

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 25, 2001

Before

Hon. Richard A. Posner, Circuit Judge
Hon. Diane P. Wood, Circuit Judge
Hon. Ann Claire Williams, Circuit Judge

No. 00-3643

AMERICAN AMUSEMENT Appeal from the United
MACHINE ASSOCIATION, States District Court for the
AMUSEMENT & MUSIC Southern District of Indiana,
OPERATORS ASSOCIATION, Indianapolis Division.
INDIANA AMUSEMENT &
MUSIC OPERATORS No. 00 C 1321
ASSOCIATION, et al.,

Plaintiffs-Appellants, David F. Hamilton,
Judge.

v.

TERI KENDRICK, in her
official capacity as the
designated City Prosecutor
of the City of Indianapolis,
JACK L. COTTEY, Sheriff,
BART PETERSON, Mayor,
et al.,
Defendants-Appellees.

O R D E R

On April 19, 2001 defendants-appellees filed a petition for rehearing and petition for rehearing en banc and on May 14, 2001 plaintiffs-appellants filed an answer. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing en banc. The petition is therefore DENIED.

CITY-COUNTY GENERAL ORDINANCE NO. 72, 2000
Proposal No. 239, 2000

PROPOSAL FOR A GENERAL ORDINANCE to regulate the conduct of persons who own or operate places of business which contain amusement machines and/or video games; in such a manner that restricts and prohibits access to amusement machines and/or video games which are deemed harmful to minors, and to prohibit such amusement machines and/or video games on public property.

WHEREAS, Marion County and the City of Indianapolis have compelling interests in protecting the well-being of minors, in protecting parents' authority to shield their minor children from influences that the parents find inappropriate or offensive, and in reducing juvenile crime; and

WHEREAS, our courts have recognized that minors are affected by and may be protected from patently offensive sex-related material; and

WHEREAS, recent academic literature corroborates the finding of earlier studies that violent video games produce psychological effects in minor children and that prolonged exposure to violent video games increases the likelihood of aggression in minor children (see Craig A. Anderson & Karen E. Dill, Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life, 78 J. of Personality and Soc. Psychol. 772 (2000) (summarizing past research and noting that the "positive association between violent video games and aggressive personality is consistent with a developmental model in which extensive exposure to violent video games . . . contributes to the creation of an aggressive personality" and concluding that "the present data indicate that concern about the potentially deleterious consequences of playing violent video games is not misplaced")); and

WHEREAS, growing evidence of the harmful effects of violent video games has led Congress to investigate the impact of these games on minor children (see Hearing on "The Impact of Interactive Violence on Children," United States Senate Comm. on Commerce, Science & Transportation, 106th Cong. (March 21, 2000) ("Hearing"); see also Majority Staff of Senate Comm. on the Judiciary, 106th Cong., Children, Violence and the Media: A Report for Parents and Policy Makers (Sept. 14, 1999)), and has led President Clinton to ask the Federal Trade Commission to investigate the marketing of violent video games to minor children (see Letter from William J. Clinton, President, to Janet Reno, Attorney General of the United States, and Robert Pitofsky, Chairman, Federal Trade Commission (June 1, 1999)); and

WHEREAS, producers and retailers of video games agree that "the best control is parental control" (see Statement of the Video Software Dealers Association in conjunction with Hearing, above); and

WHEREAS, testimony before Congress indicates that fourth through eighth graders report spending an average of from half an hour to two-and-a-half hours playing video games in arcades each week (see Hearing, above, Testimony of Jeanne B. Funk, Ph.D., clinical child psychologist); and

WHEREAS, parents are less able in public places than in the home to control the level of violence and sexual content to which their minor children are exposed; now, therefore,

BE IT ORDAINED BY THE CITY-COUNTY COUNCIL OF THE CITY OF INDIANAPOLIS AND OF MARION COUNTY, INDIANA:

SECTION 1. Section 831-1 of the "Revised Code of the Consolidated City and County," regarding definitions, hereby is amended by the deletion of the language which is stricken-through, and by the addition of the language which is underscored, to read as follows:

Sec. 831-1. Definitions.

As used in this chapter, the following terms shall have the meanings ascribed to them in this section.

Accompanied by for purposes of subsections 831-5(h), 831-5(i), 831-5(j), 831-6(f), 831-6(g), and 831-6(h), means that the parent, guardian, or custodian of the minor either:

- (1) Is within five feet of the minor at all times while the minor is operating the amusement machine; or.
- (2) Has appeared in person with the minor at the amusement location or place of business containing amusement machines on that day and has given his or her permission for the exhibitor or registrant or an employee of the exhibitor or registrant to place on the back of the minor's hand or wrist a clearly visible, non-transferable designation such as a stamp or wrist band signifying that the parent, guardian, or custodian has consented to allow the minor to operate amusement machines that are harmful to minors.

Amusement location means any public room or area in the city which contains five (5) or more amusement machines; however, amusement locations shall not include premises which are licensed (as defined in IC 7.1-1-3-20) for the sale of alcoholic beverages and where entry is limited to persons who are eighteen (18) years of age or older.

Amusement machine means a currency-operated machine or device, including a machine or device operated by tokens, cards, points, or other currency-like means, offered to the public as a game or amusement, the object of which is to achieve a high or low score based on the skill of the player, including, but not limited to, video games, pool or billiard tables and pinball machines. Such a machine or device designed and used exclusively for the vending of merchandise of a tangible nature shall not be deemed an amusement machine.

Exhibitor means a person who owns or operates a place of business in the city where four (4) or fewer amusement machines are located; however, the provisions of this chapter shall not apply to an exhibitor's place of business which is licensed (as defined in IC 7.1-1-3-20) for the sale of alcoholic beverages and where entry is limited to persons who are eighteen (18) years of age or older.

Graphic violence means an amusement machine's visual depiction or representation of realistic serious injury to a human or human-like being

where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration.

Harmful to minors means an amusement machine that predominantly appeals to minors' morbid interest in violence or minors' prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen (18) years, lacks serious literary, artistic, political or scientific value as a whole for persons under the age of eighteen (18) years, and:

- (1) Contains graphic violence; or
- (2) Contains strong sexual content.

Incidental view means a minor's view for fewer than thirty (30) seconds of the playing surface or screen of an amusement machine.

Knowingly means having general knowledge of, or reason to know, or a belief or ground for belief that warrants further inspection or inquiry of both:

- (1) The character and content of the visual representations of the amusement machine; and
- (2) The age of the person operating or seeking to operate the amusement machine, provided, however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt (including but not limited to asking for legal photo identification) to ascertain the true age of the minor.

Minor means a person under the age of eighteen (18) years. This definition does not apply to a minor who has obtained a court decree pursuant to IC 31-34-20-6.

Not harmful means an amusement machine that is not harmful to minors.

Nudity means an amusement machine's visual depiction or representation of human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or of a female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

Parent, guardian or custodian means and includes a person who has legal custody of the ~~child~~ minor and is the ~~child's~~ minor's:

- (1) Natural parent;
- (2) Stepparent, adoptive parent or custodian as those terms are defined by IC 35-42-4-7;
- (3) Guardian as defined by IC 29-3-1-6; or
- (4) Other adult who has been appointed by a court to care for a ~~child~~ minor;

but, for purposes of subsections 831-5(e), 831-5(f) and 831-5(g) and subsections 831-6(c), 831-6(d) and 831-6(e), shall not include an exhibitor, or owner or operator of an amusement location with respect to a ~~child~~ minor who is present in the exhibitor's, owner's or operator's place of business.

Pool or billiard table means a table used for any form of the games commonly referred to as pool or billiards and includes any table of any size,

the top of which is surrounded by an elastic ledge or cushion and which is designed or used to play any game which consists of impelling balls by means of sticks or cues.

~~Exhibitor means a person who owns or operates a place of business in the city where four (4) or fewer amusement machines are located.~~

Public property means all buildings and areas within Marion County that are owned, operated, or leased as lessee, by the City of Indianapolis, Marion County, a city or county department, a city-county agency, or a township, including but not limited to the Department of Parks and Recreation, but does not include property for which the City of Indianapolis, Marion County is the lessor.

Registrant in this chapter means a person registered with the controller under this chapter as the owner or operator of an amusement location in the city.

Strong sexual content means the visual depiction or representation by an amusement machine of nudity or explicit human sexual behavior by any human or human-like being in one or more of the following forms: masturbation; deviate sexual conduct; sexual intercourse; or, fondling of genitals.

SECTION 2. Section 831-5 of the "Revised Code of the Consolidated City and County," regarding operation of amusement locations, hereby is amended by the deletion of the language which is stricken-through, and by the addition of the language which is underscored, to read as follows:

Sec. 831-5. Operation of amusement locations; violations.

(a) All amusement locations shall be kept in a clean, healthful and sanitary condition at all times and the controller shall have the power to determine if such room or rooms are kept in a clean, healthful and sanitary condition and for such purpose, when desired, have the assistance of any law enforcement agency or the Health and Hospital Corporation of Marion County. If the controller shall determine, by a law enforcement agency or the division of buildings of the Health and Hospital Corporation of Marion County, that an unsanitary condition exists within an amusement location or on property immediately adjacent to the amusement location, which property is under the control of the amusement location owners or their lessee or lessor, the controller shall have the power to suspend the amusement location registration until such unsanitary condition is rectified.

(b) No registrant under this chapter shall permit persons to congregate in a disturbing manner within an amusement location or on parking areas or other property immediately adjacent to or normally used for purposes of parking for an amusement location which property is under the control of the amusement location owner or owners or their lessee or lessor. A violation of this provision shall be sufficient grounds for the revocation of the amusement location registrations by the controller.

(c) No registrant under this chapter, or registrant's employee, shall violate any state statute or city ordinance, or allow any other person to commit such violation, within an amusement location or on parking areas or other property immediately adjacent to or normally used for purposes of parking for an amusement location which property is under the control of

the amusement location owner or owners or their lessee or lessor. A violation of this provision shall be sufficient grounds for the revocation of the amusement location registrations by the controller.

(d) All employees of a registrant under this chapter shall be eighteen (18) years of age or older.

(e) It shall be unlawful for a person to allow a ~~child~~ minor under sixteen (16) years of age who is subject to the compulsory school attendance laws of the state and who is not accompanied by the ~~child's~~ minor's parent, guardian or custodian to be present in an amusement location between the hours of 7:00 a.m. and 3:30 p.m. on a day when such ~~child's~~ minor's school is in session.

(f) It shall be unlawful for a person to allow a ~~child under eighteen (18) years of age~~ minor to be present in an amusement location after the hours established by state statute or city ordinance for juvenile curfew unless such ~~child~~ minor is accompanied by the ~~child's~~ minor's parent, guardian or custodian, or an adult specified by the ~~child's~~ minor's parent, guardian or custodian.

(g) It shall be unlawful for a person to operate an amusement location unless a sign is conspicuously posted inside the location which provides that no ~~child~~ minor under sixteen (16) years of age may be present in an amusement location between the hours of 7:00 a.m. and 3:30 p.m. on a day when the ~~child's~~ minor's school is in session unless accompanied by the ~~child's~~ minor's parent, guardian or custodian, and that no ~~child under eighteen (18) years of age~~ minor may be present in an amusement location in violation of the curfew established by state statute or city ordinance.

(h) It shall be unlawful for a registrant, a registrant's agent, or an employee of an amusement location knowingly to allow a minor who is not accompanied by the minor's parent, guardian or custodian to operate in the amusement location an amusement machine that is harmful to minors.

(i) It shall be unlawful for a registrant to operate an amusement location unless each amusement machine that is harmful to minors in the amusement location displays a conspicuous sign indicating that the machine may not be operated by a minor under eighteen (18) years of age unless the minor is accompanied by his or her parent, guardian, or custodian. If amusement machines that are harmful to minors are displayed together in an area separate from amusement machines that are not harmful, a single conspicuous sign in that area or at the entrance to that area may be used to mark the group of machines for purposes of this subsection.

(j) It shall be unlawful for a registrant to make available to patrons any amusement machine that is harmful to minors within ten (10) feet of an amusement machine that is not harmful. It shall further be unlawful for a registrant not to separate amusement machines that are harmful to minors from other machines by some form of partition, divider, drape, barrier, panel, screen, or wall that completely obstructs the view of persons outside the partitioned area of the playing surface or display screen of the machines that are harmful to minors. It shall be unlawful for a registrant, registrant's agent, or employee of an amusement location to allow a minor who is not

accompanied by his or her parent, guardian, or custodian into the partitioned area.

(k) It shall be unlawful for a registrant to make available to patrons any amusement machine that is harmful to minors if the registrant has been cited for three (3) or more violations of Section 831-5(h), (i), (j), or (k) of this Code in any twelve-month period in the preceding three (3) years.

(l) One or more violations of Section 831-5(h), (i), (j), or (k) of this Code may serve as grounds for suspension or revocation of the amusement location's registration, pursuant to the authority vested in the controller and procedures prescribed in Chapter 801 of this Code. Three (3) or more violations of Section 831-5(h), (i), (j), or (k) of this Code, however, shall require revocation of the amusement location's registration, subject to the notice and hearing requirements of Chapter 801. For the purposes of this subsection, no more than one violation shall be deemed to have occurred on any one day.

SECTION 3. Section 831-6 of the "Revised Code of the Consolidated City and County," regarding operation of amusement machines by exhibitors, hereby is amended by the deletion of the language which is stricken-through, and by the addition of the language which is underscored, to read as follows:
Sec. 831-6. Operation of amusement machines by exhibitors;
violations.

(a) No exhibitor or exhibitor's employee shall permit persons to congregate in a disturbing manner on the premises of the exhibitor's place of business.

(b) No exhibitor or exhibitor's employee shall violate any state statute or city ordinance, or allow any other person to commit such violation on the premises of the exhibitor's place of business.

(c) It shall be unlawful for an exhibitor or the exhibitor's employee to allow a ~~child~~ minor under sixteen (16) years of age who is subject to the compulsory school attendance laws of the state and who is not accompanied by the ~~child's~~ minor's parent, guardian or custodian to operate an amusement machine in the exhibitor's place of business between the hours of 7:00 a.m. and 3:30 p.m. on a day when such ~~child's~~ minor's school is in session.

(d) It shall be unlawful for an exhibitor or the exhibitor's employee to allow a ~~child under eighteen (18) years of age~~ minor to operate an amusement machine in the exhibitor's place of business after the hours established by state statute or city ordinance for juvenile curfew unless such ~~child~~ minor is accompanied by the ~~child's~~ minor's parent, guardian or custodian, or an adult specified by the ~~child's~~ minor's parent, guardian or custodian.

(e) It shall be unlawful for an exhibitor to have amusement machines in his or her place of business unless a sign is conspicuously posted near any amusement machines which provides that no ~~child~~ minor under sixteen (16) years of age may operate an amusement machine between the hours of 7:00 a.m. and 3:30 p.m. on a day when the ~~child's~~ minor's school is in session unless accompanied by the ~~child's~~ minor's parent, guardian or custodian, and that no ~~child under eighteen (18) years of age~~ minor who is in violation of

the curfew established by state statute or city ordinance may operate an amusement machine.

(f) It shall be unlawful for an exhibitor, an exhibitor's agent, or an exhibitor's employee knowingly to allow a minor who is not accompanied by the minor's parent, guardian or custodian to operate in the exhibitor's place of business an amusement machine that is harmful to minors.

(g) It shall be unlawful for an exhibitor to make available to patrons in his or her place of business amusement machines that are harmful to minors unless each amusement machine that is harmful to minors displays a conspicuous sign indicating that the machine may not be operated by a minor under eighteen (18) years of age unless the minor is accompanied by his or her parent, guardian, or custodian. If amusement machines that are harmful to minors are displayed together in an area separate from amusement machines that are not harmful, a single conspicuous sign in that area or at the entrance to that area may be used to mark the group of machines for purposes of this subsection.

(h) It shall be unlawful for an exhibitor to make available to patrons any amusement machine that is harmful to minors within ten feet of an amusement machine that is not harmful. It shall further be unlawful for an exhibitor, exhibitor's agent, or exhibitor's employee to allow a minor who is not accompanied by his or her parent, guardian, or custodian to view, with the exception of an incidental view, the playing surface or screen of a game that is harmful to minors.

(i) It shall be unlawful for an exhibitor to make available to patrons any amusement machine that is harmful to minors if the exhibitor has been cited for three (3) or more violations of Section 831-6(f), (g), (h), or (i) of the Code in any twelve-month period in the preceding three (3) years.

SECTION 4. Chapter 831 of the "Revised Code of the Consolidated City and County," regarding amusement machine locations, hereby is amended by the addition of a NEW Section 831-7, regarding harmful games on public property, to read as follows:

Sec. 831-7. Harmful games on public property.

It shall be unlawful for an registrant or exhibitor to make available on public property any amusement machine that is harmful to minors.

SECTION 5. Section 831-7 of the "Revised Code of the Consolidated City and County," regarding inspections and reports of violations, upon the passage of this ordinance shall be RENUMBERED as "Section 831-8."

SECTION 6. Section 831-8 of the "Revised Code of the consolidated City and County," regarding enforcement and penalties, hereby is amended by the deletion of the language which is stricken-through, and by the addition of the language which is underscored, to read as follows:

Sec. 831- ~~89~~. Enforcement and penalties.

A person who violates any provision of this chapter shall be punishable as provided in section 103-3 of the Code; provided, however, the fine imposed for such violation shall not be less than two hundred dollars (\$200.00), that for the purpose of assessing fines no more than one violation shall be deemed to have occurred on any one day, and that each day that an

offense continues shall constitute a separate violation. The fines assessed for violations of this chapter shall be deposited with the law enforcement agency that caused the violation to be filed, if any.

SECTION 7. The expressed or implied repeal or amendment by this ordinance of any other ordinance or part of any other ordinance does not affect any rights or liabilities accrued, penalties incurred, or proceedings begun prior to the effective date of this ordinance. Those rights, liabilities, and proceedings are continued, and penalties shall be imposed and enforced under the repealed or amended ordinance as if this ordinance had not been adopted.

SECTION 8. Should any provision (section, paragraph, sentence, clause, or any other portion) of this ordinance be declared by a court of competent jurisdiction to be invalid for any reason, the remaining provision or provisions shall not be affected, if such remaining provisions can, without the invalid provision or provisions, be given the effect intended by the Council. To this end, the provisions of the ordinance are severable.

SECTION 9. This ordinance shall be in effect September 1, 2000.

The foregoing was passed by the City-County Council this 10th day of July, 2000, at 9:17 p.m.

