

MEMORANDUM

To: Honorable Mayor and Members of Town Council
From: Michael J. Hyman, Town Attorney
Date: September 13, 2023
Re: State and Local Laws on Public Indecency, Indecent Exposure, and Public Nudity

Introduction

At its August 15, 2023, regular meeting, Town Council voted to direct Town staff to address the Town Code, State laws and related Town policies governing the issue of public nudity, public indecency and indecent/obscene exposure in public places at the September 19, 2023, Town Council meeting. The following memorandum discusses these issues and provides a recommendation as to action that may be taken by the Town Council with respect to each issue. It does not address the Town's sexually oriented business ordinance found in Chapter 17.56 of the Town Code. As a reminder, the primary purpose of that ordinance is to regulate the operation of such businesses and to restrict their presence to industrial zone districts. By contrast, the proposed amendments recommended to Title 9 of the Town Code are laws of general application throughout the Town.

Public Indecency

The State of Colorado has adopted a statute making it a criminal offense to perform acts of public indecency in a public place or where the conduct may reasonably be expected to be viewed by members of the public. This statute is codified in Section 18-7-301 of the Colorado Revised Statutes, which reads as follows:

§ 18-7-301. Public indecency.

- (1) Any person who performs any of the following in a public place or where the conduct may reasonably be expected to be viewed by members of the public commits public indecency:
 - (a) An act of sexual intercourse; or
 - (b) Deleted by Laws 2010, Ch. 359, § 1, eff. Aug. 11, 2010.¹

¹ Subsection (1)(b), which referred to "deviate sexual intercourse," was repealed in its entirety at the 2010 legislative session. This action was taken in response to the decision of the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), which held that the majority of criminal sanctions imposed for consensual, adult non-procreative sexual activity (commonly referred to as sodomy laws) are unconstitutional.

- (c) A lewd exposure of an intimate part as defined by section 18-3-401(2) of the body, not including the genitals, done with intent to arouse or to satisfy the sexual desire of any person; or
 - (d) A lewd fondling or caress of the body of another person; or
 - (e) A knowing exposure of the person's genitals to the view of a person under circumstances in which such conduct is likely to cause affront or alarm to the other person.
- (2) Public indecency is a petty offense.
- (3) Deleted by Laws 2010, Ch. 359, § 1, eff. Aug. 11, 2010.²

Of particular note, the public indecency statute includes a reference to the term, “intimate part,” which is defined in Section 18-3-401 of the Colorado Revised statutes, as follows:

§ 18-3-401. Definitions

As used in this part 4, unless the context otherwise requires:

- (2) “Intimate parts” means the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person.

Under state law, public indecency is considered to be a petty offense. The penalties imposed for the commission of a petty offense are found at Section 18-1.3-503(1.5) of the Colorado Revised Statutes:

§ 18-1.3-503. Petty offense and civil infraction classified--penalties

- (1.5) For offenses committed on or after March 1, 2022, a violation of a statute of this state is a petty offense if specifically classified as a petty offense. The penalty for commission of a petty offense, upon conviction, is a fine of not more than three hundred dollars, imprisonment for not more than ten days in a county jail, or both.

Indecent Exposure

The State of Colorado has adopted a statute making it a criminal offense to commit indecent exposure. It should be noted that, unlike public indecency, there is no location requirement in the indecent exposure statute. In other words, indecent exposure may occur in a public or private setting. This statute is codified in Section 18-7-302 of the Colorado Revised Statutes, which reads as follows:

§ 18-7-302. Indecent exposure – definitions.

² Subsection (3), which made it unlawful to “knowingly perform an act of masturbation” was moved from the statute governing public indecency to the statute governing indecent exposure at the 2010 legislative session.

- (1) A person commits indecent exposure:
 - (a) If he or she knowingly exposes his or her genitals to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person with the intent to arouse or to satisfy the sexual desire of any person;
 - (b) If he or she knowingly performs an act of masturbation in a manner which exposes the act to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person.
- (2) (a) Deleted by Laws 2003, Ch. 199, § 31, eff. July 1, 2003.³
 - (b) Indecent exposure is a class 1 misdemeanor.
- (3) Deleted by Laws 2002, Ch. 322, § 21, eff. July 1, 2002.⁴
- (4) Indecent exposure is a class 6 felony if the violation is committed:
 - (a) Subsequent to two prior convictions of a violation of this section or of a violation of a comparable offense in any other state or in the United States, or of a violation of a comparable municipal ordinance; or
 - (b) When the person who commits indecent exposure knew there was a child in view of the act and the person is more than eighteen years of age and more than four years older than the child.
- (5) As used in this section, unless the context otherwise requires:
 - (a) “Child” means a person under fifteen years of age.
 - (b) “Masturbation” means the real or simulated touching, rubbing, or otherwise stimulating of a person's own genitals or pubic area for the purpose of sexual gratification or arousal of the person, regardless of whether the genitals or pubic area is exposed or covered.

Under state law, indecent exposure is generally considered to be a class 1 misdemeanor. The penalties imposed for the commission of a class 1 misdemeanor are found at Section 18-1.3-501(1)(a.5) of the Colorado Revised Statutes:

³ Subsection (2)(a), which was repealed at the 2003 legislative session, created different classifications of indecent exposure offenses depending upon the age of the victim. This is now addressed in Subsection (4) of the statute.

⁴ Subsection (3), which was repealed at the 2002 legislative session, created an enhanced penalty for a second offense of the same nature. Penalty enhancements for multiple offenses are now addressed in Title 18, Article 1.3, C.R.S.

§ 18-1.3-501. Misdemeanors classified--drug misdemeanors and drug petty offenses classified--penalties--legislative intent—definitions.

(1)(a.5) Except as otherwise provided in subsection (1)(d) of this section, for offenses committed on or after March 1, 2022, misdemeanors are divided into two classes that are distinguished from one another by the following penalties that are authorized upon conviction:

Class 1 - Maximum Sentence: 364 days imprisonment, not more than a one thousand dollar fine, or both.

The indecent exposure statute, however, provides a penalty enhancement if the offense of indecent exposure is committed in view of a child under the age of fifteen. The penalties imposed for the commission of a class 6 felony are found at Section 18-1.3-401(1)(a)(V.5)(A) of the Colorado Revised Statutes:

§ 18-1.3-401. Felonies classified--presumptive penalties

(1)(a)(V.5)(A) As to any person sentenced for a felony for an offense committed on or after July 1, 2020, felonies are divided into six classes that are distinguished from one another by the following presumptive ranges of penalties that are authorized upon conviction:

Class 6 - Minimum Sentence: One year imprisonment; Maximum Sentence: Eighteen months imprisonment; Mandatory Period of Parole: One year.

By making the latter offense a class 6 felony, the state has effectively preempted local legislation on the same subject under the decision of the Colorado Supreme Court in *Quintana v. Edgewater Municipal Court*, 498 P.2d 931 (1972) [the prosecution of felony-level offenses is exclusively within the jurisdiction of the district court]. Accordingly, the Town is precluded from adopting a corresponding ordinance on this particular subject.

Recommended Changes to the Town Code – Public Indecency and Indecent Exposure

At present, the Town of Castle Rock does not have local ordinances that correspond to the state prohibitions against public indecency or indecent exposure. As P.O.S.T.-certified peace officers under Section 16-2.5-105, C.R.S., our police officers have the authority to enforce all laws of the State of Colorado. Any charges brought under the state public indecency or indecent exposure statutes, however, must be prosecuted in the county or district court, as opposed to the Castle Rock Municipal Court.

As a reminder, the jurisdictional authority of the Castle Rock Police Department to enforce state criminal statutes and local criminal ordinances extends to all property within the boundaries of the Town. This would include any property owned and operated by Douglas County, including the Douglas County Fairgrounds and Events Center.

Regarding the possible penalties that may be obtained in a prosecution of a criminal offense in the Castle Rock Municipal Court, the maximum penalty is a fine of not more than one thousand dollars (\$1,000.00) or imprisonment not to exceed one (1) year, or both such fine and imprisonment. *See* Castle Rock Municipal Code § 1.08.010. In looking at the public indecency statute, in particular, it should be pointed out that the maximum penalty for the violation of a Town ordinance is greater than the maximum penalty for a State petty offense.

This fact alone, however, would not necessarily translate into a more severe punishment at the municipal level. On the contrary, many factors go into the sentencing of a criminal defendant (e.g., criminal record, age, sophistication, the circumstances under which the crime was committed, and whether the defendant genuinely feels remorse). In my experience, it would be out of the ordinary to see a maximum penalty meted out by a municipal court. Rather, offenses of a more serious nature are typically charged at the district court level and prosecuted by the district attorney.

If the Town Council wishes to move forward with the adoption of an amendment to the Town Code to make public indecency and indecent exposure a municipal offense, it is the recommendation of the Town Attorney's Office (i) to adopt the state statutes without any substantive change and (ii) to exclude the felony enhancement provision of the indecent exposure statute. We propose that these two new sections be added to the Town Code in a new Chapter 9.06 – Offenses Related to Morals, to read as follows:

Section 9.06.010 – Public Indecency.

A. It is unlawful for any person to commit public indecency. A person who performs any of the following in a public place or where the conduct may reasonably be expected to be viewed by members of the public commits public indecency:

1. An act of sexual intercourse; or
2. A lewd exposure of an intimate part of the body, not including the genitals, done with intent to arouse or to satisfy the sexual desire of any person; or
3. A lewd fondling or caress of the body of another person; or
4. A knowing exposure of the person's genitals to the view of a person under circumstances in which such conduct is likely to cause affront or alarm to the other person.

B. For purposes of this section, “intimate part” means the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person.

Section 9.06.020 – Indecent Exposure.

A. It is unlawful for any person to commit indecent exposure. A person commits indecent exposure:

1. If the person knowingly exposes such person's genitals to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person with the intent to arouse or to satisfy the sexual desire of any person;
2. If the person knowingly performs an act of masturbation in a manner which exposes the act to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person.

B. For purposes of this section, "masturbation" means the real or simulated touching, rubbing, or otherwise stimulating of a person's own genitals or pubic area for the purpose of sexual gratification or arousal of the person, regardless of whether the genitals or pubic area is exposed or covered.

Public Nudity

The State of Colorado has not adopted a statute criminalizing the act of appearing in a state of nudity in a public place. Historically, regulation of public nudity was left to local governments. At present, the Town of Castle Rock does not have a local ordinance prohibiting public nudity.

Ft. Collins adopted a public nudity ordinance prohibiting the exposure of a female breast without a corresponding prohibition against the exposure of a male breast. The ordinance faced a constitutional challenge. In 2019, the Tenth Circuit Federal Court of Appeals, held that the Ft. Collins ordinance violated the equal protection clause of the Fourteenth Amendment to the United States Constitution because it was discriminatory and treated women different than men. See *Free the Nipple-Fort Collins, et al v. City of Fort Collins*, 916 F.3d 792 (10th Cir. 2019). In response, the Ft. Collins City Council amended its public nudity ordinance by removing all prohibitions related to female breasts. The amended ordinance reads 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 transportation facilities, schools, places of amusement, playgrounds, and the common areas of private buildings and facilities.

- (b) The prohibition in subsection (a) does not extend to any:
 - (1) Person undergoing bona fide emergency medical examinations or treatment;
 - (2) Person located in a dressing room, shower room, bathroom, or other enclosed area not visible from any public place, specifically designated for changing clothes or in which nudity is 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.

Locally, the Town of Parker has a prohibition against appearing in a state of nudity in a public place, which prohibition is contained within its public indecency ordinance. Similarly, in 2022, the Parker Town Attorney's Office advised the Parker Town Council to amend the Town Code definition of the term, "state of nudity," to remove all references to the female breast in order to comply with the Tenth Circuit decision in *Free the Nipple-Fort Collins, et al, supra*. The ordinance now reads, in pertinent part:

8.06.060 - Public indecency.

- (a) It is unlawful for any person, in a public place, to knowingly or intentionally: ...
 - (4) Appear in a state of nudity.
- (b) For purposes of this Section, "state of nudity" means the showing of the post-pubertal human genitals, pubic region, buttocks, or anus with less than a fully opaque covering; or the exposure of any device, costume or covering which gives the appearance of or simulates the post-pubertal human genitals, pubic region, buttocks, or anus.
- (c) For purposes of this Section, public place includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

If the Town Council wishes to move forward with the adoption of an amendment to the Town Code to make public nudity a municipal offense, it is the recommendation of the Town

Attorney's Office to incorporate features of both the Ft. Collins and Parker ordinance. We propose that the section be added to the new Chapter 9.06, as proposed above, to read as follows:

Section 9.06.030. - Public nudity.

A. It is unlawful for any person to, knowingly or intentionally, appear in a state of nudity in a public place.

B. For purposes of this section, "state of nudity" means the showing of the post-pubertal human genitals, pubic region, buttocks, or anus with less than a fully opaque covering; or the exposure of any device, costume or covering which gives the appearance of or simulates the post-pubertal human genitals, pubic region, buttocks, or anus.

C. For purposes of this section, "public place" means a place, regardless of ownership, to which the public or a substantial number of the public has access, including all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

D. The prohibition in subsection A does not extend to:

1. Any person undergoing bona fide emergency medical examinations or treatment;
2. Any person located in a dressing room, shower room, bathroom, or other enclosed area not visible from any public place, specifically designated for changing clothes or in which nudity is expressly permitted; or
3. Any 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.

Use and/or Rental of Town Facilities

In the event that the Town Council should amend the Town Code to include prohibitions against public indecency, indecent exposure, and public nudity, it is the recommendation of the Town Attorney's Office that the Town include the following statement in its policies, all associated permits, and agreements for the use and rental of Town facilities:

"As a condition of the use and/or rental of a Town facility, the user and/or renter shall ensure compliance with all applicable federal, state, and local laws, including all Town ordinances concerning public indecency, indecent exposure, and public nudity. Failure to comply shall result in the revocation of any permit and/or the termination of any agreement

for such use and/or rental, and shall preclude the issuance of any future permits and/or agreements. Additionally, any failure to comply may result in the issuance of a criminal summons and complaint for violation of the Town Code and/or other applicable laws.”

Summary

As stated above, the Town Attorney’s Office recommends Town Council to amend the Castle Rock Municipal Code by adopting the following ordinances:

- Section 9.06.010 – Public Indecency;
- Section 9.06.020 – Indecent Exposure;
- Section 9.06.030 – Public Nudity.

Any violation of Section 9.06.020, involving a child of 15 years of age or younger, would be charged under the State statute as such violation consists a felony. As such, felony criminal citations may not be prosecuted in Castle Rock Municipal Court and would be handled by the Douglas County District Attorney’s Office.

Finally, the Town Attorney’s Office recommends that all permits, policies and/or agreement related to the use and/or rental of Town owned facilities include a statement informing all users and/or renters that they must ensure compliance with all applicable federal, state and local laws. The statement should expressly provide that failure to comply shall result in the revocation/termination of any permits/agreement, preclude the issuances of future permits/agreements, and may result in the issuance of a criminal summons and complaint.