the same is serving as a performance venue.

(b) The prohibition in subsection (a) does not extend to any:

(1) Persons undergoing bona fide emergency medical examinations or treatment; or

(2) Persons located in a dressing rooms, shower rooms, bathrooms, or in other enclosed areas not visible from any public place, specifically designated for changing clothes or in which nudity is explicitly expressly permitted; or

(3) Person participating in a legally protected speech or religious activity in a public place within any theater, concert hall, museum, school or other establishment that is serving as a performance or worship venue, provided the person's nudity is an inherent part of such speech or religious activity.

Introduced, considered favorably on first reading, and ordered published this 3rd day of September, A.D. 2019, and to be presented for final passage on the 17th day of September, A.D. 2019.

Mayor

ATTEST:

City Clerk

Passed and adopted on final reading on the 17th day of September, A.D. 2019.

Mayor

ATTEST:

City Clerk