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June 3, 2004

Mayor Brown and  
The City Council  
City of Lincoln Park  
1355 Southfield  
Lincoln, Park, MI 48146

RE: *Ordinances regulating public nudity*

To Mayor Brown and the City Council:

My input and opinion were requested by the City of Lincoln Park on several related issues involving local ordinances regulating public nudity. EXHIBITS 1,2, and 3. In particular, "public nudity" refers to displays by partial or totally nude performers of their breasts, pubic region, or buttocks. A couple of preliminary remarks are in order.

First, the City Council, City Manager, and City Attorney are commended for considering and studying these regulatory issues. This subject is charged with political and emotional energy that frequently exceeds the authority and fiscal resources of a municipality to enact and enforce ordinances.

Second, there is no permanent regulatory solution to adult businesses that sell sex, because the affected businesses and the state of the law continue to evolve. Now there are topless bars, totally nude cabarets, (also known as juice bars), massage parlors, nude photo shops, escort services, and adult book and video stores. A municipality must examine its regulatory system every year or so to determine if the ordinances accurately reflect the desired public policy and are capable of being enforced. This process never really ends.

My understanding of the situation in the City of Lincoln Park is that currently there is an existing juice bar that features totally nude dancers. There is no bar in the City of Lincoln Park that holds a liquor license from the Liquor Control Commission with a topless entertainment permit. A business has acquired some land within the "General Industrial" zoning district and has expressed a desire or plan to open an adult business with or without a liquor license. Presumably this adult business will feature partially nude (topless) dancers or totally nude dancers. In conjunction with a liquor

license, only partially nude (topless) entertainment can be permitted, and only by way of a topless entertainment permit issued by the Liquor Control Commission (the LCC). See MCL 436.1916(3), EXHIBIT 5. Presumably the City Council is exploring and reviewing its regulatory options.

The City of Lincoln Park already adopted the ordinance prohibiting public nudity as authorized by MCL 117.5(h), EXHIBIT 6. Once a municipality has adopted this type of ordinance, the LCC will not issue a topless entertainment permit for a licensed establishment within that municipality. See MCL 436.1916(3), EXHIBIT 5. Section 680.10, *Prohibition of Public Nudity*, EXHIBIT 1, also can be used to close down existing businesses featuring live nude entertainment, but the ordinance has not been used that way to date in Michigan. Specifically, ordinances like Section 680.10 based on MCL 117.5(h), and its township and village corollaries based on MCL 41.181 and MCL 67.1(aa), have been used primarily to deter businesses from locating within communities enacting these ordinances. To my knowledge, no Michigan municipality has used such an ordinance to shut down an existing adult business that featured live nude entertainers. Or, no Michigan municipality has used the ordinance in that manner and litigated the subject to the point of generating a reported court decision on it. This is the basic regulatory approach taken by many Michigan municipalities that do not engage in the comprehensive regulatory review now in process in the City of Lincoln Park.

Another ordinance under consideration by the Lincoln Park City Council, Section 822.30, *Nudity on Licensed Premises*, EXHIBIT 2, prohibits nudity in any bar licensed by the LCC. Obviously, Section 822.30 would have no impact on businesses that do not serve alcoholic beverages and are not licensed by the LCC.

A third ordinance apparently under consideration is an amendment to Section 822.01, *Definitions*, EXHIBIT 3, which contains proposed definitions of nudity, pornographic, pornography, prurient interest, sadomasochistic abuse, sexual conduct, and sexual excitement. There seemed to be no connection between these proposed definitions and any ordinance provision restricting, prohibiting, or otherwise regulating human behavior. There was no specified connection between the proposed definitions and the Lincoln Park zoning ordinance. There was no penalty clause, or any indication of what conduct was being regulated. This proposed ordinance is fatally flawed, and should not be adopted. If there was a purpose in proposing the ordinance definitions, I would need to see what that is, along with the proposed text purporting to regulate or prohibit the human behavior involving the defined terms. I suspect this language was lifted from a more elaborative ordinance aimed at defining and prohibiting the display of graphic photos or videos, and live performances of sexual behavior, in businesses serving alcoholic beverages. This may have been taken from an ordinance or agency regulation developed in another state, like California or New York. It serves no useful purpose in Lincoln Park, without additional supporting regulations.

The primary advantage to Section 822.30 is that similar ordinances were adopted, enforced, and upheld in two separate cases that ended up in the Michigan Court of Appeals: *Jott, Inc v Charter Township of Clinton*, 224 Mich App 513, 569 NW2d 841, EXHIBIT 7, and *Charter Township of VanBuren v Garter Belt Inc*, 258 Mich App 594, 673 NW2d 111, EXHIBIT 8. Both cases involved businesses licensed by the LCC. In *Charter Township of VanBuren v Garter Belt Inc*, the Court of Appeals clearly allowed enforcement of the local ordinance against a business that engaged in LCC permitted topless entertainment prior to adoption of the ordinance. The “grandfather defense” commonly asserted in defense of amended zoning ordinances was not a valid defense against the nudity ordinance. However, there is no current federal court decision that reaches the same conclusions as the Michigan Court of Appeals did in *Jott* and *Charter Township of Van Buren*. The closest decision is *California v LaRue*, 409 US 109; 93 SCt 390; 34 Led 2d 342 (1972), in which the United States Supreme Court upheld the constitutionality of regulations promulgated by the California Department of Alcoholic Beverages that prohibited bars from featuring “the performance of acts, or simulated acts, of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law” and the display of the pubic hair, anus, vulva, or genitals. Absent from the regulation was a ban on topless, or bare breast entertainment. After *LaRue*, the United States Supreme Court questioned its own analysis in *LaRue* when it decided *44 Liquormart Inc v Rhode Island*, 517 US 484; 116 SCt 1495; 134 LE 2d 711 (1996). State court decisions are not the final authority on the validity of ordinances like those under review by the City of Lincoln Park. Indeed, it would be incorrect to assume the ordinance that survived state court challenges also would survive federal court challenges. The state of the law remains unsettled, as can be illustrated by the plurality opinions reached by the United States Supreme Court in *Barnes v Glen Theatre Inc*, 501 US 560; 111 SCt 2456; 115 LE 2d 504 (1991)<sup>1</sup> and *City of Erie v Pap’s AM*, 529 US 277; 120 SCt 1382; 146 LE 2d 265 (2000). On the cutting edge of ordinances regulating and prohibiting nudity, the United States Supreme Court has not issued a definitive majority opinion on which municipalities can rely in developing and enforcing their ordinances. Despite the desire of local officials for an ordinance blueprint or template that is certain to pass federal court review, there simply is no such pre-approved ordinance in existence.

There is a 6<sup>th</sup> Circuit case (in which Michigan is situated) that held Akron’s ban on public nudity unconstitutional. *Triplett Grille Inc v City of Akron*, 40 F3d 129 (6<sup>th</sup> Cir 1994). A copy of the opinion is attached, EXHIBIT 9. The 6<sup>th</sup> Circuit Court of Appeals found Akron’s ordinance unconstitutional because it effected a total ban on public nudity. This was in spite of the fact that the United States Supreme Court allowed an almost identical regulation to survive legal challenges in *Barnes v Glen Theatre Inc*. The holding in *Triplett Grille Inc v Akron* suggests that an ordinance totally banning public

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<sup>1</sup> It was the decision in *Barnes v Glen Theater Inc* that prompted Michigan to enact the statutes authorizing municipalities to ban public nudity.

nudity, like Section 680.10, will not survive a well directed constitutional challenge in the federal courts. However, some highly motivated municipality will have to adopt, enforce, and litigate an ordinance like Section 680.10 to obtain a definitive decision.

A more recent federal court decision describing how nudity ordinances are likely to be analyzed is *Ben's Bar Inc v Village of Somerset*, 316 F3d 702 (7<sup>th</sup> Cir 2003). A copy is attached, EXHIBIT 10, because the opinion includes a survey of the leading cases in the area, as well as a detailed analysis of the Village of Somerset ordinance.<sup>2</sup> **This case should be read by any local elected official who is studying ordinances aimed at regulating nude entertainment.** The Court summarized its analytical approach.

Based on the road map provided by the Supreme Court in *44 Liquormart*, as described *supra*, we conclude that a liquor regulation prohibiting the sale or consumption of alcohol on the premises of adult entertainment establishments is constitutional if: (1) the State is regulating pursuant to a legitimate governmental power, *O'Brian*, 391 U.S. at 377, 88 S.Ct. 1673; (2) the regulation does not completely prohibit adult entertainment, *Renton*, 475 U.S. at 46, 106 S.Ct. 925; (3) the regulation is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments, *Pap's A.M.*, 529 U.S. at 289-91, 120 S.Ct. 1382; and (4) the regulation is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues of communication remain available, see *Alameda Books*, 122 S.Ct. at 1734 (plurality opinion); *id.* at 1739- 44 (Kennedy, J. concurring); or, alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest. *Pap's A.M.*, 529 U.S. at 296, 301 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part).

The keys to the decision for the City of Lincoln Park's purposes are that the ordinance "does not completely prohibit adult entertainment" and "is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments". The City of Lincoln Park cannot ban nude entertainment because nudity offends the citizens of Lincoln Park. This opinion signals a retreat from the plurality opinions of the United States Supreme Court in *Barnes v Glen Theatre Inc* and *City of Erie v Pap's AM*. Until the issue is heard and decided by the United States Supreme Court, it appears that municipalities should regulate nudity in public places without enacting blanket prohibitions on all nude performances, and municipalities should focus on the negative secondary effects of the nude entertainment rather than the content (i.e., nude bodies) of the entertainment.

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<sup>2</sup> Because *Ben's Bar* is a 7<sup>th</sup> Circuit decision, it is not binding precedent in the 6<sup>th</sup> Circuit, where Michigan is located, but it is persuasive authority.

It is against this legal and factual backdrop that the City Council of Lincoln Park must decide on the regulatory package to be adopted and enforced against public nudity in Lincoln Park. This becomes a public policy issue. The City Council must determine its public policy and regulatory priorities, and that determination will drive the analysis of the appropriate regulatory package.

For example, if the City Council determines that its number one priority is to ban businesses featuring totally nude live entertainment, then Section 680.10 must be adopted and enforced until a court rules against the City. The ultimate question of enforceability will not be answered until a case aimed at closing an existing business or preventing the opening of a new business is pushed through the Michigan Court of Appeals or the federal courts. The expense of this will be measured in multiples of \$10,000. A single difficult case may cost \$150,000 or more to litigate.

If the City Council determines that its number one priority is to ban new businesses featuring totally nude live entertainment, then Section 680.10 should be adopted, but enforced only against new businesses attempting to open and operate in Lincoln Park. This approach may create issues of selective enforcement, which might undercut the effectiveness of the ordinance. Again, a single difficult case may cost \$150,000 or more to litigate.

If the City Council determines that its number one priority is to ban partially nude entertainment in businesses with liquor licenses, then Section 822.30 should be adopted along with supporting legislative findings to ensure the courts can make the same rulings that were reached in Jott and VanBuren Township, and in Ben's Bar.

The significance of the Court of Appeals decision in Jott deserves additional commentary and analysis. The first ten pages of the opinion focus on the zoning ordinance of the Charter Township of Clinton. The Court's reasoning does not apply to the ordinances currently under consideration by the City Council of Lincoln Park. The Court of Appeals directed its attention to the "nudity ordinance" beginning on page 10 (page 536 in the official reporter). The Court of Appeals agreed (with the trial court) that subsections (f) and (g) were unenforceable. Obviously, those subsections should not be adopted by Lincoln Park. Also, the Court of Appeals noted "that ordinance 291-A was enacted in order to eradicate the effects of "undesirable behavior" stemming from a combination of alcohol and nudity." (Jott, p14, pp 545-546 in the official reporter.) This suggests that careful legislative findings should be made about the nature of "undesirable behavior" sought to be eradicated by the City Council by adopting a ban on the combination of liquor and nudity in establishments licensed by the LCC. The simple adoption of the basic ordinance language utilized by the Charter Township of Clinton probably won't be sufficient. The ordinance text submitted to me for review does not reflect any pertinent legislative findings, or any subsection on findings and intent. This should be corrected. An example for the City Council to

consider is attached, EXHIBIT 4. It can and should be modified to reflect the circumstances of the City of Lincoln Park, if there is a history of undesirable behavior that has been investigated and reported or documented. It probably should be expanded to include some references to studies on the negative secondary effects of the combination of alcohol and live nude entertainment. More examples are in the *Ben's Bar* opinion.

Some general information and advice about this area of the law may be helpful to the City Council. Municipalities cannot ban adult bookstores or porn shops from locating within the political boundaries. Zoning ordinances that limit adult bookstores, topless bars, and totally nude cabarets to industrial sectors are being questioned. Better planning and zoning results seem to be obtained by requiring adult businesses to locate on major thoroughfares with five traffic lanes or more with well lit parking lots situated in the front of the businesses. Ideally, there will be little or no pedestrian traffic along the roadway. This avoids dark corners and cramped spaces where criminal activity is more likely to occur outside and around the businesses. It also minimizes the number of pedestrians who must walk close to the business storefront.

Studies indicate that clusters of adult business produce real and perceived negative secondary effects, so zoning ordinance provisions should disperse and separate the adult businesses. Also, adult businesses should be separated from bars by 800 to 1500 feet to cut down on inebriated bar customers visiting adult businesses right next door. Leaving only 2 or 3 sites in the city properly zoned for adult businesses will not make it through a court challenge to the zoning ordinance.

Not every topless bar or cabaret featuring totally nude dancers is a public safety problem, but some are. If the City of Lincoln Park has actual regulatory experience with either one of these business types, public safety reports or incidents should be examined to identify the number of crimes or disturbances associated with the business operations in a calendar year, as compared with other problem sites in the City. Then actual data can be used to ascertain the extent of public safety incidents, calls, complaints, crimes, or disturbances associated with various businesses, activities, and events within Lincoln Park. Sometimes there are more calls to sporting events, wedding receptions, or conventional bars than there are to topless bars or totally nude entertainment businesses. This information is useful when developing an overall regulatory and public safety approach that will work in Lincoln Park. The information can be used to augment the legislative findings in support of an ordinance like Section 822.30.

I was asked to explain any potential conflict between the ordinance prohibiting nudity in bars and the ordinance prohibiting nudity generally. The ordinance aimed at nudity in establishments licensed by the LCC is more specific and limited. It has been upheld in two separate court challenges in Michigan, and variations of it have been

~~upheld in the federal courts. The other ordinance generally prohibiting nudity has not been tested at the Court of Appeals level, but is backed by the Michigan statute authorizing its adoption. The Attorney General may assist in defending constitutional attacks on the statute and an ordinance based on the statute. Both ordinances should produce the same result at the LCC: no more topless entertainment permits will be issued in or for the City of Lincoln Park. Enacting both ordinances may lead a court to question the constitutionality of banning totally nude performances completely. See the opinions in *Triplett Grille* and *Ben's Bar*. This is a question to which there is no precise legal answer right now. Some actual cases will have to be litigated in order to obtain a definitive response from the courts. Enacting the two ordinances will raise questions about what activity the City Council actually intended to prohibit, and actually intended to permit. The resulting uncertainty may lead a reviewing court to strike down one or both ordinances, but it is doubtful that both would be invalidated. Finally, the federal court decisions in *Triplett Grill* and *Ben's Bar* suggest that total bans on public nudity may be struck down until a case is taken all the way to the United States Supreme Court, where the ultimate ruling cannot be predicted with any certainty.~~

As noted in an even more recent case, *RVS LLC v City of Rockford*, 361 F3d 402 (7<sup>th</sup> Cir 2004), copy attached, EXHIBIT 11, the court observed that the challenged ordinance might have survived if it applied only to bars and clubs that present nude or semi-nude dancing, quoting from an earlier decision: "Such entertainment has a long history of spawning deleterious effects, including prostitution and the criminal abuse and exploitation of young women, and in most cases a city or state need only carry a minimum burden to demonstrate its interest in regulation of such activity."

This brings review of the subject full circle. The City Council must determine what its regulatory objective is, and then select the ordinance that advances or achieves that objective the best. The basic regulatory options are outlined here.

- I. If the City Council is most concerned with keeping nudity out of businesses licensed by the LCC because of the negative secondary effects of the combination of alcohol and nudity, it should adopt Section 822.30 with appropriate legislative findings and a statement of intent.
- II. If the City Council is most concerned with closing businesses featuring totally nude live entertainment, then Section 680.10 should be used to close all businesses in violation. This will be an expensive process, with an uncertain outcome. I don't recommend this.
- III. If the City Council is most concerned with preventing new businesses from opening that feature totally nude live entertainment, then Section 680.10 should be used to prevent such businesses from obtaining zoning approval. A

complete ban on nude entertainment is open to challenge, because it looks like total exclusion of that form of expression within the City of Lincoln Park.

IV. If the City Council is most concerned with dispersing topless bars, conventional bars, and businesses featuring totally nude live entertainment, the zoning ordinance should be examined and updated to make sure it accomplishes these objectives in a legally valid format. (A relatively recent pair of court decisions involving the City of Grand Rapids, *Executive Arts Studio, Inc v City of Grand Rapids*, 179 F Supp 2d 755 (2001), and *Executive Arts Studio, Inc v City of Grand Rapids*, 227 F Supp 2d 731 (2002), cast doubt over long accepted definitions and standards. More work would be required to do this correctly.)

V. If the City Council is unable to agree on regulatory objectives and public policy priorities for the City of Lincoln Park, or the City Council simply wants to do as much as it can to regulate adult businesses and the associated negative secondary effects without great risk and litigation expense, then I recommend a three step approach:

- a) adopt Section 822.30 with appropriate legislative findings and a subsection on intent, and
- b) obtain professional review of the Lincoln Park zoning ordinance as it applies to adult entertainment businesses, and
- c) repeal Section 680.10 at the same time Section 822.30 is adopted, and wait for a test case by which the enforceability of ordinances like Section 822.30 is determined by a Michigan or federal appellate court.

I would be pleased to work with the City of Lincoln Park, if needed, on any or all of the outlined options. Special attention should be given to legislative findings. I could attend a City Council session to assist in the discussion of this subject, which often leads to multiple questions about what can and should be regulated.

Very truly yours,



Eric D. Williams

enc: EXHIBITS 1 through 11



## ATTACHMENTS

- EXHIBIT 1 Section 680.10, Prohibition of Public Nudity
- EXHIBIT 2 Section 822.30, Nudity on Licensed Premises
- EXHIBIT 3 Section 822.01, Definitions
- EXHIBIT 4 Sample, Legislative Findings and Intent
- EXHIBIT 5 MCL 436.1916
- EXHIBIT 6 MCL 117.5h
- EXHIBIT 7 *Jott v Charter Township of Clinton*
- EXHIBIT 8 *Charter Township of VanBuren v Garter Belt Inc.*
- EXHIBIT 9 *Triplett Grille Inc. v City of Akron*
- EXHIBIT 10 *Ben's Bar Inc v Village of Somerset*
- EXHIBIT 11 *RVS v City of Rockford*

Exhibit  
1

PROPOSED RESOLUTION  
LINCOLN PARK CITY COUNCIL

IX

Date:

MOVED: COUNCILPERSONS Brady, DiSanto, Higgins, Kandes, Murphy, Vasio,  
MAYOR Brown

SUPPORT: COUNCILPERSONS Brady, DiSanto, Higgins, Kandes, Murphy, Vasio,  
MAYOR Brown

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RESOLVED, that an ordinance to amend the Codified Ordinances of the City of Lincoln Park by adding a new Section .10 to Chapter 680, entitled PROHIBITION OF PUBLIC NUDITY, which new section shall read as follows:

THE CITY OF LINCOLN PARK ORDAINS:

That Chapter 680 of the Codified Ordinances of the City of Lincoln Park be amended by adding a new section be given its third reading and adopted:

680.10 PROHIBITION OF PUBLIC NUDITY

(a). Public nudity is prohibited within the city limits of the City of Lincoln Park.

(b). As used in this section, "public nudity" means knowingly or intentionally displaying in a public place, or for payment or promise of payment by any person including, but not limited to, payment or promise of payment of an admission fee, any individual's genitals or anus with less than a fully opaque covering, or a female individual's breast with less than a fully opaque covering of the nipple and areola. A mother's breastfeeding of her baby does not under any circumstances constitute nudity irrespective of whether or not the nipple is covered during or incidental to the feeding.

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YEAS: COUNCILPERSONS Brady, DiSanto, Higgins, Kandes, Murphy, Vasio,  
MAYOR Brown.

NAYS: COUNCILPERSONS Brady, DiSanto, Higgins, Kandes, Murphy, Vasio,  
MAYOR Brown

ABSTAINED: COUNCILPERSONS, Brady, DiSanto, Higgins, Kandes, Higgins, Vasio,  
MAYOR Brown.



EXHIBIT  
1

*Exhibit 2*

PROPOSED RESOLUTION  
LINCOLN PARK CITY COUNCIL

Date:

MOVED: COUNCILPERSONS Brady, DiSanto, Higgins, Kandes, Murphy, Vaslo,  
MAYOR Brown

SUPPORT: COUNCILPERSONS Brady, DiSanto, Higgins, Kandes, Murphy, Vaslo,  
MAYOR Brown

\*\*\*\*\*

RESOLVED, that "AN ORDINANCE TO AMEND THE CODIFIED ORDINANCES OF THE CITY OF LINCOLN PARK BY ADDING A NEW SECTION, 822.30 NUDITY ON LICENSED PREMISES", be given its first and second reading by title only,

**The City of Lincoln Park Ordains:**

That Section 822 of the Codified Ordinances of the City of Lincoln Park be amended by adopting a new Section, .30, which new section shall read as follows;

**Section 822.30 - Nudity on licensed premises**

(a) No person, while appearing in a state of nudity as defined by this section, shall frequent, loiter, work for or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.

(b) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:

- (1) The whole or part of the pubic region;
- (2) The whole or part of the anus;
- (3) The whole or part of the buttocks;
- (4) The whole or part of the genitals;
- (5) The breast area including nipple, or more than one-half of the area of the breast.

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YEAS: COUNCILPERSONS Brady, DiSanto, Higgins, Kandes, Murphy, Vaslo,  
MAYOR Brown.

NAYS: COUNCILPERSONS Brady, DiSanto, Higgins, Kandes, Murphy, Vaslo,  
MAYOR Brown

APPROVED: CO



*Exhibit 2*



Exhibit 3

PROPOSED RESOLUTION  
LINCOLN PARK CITY COUNCIL

Date:

MOVED: COUNCILPERSONS Brady, DiSanto, Higgins, Kandes, Murphy, Vaslo,  
MAYOR Brown

SUPPORT: COUNCILPERSONS Brady, DiSanto, Higgins, Kandes, Murphy, Vaslo,  
MAYOR Brown

\*\*\*\*\*

RESOLVED, that "AN ORDINANCE TO AMEND THE CODIFIED ORDINANCES OF THE CITY OF LINCOLN PARK BY ADDING DEFINITIONS TO 822.01 - DEFINITIONS", be given its first and second reading by title only,

**The City of Lincoln Park Ordains:**

That Section 822.01. Definitions, of the Codified Ordinances of the City of Lincoln Park be amended by adding certain definitions, which shall read as follows:

**Section 822.01 - Definitions.**

The following words, terms and phrases, when used in this division, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

*Audience* means one or more persons who are permitted to view a performance for valuable consideration, or in or from a public place.

*Display publicly* means the exposing, placing, posting, exhibiting or in any other fashion displaying in any location, whether public or private, material or a performance in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision if viewed from a public place or vehicle.

*Disseminate* means to manufacture, issue, publish, sell, lend, distribute, transmit, broadcast, exhibit or present material or to offer or agree to do the same, or to have in one's possession with intent to do the same.

*Material* means any printed matter, visual representation or sound recording, and includes, but is not limited to, books, magazines, motion picture films, pamphlets, newspaper, pictures, photographs, drawings, three-dimensional forms, sculptures, and phonograph, tape or wire recordings.

*Minor* means any person under 18 years of age.



Exhibit 3

*Nudity* means uncovered, or less than opaquely covered, postpubertal human genitals or private areas, the postpubertal human female breast below a point immediately above the top of the areola or the covered human male genitals in a discernibly turgid state. For the purpose of this definition, a female breast is considered uncovered if the nipple only or the nipple and the areola only are covered.

*Pander* means advertising or propagandizing in connection with the sale of material, the offering of a service, or the presentation or exhibition of a performance by appealing to the prurient interest of potential customers.

*Performance* means any live or reproduced exhibition, including, but not limited to, any play, motion picture film, dance or appearance presented to or performed before an audience.

*Pornographic* means relating to pornography.

*Pornographic* means any material or performance when all the following elements are present:

- (1) Considered as a whole, by the average person, applying the contemporary community standards of the township, it appeals to the prurient interest.
- (2) It depicts, describes or represents in a patently offensive way, sexual conduct.
- (3) It lacks serious literary, artistic, political or scientific value.

*Pornography for minors* means any material or performance when all the following elements are present:

- (1) Considered as a whole by the average person applying the contemporary community standards of the township with respect to what is suitable for minors, it is presented in such a manner as to appeal to a minor's prurient interest.
- (2) It depicts, describes or represents in a patently offensive way, nudity or sexual conduct.
- (3) It lacks serious literary, artistic, political or scientific value for minors.

*Prurient interest* means the desire or craving for sexual stimulation or gratification. In determining prurient interest, the material or performance shall be judged with reference to average persons, unless it appears from the character of the material or performance that it is designed to appeal to the prurient interest of a particular group of persons including, but not limited to, homosexuals, or sado-masochist. In that case, it shall be judged with reference to a particular group for which it was designed.

*Public place or vehicle* means any of the streets, alleys, parks, boulevards, schools or other public property in the city, or any dance hall, rental hall, theatre, amusement park, liquor establishment, store, depot, place of public accommodation or other private property generally frequented by the public for the purpose of education, recreation, amusement, entertainment, sport, shopping or travel; or any vehicle for public transportation, owned or operated by government, either directly or through a public corporation, or authority, or owned or operated by any nongovernmental agency for the use, enjoyment or transportation of the general public.

*Sado-masochistic abuse* means flagellation or torture by or upon a person who is nude or clad in undergarments or in a sexually revealing or bizarre costume, or the condition of such person being fettered, bound or otherwise physically restrained, in an apparent act of sexual stimulation or gratification.

*Sexual conduct* includes the following:

- (1) Masturbation;
- (2) Sexual intercourse, whether genital-genital, oral-genital, oral-anal or anal-genital;
- (3) Any erotic fondling or touching of the covered or uncovered genitals, buttocks, private area or any part thereof of the breasts of the female, whether the conduct described in subsections (1) - (3) of this definition is engaged in alone or between members of the same or opposite sex, or between humans and animals or humans and inanimate objects;
- (4) Actual or simulated display or exhibition of the human pubic area or genitals or any part thereof;
- (5) Sexual excitement; or
- (6) Sado-masochistic abuse.

*Sexual excitement* means the facial expressions, movements, utterances or other responses of a human male or female, whether alone or with others, whether closed or not, who is in an apparent state of sexual stimulation or arousal, or experiencing the physical or sensual reactions of humans engaging in or witnessing sexual conduct.

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YEAS: COUNCILPERSONS Brady, DiSanto, Higgins, Kandes, Murphy, Vasio.  
MAYOR Brown.

NAYS: COUNCILPERSONS Brady, DiSanto, Higgins, Kandes, Murphy, Vasio.  
MAYOR Brown

ABSTAINED: COUNCILPERSONS, Brady, DiSanto, Higgins, Kandes, Murphy, Vasio.

SAMPLE

1. **Legislative Findings.** The City Council of Lincoln Park finds that the combination of alcohol and nudity in business establishments selling alcoholic beverages by the glass leads to or encourages undesirable behavior within the City of Lincoln Park.

2. **Intent.** It is the intent of the City Council of Lincoln Park to eradicate the effects of undesirable behavior stemming from the combination of alcoholic beverages and live nude performances or services associated with business establishments licensed by the Michigan Liquor Control Commission.

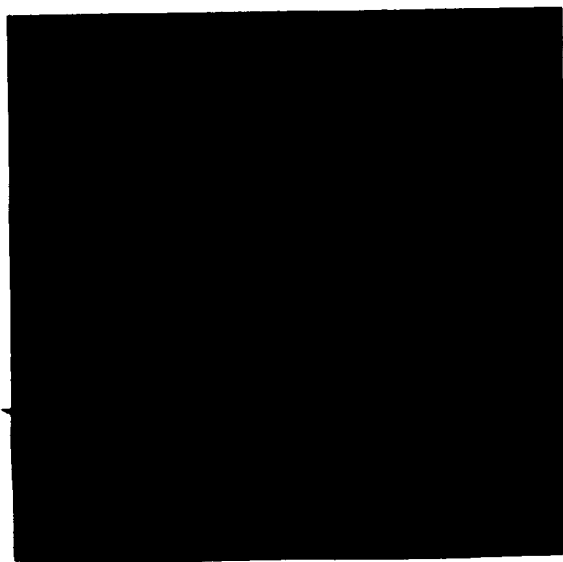


EXHIBIT  
H

*Exhibit 5*

M.C.L.A. 436.1916

▷

Michigan Compiled Laws Annotated Currentness

Chapter 436. Alcoholic Beverages

☐ Michigan Liquor Control Code of 1998 (Refs & Annos)

☐ Chapter 9

→ 436.1916. On-premises licensee; dance-entertainment permits

Sec. 916. (1) An on-premises licensee shall not allow monologues, dialogues, motion pictures, still slides, closed circuit television, contests, or other performances for public viewing on the licensed premises unless the licensee has applied for and been granted an entertainment permit by the commission. Issuance of an entertainment permit under this subsection does not allow topless activity on the licensed premises.

(2) An on-premises licensee shall not allow dancing by customers on the licensed premises unless the licensee has applied for and been granted a dance permit by the commission. Issuance of a dance permit under this subsection does not allow topless activity on the licensed premises.

(3) An on-premises licensee shall not allow topless activity on the licensed premises unless the licensee has applied for and been granted a topless activity permit by the commission. This section is not intended to prevent a local unit of government from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government. This subsection applies only to topless activity permits issued by the commission to on-premises licensees located in counties with a population of 95,000 or less.

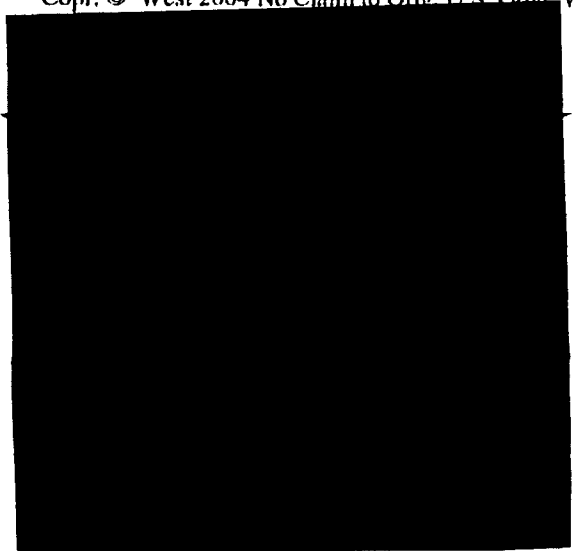
(4) The commission may issue to an on-premises licensee a combination dance-entertainment permit or topless activity-entertainment permit after application requesting a permit for both types of activities.

(5) An on-premises licensee shall not allow the activities allowed by a permit issued under this section at any time other than the legal hours for sale and consumption of alcoholic liquor.

(6) Before the issuance of any permit under this section, the on-premises licensee shall obtain the approval of all of the following:

(a) The commission.

(b) Except in cities with a population of 1,000,000 or more, the local legislative body of the jurisdiction within



*Exhibit 5*



M.C.L.A. 436.1916

which the premises are located.

(c) The chief law enforcement officer of the jurisdiction within which the premises are located or the entity contractually designated to enforce the law in that jurisdiction.

(7) The following activities are allowed without the granting of a permit under this section:

(a) The performance or playing of an orchestra, piano, or other types of musical instruments, or singing.

(b) Any publicly broadcast television transmission from a federally licensed station.

(8) In the case of a licensee granted an entertainment or dance permit under R 436.1407 of the Michigan administrative code who, after January 1, 1998, extended the activities conducted under that permit to regular or fulltime topless activity, that licensee shall apply to the commission for a topless activity permit under this section within 60 days after the effective date of this section in order to continue topless activity. Except as otherwise provided for in this subsection, this section applies only to entertainment or dance permits issued after the effective date of this section.

(9) The fees imposed by the commission for a permit under this section remain the same as the fees imposed under a permit issued under R 436.1407 of the Michigan administrative code.

(10) Except as otherwise provided, this section does not change the renewal or application process for a license under section 17 [FN1] or the renewal process for permits issued under R 436.1407 of the Michigan administrative code.

(11) As used in this section:

(a) "Nudity" means exposure to public view of the whole or part of the pubic region; the whole or part of the anus; the whole or part of the buttocks; the whole or part of the genitals; or the breast area including the nipple or more than 1/2 of the area of the breast.

(b) "Topless activity" means activity that includes, but is not limited to, entertainment or work-related activity

M.C.L.A. 436.1916

performed by any of the following persons on the licensed premises in which the female breast area, including the nipple, or more than 1/2 of the area of the breast, is directly exposed or exposed by means of see-through clothing or a body stocking:

(i) A licensee.

(ii) An employee, agent, or contractor of the licensee.

(iii) A person acting under the control of or with the permission of the licensee.

CREDIT(S)

P.A.1998, No. 58, § 916, Imd. Eff. April 14, 1998.

M.C.L.A. 117.5h

*Exhibit 6*

**C**  
Michigan Compiled Laws Annotated Currentness  
Chapter 117. Home Rule Cities  
117 Home Rule City Act (Refs & Annos)

→117.5h. Public nudity; regulation or prohibition by ordinance

Sec. 5h. (1) Whether or not so provided in its charter, a city may, by ordinance, regulate or prohibit public nudity within city boundaries.

(2) As used in this section, "public nudity" means knowingly or intentionally displaying in a public place, or for payment or promise of payment by any person including, but not limited to, payment or promise of payment of an admission fee, any individual's genitals or anus with less than a fully opaque covering, or a female individual's breast with less than a fully opaque covering of the nipple and areola. A women's breastfeeding of a baby does not under any circumstances constitute nudity irrespective of whether or not the nipple is covered during or incidental to the feeding.

CREDIT(S)

P.A.1909, No. 279, § 5h, added by P.A.1991, No. 175, § 1, Eff. March 30, 1992. Amended by P.A.1994, No. 313, § 1, Imd. Eff. July 21, 1994.

HISTORICAL AND STATUTORY NOTES

2004 Electronic Update

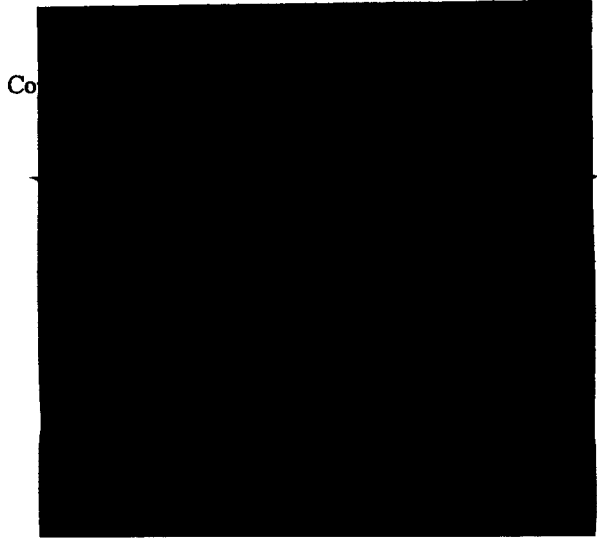
1994 Legislation

The 1994 amendment, in subsec. (2), in the first sentence added ", or a female individual's breast with less than a fully opaque covering of the nipple and areola", and added the second sentence.

M. C. L. A. 117.5h, MI ST 117.5h

Current through P.A.2004, No. 93-102

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*Exhibit 6*

Exhibit 7

C

Court of Appeals of Michigan.

JOTT, INC., Plaintiff-Appellant,

v.

CHARTER TOWNSHIP OF CLINTON, Defendant-Appellee.

JOTT, INC., Plaintiff-Appellee,

v.

CHARTER TOWNSHIP OF CLINTON, Defendant-Appellant.

Docket Nos. 173879, 181802.

Submitted Nov. 20, 1996, at Detroit.  
Decided July 15, 1997, at 9:20 a.m.  
Released for Publication Oct. 8, 1997.

Property owner sought declaration that township ordinances regulating zoning of topless entertainment and prohibiting nudity in liquor-licensed establishments were unconstitutional. The Clinton Circuit Court, George E. Montgomery, J., ruled that zoning ordinance was constitutional but that liquor-license ordinance was unconstitutional. Parties appealed. The Court of Appeals, Corrigan, J., held that: (1) zoning ordinance was a valid time, place, and manner restriction; (2) definition of "nudity" in ordinance regulating nudity at liquor-licensed establishments was valid in part and invalid in part; and (3) invalid portions of ordinance were severable.

Affirmed in part and reversed in part.

West Headnotes

[1] Zoning and Planning ↪562  
414k562 Most Cited Cases

Exhaustion of remedies requirement does not apply to facial challenge to zoning ordinance; facial challenge is one that attacks the very existence or enactment of ordinance and alleges that mere existence and threatened enforcement of ordinance adversely affects all property regulated in market as opposed to particular parcel.

[2] Zoning and Planning ↪562  
414k562 Most Cited Cases

Property owner's challenge to constitutionality of zoning ordinance regulating topless dancing was a facial challenge, and thus owner was not required to seek rezoning before seeking judicial determination regarding constitutionality of ordinance; owner claimed that ordinance was enacted without any evidence of legitimate governmental purpose and that purpose and effect of ordinance was to exclude totally constitutionally protected adult uses in township.

[3] Zoning and Planning ↪747  
414k747 Most Cited Cases

Although trial court's ruling on constitutional challenge to zoning ordinance is reviewed de novo, appellate court accords considerable deference to trial court's factual findings, and those findings will not be disturbed unless appellate court would have reached a different result had it occupied trial court's position.

[4] Constitutional Law ↪90(1)  
92k90(1) Most Cited Cases

State Constitution does not provide greater protection to speech than that afforded under First Amendment. U.S.C.A. Const.Amend. 1; M.C.L.A. Const. Art. 1, § 5.

[5] Constitutional Law ↪90.4(3)  
92k90.4(3) Most Cited Cases

Nonobscene, erotic entertainment, such as topless dancing, is a form of protected expression under First Amendment, but enjoys less protection than other forms of First Amendment expression, such as political speech. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law ↪90.4(1)  
92k90.4(1) Most Cited Cases

Zoning ordinance that does not suppress protected forms of sexual expression, but which is designed to combat undesirable secondary effects of businesses that purvey such activity, is to be reviewed under standards applicable to content-neutral time, place, and manner regulations. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law ↪90(3)  
92k90(3) Most Cited Cases

Content-neutral time, place, and manner regulations

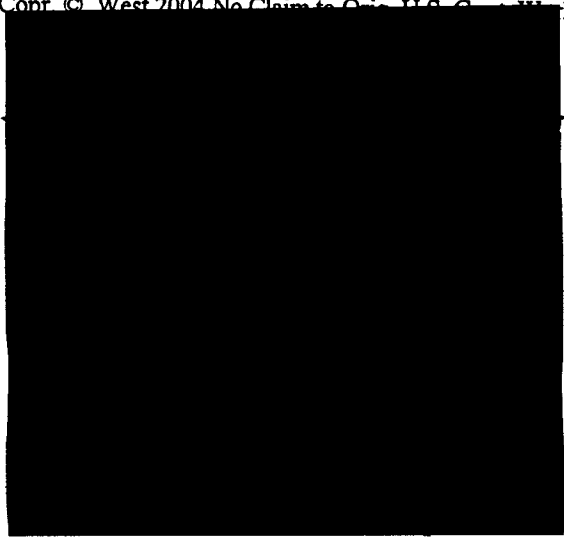


Exhibit 7

are acceptable as long as they are designed to serve substantial government interest and do not unreasonably limit alternative avenues of communication. U.S.C.A. Const.Amend. 1.

**[8] Constitutional Law** ↪90.4(3)  
92k90.4(3) Most Cited Cases

**[8] Zoning and Planning** ↪76  
414k76 Most Cited Cases

Township ordinance setting forth restrictions on spacing of topless dancing establishments and prohibiting such establishments from operating in industrial zones did not violate First Amendment; aim of ordinance was to protect neighborhoods rather than to ban such activity, ordinance contained waiver provisions, and there were several available sites for such activity under existing zoning scheme. U.S.C.A. Const.Amend. 1; Clinton Charter Township, Mich., Ordinance 260.

**[9] Intoxicating Liquors** ↪11  
223k11 Most Cited Cases

Grant to state Liquor Control Commission of power to control alcoholic beverage traffic within state does not preclude local communities from controlling alcoholic beverage traffic within their boundaries in proper exercise of their police powers. U.S.C.A. Const.Amend. 21; M.C.L.A. Const. Art. 4, § 40; M.C.L.A. § 436.1(2).

**[10] Intoxicating Liquors** ↪11  
223k11 Most Cited Cases

Township ordinance prohibiting topless dancing in liquor-licensed establishments did not conflict with state Liquor Control Commission regulation prohibiting "bottomless" nudity and other types of nudity prohibited by statute or local ordinance. Clinton Charter Township, Mich., Ordinance 291-A.

**[11] Intoxicating Liquors** ↪11  
223k11 Most Cited Cases

Definition of "public nudity" contained in township ordinance act did not preempt and did not conflict with township's definition of "nudity" in ordinance regulating nudity at liquor-licensed establishments, even though ordinance's definition of nudity was broader than that contained in act; ordinance was not an attempt to regulate public nudity per se, but rather circumstances under which liquor could be trafficked within township's boundaries. M.C.L.A. § 41.181;

Clinton Charter Township, Mich., Ordinance 291-A.

**[12] Intoxicating Liquors** ↪15  
223k15 Most Cited Cases

In township ordinance regulating nudity at liquor-licensed establishments, definition of "nudity" describing pubic region, anus, buttocks, genitals, and breast area was rationally related to objective of combating undesirable effects stemming from combination of alcohol and public exposure of those body parts. U.S.C.A. Const.Amend. 21; M.C.L.A. Const. Art. 4, § 40; M.C.L.A. § 436.1(2); Clinton Charter Township, Mich., Ordinance 291-A(a-e).

**[13] Intoxicating Liquors** ↪15  
223k15 Most Cited Cases

In township ordinance regulating nudity at liquor-licensed establishments, definition of "nudity" describing portions of leg area, hips, and stomach was not rationally related to objective of combating undesirable effects stemming from combination of alcohol and public exposure of those body parts. U.S.C.A. Const.Amend. 21; M.C.L.A. Const. Art. 4, § 40; M.C.L.A. § 436.1(2); Clinton Charter Township, Mich., Ordinance 291-A(f, g).

**[14] Municipal Corporations** ↪11(4)  
268k111(4) Most Cited Cases

Finding of unconstitutionality of subparts of definition of "nudity" in township ordinance regulating nudity at liquor-licensed establishments, which contained definition of nudity describing portions of leg area, hips, and stomach, did not render unconstitutional remaining subparts of ordinance describing pubic region, anus, buttocks, genitals, and breast area. Clinton Charter Township, Mich., Ordinance 291-A.  
**\*\*843 \*518 Robert D. Horvath**, Southfield, for Plaintiff-Appellant.

**John A. Dolan (Jerald R. Lovell**, St. Clair Shores, of counsel), Clinton Township, for Defendant-Appellee.

Before **DOCTOROFF**, C.J., and **CORRIGAN** and **R.J. DANHOF**, **[FN\*]** JJ.

**FN\*** Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

CORRIGAN, Judge.

These consolidated appeals involve plaintiff's attempt to offer "topless" entertainment in Clinton Charter Township. In Docket No. 173879, plaintiff, Jott, Inc., appeals by right an order declaring Clinton Township Zoning Ordinance 260 (restricting certain "adult uses" to districts zoned "B-3" general business use) constitutional and enjoining plaintiff from providing "adult entertainment" contrary to the ordinance. Plaintiff also challenges the trial court's decision upholding a 1984 covenant in which plaintiff agreed not to offer topless entertainment in Clinton Township. In Docket No. 181802, defendant Clinton Township appeals by right an order declaring Clinton Township Zoning Ordinance 291-A (prohibiting nudity in liquor-licensed establishments) unconstitutionally overbroad and, therefore, unenforceable. We affirm the trial court's decision upholding the constitutionality of ordinance 260. With respect to ordinance 291-A, while we agree that subparts f and g of the definition of "nudity" may not be sustained, we reverse the trial court's decision declaring the entire ordinance unconstitutional because we hold that that subparts f and g may be severed, leaving the remainder of the ordinance \*519 constitutionally intact and enforceable. Finally, we find it unnecessary to address the validity of the 1984 covenant.

#### I. Underlying Facts and Proceedings

Plaintiff operates a bar located on Groesbeck Highway in Clinton Township. When plaintiff purchased the bar in 1984, plaintiff covenanted, in exchange for defendant's approval of plaintiff's application to the Liquor Control Commission (LCC) for an entertainment permit, that it would offer only "wholesome entertainment" and would not offer "any entertainment of a lewd, obscene, or immoral nature including, but not limited to topless performers." The covenant provided that, in the event of a violation, defendant would be entitled to "take appropriate action before the Michigan Liquor Control Commission ... to cancel and terminate the entertainment permit pursuant to which th[e] covenant [was] given."

Despite its 1984 covenant, in 1992, plaintiff decided to offer "topless" dancing. Apart from the 1984 covenant, two separate local ordinances affected plaintiff's ability lawfully to provide topless entertainment in Clinton Township. First, local zoning ordinance 260 regulated certain adult uses (including establishments featuring "topless" dancers)

by, in part, restricting such uses to "B-3" general \*\*844 business use zoning districts. Plaintiff's bar was located in an "I-2" general industrial zoning district. [FN1] Second, in November 1991, \*520 defendant adopted ordinance 291, which prohibited "nudity" in liquor-licensed establishments or establishments that collect a cover charge or serve food or beverages. The ordinance defined "nudity" in a manner that encompassed "topless" entertainment.

FN1. Although liquor-licensed establishments were formerly permitted in 1-2 districts, a revision of defendant's master plan in the early 1990s led to certain changes in the zoning ordinances, with the result that liquor-licensed establishments are no longer permitted in 1-2 districts, thereby rendering plaintiff's continued operation of the bar a nonconforming use.

On May 11, 1992, plaintiff commenced the present action against defendant in the Macomb Circuit Court, seeking a declaratory judgment that ordinance 291 was unconstitutional insofar as it defined "nudity" in a manner that prohibited topless entertainment in liquor-licensed establishments and an injunction to enjoin enforcement of the ordinance. Defendant responded by filing a counterrequest for injunctive relief. Following a series of hearings, the trial court issued a preliminary injunctive order on September 14, 1992, restraining plaintiff from violating the provisions of ordinance 291, the 1984 covenant, and ordinance 260.

Simultaneously, on October 2, 1992, plaintiff's president, Scott Nadeau, and several other named individuals who had been arrested for violating ordinance 291 commenced a separate action against defendant in federal court, seeking to enjoin defendant from enforcing ordinance 291. On November 9, 1992, while the federal action was pending, defendant adopted ordinance 291-A, which repealed provisions of ordinance 291. The amended ordinance continued to prohibit "nudity" in liquor-licensed establishments, but eliminated from its coverage establishments that collect a cover charge or serve food or beverages. On January 26, 1993, the federal court issued a judgment declaring ordinance 291-A unconstitutional and permanently enjoining defendant from enforcing the \*521 ordinance. Defendant thereafter appealed that ruling to the Sixth Circuit Court of Appeals.

Plaintiff meanwhile filed an amended complaint in the present case seeking, *inter alia*, injunctive relief and a declaratory judgment that ordinance 291-A and ordinance 260 were both unconstitutional. Defendant filed a countercomplaint seeking, *inter alia*, injunctive relief and a declaratory judgment that plaintiff's use of topless dancers constituted a nuisance *per se* under ordinance 260 and the 1984 covenant.

After a bench trial in April 1993, on June 25, 1993, the trial court ruled that ordinance 260 was a constitutionally valid time, place, and manner restriction on plaintiff's First Amendment right to provide topless dancing and, accordingly, enjoined plaintiff from providing adult entertainment in violation of ordinance 260. The trial court refused to address the constitutionality of ordinance 291-A, finding that issue controlled by the decision in the related federal action and that *res judicata* barred relitigation of the issue in the state case. Finally, believing that the 1984 covenant had been executed in compliance with ordinance 291 (the predecessor to ordinance 291-A), the trial court ruled that the covenant was unenforceable, because ordinance 291-A had been declared unconstitutional by the federal court.

Subsequently, on February 4, 1994, the trial court granted rehearing of the "covenant" issue after determining that it had factually erred in finding that the covenant was executed in compliance with ordinance 291. Addressing the merits of the issue, the trial court determined that the 1984 covenant was valid and enforceable, but declined to award injunctive relief for the reason that the covenant, by its terms, provided \*522 an adequate remedy at law, *i.e.*, authority to seek cancellation of the entertainment permit. An order incorporating these rulings was entered on March 4, 1994, and plaintiff subsequently filed an appeal by right from that order (Docket No. 173879).

Thereafter, while the appeal of the related federal court decision regarding the constitutionality of ordinance 291-A was still pending, the parties in the federal action jointly moved to vacate the federal court decision, which was granted on May 27, 1994, thereby \*\*845 removing the *res judicata* effect of the federal court decision. The parties then resubmitted the issue of the constitutionality of ordinance 291-A to the trial court in this case. On November 14, 1994, the trial court issued its decision declaring ordinance 291-A unconstitutionally overbroad and, therefore, unenforceable. Defendant appealed that decision as of right (Docket No. 181802). The

appeal was subsequently consolidated with plaintiff's appeal in Docket No. 173879.

## II. Constitutionality of Ordinance 260 A

Ordinance 260 regulates four types of adult uses, namely, adult retail stores, adult theaters, adult mini-theaters and cabarets. Plaintiff's proposed use of its premises is encompassed within the definition of "cabaret," which is defined as "an establishment for entertainment which features topless dancers, strippers, male or female impersonators or similar entertainers." Ordinance 260 regulates adult uses in two primary respects. First, the ordinance restricts adult uses to B-3 general business use zoning districts. Second, the ordinance attempts to disperse adult uses \*523 throughout the B-3 districts by imposing certain spacing requirements, which may be waived under certain circumstances. The ordinance provides, in relevant part:

These [adult] uses, being recognized as having serious objectionable operational characteristics, particularly when concentrated or located with [sic] the same geographical area, are subject to the following conditions in order to insure that the surrounding area will not experience deleterious, blighting or downgrading influences:

(1) Vehicular ingress and egress shall be directly onto a major thoroughfare [sic] having an existing or planned right-of-way of at least one hundred twenty (120) feet in width and shall have one property line abutting said thoroughfare.

(2) The use shall not be located within a planned shopping center as defined in Section 202-78 of this Ordinance.

(3) In no instance shall the use be located closer than 1,000 feet from any church, park, school, playground or school bus stop.

(4) In no instance shall the use be located within one thousand (1,000) feet of any other such use, existing or proposed, as listed in Section 1203-1-1 of this Ordinance, unless the Planning Commission and Township shall find that the use:

(a) Will not be contrary to any conservation, rehabilitation or similar program within the area;

(b) Will not contribute as a blighting influence to the surrounding area;

(c) Will not contribute to a concentration of these types of uses in the area, thereby encouraging the development of a "skid row" type area.

(5) In no instance shall any of the above uses be located closer than five hundred (500) feet to residentially zoned land. If two (2) or more of the above uses are conducted as one (1) business, then said business shall be located a minimum of seven

hundred fifty (750) feet from any residentially zoned land.

\*524 (a) The Planning Commission and Township Board may waive this requirement upon the presentation to the Township of petitions, which contain signatures and addresses of at least fifty-one (51) percent of the occupants of residences within the required minimum distance, which indicate no objection to the location of the proposed use.

On appeal, plaintiff argues that ordinance 260, by limiting adult uses to B-3 zoning districts and by imposing spacing requirements on the location of such uses, impermissibly infringes on constitutionally protected activity under the First Amendment and Article 1, § 5 of our state constitution. [FN2]

FN2. U.S. Const. Am. I states that "Congress shall make no law ... abridging the freedom of speech." Similarly, Const. 1963, art. 1, § 5 provides that "[e]very person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press."

#### B

First, we reject defendant's claim that plaintiff's challenge regarding the constitutionality \*\*846 of ordinance 260 is not properly before this Court. Noting that ordinance 260 permits adult uses, including topless dancing, in B-3 general business use zoning districts, defendant argues that plaintiff, as an I-2 general industrial property owner, is barred from challenging the constitutionality of the ordinance because plaintiff never sought to have its property rezoned to B-3 status. We disagree.

[1] The exhaustion of remedies requirement does not apply to a facial challenge to a zoning ordinance. Paragon Properties Co. v. Novi, 452 Mich. 568, 577, 550 N.W.2d 772 (1996); \*525 Countrywalk Condominiums, Inc. v. Orchard Lake Village, 221 Mich.App. 19, 22, 561 N.W.2d 405 (1997); West Bloomfield Twp. v. Karchon, 209 Mich.App. 43, 47, 530 N.W.2d 99 (1995). A facial challenge is one that attacks the very existence or enactment of the ordinance; it alleges that the mere existence and threatened enforcement of the ordinance adversely affects all property regulated in the market as opposed to a particular parcel. Paragon Properties

Co. supra at 576-577, 550 N.W.2d 772; Lake Angelo Associates v. White Lake Twp., 198 Mich.App. 65, 72, 498 N.W.2d 1 (1993).

[2] Here, plaintiff's amended complaint alleges that ordinance 260 is unconstitutional because it was enacted "without any evidence of a legitimate governmental purpose that would be served by its enactment." Further, plaintiff alleges that the purpose and effect of the ordinance is to exclude totally constitutionally protected "adult uses" in Clinton Township. These allegations facially challenge the constitutionality of the ordinance. Moreover, plaintiff's assertion that ordinance 260 is unconstitutional "as applied" to prohibit plaintiff from presenting topless entertainment at its business location rests on the contention that ordinance 260 is unconstitutionally restrictive in prohibiting adult uses on any industrially zoned property. In this context, such a claim involves a challenge to the facial validity of the ordinance. Accordingly, plaintiff was not required first to seek rezoning, and the issue is ripe for judicial review. Countrywalk Condominiums, Inc. supra.

#### C

[3] Although a trial court's ruling on a constitutional challenge to a zoning ordinance is reviewed de novo, this Court accords considerable deference to the trial \*526 court's factual findings, and those findings will not be disturbed unless we would have reached a different result had we occupied the trial court's position. Guy v. Brandon Twp., 181 Mich.App. 775, 778-779, 450 N.W.2d 279 (1989).

[4] At the outset, we reject plaintiff's suggestion that the Michigan Constitution provides greater protection than that afforded under the First Amendment. Our Supreme Court has interpreted the rights to free speech and association under the First Amendment and Const. 1963, art. 1, § 5 as coextensive. Woodland v. Michigan Citizens Lobby, 423 Mich. 188, 202, 378 N.W.2d 337 (1985); Michigan Up & Out of Poverty Now Coalition v. Michigan, 210 Mich.App. 162, 168-169, 533 N.W.2d 339 (1995). Plaintiff has not identified a compelling reason for interpreting the Michigan Constitution more broadly than the federal constitution. Sitz v. Dep't of State Police, 443 Mich. 744, 763, 506 N.W.2d 209 (1993). Therefore, we will review plaintiff's challenge to ordinance 260 in accordance with federal authority construing the First Amendment.

[5] Nonobscene, erotic entertainment, such as topless dancing, is a form of protected expression under the



First Amendment, but enjoys less protection than other forms of First Amendment expression, such as political speech. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-566, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504 (1991); Woodall v. El Paso, 49 F.3d 1120, 1122 (C.A.5, 1995); Christy v. City of Ann Arbor, 824 F.2d 489, 492 (C.A.6, 1987).

The use of zoning and licensing ordinances to regulate exhibitions of "adult entertainment" is widely recognized. Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); \*527 Ferndale v. Ealand (On Remand), 92 Mich.App. 88, 92, 286 N.W.2d 688 (1979). As the United States Supreme Court stated in Young, supra at 62, 96 S.Ct. at 2448:

\*\*847 The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not sufficient reason for invalidating these ordinances.

[6][7] An ordinance that does not suppress protected forms of sexual expression, but which is designed to combat the undesirable secondary effects of businesses that purvey such activity, is to be reviewed under the standards applicable to content-neutral time, place, and manner regulations. Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49, 106 S.Ct. 925, 930, 89 L.Ed.2d 29 (1986). Content-neutral time, place, and manner regulations are acceptable as long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication. Id. at 47, 106 S.Ct. at 928.

[8] Here, ordinance 260 by its terms does not ban topless dancing, but, rather, merely restricts the location of such forms of adult entertainment. The aim of the ordinance is not to suppress such activity, but to combat the secondary effects of adult uses on surrounding areas "in order to insure that the surrounding areas will not experience deleterious, blighting or downgrading influences." Thus, as the trial court found, the ordinance may be viewed as a content-neutral time, place, and manner restriction on expressive conduct. Renton, supra at 48-49, 106 S.Ct. at 929-930. Accordingly, we must determine whether the ordinance is designed to serve a substantial governmental interest and whether it allows for reasonable alternative avenues of communication. \*528 We hold that the ordinance satisfies both standards.

In Renton, supra, a city ordinance prohibited any adult motion picture theater from locating within one

thousand feet of any residential zone, single- or multiple-family dwelling, church, or park and within one mile of any school. The Supreme Court found that the ordinance was designed to serve a substantial governmental interest "because a city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." Id. at 50, 106 S.Ct. at 930, quoting Young, supra at 71, 96 S.Ct. at 2453. This same interest is at stake here. Ordinance 260 expressly identifies the objective of protecting neighborhoods from the "serious objectionable operational characteristics [of adult uses], particularly when concentrated or located with [sic] the same geographical area," thus insuring that surrounding areas "will not experience deleterious, blighting or downgrading influences." Moreover, we conclude that the ordinance is adequately tailored to meet this objective. While the ordinance prohibits adult businesses from locating within one thousand feet of each other in order to minimize the harmful effects caused by multiple adult uses in a given area, this prohibition may be waived upon a showing that a second adult use (1) will not be contrary to any conservation, rehabilitation or similar program within the area, (2) will not contribute as a blighting influence to the surrounding area, and (3) will not contribute to a concentration of these types of uses in the area.

We reject plaintiff's claim that defendant failed to justify a need for ordinance 260 because, at the time the ordinance was enacted, not a single adult use existed in the township and because defendant never \*529 conducted its own independent study regarding the impact of adult uses in the community. In Renton, as in this case, the adult use ordinance was enacted before any such uses existed in the city and was enacted without any study specifically relating to that city's particular needs or problems. The city there relied on the experiences of, and studies produced by, other cities as justification for the ordinance. The Supreme Court held that these circumstances did not affect the validity of the ordinance:

We hold that Renton was entitled to rely on the experiences of Seattle and other cities ... in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. [Id. at 51-52, 106 S.Ct. at 931.]

\*\*848 Testimony in this case revealed that township

officials considered studies regarding the impact of the adult entertainment business in Detroit, as well as studies produced by other cities such as Austin, Amarillo, and Beaumont, Texas, and Indianapolis, Indiana. The trial court properly ruled that defendant could rely on studies produced by other cities and was not required to expend tax dollars on its own empirical studies to justify the enactment of ordinance 260.

Next, we reject plaintiff's claim that ordinance 260 is unconstitutional because it fails to allow for reasonable alternative avenues of communication. Evidence presented below revealed that Clinton Township occupies approximately 28.1 square miles or 17,991 acres, of which approximately 222 acres are \*530 zoned for B-3 use. Further, the evidence revealed that twelve sites, comprising approximately 50.97 acres, can support adult uses consistent with the requirements of ordinance 260. Moreover, the available sites are located in seven different geographical B-3 zoning districts, which are dispersed throughout the township and are capable of supporting eight or nine adult uses simultaneously consistent with the spacing requirements of the ordinance. [FN3]

[FN3. Plaintiff stipulated below that at least eight sites could simultaneously support adult uses consistent with the spacing requirements of the ordinance. Defendant contended there were actually nine.

Plaintiff advances several arguments in support of its claim that ordinance 260 should be found unconstitutional as unduly restricting access to protected forms of sexual expression, none of which we find persuasive.

First, plaintiff argues that ordinance 260 is similar in effect to other ordinances that have been declared unconstitutional as being unduly restrictive. However, we find that the cases relied upon by plaintiff are factually distinguishable. In *Ferndale, supra*, the City of Ferndale enacted a zoning ordinance requiring adult motion picture theaters to be established in areas zoned C-2, general business, but not within one thousand feet of any building containing a residential dwelling or rooming unit. Evidence in that case revealed that no location in the city met the requirements of the ordinance. Because the ordinance totally suppressed access to protected speech, this Court held the ordinance unconstitutional. *Ferndale, supra* at 92-94, 286

N.W.2d 688. Here, unlike the City of Ferndale's ordinance, defendant's ordinance does not have the effect \*531 of totally precluding the establishment of adult uses in the township.

Next, in *CLR Corp. v. Henline*, 702 F.2d 637 (C.A.6, 1983), the city of Wyoming, Michigan, enacted an ordinance that required adult bookstores, adult movie theaters, and massage parlors to be located in B-2 business districts and prohibited their location within five hundred feet of any church, school, or residence and one thousand feet from any other restricted use. The Sixth Circuit Court of Appeals found the ordinance unconstitutional because its effect was to permit only two to four restricted uses in a half-mile strip of the city, thereby severely restricting the opportunity for First Amendment free expression. *Id.* at 639. Again, this case is distinguishable. Not only does defendant's ordinance allow for a greater number of locations, but the available locations are dispersed throughout the township as opposed to being confined to a single, small section of the community. Thus, defendant's ordinance is not nearly as restrictive as the City of Wyoming's ordinance.

Finally, in *Christy, supra*, Ann Arbor enacted an ordinance requiring adult businesses to be located in areas zoned C2A and prohibiting such businesses from locating within seven hundred feet of certain other districts or within seven hundred feet of another adult business. Contrary to plaintiff's argument, however, the court in *Christy* did not declare the ordinance unduly restrictive, but merely remanded for a determination of that question after concluding that the trial court's legal analysis of the ordinance was erroneous. *Christy, supra* at 492. Hence, *Christy* provides little support for plaintiff's position.

\*532 Plaintiff also argues that ordinance 260 should be found unduly restrictive because, while twelve sites may support adult usage, most of the sites are occupied by other businesses \*\*849 and only two sites are vacant. However, the fact that available sites are currently occupied by other businesses is not relevant in determining how many sites the ordinance leaves open for adult uses. As the Supreme Court explained in *Renton, supra* at 54, 106 S.Ct. at 932:

That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," we have never suggested that the First

Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. [Citation omitted.]

Similar sentiments are expressed in *Woodall, supra* at 1124:

[T]he fact that a site may not be commercially desirable does not render it unavailable. It is not relevant that a relocation site will result in lost profits, higher overhead costs, or even prove commercially unfeasible for an adult business. There is no requirement that an adult business be able to obtain existing commercial sites at low cost and with market access to ensure its prosperity. As we have stated time and again, commercial viability is not a relevant consideration. [Citations omitted.]

Plaintiff also argues that ordinance 260 does not allow for reasonable alternative avenues of communication because the number of locations, or percentage \*533 of land, made available for adult usage is less than the amount determined to be available in other cases wherein adult use zoning ordinances have been upheld. However, none of the cited cases identify a minimum number of locations, or minimum percentage of land, that must be made available for adult usage. Each city is unique, often differing significantly in terms of its character, geography, population, and other circumstances, from another city. Indeed, plaintiff cites several cases involving larger urban areas, distinctly different from the community in this case. See e.g., *Young, supra; Alexander v. Minneapolis*, 928 F.2d 278 (C.A.8, 1991); *15192 Thirteen Mile Road, Inc. v. City of Warren*, 626 F.Supp. 803 (E.D.Mich., 1985). Because each city presents its own unique set of circumstances, "each case must be decided according to its specific facts." *Christy, supra* at 491. In this case, the trial court examined the individual characteristics of Clinton Township and reasoned as follows in determining that ordinance 260 does not unreasonably limit alternative avenues of communication:

Considering the varied needs of the Clinton Township community, the Court is not persuaded the existence of 12 potential cabaret sites within Clinton Township is anything more than an incidental restriction on Jott, Inc.'s First Amendment freedoms....

Jott Inc.'s argument that a .3% land availability percentage demonstrates Clinton Township has effectively denied Jott a reasonable opportunity to open and operate a topless bar in the Township is unpersuasive. Clinton Township encompasses

only 28.11 square miles, and includes numerous zoning districts designed to accomplish specific land uses.... According to Charter Township of Clinton's "Master Plan For Future Use," 44% of its 17,991 acres, or 7,916 acres, has been developed into residential use, while 27% (4,858 acres) has been developed for public uses such as schools, parks, \*534 and government service buildings. Expressed as a percentage of available Clinton Township land that has not already been developed into a residential or public use (a total of 12,774 acres), the 50.97 acres available for an "adult entertainment" site represents nearly 1% of Clinton Township's remaining land including land specifically zoned for parking, special purposes such as nursing homes and hospitals, a regional center, and floodways. Based upon the limited amount of land available to Clinton Township, the Court finds that 12 sites totaling 50.97 acres represents a reasonable opportunity under Ordinance 260 for Jott, Inc. to open and operate a topless bar within the \*\*850 Township. Ordinance 260 is an incidental restriction on Jott, Inc.'s First Amendment freedoms that is no greater than is essential to the furtherance of Clinton Township's varied and substantial governmental interests.

We adopt the reasoning of the trial court and hold that ordinance 260 affords plaintiff a reasonable opportunity to open and operate an adult establishment featuring topless dancing.

Finally, we turn to plaintiff's claim that ordinance 260 should be declared unconstitutional insofar as it prohibits adult uses from locating in industrially zoned areas. This claim is predicated on plaintiff's observation that a primary objective of ordinance 260 is to address the secondary effects of adult uses on residentially zoned property. Because this concern is not applicable to industrially zones areas, plaintiff argues there is no justification for excluding adult uses in such areas.

It may well be, as plaintiff contends, that locating an adult business in an industrially zoned area will cause little negative impact on the surrounding area. However, plaintiff's argument ignores the principle that "[z]oning is a legislative function that cannot constitutionally be performed by a court." \*535 *Schwartz v. Flint*, 426 Mich. 295, 307, 395 N.W.2d 678 (1986), quoting *Daraban v. Redford Twp.*, 383 Mich. 497, 503, 176 N.W.2d 598 (1970). [FN4] The United States Supreme Court has explained that where an ordinance regulating adult uses does not otherwise offend the constitution, as in

this case, it is not the function of the courts to appraise the method chosen by a municipality to further its interests. Young, supra at 71, 96 S.Ct. at 2452-2453; Renton, supra at 52, 106 S.Ct. at 931. In this case, testimony below justified the township's decision to exclude various commercial uses, including adult uses, from industrially zoned areas. Specifically, the testimony revealed that the township, in the early 1990s, was concerned that only two percent of its land was zoned for industrial use. The township was desirous of increasing the amount of industrially zoned land because industrial land uses tend to provide more jobs for the community, they generate higher tax revenues, and they generally demand fewer services than commercial uses. Accordingly, the township revised its master plan to increase the percentage of industrially zoned property and to eliminate various commercial uses from industrial districts.

FN4. As the Court in Schwartz observed:

[T]he judiciary's zoning track record is not good.... Zoning, by its nature, is most uniquely suited to the exercise of the police power because of the value judgments that must be made regarding aesthetics, economics, transportation, health, safety, and a community's aspirations and values in general. By the same token, zoning, which requires linedrawing that oftentimes "by its nature [is] arbitrary," [Delta Charter Twp. v. Dinolfo, 419 Mich. 253], 269; [351 N.W.2d 831 (1984)], is uniquely unsuited to the judicial arena. [426 Mich. at 313, 395 N.W.2d 678.]

Plaintiff relies on Morscott v. City of Cleveland, 781 F.Supp. 500 (N.D. Ohio, 1990), in which the court held \*536 that an ordinance banning adult uses in industrially zoned areas was invalid. However, the decision in Morscott was premised on the court's determination that the ordinance was adopted without any objective factual information justifying the decision. Therefore, the case is distinguishable.

Accordingly, for the foregoing reasons, we affirm the trial court's decision holding that ordinance 260 is a constitutionally valid time, place, and manner restriction governing the provision of adult uses in Clinton Township.

### III. Constitutionality of Ordinance 291-A

Ordinance 291-A, enacted in November 1992,

prohibits "nudity" in "any establishment licensed or subject to licensing by the Michigan Liquor Control Commission." The ordinance defines "nudity" as follows:

Nudity shall be defined to be the exposure by view of persons, any of the following body parts, either directly or indirectly, including but not limited to exposure, see through clothing articles or body stockings:

- (a) The whole or part of the pubic region;
- (b) The whole or part of the anus;
- (c) The whole or part of the buttocks;
- (d) The whole or part of genitals;
- \*\*851 (e) The breast area including nipple, or more than one-half of the area of the breast;
- (f) The leg area or hips more than six (6) inches above an area six (6) inches below the inseam, measured from the crotch;
- (g) The stomach area below the navel or more than three (3) inches above an area three (3) inches below the breast.

A person who violates ordinance 291-A is guilty of a misdemeanor, punishable by imprisonment for not \*537 more than ninety days in jail or a fine of not more than \$500 or both.

The trial court analyzed the constitutionality of ordinance 291-A using the four-part test enunciated in Barnes, supra and United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), for evaluating restrictions on expressive activity protected by the First Amendment. Under the Barnes- O'Brien test, a government regulation burdening expressive activity is sufficiently justified if: (1) it is within the constitutional power of the government; (2) it furthers an *important or substantial* governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest. Barnes, supra at 567, 111 S.Ct. at 2461; O'Brien, supra at 376-377, 88 S.Ct. at 1678-1679. Focusing primarily on subparts f and g of the definition of nudity, the trial court observed that "a person walking into a MLCC licensed convenience store wearing a bathing suit ... would be guilty of violating ordinance 291-A." In view of this circumstance, the trial court concluded that the "governmental restrictions in ordinance 291-A are, on their face, greater than are essential to Clinton Township's substantial interest in prohibiting nudity in MLCC licensed establishments." Accordingly, the trial court ruled that ordinance 291-A was unconstitutionally overbroad and thus "void and unenforceable as a

matter of constitutional law." The trial court did not discuss the applicability of the Twenty-first Amendment in its analysis.

On appeal, defendant argues that the trial court erred in analyzing ordinance 291-A under the stricter \*538 *Barnes-O'Brien* standard applicable to traditional First Amendment concerns, as opposed to a relaxed "rational basis" standard applicable to regulations enacted under the authority of the Twenty-first Amendment. We agree.

The Twenty-first Amendment confers upon states broad powers over the sale of alcohol. [FN5] In *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), the Supreme Court rejected challenges under the First and Fourteenth Amendments to regulations prohibiting certain sexually explicit live entertainment or films in establishments licensed to sell alcoholic beverages, notwithstanding that the regulations proscribed conduct within the limits of the First Amendment protection of freedom of expression. In sustaining the regulations, the Supreme Court drew a distinction between regulations that censor dramatic performance in the theater and regulations that only prohibit such exposure in establishments where liquor is sold by the drink:

FN5. U.S. Const., Am. XXI provides in pertinent part: "The transportation or importation into any State ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, "performances" that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.

\* \* \* \* \*

\*539 The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at \*\*852 premises that have licenses

was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution. [*id.* at 118-119, 93 S.Ct. at 397.]

The holding in *LaRue*, that the broad power of the states to regulate the sale of liquor may outweigh any First Amendment interest in nude dancing, was reaffirmed in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981). [FN6] In *Bellanca*, *id.* at 718, 101 S.Ct. at 2601, the Supreme Court upheld a ban on topless dancing in liquor-licensed establishments even though topless \*540 dancing did not involve the type of "gross sexuality" regulated in *LaRue*:

FN6. We reject plaintiff's claim, asserted at oral argument, that the holding in *LaRue* was recently overruled by the Supreme Court in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). Unlike this case, *44 Liquormart* was a "commercial speech" case. It involved a challenge to a state law banning advertisement of retail liquor prices. The Supreme Court expressly noted that laws suppressing speech are subject to greater constitutional scrutiny than laws suppressing forms of conduct. Although the Supreme Court did retreat somewhat from its position in *LaRue*, it did so only insofar as *LaRue* advanced the proposition that the constitutional prohibition against laws abridging freedom of speech embodied in the First Amendment may be shielded from attack by virtue of the Twenty-first Amendment. Indeed, the court expressly stated that it was not questioning its holding in *LaRue*. The Court noted that *LaRue*, unlike the case before it, was not a commercial speech case, but instead concerned the regulation of nude dancing where alcohol was served. The Court expressly stated that its analysis in *LaRue* would have yielded the same result, independent of the Twenty-first Amendment, in light of the state's ample inherent powers to prohibit the sale of alcoholic beverages in inappropriate locations and to restrict the kind of sexual activities described in *LaRue*. For these

reasons, we find that 44 Liquormart does not affect the disposition of this case.

Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts.

In Felix v. Young, 536 F.2d 1126, 1132 (C.A.6, 1976), the Sixth Circuit Court of Appeals succinctly articulated the Supreme Court's holding in LaRue regarding the interplay of the Twenty-first Amendment and the proper analysis to be applied in reviewing regulations restricting expressive activity under the First Amendment:

A state may promulgate broad prophylactic rules banning sexually explicit entertainment at licensed bars and cabarets so long as the regulations represent a reasonable exercise of a state's Twenty-first Amendment authority and are rationally related to the furtherance of legitimate state interests. However, if the state's authority to control liquor traffic is not implicated in a regulatory plan which impinges on free expression, the regulation must withstand stricter scrutiny.

In this case, there is no dispute that ordinance 291-A does not prohibit all public nudity. Rather, its scope is limited only to establishments that serve liquor. Nonetheless, plaintiff argues that the ordinance cannot properly be viewed as a regulation enacted under the authority of the Twenty-first Amendment because it was enacted by a local unit of government, not the state, and because, in Michigan, the LCC has been \*541 given exclusive authority to regulate liquor. We disagree.

[9] Const. 1963, art. 4, § 40 declares that the Legislature may by law establish a liquor control commission which, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state. Consistent with this constitutional authorization, the Legislature, under the Michigan Liquor Control Act, M.C.L. § 436.1 et seq.; M.S.A. § 18.971 et seq. created the Liquor Control Commission, giving it the sole right, power, and duty to control the alcoholic beverage traffic within the state, except as otherwise provided in the act, \*\*853 M.C.L. § 436.1(2); M.S.A. § 18.971(2). However, this grant of authority does not preclude local communities from controlling alcoholic beverage traffic within their boundaries in

the proper exercise of their police powers. Bundo v. Walled Lake, 395 Mich. 679, 700-701, 238 N.W.2d 154 (1976); Mutchall v. Kalamazoo, 323 Mich. 215, 223-225, 35 N.W.2d 245 (1948).

In Johnson v. Liquor Control Comm., 266 Mich. 682, 685, 254 N.W. 557 (1934), the Supreme Court stated:

The very nature of the liquor business is such that local communities, as a matter of policy, should be permitted to regulate the traffic within their own bounds in the proper exercise of their police powers, subject to the larger control of the liquor control commission as to those matters wherein the commission is given exclusive powers by the legislature.

In Tally v. Detroit, 54 Mich.App. 328, 220 N.W.2d 778 (1974), this Court upheld the constitutionality of certain licensing and identification card requirements of a Detroit ordinance that regulated topless dancing in establishments licensed to serve alcoholic beverages. \*542 The Court observed that, "[d]ue to the nature of the liquor business, the City of Detroit has the power to regulate the traffic within its own bounds through the exercise of its police powers, subject to the authority of the Liquor Control Commission only when a conflict arises." Id. at 334, 220 N.W.2d 778. Finding no conflict with the commission's regulations, the Court held that the ordinance in question was a reasonable exercise of Detroit's Twenty-first Amendment authority to regulate local liquor traffic. Id. at 337-338, 220 N.W.2d 778.

Similarly, in Felix, supra, the Sixth Circuit Court of Appeals upheld, under the authority of the Twenty-first Amendment, the constitutionality of a Detroit ordinance regulating the location of cabarets:

We find that the Detroit ordinance establishing licensing requirements for Group "D" Cabarets was enacted by authority of the Twenty-first Amendment and so the relaxed standard of review in California v. LaRue, [supra] is applicable. Accord, Paladino v. Omaha, 471 F.2d 812, 814 (C.A.8, 1972). Although Michigan has a liquor control commission which is ultimately responsible for the regulation of liquor traffic in the state, its jurisdiction is not exclusive. The Michigan Supreme Court has sanctioned the enactment of municipal ordinances regulating local traffic in liquor. See e.g., Mutchall, [supra] .... If the provisions restricting the location of Group "D" Cabarets bear a reasonable relation to legitimate municipal interests, the facial validity of the ordinances must be upheld. [536 F.2d at 1132-

1133.]

Accordingly, we conclude that defendant has the authority under the Twenty-first Amendment to regulate the traffic of liquor "within its own bounds through the exercise of its police powers, subject to the authority of the Liquor Control Commission only when a conflict arises." *Tally, supra*, at 334, 220 N.W.2d 778.

[10] \*543 Acting under the authority of M.C.L. § 436.7; M.S.A. § 18.977, the LCC has adopted the following regulation regarding nudity in liquor-licensed premises:

An on-premises licensee shall not allow in or upon the licensed premises a person who exposes to public view the pubic region, anus, or genitals or who displays *other types of nudity prohibited by statute or local ordinance*. [1980 AACS, R 436.1409(1); emphasis added.]

The foregoing regulation effectively prohibits "bottomless" nudity in all liquor-licensed establishments, as well as other types of nudity prohibited by statute or local ordinance. Because the LCC's regulations explicitly recognize the authority of local governmental units to prohibit, apart from "bottomless" nudity, other types of nudity in liquor-licensed establishments, we find no conflict between ordinance 291-A and the regulations of the LCC.

[11] Plaintiff argues, however, that the definition of nudity contained in ordinance 291-A may not be sustained because it is preempted by the definition of "public nudity" contained in the township ordinance act, M.C.L. § 41.181; M.S.A. § 5.45(1). We disagree. At the time ordinance 291-A was enacted, M.C.L. § 41.181; M.S.A. § 5.45(1) provided:

\*\*854 (1) The township board of a township may ... adopt ordinances regulating the public health, safety, and general welfare of persons and property, including, but not limited to ... the regulation or prohibition of public nudity ... [.]

\* \* \* \* \*

(3) As used in this section, "public nudity" means knowingly or intentionally displaying in a public place, or for payment or promise of payment by any person including, but not limited to, payment or promise of payment of an \*544 admission fee, any individual's genitals or anus with less than a fully opaque covering. [FN7]

FN7. The statute was amended by 1994 PA 315 to include within the definition of

"public nudity" the display of "a female individual's breast with less than a fully opaque covering of the nipple and areola," and to expressly exclude from the definition of "public nudity": (1) "[a] woman's breastfeeding of a baby whether or not the nipple or areola is exposed during or incidental to the feeding"; (2) material defined in M.C.L. § 752.362; M.S.A. § 28.579(362); and (3) material defined in M.C.L. § 722.673; M.S.A. § 25.254(3).

In discussing the question of preemption, our Supreme Court in *People v. Llewellyn*, 401 Mich. 314, 322, 257 N.W.2d 902 (1977), stated:

A municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict with the state statutory scheme, or 2) if the state statutory scheme pre-empts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation.

M.C.L. § 41.181; M.S.A. § 5.45(1) addresses a township's authority to regulate or prohibit public nudity in general. Defendant, through ordinance 291-A, is not attempting to regulate public nudity per se, but, rather, the circumstances under which liquor may be trafficked within its boundaries. Ordinance 291-A, by its terms, is applicable only to establishments holding liquor licenses; it has no applicability to public places where liquor is not sold. That preemption was not intended in this context is supported by the fact that the Legislature has conferred control over alcoholic beverage traffic in this state on the LCC, which, pursuant to authority granted to it by M.C.L. § 436.7; M.S.A. § 18.977, has adopted Rule 436.1409(1), explicitly recognizing the authority of local governmental units to \*545 prohibit different types of nudity in establishments holding liquor licenses.

Moreover, M.C.L. § 41.181; M.S.A. § 5.45(1) expressly provides that a township's authority to adopt ordinances regulating "the public health, safety, and general welfare of persons and property" is not limited to those activities expressly mentioned therein, such as "the regulation or prohibition of public nudity." As discussed previously, it has long been recognized that local communities possess "extremely broad" powers to regulate alcoholic beverage traffic within their bounds through the exercise of their general police powers, subject to the authority of the LCC when a conflict arises. *Bundo*,

*supra* at 700, 238 N.W.2d 154; *Tally, supra* at 334, 220 N.W.2d 778. Thus, the power to adopt an ordinance like ordinance 291-A, which involves such a regulation, is derived from the general grant of authority to adopt ordinances affecting "the public health, safety, and general welfare of persons and property." Conversely, the specific grant of authority to adopt an ordinance regulating or prohibiting public nudity should not be viewed as a limitation of the township's authority to regulate the local traffic of alcohol in a manner consistent with the authority of the LCC.

Accordingly, we conclude that the definition of nudity contained in ordinance 291-A is neither preempted by nor in conflict with M.C.L. § 41.181(3); M.S.A. § 5.45(1)(3). We must now decide whether ordinance 291-A, and the definition of nudity contained therein, is rationally related to a legitimate governmental interest. *LaRue, supra*.

Testimony below indicated that ordinance 291-A was enacted in order to eradicate the effects of "undesirable behavior" stemming from a combination \*546 of alcohol and nudity. The trial court did not question, nor do we, the existence of a legitimate governmental \*\*855 interest in prohibiting nudity in establishments holding liquor licenses. In *Bellanca, supra*, the Supreme Court upheld a ban on topless dancing in establishments holding liquor licenses based on a legislative finding that

"[n]udity is the kind of conduct that is a proper subject for legislative action as well as regulation by the State Liquor Authority as a phase of liquor licensing. It has long been held that sexual acts and performances may constitute disorderly behavior within the meaning of the Alcoholic Beverage Control Law....

"Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." [452 U.S. at 717-718, 101 S.Ct. at 2601 (citation omitted).]

[12][13] Furthermore, we cannot conclude that subparts a through e of the ordinance's definition of nudity, describing the pubic region, anus, buttocks, genitals, and breast area, are irrational and not reasonably related to the objective of combating the undesirable social effects stemming from a combination of alcohol and the public exposure of those body parts. However, like the trial court, we are troubled by the scope of the definition of nudity as outlined in subparts f and g of the ordinance's definition of nudity, which describe portions of the leg area or hips and stomach. As the trial court observed, subparts f and g would allow application of

the ordinance to persons c that are commonplace in are not generally associat of "nudity." Moreover inferring that pubic exp. described in subparts a through ordinance, coupled with alcohol, undesirable behavior, we are unable to make a inference with respect to public exposure of the body parts described in subparts f and g, inasmuch as those subparts describe body parts not generally associated with traditional concepts of nudity and because exposure of those body parts may be incidental to common forms of attire. Nor do we find any evidence in the record to support a conclusion that public exposure of the body parts described in subparts f and g, coupled with alcohol, may beget undesirable behavior.

[14] However, we disagree with the trial court's conclusion that these invalid portions cause the entire ordinance to be unconstitutional. Ordinance 291-A contains a severability clause that states:

Every word, sentence and claus [sic] of this ordinance is hereby declared to be severable and if any word, sentence, clause, provision or part thereof is declared to be invalid by a court of competent jurisdiction, the remaining provisions shall not be affected.

In *Pletz v. Secretary of State*, 125 Mich.App. 335, 375, 336 N.W.2d 789 (1983), this Court stated:

The doctrine of severability holds that statutes should be interpreted to sustain their constitutionality when it is possible to do so. Whenever a reviewing court may sustain an enactment by proper construction, it will uphold the parts which are separable from the repugnant provisions. To be capable of separate enforcement, the valid portion of the statute must be independent of the invalid sections, forming a complete act within itself. After separation of the valid parts of the enactment, the law enforced must be reasonable in view of the act as originally drafted. One test applied is whether the law-making body would have passed the \*548 statute had it been aware that portions therein would be declared to be invalid and, consequently, excised from the act.

Subparts f and g of the ordinance's definition of nudity are easily severable and do not affect adversely the remainder of the ordinance. Rather, the remaining, valid portions are sufficiently independent and complete and, also, are reasonable in view of the intent of the ordinance as originally



enacted. Severance is also consistent with the intent of the township as expressed in the ordinance itself. Accordingly, we hold that subparts f and g of the definition of nudity contained in ordinance 291-A may be severed, thereby leaving the remainder of the ordinance constitutionally valid and enforceable.

**\*\*856 IV. The 1984 Covenant**

As discussed previously, in 1984, in exchange for defendant's approval of plaintiff's application to the LCC for an entertainment permit, plaintiff covenanted that it would offer only "wholesome entertainment" and would not offer "any entertainment of a lewd, obscene, or immoral nature including, but not limited to topless performers." Defendant's approval was necessary because an LCC regulation prohibits an establishment holding a liquor license from permitting dancing or other forms of entertainment without a permit from the LCC. 1980 AACRS, R 436.1407. The regulation also states that no entertainment permit shall be issued without, inter alia, approval of the local legislative body. *Id.*

On appeal, plaintiff asserts that "the trial court committed fundamental error in enforcing the 1984 'covenant' not to present topless dancing." After the \*549 release of the trial court's decision, the court in *G & V. Lounge, Inc. v Michigan Liquor Control Comm.*, 23 F.3d 1071, 1077-1078 (C.A.6, 1994), issued a decision holding that covenants of the type involved in this case are unenforceable as a matter of constitutional law. Plaintiff argues that *G & V. Lounge* compels the same conclusion respecting its 1984 covenant with defendant. Defendant, while acknowledging that *G & V. Lounge* is on point, maintains that the case was incorrectly decided. For reasons hereinafter expressed, we conclude that it is unnecessary to address the validity of the covenant procedure involved here, or to determine whether *G & V. Lounge* was correctly decided.

Contrary to what plaintiff suggests on appeal, the trial court here did not declare the 1984 covenant enforceable so as to preclude plaintiff from offering topless dancing. Although defendant affirmatively requested such relief, the trial court expressly rejected that request and refused to prohibit plaintiff from offering topless dancing *on the basis of the covenant*. Defendant has not appealed that portion of the trial court's ruling and, consequently, we are not presented with the question whether a covenant of this type may be used and enforced to preclude a licensee from offering topless entertainment. In this context, this case is distinguishable from *G & V. Lounge*, because, in that case, the trial court expressly

held that the plaintiff could not prevail in its attempt to offer topless dancing because it had waived its First Amendment rights *by virtue of its covenant with the city*. *G & V. Lounge, supra* at 1077.

Although the trial court here did seem to treat the covenant as an enforceable document, it did so only \*550 insofar as it determined that defendant was permitted to seek cancellation of plaintiff's entertainment permit in view of plaintiff's attempt to offer topless dancing. However, defendant's authority to seek cancellation of the entertainment permit does not derive from the covenant, but, rather, from M.C.L. § 436.17(3); M.S.A. § 18.988(3), which states, in relevant part:

Upon request of the local legislative body after due notice and proper hearing by the local legislative body and the commission, the commission shall revoke the license of a licensee granted a license to sell alcoholic liquor for consumption on the premises or any permit held in conjunction with that license.

The record indicates that defendant did in fact commence proceedings to revoke plaintiff's entertainment permit in accordance with M.C.L. § 436.17(3); M.S.A. § 18.988(3). The LCC's written decision revoking plaintiff's entertainment permit likewise cites M.C.L. § 436.17(3); M.S.A. § 18.988(3) as authority for its decision. Plaintiff has not raised any issue challenging those proceedings per se. In short, there is no basis in the record for concluding that plaintiff has been deprived of an opportunity to present topless dancing, or other forms of adult entertainment, *by virtue of the 1984 covenant*.

Accordingly, under these circumstances, we find it unnecessary to address the validity of the covenant procedure involved in this case.

Affirmed in part and reversed in part.

569 N.W.2d 841, 224 Mich.App. 513

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Exhibit 8

**H**

Court of Appeals of Michigan.

Charter TOWNSHIP of VAN BUREN, Plaintiff-Appellee,  
v.  
GARTER BELT INC., d/b/a Legg's Lounge,  
Defendant-Appellant.

Docket No. 238571.

Submitted Sept. 16, 2003, at Detroit.  
Decided Sept. 25, 2003, at 9:00 a.m.  
Released for Publication Nov. 26, 2003.


**Background:** Township sought permanent injunction against liquor establishment, enforcing the township's ordinance prohibiting nudity at establishments licensed to sell alcohol. The Circuit Court, Wayne County, John D. O'Hair, J., granted the injunction and entered summary disposition for township. Establishment appealed.

**Holdings:** The Court of Appeals, Markey, P.J., held that:


- (1) there was no basis for disqualification of trial judge;
- (2) State did not preempt local regulation of nudity;
- (3) ordinance was a content-neutral time, place, and manner regulation designed to serve a substantial governmental interest in preserving the quality of urban life while allowing for reasonable alternative avenues of communication;
- (4) permanent injunction enforcing township's ordinance was not a "prior restraint" of expression protected by the First Amendment;
- (5) ordinance was not unconstitutionally overbroad; and
- (6) ordinance was not unconstitutionally vague.


Affirmed.

West Headnotes


**[1] Constitutional Law**  46(1)  
92k46(1) Most Cited Cases

The appellate court will first review nonconstitutional issues that might obviate the necessity of deciding the constitutional issues.

**[2] Appeal and Error**  893(1)  
30k893(1) Most Cited Cases

**[2] Appeal and Error**  964  
30k964 Most Cited Cases

The appellate court will review for an abuse of discretion the trial court's factual findings on a motion for judicial disqualification, but the application of the facts to the law is reviewed de novo.

**[3] Judges**  49(1)  
227k49(1) Most Cited Cases

A judge is disqualified when he cannot hear a case impartially.

**[4] Judges**  51(4)  
227k51(4) Most Cited Cases

A party challenging the impartiality of a judge must overcome a heavy presumption of judicial impartiality.

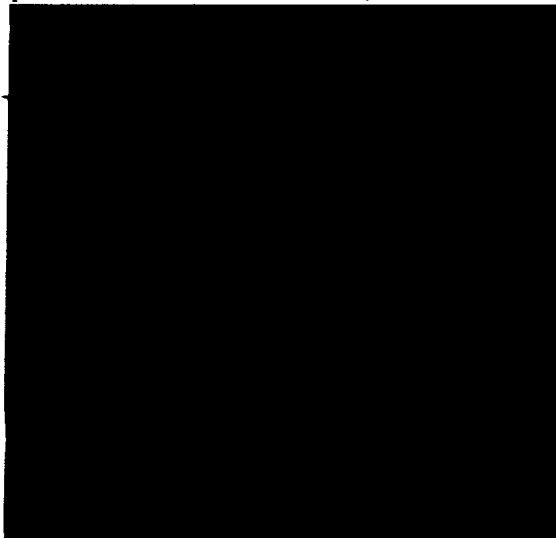
**[5] Judges**  49(1)  
227k49(1) Most Cited Cases


The challenger of the impartiality of a judge must prove a judge harbors actual bias or prejudice for or against a party or attorney that is both personal and extrajudicial. MCR 2.003(B)(1).

**[6] Judges**  49(1)  
227k49(1) Most Cited Cases


**[6] Judges**  49(2)  
227k49(2) Most Cited Cases

There was no basis for disqualification of trial judge in township's action against liquor establishment to prevent establishment from allowing nude dancing in the facility; judge denied knowing that establishment's owner had contributed funds to a election year effort to oust the judge from office, and any public comments the judge had made five years earlier as a prosecutor were insufficient to demonstrate actual bias in light of the judge's impeccable reputation. MCR 2.003(B)(1).



**[7] Constitutional Law**  251.6  
92k251.6 Most Cited Cases

Due process requires judicial disqualification without a showing of actual prejudice only in the most extreme cases. U.S.C.A. Const.Amend. 14.

**[8] Constitutional Law**  251.6  
92k251.6 Most Cited Cases

A showing of actual bias is not necessary to disqualify a judge where experience teaches that the probability of actual bias is too high to be constitutionally tolerable under due process. U.S.C.A. Const.Amend. 14.

**[9] Judges**  49(1)  
227k49(1) Most Cited Cases


The mere fact that a judge has been subjected to press criticism in connection with a case or a party does not necessarily require the judge's disqualification.

**[10] Judges**  49(1)  
227k49(1) Most Cited Cases

Prior written attacks upon a judge are legally insufficient to support a charge of judicial bias or prejudice on the part of a judge toward an author.


**[11] Judges**  49(2)  
227k49(2) Most Cited Cases

The mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice.


**[12] Constitutional Law**  314  
92k314 Most Cited Cases

**[12] Judges**  49(1)  
227k49(1) Most Cited Cases


Probability of actual bias was not so high as to require judicial disqualification without a showing, under due process, of actual bias or prejudice, in township's action against liquor establishment to prevent establishment from allowing nude dancing; there was no evidence to contradict judge's claim that he did not know that establishment's owner had publicly criticized judge years earlier and that judge had not taken the long-forgotten criticism personally. U.S.C.A. Const.Amend. 14.

**[13] Constitutional Law**  251.6  
92k251.6 Most Cited Cases

The totality of the circumstances must be examined to determine if the case is so extreme that due process requires judicial disqualification without proof of actual bias. U.S.C.A. Const.Amend. 14.

**[14] Appeal and Error**  893(1)  
30k893(1) Most Cited Cases


The appellate court will review de novo a trial court's ruling on a motion for summary disposition and its resolution of constitutional issues raised.

**[15] Appeal and Error**  893(1)  
30k893(1) Most Cited Cases

Whether state law preempts an ordinance is a question of law involving statutory construction that the appellate court will review de novo.

**[16] Courts**  91(2)  
106k91(2) Most Cited Cases

The Michigan Court of Appeals is not bound by federal decisions interpreting state law.

**[17] Statutes**  181(1)  
361k181(1) Most Cited Cases

The court's primary obligation when interpreting a statute is to ascertain and give effect to the intent of the Legislature.

**[18] Statutes**  176  
361k176 Most Cited Cases

**[18] Statutes**  212.7  
361k212.7 Most Cited Cases

The court must presume the Legislature intended the meaning clearly expressed and must enforce a statute as written.

**[19] Statutes**  184  
361k184 Most Cited Cases

Speculation about an unstated legislative purpose must not replace the unambiguous, plain text of a statute.

**[20] Statutes**  184  
361k184 Most Cited Cases

Where an ambiguity requires interpretation, the statutory language should be construed reasonably, keeping in mind the purpose of the act.

**[21] Intoxicating Liquors** 🔑11  
223k11 Most Cited Cases

State did not preempt local regulation of nudity in licensed establishments in counties with a population count greater than ninety-five thousand by State's regulation of nudity at establishments licensed to sell alcohol; legislature did not positively revoke the Liquor Control Code's (LCC) longstanding administrative and judicial deference to local control, but rather intended through the express language of the LCC to continue the longstanding broad authority of a local government to regulate liquor traffic within its jurisdiction. M.C.L.A. § 436.1916(3).

**[22] Statutes** 🔑212.1  
361k212.1 Most Cited Cases

For purposes of statutory construction, the Legislature is presumed to be aware of longstanding judicial and administrative interpretations.

**[23] Statutes** 🔑208  
361k208 Most Cited Cases

Parts of a statute must be read in the context of the entire statute so as to produce a harmonious whole.

**[24] Constitutional Law** 🔑48(1)  
92k48(1) Most Cited Cases

**[24] Municipal Corporations** 🔑122.1(2)  
268k122.1(2) Most Cited Cases

Statutes and ordinances are presumed to be constitutional and the burden of proving otherwise rests with the challenger.

**[25] Constitutional Law** 🔑48(1)  
92k48(1) Most Cited Cases

**[25] Municipal Corporations** 🔑120  
268k120 Most Cited Cases

Courts must construe a statute or ordinance as constitutional unless its unconstitutionality is clearly apparent.

**[26] Intoxicating Liquors** 🔑15

223k15 Most Cited Cases

Rational basis was the appropriate scrutiny to apply to township's liquor control laws, banning nudity from establishments that served liquor. U.S.C.A. Const.Amend. 21.

**[27] Constitutional Law** 🔑90.4(5)  
92k90.4(5) Most Cited Cases

**[27] Intoxicating Liquors** 🔑15  
223k15 Most Cited Cases

Township's ordinance banning nude dancing at establishments with liquor licenses was a content-neutral time, place, and manner regulation designed to serve a substantial governmental interest in preserving the quality of urban life while allowing for reasonable alternative avenues of communication. U.S.C.A. Const.Amend. 21.

**[28] Intoxicating Liquors** 🔑5.1  
223k5.1 Most Cited Cases

**[28] Intoxicating Liquors** 🔑15  
223k15 Most Cited Cases

A state may exercise its inherent police powers and constitutionally regulate appropriate places where liquor may be sold, including prohibiting nudity at establishments with liquor licenses.

**[29] Intoxicating Liquors** 🔑15  
223k15 Most Cited Cases


Township was not required to demonstrate that nude dancing in establishments selling alcohol caused adverse secondary effects before adopting its ordinance banning nude dancing in establishments with liquor licenses.

**[30] Constitutional Law** 🔑90(3)  
92k90(3) Most Cited Cases

Any system of prior restraints on expression bears a heavy presumption against its constitutional validity.

**[31] Constitutional Law** 🔑90(3)  
92k90(3) Most Cited Cases

The term "prior restraint" is used to describe an administrative or judicial order that forbids certain communications in advance of the time that the communications are to occur.

**[32] Constitutional Law**  90.1(1)  
92k90.1(1) Most Cited Cases


Temporary restraining orders and permanent injunctions, which actually forbid speech activities, are classic examples of prior restraints.

**[33] Constitutional Law**  90(3)  
92k90(3) Most Cited Cases


To pass constitutional muster a prior restraint of unprotected expression must meet three conditions: (1) the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor; (2) any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo; and (3) a prompt final judicial determination must be assured. U.S.C.A. Const.Amend. 1.

**[34] Constitutional Law**  90.4(3)  
92k90.4(3) Most Cited Cases

Although being in a state of nudity is not an inherently expressive condition, nonobscene nude dancing may be a form of expression falling within the outer limits of protection by the First Amendment. U.S.C.A. Const.Amend. 1.

**[35] Constitutional Law**  90.4(3)  
92k90.4(3) Most Cited Cases

The First Amendment does not protect nude dancing involving lewd, sexual activity. U.S.C.A. Const.Amend. 1.


**[36] Constitutional Law**  90.4(5)  
92k90.4(5) Most Cited Cases

**[36] Intoxicating Liquors**  262  
223k262 Most Cited Cases

A permanent injunction enforcing township's ordinance banning nude dancing from establishments holding liquor licenses was not a "prior restraint" of expression protected by the First Amendment; neither the ordinance nor the injunction totally banned nude dancing on the basis that it was obscene, but rather the ordinance and the order to comply only prohibited nude dancing at a place where liquor was sold. U.S.C.A. Const.Amend. 1.

**[37] Appeal and Error**  893(1)  
30k893(1) Most Cited Cases

The appellate court will review de novo whether a statute or ordinance is unconstitutional under the doctrines of vagueness or overbreadth.

**[38] Constitutional Law**  82(4)  
92k82(4) Most Cited Cases

A statute may be "void for vagueness" where: (1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; and (3) its coverage is overly broad and impinges on First Amendment freedoms. U.S.C.A. Const.Amend. 1.

**[39] Constitutional Law**  90(3)  
92k90(3) Most Cited Cases

A facial challenge to an ordinance on the ground that it is overbroad rests on the prediction that third parties will refrain from protected expression because of the ordinance; but there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court for it to be facially challenged on overbreadth grounds. U.S.C.A. Const.Amend. 1.


**[40] Constitutional Law**  90(3)  
92k90(3) Most Cited Cases

Particularly where expressive conduct, and not mere speech, is involved, the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. U.S.C.A. Const.Amend. 1.

**[41] Constitutional Law**  82(4)  
92k82(4) Most Cited Cases

The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge under the First Amendment. U.S.C.A. Const.Amend. 1.

**[42] Constitutional Law**  90.4(5)  
92k90.4(5) Most Cited Cases

**[42] Intoxicating Liquors**  15  
223k15 Most Cited Cases

Township's ordinance banning nude dancing from establishments holding liquor licenses was not unconstitutionally overbroad; there was no real and


substantial possibility that it would deter others from engaging in protected expressive conduct of nude dancing at establishments not licensed to sell liquor, and fact that the ordinance broadly covered both male and female nudity did not imply an infirmity but, rather, reinforced the content-neutral aim of the ordinance to eradicate the effects of undesirable behavior stemming from a combination of alcohol and nudity. U.S.C.A. Const.Amend. 1.

[43] Statutes  47  
361k47 Most Cited Cases

The comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive.

[44] Municipal Corporations  594(2)  
268k594(2) Most Cited Cases

An ordinance is "unconstitutionally vague" if it (1) does not provide fair notice of the type of conduct prohibited or (2) encourages subjective and discriminatory application by delegating to those empowered to enforce the ordinance the unfettered discretion to determine whether the ordinance has been violated.

[45] Constitutional Law  47  
92k47 Most Cited Cases

[45] Municipal Corporations  594(2)  
268k594(2) Most Cited Cases

When a statute or ordinance is challenged on the ground that it is unconstitutionally vague, a court must review the entire text of the law, giving its words their plain ordinary meanings.

[46] Municipal Corporations  594(2)  
268k594(2) Most Cited Cases

An ordinance is not vague if it is clear what the ordinance as a whole prohibits.

[47] Municipal Corporations  594(2)  
268k594(2) Most Cited Cases


An ordinance provides "fair notice of prohibited conduct" when persons of ordinary intelligence have a reasonable opportunity to know what is prohibited.


[48] Municipal Corporations  594(2)  
268k594(2) Most Cited Cases

An ordinance is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words.


[49] Statutes  47  
361k47 Most Cited Cases

Laws written in words cannot achieve the precision of a mathematical formula.

[50] Constitutional Law  82(10)  
92k82(10) Most Cited Cases

[50] Intoxicating Liquors  15  
223k15 Most Cited Cases


Township's ordinance banning nude dancing from establishments holding liquor licenses was not unconstitutionally vague; plain meaning of the words of the ordinance made clear to persons of ordinary intelligence that it prohibited "nudity" in any establishment licensed or subject to licensing, and a person of ordinary intelligence was not required to guess at the meaning of "nudity." U.S.C.A. Const.Amend. 1.

[51] Appeal and Error  766  
30k766 Most Cited Cases

The appellate court may consider an issue raised in a nonconforming brief if it is one of law and the record is factually sufficient.

[52] Constitutional Law  92  
92k92 Most Cited Cases

While no person may be deprived of life, liberty, or property without due process of law, no one has a vested right to the continuation of an existing law by precluding the amendment or repeal of the law. U.S.C.A. Const.Amend 14; M.C.L.A. Const. Art. 1, § 17.

[53] Constitutional Law  92  
92k92 Most Cited Cases

A "vested right" entitled to procedural safeguards under due process is an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice; but an interest cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the

present general laws. U.S.C.A. Const.Amend 14;  
M.C.L.A. Const. Art. 1, § 17.

[54] Constitutional Law 277(1)  
92k277(1) Most Cited Cases

Establishment's liquor license, together with entertainment and topless entertainment permits, did not constitute a "property interest" that could not be taken without due process; no denial, nonrenewal, or revocation of a liquor license was involved, but rather township enacted an ordinance banning nude dancing at establishments that held liquor licenses pursuant to its broad police powers to protect the health, safety, and welfare of the public. U.S.C.A. Const.Amend 14;  
M.C.L.A. Const. Art. 1, § 17.

\*\*116 \*595 Sommers, Schwartz, Silver & Schwartz, P.C. (by Patrick B. McCauley, David J. Szymanski, and Patrick Burkett), Southfield, for the plaintiff.

Rubin & Rubin, P.L.L.C. (by Allan S. Rubin), and Shafer & Associates, P.C. (by Bradley J. Shafer), Southfield, Lansing, for the defendant.

Before: MARKEY, P.J., and MARK J. CAVANAGH and SAAD, JJ.

MARKEY, P.J.

[1] Defendant Garter Belt, Inc., appeals by right the trial court's order granting plaintiff, Charter Township of Van Buren, summary disposition and a permanent injunction enforcing the township's ordinance prohibiting nudity at establishments licensed to sell alcohol. Defendant also appeals the denial of its motion to vacate the judgment and disqualify the trial judge. We first find that no abuse of discretion occurred with regard to the denial of defendant's motion for judicial disqualification and conclude that due process does not require disqualification under \*596 the totality of the circumstances presented in this matter. We also hold that state law does not preempt the township's ordinance because we conclude that the Legislature did not intend its regulation of nudity at establishments licensed to sell alcohol to change the longstanding broad authority of local governments to regulate liquor trafficking within their jurisdiction. We consider last defendant's constitutional \*\*117 claims. [FN1] We hold that both Van Buren Township's ordinance and the permanent injunction are constitutionally valid.

[FN1] We first review nonconstitutional issues "that might obviate the necessity of deciding the constitutional" issues. Taxpayers of Michigan Against Casinos v. Michigan, 254 Mich.App. 23, 43, 657 N.W.2d 503 (2002). See also People v. Riley, 465 Mich. 442, 447, 636 N.W.2d 514 (2001) ("constitutional issues should not be addressed where the case may be decided on nonconstitutional grounds").

#### I. Summary of Material Facts and Proceedings

Defendant owns and operates a bar in Van Buren Township that features nude dancing and is licensed by the Michigan Liquor Control Commission (LCC). In March 1999, Van Buren Township enacted Ordinance No. 02-16-99(2) (§ 6-69 of plaintiff's code of ordinances), which prohibits persons "appearing in a state of nudity" from frequenting, loitering, working, or performing in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. It is not disputed that defendant featured nude dancing long before the adoption of § 6-69 and that Van Buren Township's ordinance is worded identically to that part of a Clinton Township ordinance that this Court held "constitutionally valid and \*597 enforceable" in Jott, Inc. v. Clinton Charter Twp., 224 Mich.App. 513, 548, 569 N.W.2d 841 (1997).

After defendant failed to comply with § 6-69, plaintiff sued, seeking to enjoin defendant from featuring nude dancing that violates the ordinance. Defendant answered and, by affirmative defenses and a counterclaim, sought to have the ordinance declared unconstitutional. Plaintiff moved for summary disposition, arguing that the ordinance was not a complete ban on nude entertainment, but, instead, was a valid liquor control ordinance designed to combat known adverse secondary adverse effects associated with the combination of nudity and the consumption of alcohol. Defendant argued that nude dancing is a form of expression protected by the First Amendment, U.S. Const., Am. I, and that plaintiff improperly enacted its ordinance without proof that defendant's bar caused any adverse secondary effects. Specifically, defendant argued that subsequent decisions of the United States Supreme Court superseded Jott.

The trial court disagreed that a legislative body must hold an evidentiary hearing to determine whether a proposed ordinance would further a legitimate

governmental interest. Instead, the trial court concluded that a legislative body could consider any material it deems pertinent and may also employ common sense. The court concluded that under the Twenty-first Amendment, U.S. Const., Am. XXI, the state and local units of government have authority to control liquor traffic within their jurisdiction even though such regulation may incidentally affect activity protected by the First Amendment. Finding that the case at bar was controlled by Joff, the trial court granted \*598 summary disposition to plaintiff and permanently enjoined defendant from violating the ordinance.

On December 28, 2001, this Court denied defendant's motion for a stay of the judgment and the injunction. We denied reconsideration on January 9, 2002. On January 23, 2002, our Supreme Court denied defendant's application for leave to appeal. This Court denied defendant's motion for peremptory reversal on April 18, 2002.

## II. Judicial Disqualification

[2] We review for an abuse of discretion the trial court's factual findings on a \*\*118 motion for disqualification, but the application of the facts to the law is reviewed de novo. Cain v. Dep't of Corrections, 451 Mich. 470, 503 n. 38, 548 N.W.2d 210 (1996); Armstrong v. Ypsilanti Charter Twp., 248 Mich.App. 573, 596, 640 N.W.2d 321 (2001).

[3][4][5] A judge is disqualified when he cannot hear a case impartially. Cain, supra at 503, 548 N.W.2d 210. But a party challenging the impartiality of a judge "must overcome a heavy presumption of judicial impartiality." Id. at 497, 548 N.W.2d 210. In general, the challenger must prove a judge harbors actual bias or prejudice for or against a party or attorney that is both personal and extrajudicial. MCR 2.003(B)(1); Cain, supra at 495, 548 N.W.2d 210; Armstrong, supra at 597, 640 N.W.2d 321. Here, the public comments Judge John D. O'Hair purportedly made in 1996 when he was the Wayne County Prosecuting Attorney do not establish the requisite actual bias or prejudice to overcome the presumption of judicial impartiality.

[6] At the hearing on defendant's motion, Judge O'Hair denied having any personal bias or prejudice. He also \*599 denied knowing that defendant's owner, who had contributed funds to a "Dump O'Hair" election year effort in 1996, was even involved in this case. Indeed, O'Hair asserted that he did not take such matters personally and had "long forgotten" events defendant raised until the motion to disqualify

was filed after the court had already ruled. Further, O'Hair affirmed that his decision was controlled by the law, and not by any discretionary fact-finding on his part. On review de novo, Chief Judge Michael F. Sapala found that O'Hair had been "a long-time sitting Judge of the Wayne County Circuit Court, blessed with an impeccable reputation with regard to integrity." Chief Judge Sapala also found that comments on public issues attributed to O'Hair while he was the prosecutor five years earlier were insufficient to demonstrate actual bias in light of O'Hair's impeccable reputation. The chief judge's factual findings are reviewed with deference, and the record here does not establish that an abuse occurred in finding that O'Hair was not actually biased or prejudiced. Cain, supra at 503, 548 N.W.2d 210.

[7][8] We also find no merit in defendant's argument that the appearance of bias is too high to be constitutionally tolerated. Due process requires judicial disqualification without a showing of actual prejudice only in the most extreme cases. Cain, supra at 497-498, 548 N.W.2d 210. A showing of actual bias is not necessary to disqualify a judge where "experience teaches that the probability of actual bias ... is too high to be constitutionally tolerable." Crampton v. Dep't of State, 395 Mich. 347, 351, 235 N.W.2d 352 (1975), quoting Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). Our Supreme Court noted such situations include: (1) where the judge has a pecuniary interest in the outcome; (\*600 2) where the judge has been the subject of personal abuse or criticism from the party before him; (3) where the judge is enmeshed in other matters involving the complaining party; or (4) where the judge might have prejudged the case because of having previously acted as an accuser, fact-finder, or initial decision maker. Crampton, supra at 351, 235 N.W.2d 352. Although not exclusive, the Crampton categories should be narrowly interpreted in light of examples provided by the Supreme Court and are "not to be viewed as catch-all provisions for petitioners desiring disqualification." Cain, supra at 500 n. 36, 548 N.W.2d 210.

\*\*119 [9] Defendant does not claim that Judge O'Hair held a pecuniary interest in the instant case, but does claim that the other Crampton categories apply. But defendant produced only newspaper reports from 1996 showing that defendant's principal owner, who is not a party to the instant case, had been critical of Judge O'Hair's criminal law enforcement activity when the judge was the prosecutor five years earlier. Defendant's owner had also contributed to an anti-O'Hair political fund.



According to press reports, O'Hair responded to the attack by stating that he would not be intimidated from enforcing the law. "The mere fact that a judge has been subjected to press criticism in connection with a case or a party does not necessarily require the judge's disqualification." Cain, supra at 515, 548 N.W.2d 210, quoting Illinois v. Coleman, 168 Ill.2d 509, 541, 214 Ill.Dec. 212, 660 N.E.2d 919 (1995). Here, there was no evidence to contradict Judge O'Hair's claim that he did not know who owned defendant until after rendering his ruling and had not taken long-forgotten criticism personally. Narrowly construed, the Crampton "personal abuse" category does not apply.

[10][11] \*601 Similarly, Crampton categories three and four, narrowly construed, did not require recusal of Judge O'Hair on the basis of his activity as a prosecutor five years before in enforcing the criminal law and his public comments related to that activity. Defendant's claims do not demonstrate that Judge O'Hair was "enmeshed" with a party in other matters, or that he had prejudged civil enforcement of a township ordinance regulating establishments that serve alcohol. Generally, a prosecutor is not disqualified from future activity as a judge, unless he had directly participated in the same case, MCR 2.003(B)(3), or directly participated in the prosecution of the defendant within the prior two years, MCR 2.003(B)(4). See People v. Williams (After Remand), 198 Mich.App. 537, 544, 499 N.W.2d 404 (1993), and People v. Delongchamps, 103 Mich.App. 151, 156, 302 N.W.2d 626 (1981). Also, topics that were once hot topics will cool with the passage of time. Cain, supra at 515, 548 N.W.2d 210. And, "Prior written attacks upon a judge are ... legally insufficient to support a charge of bias or prejudice on the part of a judge toward an author." Id. at 516 n. 52, 548 N.W.2d 210, quoting United States v. Bray, 546 F.2d 851, 858 (C.A.10, 1976). Finally, "[t]he mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice." Id. at 857.

[12][13] The totality of the circumstances must be examined to determine if the present case is so extreme that due process requires disqualification without proof of actual bias. Armstrong, supra at 598, 640 N.W.2d 321. We conclude that the totality of the circumstances, including the \*602 suspect timing [FN2] of the motion after Judge O'Hair had ruled in plaintiff's favor, Wayne Co. Jail Inmates v. Wayne Co. Chief Executive Officer, 178 Mich.App. 634, 665, 444 N.W.2d 549 (1989), does not establish that the probability of actual bias is so high as to

require disqualification without a showing of actual bias or prejudice. Armstrong, supra at 599, 640 N.W.2d 321. Because Chief Judge Sapala \*\*120 did not abuse his discretion in finding that the presumption of judicial impartiality had not been overcome with a showing that Judge O'Hair was actually biased or prejudiced, error warranting reversal did not occur.

[FN2] Although defense counsel claimed to be surprised that Judge O'Hair heard plaintiff's motion for summary disposition on November 30, 2001, the trial court record reflects a September 6, 2001, scheduling order signed by Judge O'Hair, acting for and in the absence of Judge Jeanne Stempien. The trial court record also contains a proof of service by mailing the scheduling order to both of defendant's cocounsel on September 17, 2001.

### III. State Law Preemption

[14][15] We review de novo a trial court's ruling on a motion for summary disposition and its resolution of constitutional issues raised. Id. at 582, 640 N.W.2d 321. Whether state law preempts plaintiff's ordinance is a question of law involving statutory construction that we also review de novo. Saginaw Co. v. John Sexton Corp. of Michigan, 232 Mich.App. 202, 214, 591 N.W.2d 52 (1998).

Defendant, relying on Nadeau v. Clinton Charter Twp., 827 F.Supp. 435 (E.D.Mich., 1992), argues that MCL 41.181, through its definition of "nudity," limits a township to imposing "pasties and G-strings" regulations. Defendant also argues that MCL 436.1916(3) divests counties with a population of ninety-five thousand \*603 or more from enacting topless activity regulations broader than those found in state law. We disagree. State law does not preempt local regulation of nudity at establishments licensed to sell alcohol because MCL 436.1916(3) expressly states, in part: "This section is not intended to prevent a local unit of government from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government." This Court is also bound by Jott, supra at 543-545, 569 N.W.2d 841, which held that a local ordinance identical to plaintiff's neither conflicted with nor was preempted by MCL 41.181. MCR 7.215(J)(1); Dunn v. Detroit Auto. Inter-Ins Exchange, 254 Mich.App. 256, 260-261, 657 N.W.2d 153 (2002).

The *Jott* Court held that state law did not preempt Clinton Township from adopting an ordinance nearly identical to the one at issue in this case. *Jott, supra* at 543-545, 569 N.W.2d 841. Although MCL 41.181 conferred general authority on townships to regulate public nudity, the ordinance at issue regulated liquor traffic rather than nudity per se. *Jott, supra* at 544, 569 N.W.2d 841. And the Court found evidence that the Legislature did not intend to preempt local regulation because it had "conferred control over alcoholic beverage traffic in this state on the LCC, which ... has adopted Rule 436.1409(1), [FN3] explicitly recognizing the authority of local governmental units to prohibit different types of nudity in establishments \*604 holding liquor licenses." *Jott, supra* at 544-545, 569 N.W.2d 841. Further, "it has long been recognized that local communities possess 'extremely broad' powers to regulate alcoholic beverage traffic within their bounds through the exercise of their general police powers, subject to the authority of the LCC when a conflict arises." *Id.* at 545, 569 N.W.2d 841, citing *Bundo v. Walled Lake*, 395 Mich. 679, 700, 238 N.W.2d 154 (1976), and *Tally v. Detroit*, 54 Mich.App. 328, 334, 220 N.W.2d 778 (1974). So, this Court held that the definition of nudity in MCL 41.181 neither conflicted with nor preempted Clinton Township's ordinance. *Jott, supra* at 545, 569 N.W.2d 841.

FN3. 1980 AACCS, R 436.1409(1), effective February 3, 1981, provides: "An on-premises licensee shall not allow in or upon the licensed premises a person who exposes to public view the pubic region, anus, or genitals or who displays other types of nudity prohibited by statute or local ordinance." The rule has not been amended or repealed since the adoption of 1998 PA 58, the Michigan Liquor Control Code, MCL 436.1101 *et seq.*, effective April 14, 1998.

\*\*121 [16] With respect to defendant's argument that MCL 41.181 preempts plaintiff's ordinance, *Jott* is binding precedent on this Court. MCR 7.215(J)(1); *Dunn, supra* at 260-261, 657 N.W.2d 153. Defendant's reliance on *Nadeau, supra*, is misplaced because that case addressed the same Clinton Township ordinance at issue in *Jott*. This Court is not bound by federal decisions interpreting Michigan law. *Ryder Truck Rental, Inc. v. Auto-Owners Ins. Co., Inc.*, 235 Mich.App. 411, 416, 597 N.W.2d 560

(1999). Moreover, *Nadeau* was vacated by stipulation of the parties. See *Jott, supra* at 522, 569 N.W.2d 841.

But defendant also argues that the Legislature codified state liquor laws after *Jott* was decided by adopting 1998 PA 58, effective April 14, 1998. Defendant points to § 916 of the Michigan Liquor Control Code (MLCC), MCL 436.1101 *et seq.*, which requires liquor licensees to obtain entertainment, dance, and topless activity permits. MCL 436.1916. Defendant specifically relies on subsection 916(3) of the MLCC, which provides:

An on-premises licensee shall not allow topless activity on the licensed premises unless the licensee has applied for \*605 and been granted a topless activity permit by the commission. This section is not intended to prevent a local unit of government from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government. This subsection applies only to topless activity permits issued by the commission to on-premises licensees located in counties with a population of 95,000 or less. [MCL 436.1916(3).]

Defendant argues that because Van Buren Township is situated in Wayne County with a population number greater than ninety-five thousand the third sentence of subsection 916(3) removes the specific legislative grant of authority to local governments found in the second sentence. In essence, defendant argues that the state has preempted local regulation of nudity in licensed establishments in counties with a population count greater than ninety-five thousand pursuant to the first of four guidelines set forth in *People v. Llewellyn*, 401 Mich. 314, 322, 257 N.W.2d 902 (1977), for determining when the state has preempted local regulation "by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation." The *Llewellyn* guidelines provide a state regulatory scheme preempts local regulation: (1) when state law expressly provides that the state's authority is exclusive; (2) when preemption is implied in legislative history; (3) although generally not sufficient by itself, when the pervasiveness of the state regulatory scheme supports such a finding; and, (4) when the nature of the regulated subject matter demands exclusive state control to achieve the uniformity necessary to serve the purpose or interest of the state. See \*606 *Rental Prop Owners Ass'n of Kent Co. v. Grand Rapids*, 455 Mich. 246, 257, 566 N.W.2d 514 (1997), and *Llewellyn, supra* at 323-324, 257 N.W.2d 902. Defendant argues that the state has

expressed its intention in subsection 916(3) to exclusively occupy the field of regulating nudity in licensed establishments located in large counties. See e.g., Michigan Coalition for Responsible Gun Owners v. Ferndale, 256 Mich.App. 401, 413-414, 662 N.W.2d 864 (2003) (holding that when the Legislature has expressly stated its intent to exclusively occupy a field it is unnecessary to consider the other three Llewellyn factors).

[17][18][19][20] Applying well-settled principles of statutory construction, defendant's argument fails. This Court's primary obligation \*\*122 when interpreting a statute is to ascertain and give effect to the intent of the Legislature. Gladych v. New Family Homes, Inc., 468 Mich. 594, 597, 664 N.W.2d 705 (2003). We must presume the Legislature intended the meaning clearly expressed and must enforce a statute as written. Id.; People v. Morey, 461 Mich. 325, 330, 603 N.W.2d 250 (1999). Thus, speculation about an unstated legislative purpose must not replace the unambiguous, plain text of a statute. Gladych, supra. Where an ambiguity requires interpretation, the statutory language should be construed reasonably, keeping in mind the purpose of the act. Draprop Corp. v. Ann Arbor, 247 Mich.App. 410, 415, 636 N.W.2d 787 (2001).

[21][22][23] We cannot accept defendant's speculative claim that the third sentence of MCL 436.1916(3) defeats the explicit, expressed intent in the second sentence. Gladych, supra. Defendant's construction also contravenes the settled principle that every word, phrase, and clause of a statute be given effect. Morey, supra at 330, 603 N.W.2d 250. More important, the Legislature is presumed \*607 to be aware of longstanding judicial, see Jott, supra at 545, 569 N.W.2d 841, and administrative interpretations, see 1980 AACRS, R 436.1409(1), [FN4] upholding local control of nudity in connection with liquor trafficking. Gordon Sel-Way, Inc. v. Spence Bros., Inc., 438 Mich. 488, 505, 475 N.W.2d 704 (1991); Consumers Power Co. v. Dep't of Treasury, 235 Mich.App. 380, 388, 597 N.W.2d 274 (1999). Although aware of the longstanding administrative and judicial deference to local control, the Legislature did not positively revoke the LCC's longstanding rule, nor disapprove this Court's holding in Jott. Rather, the Legislature expressly provided that the adoption of § 916 was "not intended to prevent a local unit of government from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government." MCL 436.1916(3). Parts of a statute must be read in the context of the entire statute so as to produce a harmonious whole, Macomb Co.

Prosecutor v. Murphy, 464 Mich. 149, 159, 627 N.W.2d 247 (2001). Here, the Legislature granted local units of government the ability to veto any state permit, MCL 436.1916(3). In sum, defendant's interpretation of MCL 436.1916(3) is unreasonable in light of the express language the Legislature used and the longstanding judicial and administrative interpretation approving extremely broad authority of local governments to regulate liquor trafficking. Jott, supra at 545, 569 N.W.2d 841.

FN4. See n. 3.

Although legislative analysis is of limited value in interpreting a statute, \*608 Frank W Lynch & Co. v. Flex Technologies, Inc., 463 Mich. 578, 587, 624 N.W.2d 180 (2001), a reasonable interpretation of the statute consistent with its express language is set forth in House Legislative Analysis, Third Analysis, HB 4454, July 9, 1998. After commenting on the apparent problem addressed by recodification of liquor control laws, the analysis reads: "In addition, some have proposed adding language to the liquor code to allow local governments more authority to regulate topless entertainment." Id., p. 1. After summarizing the proposed recodification, the analysis provides, in part:

In addition to the reorganization of sections, the bill would make the following *substantive changes*:

The bill would create a topless activity permit for on-premise licensees, in addition to the dance and entertainment permits currently issued under departmental rules... Topless activity would be \*\*123 banned without a topless activity permit in those counties with a population of 95,000 or less. However, a local unit of government would not be prevented from enacting an ordinance to prohibit topless activity or nudity on licensed premises within its jurisdiction. [Id., p. 4.]

We therefore conclude that the Legislature intended through the express language of MCL 436.1916(3) to continue the longstanding broad authority of a local government to regulate liquor traffic within its jurisdiction. Accordingly, we hold that state law does not preempt local regulation of nudity at establishments licensed to sell alcohol.

#### IV. Constitutional Issues A. Standard of Review

[24][25] We review de novo both a trial court's ruling on a motion for summary disposition and its

resolution of \*609 any constitutional issues raised. Armstrong, supra at 582, 640 N.W.2d 321. Statutes and ordinances are presumed to be constitutional and the burden of proving otherwise rests with the challenger. Gora v. Ferndale, 456 Mich. 704, 711-712, 576 N.W.2d 141 (1998); People v. Boomer, 250 Mich.App. 534, 538, 655 N.W.2d 255 (2002). Further, we must construe a statute or ordinance as constitutional unless its unconstitutionality is clearly apparent. Owosso v. Pouillon, 254 Mich.App. 210, 213, 657 N.W.2d 538 (2002); People v. Barton, 253 Mich.App. 601, 603, 659 N.W.2d 654 (2002).

#### B. Rational Basis Scrutiny of Liquor Regulations

Defendant argues that the trial court erred by applying rational basis scrutiny to liquor control laws as employed by the Jott Court in reliance on California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), and its progeny. LaRue held that the Twenty-first Amendment conferred broad powers on the states to regulate sexually explicit entertainment in establishments licensed to sell alcoholic beverages. In particular, defendant argues that Jott has been superseded by subsequent decisions of the United States Supreme Court, including 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), and City of Erie v. Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), which applied intermediate scrutiny established in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), for expressive conduct protected by the First Amendment. We disagree. Jott, supra, binds this Court. MCR 7.215(J)(1). The United States Supreme Court has not clearly repudiated, either in 44 Liquormart, supra or Pap's, supra, the underlying \*610 premise of LaRue and its progeny that a state may, in the exercise of its inherent police powers, constitutionally regulate appropriate places where liquor may be sold, including prohibiting nudity at licensed to sell alcohol establishments.

The Supreme Court in LaRue, supra, upheld the constitutionality of California's ban on nudity, and real or simulated sexual acts, in establishments licensed to serve alcohol. The LaRue Court observed that "the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." LaRue, supra at 114, 93 S.Ct. 390. The Twenty-first Amendment provides, in part: "The transportation or importation into any State ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const., Am. XXI.

Although not holding that the Twenty-first Amendment superseded other parts of the United States Constitution, the LaRue \*\*124 Court nevertheless concluded that "the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened...." LaRue, supra at 115, 93 S.Ct. 390. The Court also concluded that California's determination that the "sale of liquor by the drink and lewd or naked dancing and entertainment" should not occur in the same place was rational. Id. at 115, 93 S.Ct. 390. And the Court reasoned that although some of the banned performances "are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board," but rather "has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." \*611/d. at 118, 93 S.Ct. 390. Thus, the LaRue Court held that California's ban on "bacchanalian revelries" at establishments licensed to sell alcoholic beverages did not violate the United States Constitution " [g]iven the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires...." Id. at 118-119, 93 S.Ct. 390.

The Supreme Court affirmed its holding in LaRue in at least three subsequent decisions: Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981), and Newport, Kentucky v. Jacobucci, 479 U.S. 92, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986). In Doran, the Court upheld a preliminary injunction against enforcement of a local ordinance that banned topless dancing not only in bars but also in any public place. The Court summarized LaRue and held "that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program." Doran, supra at 932-933, 95 S.Ct. 2561. But because the ordinance was not limited to bars and no other legitimate state interest was suggested to counterbalance the constitutional protection presumptively afforded to activities within the scope of the ordinance, the preliminary injunction was held to have been properly issued. Id. at 933-934, 95 S.Ct. 2561.

In Bellanca, supra, the Supreme Court considered a challenge based on the First Amendment to a New York law banning nude dancing at establishments licensed to sell liquor for consumption on the

premises. The Court reviewed its decisions in LaRue and \*612 Doran, and concluded that the state of New York had done just what the Court had said a state could do. Bellanca, supra at 717, 101 S.Ct. 2599. The Court reasoned that because New York possessed the power to ban the sale of alcoholic beverages entirely it could also ban the sale of liquor on premises where topless dancing occurs. Id. While not requiring legislative findings to support the ban, the Court found them in a legislative memorandum that included the observation that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." Id. at 718, 101 S.Ct. 2599. So, the Court held that New York had "chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption." Id. The Court concluded that New York's policy choice did not violate the United States Constitution given the "'added presumption in favor of the validity of the state regulation' conferred by the Twenty-first Amendment..." Id., quoting LaRue, supra at 118, 93 S.Ct. 390.

In Iacobucci, the city of Newport, Kentucky, enacted an ordinance that prohibited \*\*125 nude or nearly nude dancing in local establishments licensed to sell liquor for consumption on the premises. A challenge to the ordinance under the First and Fourteenth Amendments failed in the federal district court. Id. at 92-93, 107 S.Ct. 383. The Sixth Circuit Court of Appeals reversed the holding of the district court, 785 F.2d 1354 (C.A.6, 1986), finding that Bellanca did not apply because in Kentucky local voters, not the city or the commonwealth, determine whether alcohol may be sold locally. Iacobucci, supra at 94, 107 S.Ct. 383. The Supreme Court disagreed, finding that Bellanca controlled because \*613 the commonwealth's authority under the Twenty-first Amendment extended to the city. Id. at 94, 107 S.Ct. 383. The Court opined:

In holding that a State "has broad power ... to regulate the times, places, and circumstances under which liquor may be sold," Bellanca, 452 U.S., at 715, 101 S.Ct. 2599 this Court has never attached any constitutional significance to a State's division of its authority over alcohol. The Twenty-first Amendment has given broad power to the States and generally they may delegate this power as they see fit. [Iacobucci, supra at 96, 107 S.Ct. 383.]

This Court, relying on LaRue and Bellanca, applied rational basis scrutiny to a First Amendment challenge to a Clinton Township ordinance identical in pertinent parts to plaintiff's ordinance. Jott, supra

at 538, 569 N.W.2d 841. The Jott Court found that the parts of the Clinton Township ordinance identical to the Van Buren Township ordinance at issue here were rationally related to the legitimate governmental interest of eradicating the effects of "'undesirable behavior" ' "stemming from a combination of alcohol and nudity. Id. at 546, 569 N.W.2d 841, quoting Bellanca, supra at 718, 101 S.Ct. 2599 quoting the legislative memorandum relied on in Bellanca. After severing invalid parts of the ordinance, this Court held "the remainder of the ordinance constitutionally valid and enforceable." Jott, supra at 548, 569 N.W.2d 841.

In 44 Liquormart, supra at 489, 116 S.Ct. 1495 the Supreme Court held that Rhode Island's statutory prohibition against advertisements containing accurate information about retail prices of alcoholic beverages was invalid because it abridged speech protected by the First Amendment. The 44 Liquormart Court held that the Twenty-first Amendment did not shield the ban on \*614 commercial speech from constitutional scrutiny. [FN5] Id. at 488, 516, 116 S.Ct. 1495. The Court also limited its decision in LaRue. "Without questioning the holding in LaRue, we now disavow its reasoning insofar as it relied on the Twenty-first Amendment." Id. at 516, 116 S.Ct. 1495. The Court reasoned that because the Twenty-first Amendment did not diminish other provisions of the United States Constitution, including the Supremacy Clause, the Establishment Clause, or the Equal Protection Clause, it would not diminish the First Amendment. Id. Nevertheless, the Court opined that "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." Id. at 515, 116 S.Ct. 1495. Moreover, a state's inherent police powers "provide ample authority to restrict the kind of 'bacchanalian revelries' described \*\*126 in the LaRue opinion regardless of whether alcoholic beverages are involved." Id.

FN5. A decade before the Supreme Court decided 44 Liquormart, this Court held that a ban on advertising liquor prices was an unconstitutional restraint on commercial speech not shielded by the Twenty-first Amendment. Michigan Beer & Wine Wholesalers Ass'n v. Attorney General, 142 Mich.App. 294, 370 N.W.2d 328 (1985).

In Jott, this Court specifically rejected defendant's argument that 44 Liquormart requires a higher level

(Cite as: 258 Mich.App. 594, 673 N.W.2d 111)

of scrutiny than rational basis when reviewing a state's exercise of its police powers under the Twenty-first Amendment to regulate appropriate places to sell alcohol. The *Jott* Court opined:

We reject plaintiff's claim, asserted at oral argument, that the holding in *LaRue* was recently overruled by the Supreme Court in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). Unlike this case, *44 Liquormart* was a "commercial speech" case. It \*615 involved a challenge to a state law banning advertisement of retail liquor prices. The Supreme Court expressly noted that laws suppressing speech are subject to greater constitutional scrutiny than laws suppressing forms of conduct. Although the Supreme Court did retreat somewhat from its position in *LaRue*, it did so only insofar as *LaRue* advanced the proposition that the constitutional prohibition against laws abridging freedom of speech embodied in the First Amendment may be shielded from attack by virtue of the Twenty-first Amendment. Indeed, the court expressly stated that it was not questioning its holding in *LaRue*. The Court noted that *LaRue*, unlike the case before it, was not a commercial speech case, but instead concerned the regulation of nude dancing where alcohol was served. The Court expressly stated that its analysis in *LaRue* would have yielded the same result, independent of the Twenty-first Amendment, in light of the state's ample inherent powers to prohibit the sale of alcoholic beverages in inappropriate locations and to restrict the kind of sexual activities described in *LaRue*. For these reasons, we find that *44 Liquormart* does not affect the disposition of this case. [*Jott, supra* at 539 n. 6, 569 N.W.2d 841.]

*Jott* is binding on this Court. MCR 7.215(J)(1); *Dunn, supra* at 260-261, 657 N.W.2d 153.

We also reject defendant's claim that the Supreme Court's decision in *Pap's A.M., supra*, requires a different result because *Pap's* did not address the issue of where alcohol may be sold but, rather, concerned a general community-wide ban on nudity similar to that considered in *Doran, supra*. Thus, *Pap's* does not call into question the state's exercise of its police power to "prohibit the sale of alcoholic beverages in inappropriate locations." *44 Liquormart, supra* at 515, 116 S.Ct. 1495; *Jott, supra* at 539 n. 6, 569 N.W.2d 841.

Defendant's argument is also not supported by *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). That case addressed \*616 whether the city of Los Angeles

could rely on a 1977 study of crime to justify its zoning restrictions on adult entertainment businesses (prohibiting them within one thousand feet of each other or within five hundred feet of a religious institution, school, or public park). *Id.* at 430-433, 441, 122 S.Ct. 1728. The Supreme Court in *Alameda Books* intended to clarify the standard of review for content-neutral time, place, and manner regulations designed to combat adverse secondary effects of businesses that purvey sexually explicit materials. *Id.* at 433-434, 122 S.Ct. 1728; *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49-50, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Content-neutral time, place, and manner regulations are constitutionally valid if they are "designed to serve a substantial governmental interest and [allow] for reasonable alternative avenues \*\*127 of communication." *Id.* at 50, 106 S.Ct. 925; *Jott, supra* at 529, 569 N.W.2d 841.

The plurality opinion in *Alameda Books* concluded that Los Angeles could rely on its 1977 study because it supported the city's theory that a concentration of adult operations in one locale attracts crime. *Alameda Books, supra* at 442, 122 S.Ct. 1728. The Court reasoned that a governmental unit is entitled to rely on "any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Id.* at 438, 122 S.Ct. 1728 citing *Renton, supra* at 51-52, 106 S.Ct. 925 and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter, J., concurring in judgment). The government meets its burden if the evidence relied on fairly supports its rationale. *Alameda Books, supra* at 438, 122 S.Ct. 1728. If a challenger fails to cast direct doubt on the government's rationale, either by demonstrating that the evidence does not support the rationale of the \*617 government or by furnishing evidence that disputes the government's factual findings, the municipality meets the *Renton* standard. *Id.* at 438-439, 122 S.Ct. 1728. If the challenger is successful in raising doubt about the government's rationale, "the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* at 439, 122 S.Ct. 1728. Importantly, the plurality opinion did not address whether the government must actually consider the evidence supporting its rationale before adopting the regulation. *Id.* at 442, 122 S.Ct. 1728. Rather, the Court left intact its prior holding that the government may support its rationale with studies of the experience of other governments, and on court opinions addressing the same topic. See *Renton, supra* at 51-52, 106 S.Ct. 925.

[26] So, even if plaintiff were required to apply an intermediate level of scrutiny to demonstrate that its ordinance was a content-neutral time, place, and manner regulation designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication, it would have met its burden. Plaintiff could reasonably rely on the finding adopted by the Supreme Court and by this Court that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." *Bellanca, supra* at 718, 101 S.Ct. 2599 quoting a legislative memorandum relied on in *Bellanca*; *Jott, supra* at 546, 569 N.W.2d 841.

Furthermore, Bryce Kelley, the township planner responsible for drafting the ordinance, testified in a deposition that his understanding of the experience of other communities in separating alcohol and nudity was that it created a better community. "A city's \*618 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" *Alameda Books, supra* at 444, 122 S.Ct. 1728 (Kennedy, J., concurring), quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion). Kelley also testified that he compared the number of police runs to defendant's bar with the number of police runs to a strip mall containing no adult entertainment establishments and found thirty percent more police runs to defendant's business. Although Kelley testified that he did not present this information to the township board before the adoption of the ordinance, the person who was the township clerk at the time the ordinance was enacted recalled Kelley discussing the issue when the ordinance was being considered.

More importantly, Kelley testified that he sought assistance from a consulting \*\*128 company, McKenna Associates, that prepared a report for the township board concerning several ordinance revisions, including Ordinance No. 02-16- 99(2), which regulated sexually oriented businesses. The McKenna report, based on studies from a number of municipalities, summarized adverse secondary effects of sexually oriented businesses, including topless bars:

These studies, taken together, provide compelling evidence that sexually oriented businesses are associated with high crime rates and depression of property values. In addition, such businesses can dramatically change the character of the community because of noise, litter, and illicit activities generated by them. [Deposition of Bryce Kelley, exhibit 2, McKenna report, p. 1]

[27][28] In summary, we hold that the trial court did not err by applying rational basis scrutiny to plaintiff's ordinance \*619 and finding that it was constitutionally valid and enforceable. *Jott, supra* at 545-548, 569 N.W.2d 841. Moreover, *MCR 7.215(J)(1)* requires this Court to follow *Jott, supra*. Under *LaRue* and its progeny, as modified by *44 Liquormart*, a state may exercise its inherent police powers and constitutionally regulate appropriate places where liquor may be sold, including prohibiting nudity at establishments with liquor licenses. "[T]he State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *44 Liquormart, supra* at 515, 116 S.Ct. 1495. Finally, even if we apply intermediate level scrutiny to plaintiff's ordinance, we still find it to be a constitutional content-neutral time, place, and manner regulation that is designed to combat adverse secondary effects of the combination of alcohol and nudity and that allows for reasonable alternative avenues of communication. *Iacobucci, supra* at 96-97, 107 S.Ct. 383; *Jott, supra* at 527, 545-546, 569 N.W.2d 841.

#### C. A Disputed Material Fact Issue Does Not Require A Trial

Defendant also argues that there is no evidence in the record of adverse secondary effects from defendant's business and that it presented evidence that there are no adverse secondary effects from adult entertainment in general, or from defendant's business in particular. At a minimum, defendant argues that a sufficient question of fact existed concerning such secondary effects to avoid the grant of summary disposition. We disagree.

A municipality may adopt an ordinance to address its concern regarding adverse effects it reasonably believes may occur to the community in the future. In *Jott, supra* at 528-529, 569 N.W.2d 841, this Court rejected the claim that defendant Clinton Township had not justified its \*620 zoning ordinance restricting locations of adult entertainment uses "because, at the time the ordinance was enacted, not a single adult use existed in the township and because defendant never conducted its own independent study regarding the impact of adult uses in the community." The *Jott* panel relied on *Renton, supra*, where the Supreme Court upheld the constitutionality of a zoning ordinance restricting adult motion picture theaters opining:

"We hold that Renton was entitled to rely on the experiences of Seattle and other cities ... in enacting its adult theater zoning ordinance. The

First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." [**\*\*129**, *Jott, supra* at 529, 569 N.W.2d 841, quoting *Renton, supra* at 51- 52, 106 S.Ct. 925.]

[29] In both *Renton* and *Jott* the municipality considered the experience of other cities with adult entertainment business. *Renton, supra* at 50, 106 S.Ct. 925; *Jott, supra* at 529, 569 N.W.2d 841. Further, the United States Supreme Court held that the city of Renton could rely on the "detailed findings" of adverse secondary effects of adult entertainment businesses in an appellate decision [FN6] addressing the type of ordinance at issue. *Renton, supra* at 51, 106 S.Ct. 925. In *Pap's, supra*, the plurality opinion recognized that the ordinance of the city of Erie prohibiting public nudity (effectively banning nude dancing without pasties and G-strings) was aimed at combating crime and other negative secondary effects "which we have previously recognized are 'caused by \*621 the presence of even one such' establishment." *Pap's, supra* at 291, 120 S.Ct. 1382 quoting *Renton, supra* at 47-48, 50, 106 S.Ct. 925. The Court observed that "[e]ven in cases addressing regulations that strike closer to the core of First Amendment values, we have accepted a state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing." *Pap's, supra* at 297, 120 S.Ct. 1382 citing *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 393 n. 6, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (applying "exacting scrutiny" and upholding Missouri's campaign finance legislation against First Amendment challenge). And the Court noted that *O'Brien, supra*, which applied intermediate scrutiny to federal legislation banning draft card burning, "required no evidentiary showing at all that the threatened harm was real." *Pap's, supra* at 299, 120 S.Ct. 1382. Clearly, plaintiff was not required to demonstrate that nude dancing in establishments selling alcohol caused adverse secondary effects by conducting an empirical study in the community before adopting its ordinance.

FN6. *Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978).

We also reject defendant's argument that an affidavit by its expert, Dr. Daniel Linz, cast sufficient doubt

on studies finding adverse secondary effects from adult entertainment businesses to create an issue of material fact requiring trial. Dr. Linz opined that "there is absolutely no *properly* conducted studies or research that establish or demonstrate that exotic dance clubs which serve alcoholic beverages engender *sufficient* 'secondary effects' so as to warrant the enactment" of plaintiff's ordinance. [FN7] Dr. Linz also \*622 noted his work was submitted to the Supreme Court in *Pap's, supra*, in an amicus curiae brief, and that Justice O'Connor (plurality opinion) and Justice Souter (concurring and dissenting) commented on it. In that regard, Justice O'Connor wrote: "In *Nixon*, however, we flatly rejected that idea [to require an empirical study to support the city's conclusion concerning adverse secondary effects] ... (noting that the 'invocation of academic studies said to indicate' that the threatened harms are not real is insufficient to cast doubt on the experience of the local government)." *Pap's, supra* at 300, 120 S.Ct. 1382 citing and quoting *Nixon, supra* at 394, 120 S.Ct. 897. Moreover, as already discussed, this Court held in *Jott* that a rational basis exists for banning nudity from establishments licensed to sell alcohol. No further evidentiary showing by plaintiff was necessary in this case where plaintiff's ordinance and the one this Court held to be "constitutionally valid and \*\*130 enforceable" were, in pertinent part, identical. *Jott, supra* at 548, 569 N.W.2d 841.

FN7. Affidavit of Dr. Daniel Linz, ¶ 9, exhibit D, defendant's response to plaintiff's motion for summary disposition (emphasis added).

#### D. An Injunction Enforcing Plaintiff's Ordinance Is Not A "Prior Restraint"

Defendant next argues that the issuance of a permanent injunction is an unconstitutional prior restraint of expression protected by the First Amendment. We disagree.

[30][31][32][33] "Any system of prior restraints on expression bears a heavy presumption against its constitutional validity." *Cadillac v. Cadillac News & Video, Inc.*, 221 Mich.App. 645, 649, 562 N.W.2d 267 (1997), citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). The term "prior restraint" is used to describe an administrative or judicial order that forbids \*623 certain communications in advance of the time that



the communications are to occur. Alexander v. United States, 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993). Temporary restraining orders and permanent injunctions, which actually forbid speech activities, are classic examples of prior restraints. Id. Prior restraints usually arise in efforts by the government to suppress obscenity. See, e.g., Cadillac News & Video, supra. In Freedman v. Maryland, 380 U.S. 51, 58-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), the Supreme Court held that the First Amendment required procedural safeguards to guard against suppression of protected speech when attempting to ban unprotected speech. The Freedman Court held unconstitutional a state system for the licensing of movies, holding "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." Id. at 58, 85 S.Ct. 734. To pass constitutional muster a prior restraint of unprotected expression must meet three conditions:

*First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured. [Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), summarizing Freedman, supra.]

Defendant relies on Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980), to support the argument that the injunction here is a prior restraint. In Vance, the Supreme Court \*624 held a Texas statute unconstitutional on the basis that it authorized an invalid prior restraint because it permitted enjoining the future showing of films that had not yet been found to be obscene when a movie theater had exhibited obscene films in the past. Id. at 316, 100 S.Ct. 1156. The Court held that the fact that a judge had issued the injunction in Vance did not save the statute from constitutional infirmity and that "the absence of any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures, without regard to the context in which they are displayed, precludes the enforcement of these nuisance statutes against motion picture exhibitors." Id. at 317, 100 S.Ct. 1156.

[34][35][36] Although being "in a state of nudity" is not an inherently expressive condition," Pap's, supra at 289, 120 S.Ct. 1382 nonobscene nude dancing may be a form of expression falling within the outer limits

of protection by the First Amendment, Jott, supra at 526, 569 N.W.2d 841, citing Barnes, supra at 565-566, 111 S.Ct. 2456. \*\*131 On the other hand, the First Amendment does not protect nude dancing involving lewd, sexual activity. Michigan ex rel Wayne Co. Prosecutor v. Dizzy Duck, 449 Mich. 353, 360-361, 365, 535 N.W.2d 178 (1995). So a censor's effort to ban nude dancing because it is obscene may experience difficulties in separating nonobscene expressive conduct from obscene nude dancing. Defendant's argument fails because neither plaintiff's ordinance nor the injunction at issue here totally bans nude dancing on the basis that it is obscene; the ordinance and the order to comply with the ordinance only prohibit nude dancing at a place where liquor is sold. Jott, supra at 538, 569 N.W.2d 841. The "critical fact is that [the ordinance and the injunction enforcing it] has not forbidden \*625 [nude dancing] across the board." Id., quoting LaRue, supra at 118, 93 S.Ct. 390.

In Danish News Co. v. Ann Arbor, 517 F.Supp. 86 (E.D.Mich., 1981), affirmed without opinion 751 F.2d 384 (C.A.6, 1984), Judge Patricia A. Boyle, then a United States District Court judge, and later a Michigan Supreme Court Justice, declined to entertain the plaintiff's constitutional challenge to a zoning ordinance of the city of Ann Arbor restricting locations of "adult entertainment business." Finding the zoning ordinance constitutional, the state trial court granted Ann Arbor a preliminary injunction because the plaintiff's business, an adult bookstore, was a nonconforming use that constituted a nuisance per se. Id. at 88. This Court and our Supreme Court denied the plaintiff's application for leave to appeal. Id. Like defendant, the plaintiff in that case argued that Freedman, supra, together with Vance, supra, "require the conclusion that where a nuisance per se statute is applied to first amendment activity an injunctive order in accordance with the statute is a prior restraint." Danish News, supra at 92. But Judge Boyle found that enjoining a violation of Ann Arbor's zoning ordinance was materially distinguishable from enjoining the future showing of films under the nuisance statute in Vance, which was aimed at obscenity, because the statute in Vance "presented the usual problem of discerning the fine line between obscenity which is not protected by the first amendment [sic] and ... material which does not meet the definition of obscenity and, therefore, enjoys first amendment protection." Danish News, supra at 93. In contrast, a zoning ordinance "does not purport to forbid display or sale of obscenity but rather defines a particular \*626 type of business which may admittedly have first amendment protection and simply regulates the location of the

business." *Id.* Thus, Judge Boyle opined:

Because the zoning ordinance does not rely on the fine line between obscenity and protected first amendment material, certain of the reasons for the strict safeguards of *Freedman* evaporate. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59, 95 S.Ct. 1239, 1246-47, 43 L.Ed.2d 448. The question is rather one of applying the plain terms of the constitutional ordinance to the situation at hand to determine whether the activity of the alleged violator is covered by the zoning ordinance. [*Danish News, supra* at 93.]

Thus, the instant case is not one where procedural safeguards are invoked because it is not necessary to draw the fine line between obscene and nonobscene nude dancing. The plain terms of plaintiff's constitutional ordinance are simply applied to the undisputed facts, i.e., that defendant provided nude dancing at its establishment licensed to sell alcohol. Enforcement of plaintiff's content-neutral, constitutional ordinance is simply not a prior restraint. In *Benton Co. v. Kismet Investors, Inc.*, 653 N.W.2d 193 (Minn.App., 2002), the \*\*132 court affirmed the lower court's finding that the defendant's business offering nude dancing violated the county's zoning ordinance, and therefore, affirmed the issuance of a permanent injunction. The ordinance had previously been held to be a constitutionally valid time, place, and manner regulation. *Id.* at 194, 198, citing *Kismet Investors, Inc. v. Benton Co.*, 617 N.W.2d 85, 93-95 (Minn.App., 2000). See, also, *Village of Winslow v. Sheets*, 261 Neb. 203, 622 N.W.2d 595 (2001) (upholding the constitutionality of a village ordinance banning totally nude dancing and affirming \*627 the issuance of a permanent injunction enforcing the ordinance), and *Colorado v. 2896 West 64th Avenue*, 989 P.2d 235 (Colo.App., 1999) (upholding issuance of a permanent injunction prohibiting nude entertainment as a nuisance contrary to a local ordinance, previously found constitutional, that regulated places where nude entertainment could be provided). Accordingly, we hold that the issuance of an injunction to enforce Van Buren Township's constitutionally valid ordinance does not violate the First Amendment as a prior restraint without procedural safeguards.

#### E. The Overbreadth Doctrine

Defendant argues that the township's prohibition of nudity in establishments that serve alcohol is unconstitutionally overbroad because it bans even plunging necklines and thongs and "legitimate" nude or seminude theatrical performances (*Hair, Oh! Calcutta, Salome, and Dance*). Also, defendant

notes that the ordinance does not distinguish between male or female nudity and argues that the ordinance even extends to exposure of body parts in the restroom of any bar in the township. Defendant contends that a ban on nudity must be no greater than necessary to address harmful secondary effects and that restrictions beyond "pasties and G-strings" limit the erotic message of dancers, rendering the ordinance overbroad. We disagree.

[37] We review de novo whether a statute or ordinance is unconstitutional under the doctrines of vagueness or overbreadth. *Boomer, supra* at 538, 655 N.W.2d 255; *People v. Rogers*, 249 Mich.App. 77, 94, 641 N.W.2d 595 (2001). We hold that plaintiff's ordinance is not unconstitutionally overbroad because there is no real and substantial\*628 possibility that it will deter others not before the Court from engaging in protected expressive conduct--nude dancing at establishments not licensed to sell liquor. *Id.* at 96, 641 N.W.2d 595.

[38] The constitutional doctrines of vagueness and overbreadth both curb arbitrary and discriminatory enforcement but are nonetheless distinct. *Plymouth Charter Twp. v. Hancock*, 236 Mich.App. 197, 199-200, 600 N.W.2d 380 (1999). The doctrines are often considered together because they are closely related, especially where claims of First Amendment violations are raised. *Id.* at 200, 600 N.W.2d 380, citing *Grayned v. Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (a vague statute may deter protected speech). There are three grounds on which a statute may be held to be void because it is vague or overbroad. *Burns v. Detroit (On Remand)*, 253 Mich.App. 608, 625, 660 N.W.2d 85 (2002), mod 468 Mich. 881, 661 N.W.2d 231 (2003). A statute may be void for vagueness where: "(1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; and (3) its coverage is overly broad and impinges on First Amendment freedoms." *People v. Morey*, 230 Mich.App. 152, 163, 583 N.W.2d 907 (1998), aff'd 461 Mich. 325, 603 N.W.2d 250 (1999).

\*\*133 [39][40][41] A facial challenge to an ordinance on the ground that it is overbroad rests on the "prediction that third parties will refrain from protected expression because of the [ordinance]." *In re Chmura*, 461 Mich. 517, 530, 608 N.W.2d 31 (2000). But "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially \*629

challenged on overbreadth grounds.' " *Id.* at 531, 608 N.W.2d 31, quoting *Los Angeles City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). Moreover, particularly where expressive conduct, and not mere speech, is involved, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." " *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). See, also, *Burns, supra* at 626-627, 660 N.W.2d 85, and *Morey, supra* at 164, 603 N.W.2d 250. But the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." " *Rogers, supra* at 96, 641 N.W.2d 595, quoting *Taxpayers for Vincent, supra* at 800, 104 S.Ct. 2118.

[42][43] In analyzing defendant's overbreadth challenge, we note that nudity is not protected expressive conduct, it is erotic nude dancing that is expressive conduct at the outer edges of the protection afforded by the First Amendment. *Pap's, supra* at 289, 120 S.Ct. 1382. Also, unlike the defendant city's public decency ordinance in *Triplett Grille, Inc. v. Akron*, 40 F.3d 129 (C.A.6, 1994), on which defendant relies, plaintiff's ordinance does not ban nudity in all public places. The ban is limited to establishments that serve alcohol, *Jott, supra* at 540, 569 N.W.2d 841. That the ordinance broadly covers both male and female nudity does not imply an infirmity but, rather, reinforces the content-neutral aim of the ordinance to "eradicate the effects of 'undesirable behavior' stemming from a combination of alcohol and nudity." *Jott, supra* at 545-546, 569 N.W.2d 841. The "comprehensiveness of the statute is a virtue, not a vice, because it is evidence \*630 against there being a discriminatory governmental motive." *Hill, supra* at 731, 120 S.Ct. 2480. And tavern patrons using restroom facilities are generally not engaged in expressive conduct. The plain and legitimate sweep of the ordinance is to regulate trafficking in liquor by applying a prophylactic rule banning sexually explicit entertainment at licensed bars, cabarets, or taverns. *Jott, supra* at 540, 569 N.W.2d 841, citing *Felix v. Young*, 536 F.2d 1126, 1132 (C.A.6, 1976). The ordinance simply does not present a real and substantial danger of sweeping within its ambit the presentation of theatrical productions that involve nudity; nor do the other hypothetical situations defendant imagines present a real and substantial danger of chilling protected speech. Accordingly, plaintiff's ordinance is not constitutionally overbroad. *Hill, supra* at 722-723,

120 S.Ct. 2480; *Rogers, supra* at 96, 641 N.W.2d 595.

Our conclusion is further supported by the presumption of constitutional validity, *Burns, supra* at 627-628, 660 N.W.2d 85, and by the binding precedent of *Jott, supra*. Plaintiff's ordinance is identical to the ordinance held constitutional in *Jott* after this Court severed parts of the ordinance not reasonably related to the legitimate governmental interest involved. *Id.* at 548, 569 N.W.2d 841. Although *Jott* did not extensively analyze the overbreadth issue, it reversed the trial court's determination that Clinton Township's ordinance was constitutionally overbroad. \*\*134 *Jott, supra* at 537, 548, 569 N.W.2d 841. Under MCR 7.215(J)(1), the *Jott* Court's rejection of an overbreadth challenge binds this Court.

#### F. The Vagueness Doctrine

Defendant also argues that plaintiff's ordinance is unconstitutionally vague because a person of ordinary \*631 intelligence cannot know what is prohibited, and no guidelines are provided to law enforcement. We again disagree.

[44][45][46][47][48] "An ordinance is unconstitutionally vague if it (1) does not provide fair notice of the type of conduct prohibited or (2) encourages subjective and discriminatory application by delegating to those empowered to enforce the ordinance the unfettered discretion to determine whether the ordinance has been violated." *Hancock, supra* at 200, 600 N.W.2d 380. When a statute or ordinance is challenged on the ground that it is unconstitutionally vague, a court must review the entire text of the law, giving its words their plain ordinary meanings. *Rogers, supra* at 94, 641 N.W.2d 595; *Morey, supra* at 163, 583 N.W.2d 907. An ordinance is not vague if "it is clear what the ordinance as a whole prohibits." " *Hill, supra* at 733, 120 S.Ct. 2480 quoting *Gravned, supra* at 110, 92 S.Ct. 2294. An ordinance provides fair notice when persons of ordinary intelligence have a reasonable opportunity to know what is prohibited. *People v. Noble*, 238 Mich.App. 647, 652, 608 N.W.2d 123 (1999). Thus, an ordinance "is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Id.*

[49][50] The plain meaning of the words of the ordinance makes clear to persons of ordinary intelligence that it prohibits "nudity" in "any

establishment licensed or subject to licensing by the Michigan Liquor Control Commission." Subsection 6-69(1), Van Buren Charter Township Code of Ordinances. See also *Jott, supra* at 536, 569 N.W.2d 841. Contrary to defendant's argument, a person of ordinary intelligence is not required to guess at the meaning of "nudity." And what the ordinance as a whole prohibits is easily understood by persons of ordinary intelligence. Laws written in words cannot achieve the precision of a mathematical formula. *Hill, supra* at 733, 120 S.Ct. 2480; *Grayned, supra* at 110, 92 S.Ct. 2294. But it is clear that the ordinance as a whole prohibits nudity at establishments licensed to sell alcohol. Finally, because the ordinance is not vague, it does not confer unfettered discretion to those empowered to enforce the ordinance to determine whether it has been violated. *Owosso, supra* at 217, 657 N.W.2d 538; *Hancock, supra* at 200, 600 N.W.2d 380.

#### G. Due Process

[51] Defendant raises one other constitutional issue in the course of arguing that state law preempts plaintiff's ordinance: that its liquor license, together with entertainment and topless entertainment permits, constitute a property interest that cannot be taken without due process of law. Defendant waived this issue because it was not included in defendant's statement of questions on appeal. *MCR 7.212(C)(5); Persinger v. Holst*, 248 Mich.App. 499, 507 n. 2, 639 N.W.2d 594 (2001). Nevertheless, this Court may consider an issue raised in a nonconforming brief if it is one of law and the record is factually sufficient. *McKelvie v. Auto Club Ins. Ass'n*, 203 Mich.App. 331, 337, 512 N.W.2d 74 (1994). We briefly address this issue, and conclude it has no merit. See, e.g., *Joerger v. Gordon Food Service, Inc.*, 224 Mich.App. 167, 172, 568 N.W.2d 365 (1997).

\*\*135 [52][53][54] Defendant's argument relies on *Bundo, supra*, which held a holder of a liquor license "has a 'property' interest in the renewal of his liquor license such that before he may be deprived of this interest he must be afforded rudimentary due process." \*633 *Bundo, supra* at 704, 238 N.W.2d 154. Reliance on *Bundo* is misplaced. No denial, nonrenewal, or revocation of a liquor license was involved in this case. Instead, Van Buren Township enacted an ordinance pursuant to its broad police powers to protect the health, safety, and welfare of the public. While no person may be deprived of life, liberty, or property without due process of law, *U.S. Const., Am. V; Const. 1963, art. 1, § 17; Tolksdorf v. Griffith*, 464 Mich. 1, 7, 626 N.W.2d 163 (2001), no one has a vested right to the continuation of an

existing law by precluding the amendment or repeal of the law, *Rookledge v. Garwood*, 340 Mich. 444, 457, 65 N.W.2d 785 (1954). A vested right is "an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice." *Detroit v. Walker*, 445 Mich. 682, 699, 520 N.W.2d 135 (1994). But an interest "cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws." *Id.*, quoting *Minty v. Bd. of State Auditors*, 336 Mich. 370, 390, 58 N.W.2d 106 (1953). That is the case here; consequently, defendant's argument fails on the merits.

#### V. Conclusion

The trial court did not abuse its discretion in finding no basis for judicial disqualification. We also hold that under the totality of the circumstances, due process did not require judicial disqualification. We conclude that state law does not preempt Van Buren Township's ordinance. Finally, we hold that Van Buren Township's ordinance is constitutional and enforceable. Accordingly, we affirm the trial court's \*634 grant of summary disposition and the issuance of a permanent injunction enforcing the ordinance.

673 N.W.2d 111, 258 Mich.App. 594

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